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CONTENTS

FOREWORD

This publication contains summaries of the judgments, advisory opinions and orders of a substantive nature issued by the International Court of Justice, the principal judicial organ of the United Nations, from 1 January 2018 to 31 December 2022. It is the continuation of six earlier volumes on the same subject (ST/LEG/SER.F/1 and Addenda 1, 2, 3, 5 and 6), which covered the periods 1948–1991, 1992–1996, 1997–2002, 2003–2007, 2008–2012 and 2013–2017, respectively.[1]

During the period covered by this publication, the Court issued 29 judgments, advisory opinions and orders of a substantive nature. It should be noted that the materials contained herein are summaries prepared by the Registry of the Court, which do not involve the responsibilities of the Court itself. These summaries are for information purposes and should not be quoted as the actual texts of the same. Nor do they constitute an interpretation of the original.

The Codification Division of the Office of Legal Affairs wishes to acknowledge the invaluable assistance received from the Registry of the Court in making available these summaries for publication.

[1] The summaries of judgments, advisory opinions and orders of the Permanent Court of International Justice are published under ST/LEG/SER.F/1/Add. 4.

224. CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA *v.* NICARAGUA) [QUESTION OF COMPENSATION]

Judgment of 2 February 2018

On 2 February 2018, the International Court of Justice delivered its Judgment on the question of compensation in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua).*

The Court was composed as follows: 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.

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I. Introductory observations (paras. 21–28)

The Court observes at the outset that, pursuant to the findings set out in its Judgment of 16 December 2015, and 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. The Court begins by recalling certain facts on which it based that Judgment.

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 in its Order on provisional measures of 8 March 2011 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".

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.

In its Order on provisional measures of 22 November 2013, the Court found that two new *caños* had been constructed by Nicaragua in the disputed territory (hereinafter referred to as the "2013 *caños*"). Nicaragua acknowledged that the excavation of the *caños* represented an infringement of its obligations under the 2011 Order.

The Court further observes that, following its 2013 Order, after consultation with the Secretariat of the Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed at Ramsar on 2 February 1971 (hereinafter the "Ramsar Convention"), 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*").

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. The Court held that Nicaragua had therefore incurred the obligation to make reparation for the damage caused by its unlawful activities and 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. The present Judgment determines the amount of compensation due to Costa Rica.

II. Legal principles applicable to the compensation due to Costa Rica (paras. 29–38)

Before turning to the consideration of the issue of compensation due in the present case, the Court states some of the principles relevant to its determination. It notes that 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". The Court further observes that the obligation to make full reparation for the damage caused by a wrongful act has been recognized by the Court in a number of cases. The Court has also held that compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible or unduly burdensome. Compensation should not, however, have a punitive or exemplary character.

The Court considers that, in order to award compensation, it has to 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 has to determine the amount of compensation due.

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.

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.

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The Court notes that in the present case, Costa Rica claims compensation for quantifiable environmental damage and for costs and expenses incurred as the result of

Nicaragua's unlawful activities, including expenses incurred to monitor or remedy the environmental damage caused.

III. Compensation for environmental damage (paras. 39–87)

1. The compensability of environmental damage (paras. 39–43)

The Court observes that it 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 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.

The Court adds that 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 (paras. 44–53)

The Court gives an overview of the methodology advanced by each Party for the valuation of environmental damage in the present case. The methodology that Costa Rica considers most appropriate, which it terms the "ecosystem services approach", 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. 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.

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.

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The Court acknowledges 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, it points out that 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 programs for the purpose of public policy setting. The Court states that it 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.

In determining the compensation due for environmental damage, the Court explains that it will assess 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 (paras. 54–87)

The Court turns to the determination of the extent of the damage caused to the environment and of the amount of compensation due. It notes that Costa Rica claims compensation (i) for the impairment or loss of environmental goods and services as a result of Nicaragua's activities and (ii) for restoration costs, comprising the cost of replacement soil in the two *caños* and costs for the restoration of the wetland.

The Court observes that, 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.

Before assigning a monetary value to the damage to the environmental goods and services caused by Nicaragua's wrongful activities, the Court announces that it 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.

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 meters 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, the Court finds that 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.

The Court then examines 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 Court finds that the evidence before it 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. The Court considers that 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.

With regard to the valuation of the damage caused to environmental goods and services, the Court states that it 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. 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.

The Court considers 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 value 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.

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. 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. Thirdly, such an overall valuation will allow the Court to take into account the capacity of the damaged area for natural regeneration.

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.

In its overall valuation, the Court takes into account the above-mentioned categories of environmental goods and services the impairment or loss of which has been established.

The Court recalls that, in addition to the two valuations, 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". The Court considers, however, that Nicaragua's "corrected analysis" underestimates the value to be assigned to certain categories of goods and services prior to recovery.

The Court further recalls that the absence of certainty as to the extent of damage does not necessarily preclude 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 its shortcomings. 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.

In relation to restoration, the Court rejects Costa Rica's claim of US$54,925.69 for replacement soil for the reasons given above. 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 (paras. 88–147)

The Court notes that, in addition to its claims of compensation for environmental damage, Costa Rica requested that it be awarded compensation for costs and expenses incurred as a result of Nicaragua's unlawful activities.

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 (paras. 90–106)

The Court turns to the 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 provided adequate evidence demonstrating that some of the costs incurred have a sufficiently direct and certain causal nexus with the internationally wrongful conduct of Nicaragua.

The first head of expenses, which the Court finds compensable in part, relates to fuel and maintenance services for police aircraft used to reach and overfly the northern part of Isla Portillos. 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 states that it 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.

Turning to the question of quantification, the Court observes 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 various days in October 2010 and November 2010. In this regard, Costa Rica has presented evidence in the form of relevant flight logs, and an official communication dated 2 March 2016, totalling US$37,585.60. The Court notes that Costa Rica calculated the expenses under this head 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. The Court therefore considers that these miscellaneous expenses are not compensable.

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. The Court finds that Costa Rica has failed to demonstrate why these missions were necessary to respond to Nicaragua's unlawful activities and that it has therefore not established the requisite causal nexus between Nicaragua's unlawful activities and the expenses relating to these flights.

The Court also considers it necessary to recalculate the compensable expenses based on the information provided in the above-mentioned 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 accordingly 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.

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 report and is satisfied that the analysis given therein 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.

Turning to the question of quantification, the Court notes that Costa Rica has presented a numbered and dated invoice from UNITAR/UNOSAT for US$15,804, with an annexed cost breakdown. The Court considers that there is a sufficiently direct and certain causal nexus between Nicaragua's activities and the cost of commissioning the report. The Court therefore finds that Costa Rica is entitled to full compensation for this expense.

The Court then turns to those heads of expenses with reference to which it considers that Costa Rica has failed to meet its burden of proof.

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. 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. The Court notes that this approach is in line with international practice.

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. 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 the Tortuguero Conservation Area (referred to by the Spanish acronym ACTo).

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). Having reviewed the evidence put before it, the Court notes that, in terms of 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, the evidence does not provide any information whatsoever regarding costs incurred in connection with fluvial transportation.

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.

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. Having reviewed the evidence adduced by Costa Rica in support of this claim—in the form of two invoices—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.

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 (paras. 107–131)

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.

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 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. Based on the technical report produced by the officials of the Secretariat of the Ramsar Convention, it is the view of the Court that the inspection was directly connected to the monitoring of the northern part of Isla Portillos that was made necessary as a result of Nicaragua's wrongful conduct.

Turning to the question of quantification, 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", based on 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. The Court considers it necessary to evaluate the compensable expenses by reference to the information provided in the above-mentioned official communication and in the flight logs, 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. With regard to Costa Rica's claim for salaries and related allowances for Air Surveillance Service personnel involved in aircraft missions, the Court finds that Costa Rica is not entitled to claim the cost of salaries for the April 2011 inspection mission. As noted earlier, 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.

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.

Turning to the question of quantification, 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 considers that they can be divided into three sets, by reference to the area covered by the satellite images. The first set relates to the satellite images that cover the northern part of Isla Portillos; the second set relates to the satellite images that cover the general area of the northern border with Nicaragua; and the third set provides no indication of the area covered by the satellite images.

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 relating to satellite images covering the northern part of Isla Portillos, compensation for one satellite image covering an area of 30 square kilometres at a unit price of US$28 per square kilometre.

With regard to the other set of invoices, which provides no indication of the area covered by the satellite images, 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.

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.

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 (which consists of three sections) and observes 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.

Turning to the question of quantification, the Court notes that the three sections of the UNITAR/UNOSAT report are separable (in the sense that each section is self-standing) and only the content of Section 2 of the report is directly relevant. The Court thus 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.

With regard to the other heads of expenses for compensation, the Court observes that 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. 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. 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. With reference to the third category, as already explained earlier in the context of similar claims for compensation made by Costa Rica, the Court does not accept that a State is entitled to compensation for the regular salaries of its officials. The Court also 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 for ACTo personnel, were connected with Costa Rica's monitoring of the northern part of Isla Portillos following the withdrawal of Nicaragua's military personnel.

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) (paras. 132–146)

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".

The Court begins by setting out some of the factual background. 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 program. 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*.

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. After 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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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. In its view, 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.

The Court notes that, 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*. In the Court's view, the expenses for this flight are thus not compensable.

The Court further notes that, 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*. 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 states that it is satisfied that the evidence adduced fully supports Costa Rica's claim. 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. In the Court's view, 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. 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).

Finally, 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. In the Court's opinion, 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. The Court finds that the total expense incurred by Costa Rica under this head of expenses, totalling US$33,041.75, is therefore compensable.

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 (para. 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, 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 (paras. 148–155)

The Court notes that, according to Costa Rica, in view of the extent of damage suffered, full reparation cannot be achieved without payment of interest. Costa Rica claims both pre-judgment and post-judgment interest.

The Court recalls that in the practice of international courts and tribunals, prejudgment interest may be awarded if

full reparation for injury caused by an internationally wrongful act so requires. Nevertheless, it states that interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case.

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.

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.

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". The Court sees no reason in the current case to adopt a different approach. 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 principal sum. This interest shall be paid at an annual rate of 6 per cent.

VI. Total sum awarded (para. 156)

The Court concludes that the total amount of compensation to be 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. It adds that, should payment be delayed, post-judgment interest on the total amount will accrue as from 3 April 2018.

VII. Operative part (para. 157)

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.

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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.

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Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of 13 parts, Judge Cançado Trindade begins by explaining that, although he has concurred with his vote to the adoption of the present Judgment ordering compensation, there are related issues underlying the present decision of the International Court of Justice but left out of its reasoning; his outlook of reparations for environmental damages being much wider, he feels obliged to dwell upon, and to leave on the records, the foundations of his own personal position thereon. After all, this is the first case ever in which the International Court of Justice is called upon to pronounce on reparations for environmental damages.

2. Those issues, to start with, are: *a*) the principle *neminem laedere* and the duty of reparation for damages; *b*) the

indissoluble whole of breach and prompt reparation; *c*) duty of reparation as a fundamental, rather than "secondary", obligation; *d*) reparations in the thinking of the "founding fathers" of the law of nations: their perennial legacy; *e*) reparation in all its forms (compensation and others); *f*) reparation for environmental damages, the intertemporal dimension, and *obligations of doing* in regimes of protection.

3. And the remaining issues, all in logical sequence, are: *g*) the centrality of *restitutio* and the insufficiencies of compensation; *h*) the incidence of considerations of equity and jurisprudential cross-fertilization; *i*) environmental damages and the necessity and importance of restoration; and *j*) restoration beyond simply compensation: the need for non-pecuniary reparations. He at last proceeds to his final considerations, and to an epilogue containing a recapitulation of all points examined herein.

4. Judge Cançado Trindade begins by pondering that the Court's reasoning should have been much wider, going beyond compensation, encompassing also the consideration of restoration measures, and distinct forms of reparation. In his view, "[t]he Court should have taken another step forward in the present domain of reparations, as it did in its previous Judgment on reparations (of 19 June 2012) in the case of *A.S. Diallo* (Guinea *versus* D.R. Congo)"; in both cases,—he added,—reparations are "to be considered within the framework of international regimes of protection: in the *A.S. Diallo* case, human rights protection, and in the present case, environmental protection" (paras. 2–3).

5. He then observes, in recalling the Court's *jurisprudence constante*, that, according to a well-established principle of international law, reparation must cease all consequences of the unlawful act and re-establish the situation which existed prior to the occurrence of the breach. Recourse is to be made, first, to *restitutio in integrum*,—he proceeds,—and, when restitution is not possible, one then turns to compensation. The conception of the duty of reparation for damages has deep-rooted historical origins, going back to antiquity and Roman law; it was inspired by the natural law general principle of *neminem laedere* (paras. 7–11).

6. Judge Cançado Trindade stresses that the breach causing harm promptly generates the duty of reparation; breach and prompt reparation complement each other, forming an indissoluble whole (paras. 12–13). And he adds that responsibility for environmental damage and reparation cannot make abstraction of the temporal dimension; after all, responsibility for environmental damage has an inescapable longstanding dimension. In his own words,

> "As cases concerning environmental damage show, the indissoluble whole formed by breach and reparation has a temporal dimension, which cannot be overlooked. In my perception, it calls upon looking at the past, present and future altogether. The search for *restitutio in integrum*, *e.g.*, calls for looking at the present and the past, as much as it calls for looking at the present and the future. As to the past and the present, if the breach has not been complemented by the corresponding reparation, there is then a *continuing situation* in violation of international law.
>
> As to the present and the future, the reparation is intended to cease all the effects of the environmental damage, cumulatively in time. It may occur that the damage is irreparable, rendering *restitutio in integrum* impossible, and then compensation applies. In any case, responsibility for environmental damage and reparation cannot, in my view, make abstraction of the intertemporal dimension (…). After all, environmental damage has a longstanding dimension" (paras. 14–15)."

7. He further stresses that the duty of prompt reparation is a fundamental, rather than "secondary", obligation: it is an imperative of justice,—as he already pointed out in his Separate Opinion (para. 97) in the previous case on reparations decided by the ICJ, that of *A.S. Diallo* (Guinea *versus* D.R. Congo, Judgment of 19 June 2012). Along the centuries, it is in jusnaturalist thinking that attention to *prompt* reparation has been properly pursued (para. 29). Going well beyond the reasoning of the Court in the present Judgment on *Compensation Owed by Nicaragua to Costa Rica*, Judge Cançado Trindade sustains that, first, reparations are to be properly appreciated within the conceptual framework of *restorative justice*; and secondly, *exemplary reparations* exist and gain in importance within regimes of protection and in face of environmental damages (paras. 16–19).

8. In his following considerations, Judge Cançado Trindade observes that, in the law of nations, reparation is necessary to the preservation of the international legal order, thus responding to a true international need, in conformity with the *recta ratio*; this latter, and the *rationale* of reparation, were already dwelt upon in the writings of the "founding fathers" of the law of nations (Sixteenth century onwards). Such writings also turned to the *forms* of reparation (namely, *restitutio in integrum*, satisfaction, compensation, rehabilitation and guarantee of non-repetition of acts or omissions in breach of international law). All these points are part of their perennial legacy on prompt reparation, in the line of jusnaturalist thinking (paras. 20–27). And he adds:

> "The wisdom of the thinking of the "founding fathers" of law of nations (*droit des gens*) has rendered its legacy perennial, endowed with topicality even in our days, in this second decade of the Twenty-first century. In my perception, the lessons extracted from their jusnaturalist thinking have helped to shape the attention devoted to principles (like those resting in the foundations of the duty of reparation) by Latin American legal doctrine, with its influential contribution to the progressive development of international law" (para. 28).

9. In sequence, Judge Cançado Trindade asserts that, in order to *say what the Law is* (*juris dictio*) as to the fundamental duty of reparation, the Court cannot restrict itself only to compensation, even if the contending parties address just this latter. *Restitutio in integrum* is the modality of reparation *par excellence*, the first one to be sought. All forms of reparation (namely, *restitutio in integrum*, satisfaction, compensation, rehabilitation and guarantee of non-repetition of acts or omissions in breach of international law), complement each other.

10. He recalls that, in the present Separate Opinion in the *cas d'espèce* as well as in his previous Separate Opinions in the cases of *Armed Activities on the Territory of the Congo*

(Order of 6 December 2016), and of *A.S. Diallo* (Judgment of 19 June 2012) (paras. 11–16; and 50–51, 54, 80, 83 and 90, respectively),—and earlier on in several of his Individual Opinions in the Inter-American Court of Human Rights (IACtHR),—he makes reiteratedly the point that there are circumstances in which the simple quantification of damages (for compensation) is insufficient, calling thus for other forms of reparation (paras. 29–37).

11. Judge Cançado Trindade then sustains that *obligations of doing*—which are essential to restoration—assume particular importance in the consideration of reparations within the framework of *regimes of protection* (such as that of the environment); *obligations of doing* are essential to restoration (paras. 38–41). Restorative justice encompasses reparations in all their forms, to be all kept in mind. In his perception, only by means of restorative measures will the damaged environment be made to return, to the extent possible, to the pre-existing situation (remediation) (paras. 42–46, 53–58 and 80).

12. Judge Cançado Trindade proceeds, in underlining that in the case of reparations (in all its forms) for environmental harm, one is to resort to *considerations of equity*, which cannot be minimized (as juspositivists in vain try to do); such considerations assist international tribunals to adjudicate matters *ex aequo et bono* (paras. 47–48, 52 and 78). He warns that greater attention is to be given to *jurisprudential cross-fertilization*, in particular to the relevant case-law of the IACtHR and the ECtHR on reparations in their distinct forms. International tribunals, especially those operating within the framework of international regimes of protection (mainly the IACtHR), do not hesitate to make recourse to considerations of equity (paras. 39–51).

13. Next, he further warns that "[c]ompensation, in sum, is not self-sufficient; it is interrelated with other forms of reparation, and to *restoration* at large" (para. 53). In the present case, remediation of the environmental damage calls for going beyond compensation only, so as consider restoration measures (para. 58). Full reparations, in a case of the kind of the present one, in his view can only be attained within the framework of restorative justice.

14. Judge Cançado Trindade then points out that environmental harms also concern populations; one is to address environmental vulnerability, in seeking to secure human health (1992 Rio de Janeiro Declaration on Environment and Development), the *right of living* (paras. 60 and 74–77). The *realization of justice* can be seen in itself as a form of reparation, when securing satisfaction to those victimized. To him, environmental damages cannot be precisely assessed and quantified only in financial or pecuniary terms; full reparation is not attainable by compensation only.

15. In his understanding, attention is thus to be kept on the importance of restoration measures, beyond monetary compensation (*e.g.*, planting trees to restore biodiversity), so as to achieve the remediation of the environmental harms. There is need to consider also non-pecuniary reparations (paras. 59–64). And he adds that

> "the *realization of justice*, seeking to cease the effects of the harmful acts, can be seen in itself as a form of reparation, when securing satisfaction to those victimized. Restorative justice is considerably important: even if *restitutio in integrum* is not attainable, other forms of reparation such as rehabilitation and satisfaction are to be pursued so as to achieve restoration. Rehabilitation and satisfaction are forms of non-pecuniary reparation, requiring *obligations of doing* (cf. section VII, *supra*) to the effect of restoration. To them one can add the guarantee of non-repetition of the breaches" (para. 65).

16. Restoration measures can, with the passing of time, cease the consequences of the environmental damages. Judge Cançado Trindade then emphasizes that one is to bear in mind "the intrinsic value of the environment for the populations"; taking, for example, the question of reparation in respect of the damage done to wetlands, the 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat draws attention to the interdependence of human beings and their environment, thus rendering it "necessary here to go beyond the strict inter-State outlook, and to keep in mind the populations of the countries concerned" (para. 70).

17. Moving to his final considerations, Judge Cançado Trindade next warns that it should be pointed out that the monetary sums ordered by the Court in the present Judgment could be used "to plant trees and other plants, seeking to restore biodiversity, and increase the future provision of such services as gas regulation, air quality and raw materials, besides other restorative measures" (para. 79). In effect,—he adds,—as to the duty of reparation, "lessons from the past have simply not been learned yet"; the application of that duty in contemporary international law seems to be still in its infancy (para. 93). There thus remains nowadays a long way to go,—he concludes,—so as to ensure, within the wider framework of restoration, the progressive development of international law in the domain of reparations (para. 93).

Separate opinion of Judge Donoghue

Judge Donoghue has submitted a separate opinion that sets out the reasons for her votes with respect to compensation for the impairment or loss of environmental goods and services (paragraph 157 (1) (*a*)) and restoration costs (paragraph 157 (1) (*b*)).

She has voted in favor of the award of compensation to Costa Rica for the impairment or loss of environmental goods and services (paragraph 157 (1) (*a*)), but she considers that the evidence only supports compensation in the range of US$70–75,000. She does not consider that Costa Rica's claim for the value of the restoration of the wetland is supported by the evidence and thus has voted against paragraph 157 (1) (*b*).

Separate opinion of Judge Bhandari

Judge Bhandari agrees with the Court's Judgment on compensation, but wishes to place on record his views on certain issues which the Court did not address in detail. According to Judge Bhandari, the Court correctly stated that restitution is the preferred method for compensation under current international law, as reflected in Articles 35 and 36 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts

("ARSIWA"). He states that there are two reasons why the Court awarded compensation, instead of restitution, in the present case. First, the present case falls within the scope of one of the exceptions to the availability of restitution under Article 35 ARSIWA, namely that restitution would be "materially impossible". Second, an injured State may choose to specify which method of reparation it prefers upon notifying the responsible State of its claim, as provided under Article 43 ARSIWA. In its Application instituting proceedings before the Court (18 November 2010), Costa Rica requested that Nicaragua be ordered to pay compensation for the unlawful activities carried out in the affected area.

Judge Bhandari is of the view that the Court should have elaborated further on the method for determining the *quantum* of compensation. According to him, the evidence provided by the Parties was not sufficient for the determination of such *quantum*. In cases in which the Court does not have adequate evidence before it, compensation should be awarded based on equitable considerations. Judge Bhandari believes that the Court ought to have stated more clearly that it determined the amount of compensation due based on equitable considerations.

Judge Bhandari is also of the view that the precautionary approach should have played a more central role in the proceedings opposing Costa Rica to Nicaragua. He notes that the precautionary approach has been incorporated into a growing number of international instruments. Moreover, international courts and tribunals have referred to it in recent decisions, stating that it could be considered to be part of customary international law.

In addition, Judge Bhandari notes the paramount importance of environmental protection. Owing to the supreme interest that humankind holds in the preservation of the natural environment, Judge Bhandari is of the opinion that international law ought to develop in order to allow punitive or exemplary damages where serious harm has been caused to the environment. According to him, States have expressly created international obligations for the protection and preservation of the environment. Moreover, science has proven beyond doubt that humanity will suffer tremendously if the natural environment is irremediably prejudiced by human activity. Judge Bhandari believes that developing international law to allow award of punitive or exemplary damages is also in line with the approach of domestic courts in certain jurisdictions, with the "polluter pays principle", and with the need to deter States from harming the environment in the future. However, an award of punitive or exemplary damages should not be out of proportion with respect to the actual harm caused by the responsible State.

Declaration of Judge Gevorgian

Judge Gevorgian explains that while agreeing with the *dispositif* of the Judgment, including both the amount of compensation due from the Republic of Nicaragua to the Republic of Costa Rica and the application of a "holistic" approach in assessing environmental damages, he nonetheless wishes to expresses caution in relation to certain aspects of the Court's reasoning, since it is the Court's first Judgment on environmental damages as such.

First, though the Court's acknowledges a potentially "flexible" application of the general rule that the burden of proof rests with the party seeking compensation, this flexible approach was not applied in the present case. As such, in this case, the burden of proof rested with the Applicant.

Second, of the six categories of potential damages identified by Costa Rica, the Judgment found that four, namely: standing timber; other raw materials (fibre and energy); gas regulation and air quality; and biodiversity, in terms of habitat and nursery, had sufficient evidence to support a finding of compensation. Judge Gevorgian was not persuaded by the evidence presented by Costa Rica to justify compensation for either gas regulation and air quality nor biodiversity.

With respect to gas regulation and air quality, Judge Gevorgian notes that, as affirmed by Nicaragua, any damage done to gas regulation and air quality by the release of carbon dioxide into the atmosphere was felt globally. As such, to the extent that this damage effected Costa Rica, Costa Rica is only entitled to a miniscule share of the global damage.

With respect to biodiversity, Judge Gevorgian notes the absence of a baseline to measure any damage to the wetlands against. While acknowledging the various studies presented, Judge Gevorgian found that these studies were done with respect to different areas, industries, and did not assist in providing a clear baseline to measure the damage that Nicaragua's activities have done. As such, Costa Rica has failed to meet its burden of proof with respect to this head of damage.

Finally, Judge Gevorgian, while supporting the total compensation award, notes that it is important not to interpret the present Judgment in far-reaching terms and that any possibility of interpreting the "overall assessment" of environmental damage as being "punitive or exemplary" should be avoided so as not to jeopardize the peaceful settlement of environmental disputes.

Declaration of Judge *ad hoc* Guillaume

1. Given that Costa Rica assessed the material damage caused by Nicaragua at US$6,711,685.26, Judge *ad hoc* Guillaume observes that, in fixing the principal sum of compensation due at US$358,740.55, the Court has rejected the majority of Costa Rica's submissions. He agrees with the Court's assessment, even though he finds it generous in certain respects, but wishes to clarify his views on certain points.

2. Regarding compensation for "restoration costs" anticipated by Costa Rica in respect of the "protected wetland", while Judge *ad hoc* Guillaume supports the solution adopted by the Court, he expresses the hope that this work, which is ill-defined in the case file, will actually be planned and carried out.

3. Regarding compensation for environmental damage, Judge *ad hoc* Guillaume points to the mistakes in the assessment submitted by Costa Rica, particularly as regards the calculation of damages for the felling of trees, and those relating to gas regulation and air quality. He notes that although the method of assessment put forward by Nicaragua is preferable, it is not without its own problems. He concludes that the evaluation of damage in this instance is necessarily only approximate.

4. Judge *ad hoc* Guillaume welcomes the Court's decision not to uphold Costa Rica's claims for the reimbursement of expenses relating, *inter alia*, to the establishment of police posts: such expenses were not directly linked to Nicaragua's unlawful activities. Furthermore, redeploying the personnel concerned did not generate any additional expenses for Costa Rica.

5. Finally, Judge *ad hoc* Guillaume observes that the Court has, for the first time, awarded pre-judgment interest to the Applicant and considers this a sensible solution in this particular instance, given the nature of the expenses incurred by Costa Rica. He notes that it leaves room in the future for assessments to vary from case to case.

Dissenting opinion of Judge *ad hoc* Dugard

Judge *ad hoc* Dugard's disagreement with the Judgment relates to both the method employed by the Court to reach its decision on the quantum of damages to be awarded and the amount determined by the Court in its quantification of environmental damages.

The Court awarded US$120,000 for environmental damage. In Judge *ad hoc* Dugard's opinion a considerably higher compensation is warranted, one that takes account of an increased valuation of the impairment to trees, raw materials, biodiversity and gas regulation; the inclusion of a valuation for the impairment of soil formation; harm caused to the environment; the implications of the felling of trees and the destruction of undergrowth for climate change; and the gravity of an intentional harm caused to the environment of a wetland by Nicaragua.

Precise quantification of the harm caused by Nicaragua to Costa Rica's environment is impossible. The assessment of damage to the environment is a difficult task, rendered even more difficult by the absence of an agreed scientific method for making such an assessment.

The approach which the Court followed for quantification of environmental damage is unsatisfactory. The Court's apparent reliance on the "corrected analysis" of Payne and Unsworth (Nicaragua's experts) is problematic for several reasons which are addressed in the dissenting opinion. For one, the "corrected analysis" attaches a value to each head of damage in isolation.

Secondly, certain elements of the "corrected analysis" cannot legitimately be relied upon by the Court as providing a "reasonable basis" for its own valuations. Thirdly, the Court rejects Costa Rica's argument that the recovery period for goods and services is 50 years, but gives no indication of what it considers to be the appropriate recovery period for the goods and services in question.

In the present case there are a number of equitable considerations that the Court might and should have taken into account in its quantification of damages including the protection of the environment, the importance attached to measures to combat climate change in today's world, and the gravity of the respondent State's actions.

In relation to the loss of gas regulation, Nicaragua argued that the cost of lost carbon sequestration reflects the value to the world population of this ecological service and that Costa Rica was therefore not entitled to claim for the full amount of harm done. The obligation not to engage in wrongful deforestation that results in the release of carbon into the atmosphere and the loss of gas sequestration services is an obligation *erga omnes*.

In assessing compensation in this case, the Court should have had regard to the gravity of Nicaragua's unlawful activities, and the amount of compensation should be assessed so as to fit the wrongful conduct. Nicaragua's conduct in these proceedings has been characterized by bad faith and a determination to deliberately flout international law and the Court's authority. Without advocating the imposition of punitive damages, it is possible to take account of the gravity of Nicaragua's conduct in seeking to fully restore Costa Rica to the position which it enjoyed prior to Nicaragua's violation taking place.

225. MARITIME DELIMITATION IN THE CARIBBEAN SEA AND THE PACIFIC OCEAN (COSTA RICA *v.* NICARAGUA) AND LAND BOUNDARY IN THE NORTHERN PART OF ISLA PORTILLOS (COSTA RICA *v.* NICARAGUA)

Judgment of 2 February 2018

On 2 February 2018, the International Court of Justice delivered its Judgement in the joined cases concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua).*

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judges *ad hoc* Simma, Al-Khasawneh; Registrar Couvreur.

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Procedural background (paras. 1–44)

The Court begins by recalling that, on 25 February 2014, the Republic of Costa Rica (hereinafter "Costa Rica") instituted proceedings against the Republic of Nicaragua (hereinafter "Nicaragua") with regard to a dispute concerning the "establishment of single maritime boundaries between the two States in the Caribbean Sea and the Pacific Ocean, respectively, delimiting all the maritime areas appertaining to each of them, in accordance with the applicable rules and principles of international law" (hereinafter the "case concerning *Maritime Delimitation*").

The Court then recalls that, by an Order dated 31 May 2016, it decided that an expert opinion would be arranged to inform it as to the state of the coast between the point suggested by Costa Rica and the point suggested by Nicaragua in their pleadings as the starting-point of the maritime boundary in the Caribbean Sea. By an Order dated 16 June 2016, the President of the Court appointed the following two experts: Mr. Eric Fouache, of French nationality, and Mr. Francisco Gutiérrez, of Spanish nationality. The experts conducted a first site visit from 4 to 9 December 2016.

The Court further recalls that, on 16 January 2017, Costa Rica instituted proceedings against Nicaragua in a dispute concerning "the precise location of the land boundary separating the Los Portillos/Harbor Head Lagoon sandbar from Isla Portillos" and "the … establishment of a military camp by Nicaragua on the beach of Isla Portillos" (hereinafter "the case concerning the *Northern Part of Isla Portillos*"). The Court explains that, by an Order dated 2 February 2017, it decided to join the proceedings in the case concerning *Maritime Delimitation* and the case concerning the *Northern Part of Isla Portillos*.

The Court observes that the experts conducted a second site visit from 12 to 17 March 2017 and submitted their report to the Court on 1 May 2017. That report was transmitted to the Parties, which were given an opportunity to comment on it.

Finally, the Court recalls that public hearings were held in the joined cases from Monday 3 July to Thursday 13 July 2017.

I. Jurisdiction of the Court (paras. 45–46)

The Court notes that, in both of the cases, Costa Rica invokes, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the declarations by which the Parties have recognized the compulsory jurisdiction of the Court under Article 36 of the Statute, and that Nicaragua does not contest the Court's jurisdiction to entertain Costa Rica's claims. The Court finds that it has jurisdiction over both cases.

II. General background (paras. 47–58)

A. Geography (paras. 47–50)

The Court recalls the geographical context to the two cases. It explains in this regard that Isla Portillos, the northern part of which is the subject of the land boundary dispute, is an area (approximately 17 sq. km) bounded to the west by the San Juan River and to the north by the Caribbean Sea. It observes that at the north-western extremity of Isla Portillos, a sandspit of variable length deflects the final course of the San Juan River, displacing its mouth towards the west. It notes that on the coast of Isla Portillos, approximately 3.6 km east of the mouth of the San Juan River, is a lagoon called Laguna Los Portillos by Costa Rica and Harbor Head Lagoon by Nicaragua, and that this lagoon is at present separated from the Caribbean Sea by a sandbar.

The Court observes that in the Caribbean Sea off the coast of Nicaragua there are several islands and cays, the most prominent of which are the Corn Islands, located approximately 26 nautical miles off its coast; these islands have an area of 9.6 sq. km (Great Corn Island) and 3 sq. km (Little Corn Island) and a population of approximately 7,400 inhabitants. The Court points out that on the Pacific side, the coast of Nicaragua is relatively straight and generally follows a north-west to south-east direction, whereas the Costa Rican coast is more sinuous and includes the peninsulas of Santa Elena (near the land boundary terminus), Nicoya and Osa.

B. Historical context (paras. 51–56)

The Court then describes the historical context to the present disputes. It observes in this regard that, following hostilities between the two States in 1857, the Governments of Costa Rica and Nicaragua concluded in 1858 a Treaty of Limits (hereinafter the "1858 Treaty"), which fixed the course of the land boundary between the two countries from the Pacific Ocean to the Caribbean Sea. Following challenges by Nicaragua on various occasions to the validity of this Treaty, Costa Rica and Nicaragua signed another instrument on 24 December 1886, whereby the two States agreed to submit the question of the validity of the 1858 Treaty, as well as various other points of "doubtful interpretation", to the President of the United States of America, Grover Cleveland, for arbitration. The Court notes that, in the Award he handed down in 1888, President Cleveland, *inter alia*, confirmed

the validity of the Treaty, and found that the boundary line between the two States on the Atlantic side "begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858". Subsequent to that decision, in 1896, Costa Rica and Nicaragua agreed to establish two national Demarcation Commissions, which were to include an engineer, who "shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final". United States General Edward Porter Alexander was so appointed. During the demarcation process (which began in 1897 and was concluded in 1900), General Alexander rendered five Awards. The Court recalls that, in his First Award, dated 30 September 1897, General Alexander determined the starting segment of the land boundary near the Caribbean Sea in light of geomorphological changes that had occurred since 1858. Following Alexander's First Award, the Demarcation Commissions recorded the co-ordinates of the starting-point of the land boundary determined by General Alexander by reference to the centre of Plaza Victoria in old San Juan de Nicaragua (Greytown) and other points on the ground.

The Court explains that since the time of the Alexander Awards and the work of the Demarcation Commissions, the northern part of Isla Portillos has continued to undergo significant geomorphological changes. It recalls that, in 2010, a dispute arose between Costa Rica and Nicaragua with regard to certain activities carried out by Nicaragua in that area. The Court further recalls that, in its 2015 Judgment in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua*) (hereinafter the "2015 Judgment"), it considered the impact of some of these changes on the issue of territorial sovereignty. The Court stated in its 2015 Judgment "that the territory under Costa Rica's sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea". The Court thus concluded in the 2015 Judgment that Costa Rica had sovereignty over a 3 sq. km area in the northern part of Isla Portillos, although noting in its description of this area that it did "not specifically refer to the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon, which lagoon both Parties agree is Nicaraguan, and the mouth of the San Juan River". The Court observes that the course of the land boundary on this stretch of coast is one of the subjects of dispute between the Parties in the present joined cases.

With respect to maritime areas, the Court recalls that a bilateral Sub-Commission was established by the two Parties in May 1997 to carry out preliminary technical studies regarding possible maritime delimitations in the Pacific Ocean and the Caribbean Sea. It held five meetings between 2002 and 2005, after which negotiations on maritime delimitations between the two States stalled.

C. Delimitations already effected in the Caribbean Sea and the Pacific Ocean (paras. 57–58)

The Court points out that, in the Caribbean Sea, Costa Rica concluded, on 2 February 1980, a treaty with Panama delimiting a maritime boundary; this treaty entered into force on 11 February 1982. Costa Rica negotiated and signed a maritime delimitation treaty with Colombia in 1977, but never ratified that instrument. Nicaragua's maritime boundaries with Honduras (to the north) and Colombia (to the east) have been established by Judgments of the Court in 2007 and 2012, respectively. Colombia and Panama also concluded a maritime delimitation treaty establishing their boundary in the Caribbean Sea on 20 November 1976.

The Court further observes that the 1980 treaty between Costa Rica and Panama also delimited their maritime boundary in the Pacific Ocean. For its part, Nicaragua has not concluded any treaty establishing a maritime boundary in the Pacific Ocean.

III. Land Boundary in the Northern Part of Isla Portillos (paras. 59–78)

A. Issues concerning territorial sovereignty (paras. 59–73)

The Court explains that the case concerning the *Land Boundary in the Northern Part of Isla Portillos* raises issues of territorial sovereignty which it is expedient to examine first, because of their possible implications for the maritime delimitation in the Caribbean Sea.

The Court observes that the Parties express divergent views on the interpretation of the 2015 Judgment and advance opposing claims to sovereignty over the coast of the northern part of Isla Portillos. The Court recalls that the operative part of its 2015 Judgment stated that "Costa Rica has sovereignty over the 'disputed territory', as defined … in paragraphs 69–70" of that Judgment. The term "disputed territory" was described in those paragraphs as including "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 disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon". The Court noted in the 2015 Judgment, however, that "[t]he above definition of the "disputed territory" does not specifically refer to the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon, which lagoon both Parties agree is Nicaraguan, and the mouth of the San Juan River". The Court further noted in the 2015 Judgment that the Parties

> "did not address the question of the precise location of the mouth of the river nor did they provide detailed information concerning the coast. Neither Party requested the Court to define the boundary more precisely with regard to this coast. Accordingly, the Court will refrain from doing so."

In the present Judgment, the Court is of the view that these passages indicate that no decision was taken in its 2015 Judgment on the question of sovereignty concerning the coast of the northern part of Isla Portillos, since this question had been expressly excluded. This means that it is not possible for the issue of sovereignty over that part of the coast to be *res judicata*. Therefore, the Court explains, it cannot declare inadmissible Nicaragua's claim concerning sovereignty over that stretch of coast of Isla Portillos.

The Court recalls that, in its 2015 Judgment, it interpreted the 1858 Treaty as providing that "the territory under Costa Rica's sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea". However, the Court states, the absence of "detailed information", which

had been observed in the 2015 Judgment, had left the geographical situation of the area in question somewhat unclear with regard to the configuration of the coast of Isla Portillos, in particular regarding the existence of maritime features off the coast and the presence of a channel separating the wetland from the coast.

For the Court, the assessment made by the Court-appointed experts, which was not challenged by the Parties, dispels all uncertainty about the present configuration of the coast and the existence of a channel linking the San Juan River with Harbor Head Lagoon. The experts ascertained that "[o]ff the coastline, there are no features above water even at low tide" and that, west of Harbor Head Lagoon, "the coast is made up of a broad sandy beach with discontinuous and coast-parallel enclosed lagoons in the backshore", while "[i]n the westernmost portion, close to the mouth of the San Juan River, there are no lagoons with free-standing water in the backshore". Significantly, the experts observed that there is no longer any water channel connecting the San Juan River with Harbor Head Lagoon. For the Court, since there is no channel, there cannot be a boundary running along it; Nicaragua's contention that "the boundary should continue to be defined by the approximate location of the former channel" linking the river with Harbor Head Lagoon ignores the fact that the channel in question, as it existed at the time of the Alexander Awards, was running well north of the present beach and has been submerged by the sea, as the Court-appointed experts noted, explaining that "such … continuous channel has disappeared due to coastal recession". In light of these findings, the Court determines that Costa Rica has sovereignty over the whole of Isla Portillos up to where the river reaches the Caribbean Sea, and that the starting-point of the land boundary is the point at which the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea, currently located at the end of the sandspit constituting the right bank of the San Juan River at its mouth.

The Court recalls, however, that the Parties agree that Nicaragua has sovereignty over Harbor Head Lagoon. According to the Court-appointed experts, "Los Portillos/Harbor Head Lagoon is commonly separated from the sea by [a] sand barrier", although there may be "temporary channels in the barrier". The Court observes that this assessment, which implies that the barrier is above water even at high tide, was not challenged by the Parties. The Court therefore considers that the Parties agree that both Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea are under Nicaragua's sovereignty. According to the experts, the sandbar extends between the points at the edge of the north-eastern and north-western ends of the Lagoon. The current location of these points has been identified by the experts in their report as points Ple2 and Plw2 with respective co-ordinates of 10° 55' 47.23522" N, 83° 40' 03.02241" W and 10° 56' 01.38471" N, 83° 40' 24.12588" W in WGS 84 datum. The Court concludes that the sandbar extends between the points located at the north-eastern and north-western ends of the Lagoon, currently between points Ple2 and Plw2, respectively; from each of these two points, the land boundary should follow the shortest line across the sandbar to reach the low-water mark of the coast of the Caribbean Sea, as depicted on sketch-map No. 2 (reproduced in Annex 2 of the present summary).

B. Alleged violations of Costa Rica's sovereignty (paras. 74–78)

The Court recalls that Costa Rica's Application includes the claim that, "by establishing and maintaining a new military camp on the beach of Isla Portillos, Nicaragua has violated the sovereignty and territorial integrity of Costa Rica, and is in breach of the Judgment of the Court of 16 December 2015 in the *Certain Activities* case". Costa Rica requests the Court to declare that "Nicaragua must withdraw its military camp" and reserves its position with regard to further remedies. The Court notes that the experts have assessed that the edge of the north-western end of Harbor Head Lagoon lies east of the place where the military camp was located. The Court observes that it is now common ground that the military camp was placed by Nicaragua on the beach close to the sandbar, but not on it. The Court concludes that the installation of the camp thus violated Costa Rica's territorial sovereignty as defined above. It follows that the camp must be removed from Costa Rica's territory. However, there was no breach by Nicaragua of the 2015 Judgment because the boundary with regard to the coast had not been defined in that Judgment. The Court considers that the declaration of a violation of Costa Rica's sovereignty and the order addressed to Nicaragua to remove its camp from Costa Rica's territory constitute appropriate reparation.

IV. Maritime Delimitation in the Caribbean Sea (paras. 79–166)

A. Starting-point of the maritime delimitation (paras. 80–89)

The Court observes that, since the starting-point of the land boundary is currently located at the end of the sandspit bordering the San Juan River where the river reaches the Caribbean Sea, the same point would normally be the starting-point of the maritime delimitation. However, the great instability of the coastline in the area of the mouth of the San Juan River, as indicated by the Court-appointed experts, prevents the identification on the sandspit of a fixed point that would be suitable as the starting-point of the maritime delimitation. It is preferable, the Court reasons, to select a fixed point at sea and connect it to the starting-point on the coast by a mobile line. Taking into account the fact that the prevailing phenomenon characterizing the coastline at the mouth of the San Juan River is recession through erosion from the sea, the Court deems it appropriate to place a fixed point at sea at a distance of 2 nautical miles from the coast on the median line.

With regard to the enclave under Nicaragua's sovereignty, the Court notes that the sandbar separating Harbor Head Lagoon from the Caribbean Sea is a minor feature without vegetation and characterized by instability. In relation to this sandbar, the Court determines that the question of the starting-points of the maritime delimitation is bound up with the effects, if any, of this feature of the maritime delimitation. The Court addresses this latter issue later in its Judgment, taking into account the characteristics of the feature in question.

B. Delimitation of the territorial sea (paras. 90–106)

The Court recalls that, in accordance with its established jurisprudence, it proceeds in two stages to delimit the

territorial sea: first, the Court draws a provisional median line; second, it considers whether any special circumstances exist which justify adjusting such a line.

The Court states that it will construct the provisional median line only on the basis of points situated on the natural coast, which may include points placed on islands or rocks. The base points used by the Court are located on salient points that are situated on solid land and thus have a relatively higher stability than points placed on sandy features. The Court observes that Paxaro Bovo and Palmenta Cays do not affect the construction of the median line in the territorial sea.

The Court considers that, for the delimitation of the territorial sea, the combined effect of the concavity of Nicaragua's coast west of the mouth of the San Juan River and of the convexity of Costa Rica's coast east of Harbor Head Lagoon is of limited significance and does not represent a special circumstance that could justify an adjustment of the median line under Article 15 of UNCLOS.

However, the Court considers that a special circumstance affecting maritime delimitation in the territorial sea consists in the high instability and narrowness of the sandspit near the mouth of the San Juan River which constitutes a barrier between the Caribbean Sea and a sizable territory appertaining to Nicaragua. The instability of this sandspit does not allow one to select a base point on that part of Costa Rica's territory, as Costa Rica acknowledges, or to connect a point on the sandspit to the fixed point at sea for the first part of the delimitation line. The Court is of the view that it is more appropriate that the fixed point at sea on the median line be connected by a mobile line to the point on solid land on Costa Rica's coast which is closest to the mouth of the river. The Court observes that this point has been identified by the Court-appointed experts as point Pv but there may be geomorphological changes over time. For the present, the Court concludes, the delimitation line in the territorial sea extends from the fixed point at sea landwards to the point on the low-water mark of the coast of the Caribbean Sea that is closest to point Pv. From the fixed point seawards, the delimitation line in the territorial sea is the median line as determined by the base points selected in relation to the present situation of the coast.

The Court considers that another special circumstance is relevant for the delimitation of the territorial sea. The instability of the sandbar separating Harbor Head Lagoon from the Caribbean Sea and its situation as a small enclave within Costa Rica's territory call for a special solution. Should territorial waters be attributed to the enclave, they would be of little use to Nicaragua, while breaking the continuity of Costa Rica's territorial sea. Under these circumstances, the delimitation in the territorial sea between the Parties will not take into account any entitlement which might result from the enclave.

The Court concludes that the delimitation line in the territorial sea is obtained by joining landwards the fixed point at sea (with the co-ordinates given in paragraph 106 of the Judgment) with the point on solid land on Costa Rica's coast that is closest to the mouth of the river and by joining seawards with geodetic lines the points set out in paragraph 106 of the Judgment, as depicted on sketch-map No. 5 (reproduced in Annex 2 of the present summary).

C. Delimitation of the exclusive economic zone and the continental shelf (paras. 107–166)

The Court then proceeds to the delimitation of the exclusive economic zones and continental shelves appertaining to Costa Rica and Nicaragua, for which both Parties requested the Court to draw a single delimitation line.

(*a*) *Relevant coasts and relevant area* (paras. 108–122)

(i) *Relevant coasts* (paras. 108–114)

The Court recalls that the relevant coasts for the delimitation are those that generate projections which overlap with projections form the coast of the other party. In the present case, the Court considers that the entire mainland coast of Costa Rica is relevant. In the Court's view, the mainland coast of Nicaragua is relevant up to Punta Gorda (north), where the coast shows a significant inflexion. The coasts of the Corn Islands that do not face north also have to be included when determining the length of the relevant coasts. On the other hand, no evidence concerning the capacity of the Cayos de Perlas to "sustain human habitation or economic life of their own" as required by Article 121 of UNCLOS was supplied by Nicaragua to support its assertion that "the Cayos de Perlas generate maritime projections". Therefore their coasts should not be included among the relevant coasts. Given the fact that the relevant coasts of Nicaragua and Costa Rica are not characterized by sinuosity, the length of the relevant coasts should preferably be measured on the basis of their natural configuration. This results in a total length of the coasts of 228.8 km for Costa Rica and of 465.8 km for Nicaragua, with a ratio of 1:2.04 in favour of Nicaragua.

(ii) *Relevant area* (paras. 115–122)

The Court recalls that the relevant area comprises that part of the maritime space in which the potential entitlements of the Parties overlap. Here, the Court considers that, except for the space attributed to Colombia in the 2012 Judgment, the area where there are overlapping projections in the north includes the whole maritime space situated within a distance of 200 nautical miles from Costa Rica's coast. In the south, the situation is more complicated because of the presence of claims of third States on which the Court cannot pronounce itself. The impact of the rights of third States in the areas that may be attributed to one of the Parties cannot be determined, but the spaces where third States have a claim may nevertheless be included. The Court further analyses the issue of the relevant area in the Caribbean Sea later in its Judgment (see sub-section (*e*) below).

(*b*) *Relevance of bilateral treaties and judgments involving third States* (paras. 123–134)

The Court observes that the 1976 Treaty between Panama and Colombia involves third States and cannot be considered relevant for the delimitation between the Parties. With regard to the 1977 Treaty between Costa Rica and Colombia, there is no evidence that a renunciation by Costa Rica of its maritime entitlements, if it had ever taken place, was also intended to be effective with regard to a State other than Colombia.

(*c*) *Provisional equidistance line* (paras. 135–145)

The Court recalls that it delimits the exclusive economic zone and the continental shelf pursuant to its established methodology in three stages. First, it provisionally draws an equidistance line using the most appropriate base points on the relevant coasts of the Parties. Second, it considers whether there exist relevant circumstances which are capable of justifying an adjustment of the equidistance line provisionally drawn. Third, it assesses the overall equitableness of the boundary resulting from the first two stages by checking whether there exists a marked disproportionality between the length of the Parties' relevant coasts and the maritime areas found to appertain to them.

The Court then turns to the construction of the provisional equidistance line in the case at hand, observing that the Parties are generally in agreement with regard to the selection of base points, but are divided on two issues. The first issue concerns the placement of base points on the Corn Islands, and the second concerns the placement of base points on Paxaro Bovo and Palmenta Cays. The Court concludes that base points should be placed on the Corn Islands for the purpose of constructing a provisional equidistance line. It observes in this respect that these islands have a significant number of inhabitants and sustain economic life; they therefore amply satisfy the requirements set forth in Article 121 of UNCLOS for an island to be entitled to generate an exclusive economic zone and continental shelf. With regard to the Palmenta Cays and Paxaro Bovo, the Court notes that these features may be assimilated to the coast and thus it considers it appropriate to place base points on them for the construction of the provisional equidistance line. The Court concludes that the provisional equidistance line shall follow a series of geodetic lines described in paragraph 145 of the Judgment, as depicted on sketch-map No. 9 (reproduced in Annex 2 of the present summary).

(*d*) *Adjustment to the provisional equidistance line* (paras. 146–158)

The Court then considers whether there are factors calling for the adjustment of the provisional equidistance line in order to achieve an equitable result. In the case of the Corn Islands, the Court considers that, given their limited size and significant distance from the mainland coast, it is appropriate to give them only half effect. This produces an adjustment of the equidistance line in favour of Costa Rica. The Court decides that the other arguments advanced by the Parties to support an adjustment of the provisional equidistance line cannot be accepted. Nicaragua's alleged combination of a convex coast of Costa Rica near Punta de Castilla and of its own concave coast has a limited effect on the boundary line, especially at a distance from the coast, and is not sufficiently significant to warrant an adjustment of the line. The overall concavity of Costa Rica's coast and its relations with Panama cannot justify an adjustment of the equidistance line in its relations with Nicaragua. When constructing the maritime boundary between the Parties, the relevant issue is whether the seaward projections from Nicaragua's coast create a cut-off for the projections from Costa Rica's coast as a result of the concavity of that coast. This alleged cut-off is not significant, even less so once the equidistance line has been adjusted by giving a half effect to the Corn Islands.

The resulting adjusted equidistance line is described in paragraph 156 of the Judgment and depicted on sketch-map No. 10 (reproduced in Annex 2 of the present summary). The Court recalls that this line is constructed without prejudice to any claims that a third State may have on part of the area crossed by the line. Given the complexity of that line, the Court considers it more appropriate to adopt a simplified line, on the basis of the most significant turning points. The resulting simplified line is set out in paragraph 158 of the Judgment and depicted on sketch-map No. 11 (reproduced in Annex 2 of the present summary).

(*e*) *Disproportionality test* (paras. 158–166)

The Court observes that the attribution of some maritime space to a third State will affect the part of the relevant area that appertains to each Party. Since the maritime space appertaining to third States cannot be identified in the present proceedings, it is impossible for the Court to calculate precisely the part of the relevant area of each Party. However, for the purpose of verifying whether the maritime delimitation shows a gross disproportion, an approximate calculation of the relevant area is sufficient. In the present case, the Court finds it appropriate to base this calculation on the "notional extension of the Costa Rica-Panama boundary" as suggested by Costa Rica.

The Court then observes that the relevant area identified would be divided by the maritime boundary into 73,968 sq. km for Nicaragua and 30,873 sq. km for Costa Rica, with a resulting ratio of 1:2.4 in favour of Nicaragua. The Court concludes that a comparison with the ratio of coastal lengths (1:2.04 also in favour of Nicaragua) does not show any "marked disproportion".

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The Court therefore finds that the delimitation concerning the exclusive economic zone and the continental shelf between the Parties in the Caribbean Sea shall follow the line described in paragraph 158 of the Judgment, as depicted on sketch-map No. 13 (reproduced in Annex 2 of the present summary).

V. Maritime Delimitation in the Pacific Ocean (paras. 167–204)

The Court then moves to the delimitation of the maritime boundary between the Parties in the Pacific Ocean. As with the maritime delimitation in the Caribbean Sea, the Court was requested with respect to the Pacific Ocean to delimit the boundary for the territorial sea, the exclusive economic zone and the continental shelf.

A. Starting-point of the maritime delimitation (para. 169)

With regard to the starting-point of the maritime delimitation in the Pacific Ocean, the Court observes that Costa Rica and Nicaragua agree that it is the midpoint of the closing line of Salinas Bay. In the oral proceedings, Costa Rica raised no objection to using the co-ordinates indicated by Nicaragua in its Counter-Memorial for the purposes of identifying the starting-point of the maritime boundary in the Pacific Ocean. Therefore, on the basis of the agreement between the Parties, the Court finds that the maritime boundary between Costa Rica and Nicaragua in the Pacific Ocean shall start at the

midpoint of the closing line of Salinas Bay, with co-ordinates 11° 03' 56.3'' N, 85° 44' 28.3'' W (WGS 84 datum).

B. Delimitation of the territorial sea (paras. 170–175)

The Court next addresses the delimitation of the territorial sea. It notes that, for the construction of the provisional median line in the present case, Costa Rica and Nicaragua selected the same base points, which are located on certain prominent features on their coasts. The Court sees no reason to depart from the base points selected by both Parties.

The Court recalls, however, that the Parties differ on whether the configuration of the coast constitutes a special circumstance within the meaning of Article 15 of UNCLOS which would justify an adjustment of the provisional median line in the territorial sea. The issue is whether locating base points on the Santa Elena Peninsula has a significant distorting effect on the provisional median line which would result in a cut-off of Nicaragua's coastal projections within the territorial sea. As the Court has noted in a previous case, "islets, rocks and minor coastal projections" can have a disproportionate effect on the median line. Such an effect can call for an adjustment of the provisional median line in the territorial sea. In the vicinity of Salinas Bay, however, the Court takes the view that the Santa Elena Peninsula cannot be considered to be a minor coastal projection that has a disproportionate effect on the delimitation line. It observes that the coast of the Santa Elena Peninsula accounts for a large portion of Costa Rica's coast in the area in which the Court is requested to delimit the territorial sea. Moreover, it notes, the adjustment proposed by Nicaragua in the territorial sea would push the boundary close to Costa Rica's coast, thus significantly cutting off Costa Rica's coastal projections within the territorial sea. The Court concludes that the territorial sea in the Pacific Ocean shall be delimited between the Parties by means of a median line which shall follow a series of geodetic lines connecting the points set out in paragraph 175 of the Judgment, as depicted on sketch-map No. 15 (reproduced in Annex 2 of the present summary).

C. Delimitation of the exclusive economic zone and the continental shelf (paras. 176–204)

(*a*) *Relevant coasts and relevant area* (paras. 177–185)

(i) *Relevant coasts* (paras. 177–181)

With respect to the relevant coasts, the Court reasons that since in the Pacific Ocean the coast of Costa Rica is characterized by a certain degree of sinuosity, whereas the coast of Nicaragua largely develops along a straight line, it is appropriate to identify the relevant coast of both Parties by means of straight lines.

The Court notes that the Parties' positions do not differ significantly with respect to the identification of Nicaragua's relevant coast. It finds that the entire Nicaraguan coast, from Punta Arranca Barba to Punta Cosigüina, generates potential maritime entitlements overlapping with those of Costa Rica. The length of Nicaragua's relevant coast, thus identified and measured by the Court along a straight line, is 292.7 km long.

The Court observes that the Parties' arguments concerning Costa Rica's relevant coast differ significantly. The Court is of the view that the coast of Costa Rica between Punta Guiones and Cabo Blanco, as well as between Punta Herradura and Punta Salsipuedes, generates potential maritime entitlements overlapping with those of the relevant coast of Nicaragua as identified in the previous paragraph. Under the circumstances, the Court finds it appropriate to include within the relevant coast certain parts of Costa Rica's coast south of Punta Guiones. The Court notes that the coasts of Nicoya Gulf face each other and considers that they are not relevant for the purposes of delimitation. The Court concludes that the first segment of Costa Rica's relevant coast runs along the straight lines connecting Punta Zacate, Punta Santa Elena, Cabo Velas, Punta Guiones and Cabo Blanco. The second segment of Costa Rica's relevant coast runs along the straight lines connecting Punta Herradura, the Osa Peninsula, Punta Llorona and Punta Salsipuedes. Costa Rica's relevant coast, thus identified and measured by the Court along straight lines, is 416.4 km long.

(ii) *Relevant area* (paras. 182–185)

With respect to the relevant area, the Court is of the view that the potential maritime entitlements generated by both the northern and southern parts of Costa Rica's relevant coast overlap with the potential maritime entitlements generated by the relevant coast of Nicaragua. The Court considers that the relevant area is bordered in the north by a line starting at Punta Cosigüina and perpendicular to the straight line approximating the general direction of Nicaragua's coast. In the west and in the south, the Court determines that the relevant area is limited by the envelope of arcs marking the limits of the area in which the potential maritime entitlements of the Parties overlap. The relevant area thus identified measures approximately 164,500 sq. km.

(*b*) *Provisional equidistance line* (paras. 186–189)

The Court next constructs a provisional equidistance line. The Court is satisfied that the base points selected by the Parties are appropriate for drawing a provisional equidistance line in the Pacific Ocean. It states that the provisional equidistance line for the exclusive economic zone and the continental shelf shall begin at the end of the boundary in the territorial sea, and thence it shall follow a series of geodetic lines as described in paragraphs 188–189 of the Judgment and depicted on sketch-map No. 19 (reproduced in Annex 2 of the present summary).

(*c*) *Adjustment to the provisional equidistance line* (paras. 190–201)

The Court then turns to the arguments of the Parties concerning the adjustment of the provisional equidistance line, which focus on whether either the Santa Elena Peninsula or the Nicoya Peninsula create an inequitable cut-off of Nicaragua's coastal projections.

With respect to the Santa Elena Peninsula, a protrusion lying close to the starting-point of the maritime boundary between the Parties, the Court states that while it did not consider any adjustment of the provisional median line was necessary for that peninsula within the territorial sea, the situation is different for the exclusive economic zone and the continental shelf, for which the base points placed on the Santa Elena Peninsula control the course of the provisional equidistance line from the 12-nautical-mile limit of the territorial sea

up to a point located approximately 120 nautical miles from the coasts of the Parties. The Court considers that such base points have a disproportionate effect on the direction of the provisional equidistance line, which results in a significant cut-off of Nicaragua's coastal projections. In the view of the Court, this cut-off effect is inequitable. Therefore, the Court finds it appropriate to adjust the provisional equidistance line for the exclusive economic zone and the continental shelf by giving half effect to the Santa Elena Peninsula.

With respect to the Nicoya Peninsula, the Court observes that this is a feature with a large landmass, corresponding to approximately one seventh of Costa Rica's territory, and with a large population. It notes that the coast of that peninsula accounts for a sizeable portion of the coast of Costa Rica in the area to be delimited and, as a consequence, its direction cannot be said to depart from the general direction of Costa Rica's coast. The Court further notes that it has drawn the provisional equidistance line using Cabo Velas, located on the Nicoya Peninsula, as a base point, and that Cabo Velas controls the equidistance line for approximately 80 nautical miles. The Court recalls that, in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America*), the Chamber rejected proposals to give less than full effect to certain substantial mainland features, in particular Nova Scotia and Cape Cod. The Court observes that the Nicoya Peninsula is a prominent part of Costa Rica's mainland and is comparable to the Nova Scotian Peninsula or to Cape Cod; therefore, the Court considers that it cannot be given less than full effect in delimiting the boundary in the exclusive economic zone and on the continental shelf. The Court finds that no adjustment of the provisional equidistance line is necessary on account of the presence of the Nicoya Peninsula.

The Court concludes that the maritime boundary in the exclusive economic zone and on the continental shelf between Costa Rica and Nicaragua in the Pacific Ocean follows an equidistance line starting at the endpoint of the boundary in the territorial sea and subsequently adjusted as just described. The adjusted line is described in paragraph 200 of the Judgment and depicted on sketch-map No. 20 (reproduced in Annex 2 of the present summary). Given the complexity of that line, the Court considers it more appropriate to adopt a simplified line, on the basis of the most significant turning points on the adjusted equidistance line, which indicate a change in the direction of that line. The resulting simplified line is described in paragraph 201 of the Judgment and is depicted on sketch-map No. 21 (reproduced in Annex 2 of the present summary).

(*d*) *Disproportionality test* (paras. 202–204)

The Court finally turns to the disproportionality test. It observes that the relevant coast of Costa Rica in the Pacific Ocean is 416.4 km long, and the relevant coast of Nicaragua in the Pacific Ocean is 292.7 km long. The two relevant coasts stand in a ratio of 1:1.42 in favour of Costa Rica. The Court finds that the maritime boundary it established between the Parties in the Pacific Ocean divides the relevant area in such a way that approximately 93,000 sq. km of that area appertain to Costa Rica and 71,500 sq. km of that area appertain to Nicaragua. The ratio between the maritime areas found to appertain to the Parties is 1:1.30 in Costa Rica's favour. The Court considers that, taking into account all the circumstances of the present case, the maritime boundary established between Costa Rica and Nicaragua in the Pacific Ocean does not result in gross disproportionality. Accordingly, the Court finds that the delimitation of the maritime boundary for the exclusive economic zone and the continental shelf achieves an equitable solution in accordance with Articles 74 and 83 of UNCLOS.

*

The Court therefore concludes that the delimitation concerning the exclusive economic zone and the continental shelf in the Pacific Ocean shall follow the line described in paragraph 201 of the Judgment. The course of the maritime boundary in the Pacific Ocean is depicted on sketch-map No. 22 (reproduced in Annex 2 of the present summary).

Operative Part (para. 205)

The Court,

(1) By fifteen votes to one,

Finds that the Republic of Nicaragua's claim concerning sovereignty over the northern coast of Isla Portillos is admissible;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Gevorgian; Judges *ad hoc* Simma, Al-Khasawneh;

Against: Judge Robinson;

(2) By fourteen votes to two,

Finds that the Republic of Costa Rica has sovereignty over the whole northern part of Isla Portillos, including its coast up to the point at which the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea, with the exception of Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea, sovereignty over which appertains to Nicaragua within the boundary defined in paragraph 73 of the present Judgment;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson; Judge *ad hoc* Simma;

Against: Judge Gevorgian; Judge *ad hoc* Al-Khasawneh;

(3) (*a*) By fourteen votes to two,

Finds that, by establishing and maintaining a military camp on Costa Rican territory, the Republic of Nicaragua has violated the sovereignty of the Republic of Costa Rica;

In favour: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson; Judge *ad hoc* Simma;

Against: Judge Gevorgian; Judge *ad hoc* Al-Khasawneh;

(*b*) Unanimously,

Finds that the Republic of Nicaragua must remove its military camp from Costa Rican territory;

(4) Unanimously,

Decides that the maritime boundary between the Republic of Costa Rica and the Republic of Nicaragua in

the Caribbean Sea shall follow the course set out in paragraphs 106 and 158 of the present Judgment;

(5) Unanimously,

Decides that the maritime boundary between the Republic of Costa Rica and the Republic of Nicaragua in the Pacific Ocean shall follow the course set out in paragraphs 175 and 201 of the present Judgment.

*

Judge Tomka appends a declaration to the Judgment of the Court; Judge Xue appends a separate opinion to the Judgment of the Court; Judge Sebutinde appends a declaration to the Judgment of the Court; Judge Robinson appends a separate opinion to the Judgment of the Court; Judge Gevorgian appends a declaration to the Judgment of the Court; Judge *ad hoc* Simma appends a declaration to the Judgment of the Court; Judge *ad hoc* Al-Khasawneh appends a dissenting opinion and a declaration to the Judgment of the Court.

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* *

Declaration of Judge Tomka

Judge Tomka outlines in his declaration that he is not fully satisfied with the way in which the Court has delimited the maritime boundary between the Parties in the Caribbean Sea. He outlines that the Court, governed by Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea, is obliged to achieve "an equitable solution" in delimiting the maritime boundaries between the Parties in the exclusive economic zone and continental shelf. Its Judgment in this respect substitutes for an agreement of the Parties, which they failed to reach.

Judge Tomka observes that the jurisprudence of the Court and other international tribunals establishes that a provisional equidistance line ought to be adjusted where that line would significantly cut off the maritime projections of the coast of one of the parties. In this case, he considers that the Court has not avoided the cut-off effect generated by the first part of the delimitation line in the Caribbean Sea. Indeed, that line has the effect of cutting off Nicaragua's coastal projections as they relate to almost half of its significant concave coast in the Bahía de San Juan del Norte.

Judge Tomka considers that the Court's solution is not fully equitable and that the Court should have adjusted the line to alleviate this cut-off by joining, by way of a straight line, the endpoint of the maritime boundary in the territorial sea to a point further along the delimitation line. He considers that this would have been particularly appropriate in light of the fact that the Court did not take into account any Nicaraguan maritime entitlements which might be generated by the sandbar separating Harbor Head Lagoon from the Caribbean Sea.

Separate opinion of Judge Xue

Notwithstanding her vote on subparagraph (4) of the operative part of the Judgment, Judge Xue disagrees with the reasoning in relation to the location of the starting-point of the land boundary between the Parties and the way in which this issue is treated in the maritime delimitation in the case.

First of all, Judge Xue is of the view that, under the 1858 Treaty of Limits, the Cleveland Award and the Alexander Awards, the starting-point of the land boundary should be located on the north-eastern end of the Harbor Head Lagoon rather than at the end of the sandspit of Isla Portillos at the mouth of the San Juan River (right bank).

In this joint case, the identification of the starting-point of the land boundary is an essential issue, both for the determination of the territorial sovereignty of the coast in dispute and for the maritime delimitation between the Parties in the Caribbean Sea. In her view, the starting-point of the land boundary has to be determined in accordance with the 1858 Treaty of Limits, the Cleveland Award and the Alexander Awards.

Judge Xue points out that the report of the Court-appointed experts demonstrates that the initial segment of the land boundary, including its starting-point, remains identifiable and actually identified. What is left of Harbor Head Lagoon and the accreted sandbar separating the lagoon and the sea is a broken part of the land boundary, now enclaved within Costa Rica's territory. The experts' answer to the first question put forward by the Court in its Order of 31 May 2016 in fact identified the current location of the point at which the San Juan River reaches the sea, in other words, the place where the original land boundary breaks.

Contrary to the Court's interpretation, Judge Xue takes the view that the Court has not determined the starting-point of the land boundary in its 2015 Judgment in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*. Although the drafters of the 1858 Treaty and the arbitral awards well anticipated that the land boundary would necessarily be affected by gradual or sudden coastal changes in the future, they did not specifically spell out what principles of international law would apply in the event of such changes. The situation of what it now stands as partial disappearance of the watercourse was not envisaged. In her view, if the starting-point of the boundary is to be automatically determined by the river's outlet to the sea, it would be difficult to explain why both Parties agree that Harbor Head Lagoon belongs to Nicaragua rather than Costa Rica; since the watercourse has now reached the Caribbean Sea at the mouth of the San Juan River, what is on the right bank of the River, including Harbor Head Lagoon, should automatically be merged with Costa Rica's territory.

Judge Xue observes that when the Court determines that there is no longer any water channel connecting the San Juan River with Harbor Head Lagoon and therefore the coast of the northern part of Isla Portillos belongs to Costa Rica, it virtually states that the land boundary is disrupted at the mouth of the San Juan River by the natural change of the coast. In her view, the Court's decision that Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea are under Nicaragua's sovereignty cannot simply be attributed to the agreement of the Parties; the underlying reason is Costa Rica's recognition that the line around Harbor Head Lagoon still constitutes part of the land boundary, albeit disconnected with the rest of the land boundary.

Situations with water boundaries vary from case to case. There is no established rule of customary international law governing the legal impact of watercourse change on boundaries. In the present case, Judge Xue considers that so far as the land boundary is concerned, two relevant factors should be taken into account. First, the starting-point of the land boundary, even after being relocated, remains in an unstable situation. To maintain stability and certainty of the boundary, more weight should be given to its legal title than to the factual change on the ground. Second, the enclave resulting from the break-up of the land boundary is not a self-standing geographical feature as such; until the Court's present decision on the sovereignty of the coast of the northern part of Isla Portillos, it formally constituted part of the land boundary.

The enclave, as it currently stands, should form part of the geomorphological circumstances of the coast for the maritime delimitation. Although the Court takes cognition of the great instability of the coastline in the area of the mouth of the San Juan River, Judge Xue considers that the Court does not give sufficient consideration to the coastal relationship between the Parties. With Costa Rica's coast now situated between Nicaragua's territories, Harbor Head Lagoon on the eastern side and the river mouth on the western side, it would be difficult, if not impossible, to choose a starting-point on land that would genuinely reflect a median point. Either way, there would be some cut-off effect to the detriment of one Party.

Recalling the Court's statement in the *Nicaragua* v. *Honduras* case that "[n]othing in the wording of Article 15 suggests that geomorphological problems are *per se* precluded from being 'special circumstances' within the meaning of the exception, nor that such 'special circumstances' may only be used as a corrective element to a line already drawn" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 744, para. 280), Judge Xue takes the view that the geomorphological conditions of the coast of the northern part of Isla Portillos and the break-up of the land boundary constitute such special circumstances.

While she agrees with the majority that given the prevailing circumstances of the coast and the current location of the mouth of the San Juan River, it is reasonable and equitable to draw the provisional median line from the coast on the western side of Isla Portillos near the mouth of the San Juan River, Judge Xue doubts the wisdom to select as the starting-point of the maritime boundary a point on the solid land closest to the mouth of the river, currently identified as point Pv, because that point is equally unstable, and moreover, by selecting that starting-point, the Court would provide Nicaragua with no access to the enclave.

In paragraph 105 of the Judgment, the Court recognizes that the situation of the enclave is a special circumstance and calls for "a special solution". It nevertheless considers that "[s]hould territorial waters be attributed to the enclave, they would be of little use to Nicaragua, while breaking the continuity of Costa Rica's territorial sea". Therefore, the delimitation in the territorial sea between the Parties will not take into account any entitlement which might result from the enclave. In her opinion, this is not a convincing reasoning to ignore Nicaragua's entitlement from the enclave, no matter how small it is.

In order to overcome the difficulty arising from the repositioning of the starting-point of the land boundary at the mouth of the San Juan River as a result of the disappearance of the watercourse along the coast, Judge Xue is of the view that the maritime boundary may start from a fixed point (the same as the hinge point) on the median line at a distance of 2 nautical miles from the coast without being connected with a mobile line to a point on land. Although with 2 nautical miles' territorial sea undelimited, she considers that this approach would place the Parties in a better position to manage their coastal relations, particularly in respect of navigation. It would not be the first time that a delimitation begins at some distance out to the sea; the judicial and arbitral practices support such a resolution where there is an uncertain land boundary terminus.

Declaration of Judge Sebutinde

Judge Sebutinde concurs with all aspects of the Court's decision as stated in the operative paragraph 205 of the Judgment, but considers that in respect of the case concerning the *Land Boundary in the Northern Part of Isla Portillos* (Part III) the Court should, in its reasoning, have addressed more fully all the issues underlying its decisions in that case.

First, whilst Judge Sebutinde agrees with the Court's conclusion in paragraph 69 that the issue of territorial sovereignty over the coast of Isla Portillos is not *res judicata*, she notes that the present Judgment omits to address another important and related issue, namely, whether or not the Court in its Judgment of 16 December 2015 in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), I.C.J. Reports 2015* (II), p. 665 determined with the force of *res judicata*, the course of the land boundary in the northern part of Isla Portillos. Since this is part of the dispute between the Parties in the present case, the Court should in the interest of fully settling the case, have addressed this point. Her view is that the precise course of the land boundary in the northern part of Isla Portillos has never been determined by the Court and thus the matter is not *res judicata*.

Secondly, whilst she agrees with the land boundary in the northern part of Isla Portillos depicted in sketch-map No. 2 of the Judgment, Judge Sebutinde is of the view that the Court's reasoning in paragraphs 70–73 does not adequately explain the geographical changes that have occurred in the area and their effect on the historical land boundary described in the 1858 Treaty of Limits. Furthermore, she notes that although both Parties in their written and oral pleadings requested the Court to "determine the course of the land boundary in the northern part of Isla Portillos", the Court falls short of tracing the said boundary, focusing rather on the issue of territorial sovereignty over the coast of Isla Portillos. In her opinion, the Court should logically have determined the course of the said boundary before pronouncing itself on the related issue of territorial sovereignty.

Lastly, Judge Sebutinde opines that in determining the present course of the land boundary in the northern part of Isla Portillos as requested by both Parties, the Court should do so first, by reference to the historical land boundary as

contained in the 1858 Treaty of Limits and interpreted by the various Cleveland and Alexander Awards, before taking into account any relevant geographical changes that may warrant an adjustment in the historical land boundary. In her view, such an approach results in a land boundary comprising two distinct sectors with three termini as depicted in sketch-map No. 2 of the Judgment. Judge Sebutinde does however, concur with paragraph 71 of the Judgment that start of the maritime delimitation in the Caribbean Sea should, in principle, coincide with the point where "the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea", which point she considers the third terminus and starting-point of the second sector of the land boundary.

Separate opinion of Judge Robinson

Judge Robinson's separate opinion addresses a specific issue raised by Nicaragua in the proceedings, namely, whether there has been a "convergence in maritime delimitation methodology" in the delimitation of the territorial sea, EEZ and continental shelf, so that the principles for the delimitation of the EEZ and continental shelf as set out in Articles 74 and 83 of the United Nations Convention on the Law of the Sea ("the UNCLOS") would apply equally to the delimitation of the territorial sea under Article 15.

The separate opinion argues that based on a proper interpretation of Articles 15, 74 and 83 of the UNCLOS, including in particular its drafting history, there has been no such convergence in the maritime delimitation methodology for the three zones. A proper interpretation of the UNCLOS shows that it calls for a dichotomous approach whereby the territorial sea is delimited on the basis of the median line/special circumstances method, while the EEZ and continental shelf are delimited on the basis of any method that would result in an "equitable solution".

Judge Robinson comments that although it is possible for States to agree to utilize a uniform method under the UNCLOS, the difference in the legal régime for the territorial sea on the one hand, and for the EEZ and continental shelf on the other hand, explains why the Convention calls for a dichotomous approach in maritime delimitation methodology.

In Judge Robinson's opinion, different values are attached to the various elements relevant to the delimitation in the various zones. Therefore, the provisional median line in the territorial sea has a different value from the provisional equidistance line in the EEZ and continental shelf and, similarly, special circumstances in the territorial sea will have a different value from relevant circumstances in the EEZ and continental shelf.

Judge Robinson also reiterates that the Court's practice supports a dichotomous approach. In that regard, he finds it difficult to understand the statement of the Arbitral Tribunal in *Croatia/Slovenia* that the practice of the Court supports a uniform approach for the delimitation of all three zones.

Declaration of Judge Gevorgian

In his declaration, Judge Gevorgian explains the reasons for his vote against the Court's findings on the land boundary at northern Isla Portillos and comments on certain aspects of the Court's delimitation of the maritime boundary in the Caribbean Sea.

In relation to the first question, Judge Gevorgian disagrees with the Court's finding that Costa Rica has sovereignty over the beach of northern Isla Portillos (he does agree, however, with the Court's determination of Nicaragua's sovereignty over Harbor Head Lagoon).

In his opinion, it results from Article II of the 1858 Treaty of Limits concluded between Costa Rica and Nicaragua, as interpreted by the Cleveland and Alexander Awards, that the point named "Punta de Castilla" was meant to be the starting-point of the boundary. The fact that important geomorphological changes have occurred both after 1858 and 1897–1900 (the latter being the time when General Alexander demarcated the boundary) does not change this conclusion. For this purpose, Judge Gevorgian relies on the Awards rendered by General Alexander and refers to the Court-appointed experts' findings on the existence of "discontinuous coast-parallel lagoons" that are the "remnants" of the channel that General Alexander took in 1897 as a reference to demarcate the boundary.

Judge Gevorgian also disagrees with the Court's finding that Nicaragua has violated Costa Rica's sovereignty as a consequence of its military camp on the beach of northern Isla Portillos. As the present Judgment indicates, the question of sovereignty over such a beach was not solved when the Court rendered its first Judgment on Isla Portillos in December 2015. So, the territory at stake until 2 February 2018, the date of delivery of the present Judgment, was "a disputed territory" and not a territory under the sovereignty of Nicaragua. Referring to his declaration on the 2015 Judgment and to the Court's case law, Judge Gevorgian considers that a statement on the sovereignty of this area (with which he does not agree, but which it is binding for the Parties) and an order to remove the camp from the beach would have constituted sufficient relief for the Applicant.

In relation to the maritime boundary in the Caribbean Sea, Judge Gevorgian agrees with the Court's delimitation line. At the same time, he is inclined to consider that the starting-point of the maritime boundary should have been situated at the "Alexander Point" (that is, the point at which General Alexander fixed the starting-point of the land boundary). But since the starting-point identified by the Court does not significantly move the course of the would-be boundary line, he has voted in favour of the Court's findings on this issue.

Finally, Judge Gevorgian suggests that some aspects of the case could have been addressed in more detail. He mentions in particular the questions of Nicaragua's territorial sea in Harbor Head Lagoon (which the Court did not consider in fixing the delimitation line), the legal effects of the bilateral boundary treaties respectively concluded in 1977 and 1980 between Costa Rica, on the one hand, and Colombia and Panama, on the other; and the different methodologies employed to delimit the territorial sea and the economic exclusive zone and continental shelf. However, overall, he believes that the Judgment strikes a fair balance between the respective entitlements of the two Parties in the Caribbean Sea and the Pacific Ocean.

Declaration of Judge *ad hoc* Simma

Judge *ad hoc* Simma has voted in favour of each of the Judgment's operative paragraphs. In his short declaration, he comments on the relevance of Article 102 of the Charter of the United Nations to this case.

He outlines that both Parties made reference to the Treaty Concerning Delimitation of Marine Areas and Maritime Cooperation between the Republic of Costa Rica and the Republic of Panama, which was signed on 2 February 1980 and entered into force on 11 February 1982, and which does not appear to have been registered with the United Nations Secretariat in accordance with the requirements of Article 102, paragraph 1, of the Charter.

While Judge *ad hoc* Simma observes that neither Party to this case was probably captured by the terms of Article 102, paragraph 2, of the Charter, which prevents a "party to any such treaty or international agreement which has not been registered" from "invok[ing] that treaty or agreement before any organ of the United Nations", it is nonetheless important that parties to treaties respect their obligations under the Charter. Judge *ad hoc* Simma would have wished for the Court to take the opportunity to acknowledge this in its Judgment.

Dissenting opinion and declaration of Judge *ad hoc* Al-Khasawneh

Judge *ad hoc* Al-Khasawneh dissented on the land delimitation and wrote a separate declaration on maritime delimitation in the Pacific Ocean.

I

In his dissenting opinion Judge *ad hoc* Al-Khasawneh started by stressing the importance of putting to rest on the basis of international law, a long-running dispute between the Parties that pre-dated the Treaty of Limits of 1858. The ambiguity in the treaty was responsible for a number of subsequent arbitrations, delimitation commissions and stalled diplomatic negotiations right up to the involvement of the Court, since 2005, in a number of cases dealing with various aspects of this dispute.

The Court is now faced with two conflicting sets of decisions, each possessing the force of *res judicata*. On the one hand, there is the Cleveland Award of 1888 and the First and Second Alexander Awards of 1897, in which the territorial delimitation was effected on the basis of the 1858 treaty even when the starting-point of that delimitation (the initial marker) had been submerged in the sea due to the general retreat of the coast. On the other hand, there is the 2015 Judgment, on which the findings in the present Judgment were predicated, namely that the so-called Alexander Point should be abandoned in favour of a new point at the mouth of the San Juan River as it presently stands.

Judge *ad hoc* Al-Khasawneh felt that there was no justification in the Court's approach, all the more so in view of the on-going general retreat of the Caribbean coast which may lead to the San Juan River emptying again into Harbor Head Lagoon, as it did in 1858, a possibility contemplated by the Court-appointed experts. The finality and permanence of territorial delimitation was not served by adopting a new point which is ephemeral.

Judge *ad hoc* Al-Khasawneh then analysed developments since 1858 to prove that the mouth of the river—after it had shifted—was not and could not have been the starting-point in the mind of arbitrator Alexander.

Turning to the existence or otherwise of a channel connecting Harbor Head Lagoon with the river, Judge *ad hoc* Al-Khasawneh, while acknowledging that at the time of their visit(s) no such channel existed, felt that the experts' reference to a channel like water gap in the recent past and the existence of discontinuous elongated lagoons parallel to the coast carries evidence that the Court should have taken into consideration. Moreover, in arid parts of the world, dried-up rivers are often used to delimit boundaries. He believed that this partly dried channel is the border between the Parties.

Similarly, the existence of Harbor Head Lagoon and the sand barrier enclosing it from the Caribbean is acknowledged by both Parties to be Nicaraguan, this attests that the whole shore had *a priori* to be Nicaraguan.

He disagreed with the majority regarding their decision not to give the sand barrier any maritime entitlements, a decision that was not reasoned at all, but which rested on the hope that the sands of the barrier will be submerged by the sea, which may or may not happen.

II

With respect to maritime delimitation in the Pacific, Judge *ad hoc* Al-Khasawneh started by observing that maritime delimitation is, of necessity, a compromise between certitude of the law and the need to take cognizance of dissimilar situations.

While judges are enjoined not to "completely refashion nature" some refashioning must have been contemplated in the Law of the Sea Convention Articles 74 and 83. This attests to the discretion that the legislator must give the judge.

For their part, courts strive to decrease the space of their discretion and the three-stage technique favoured in recent cases is a prime example of this movement towards uniformity.

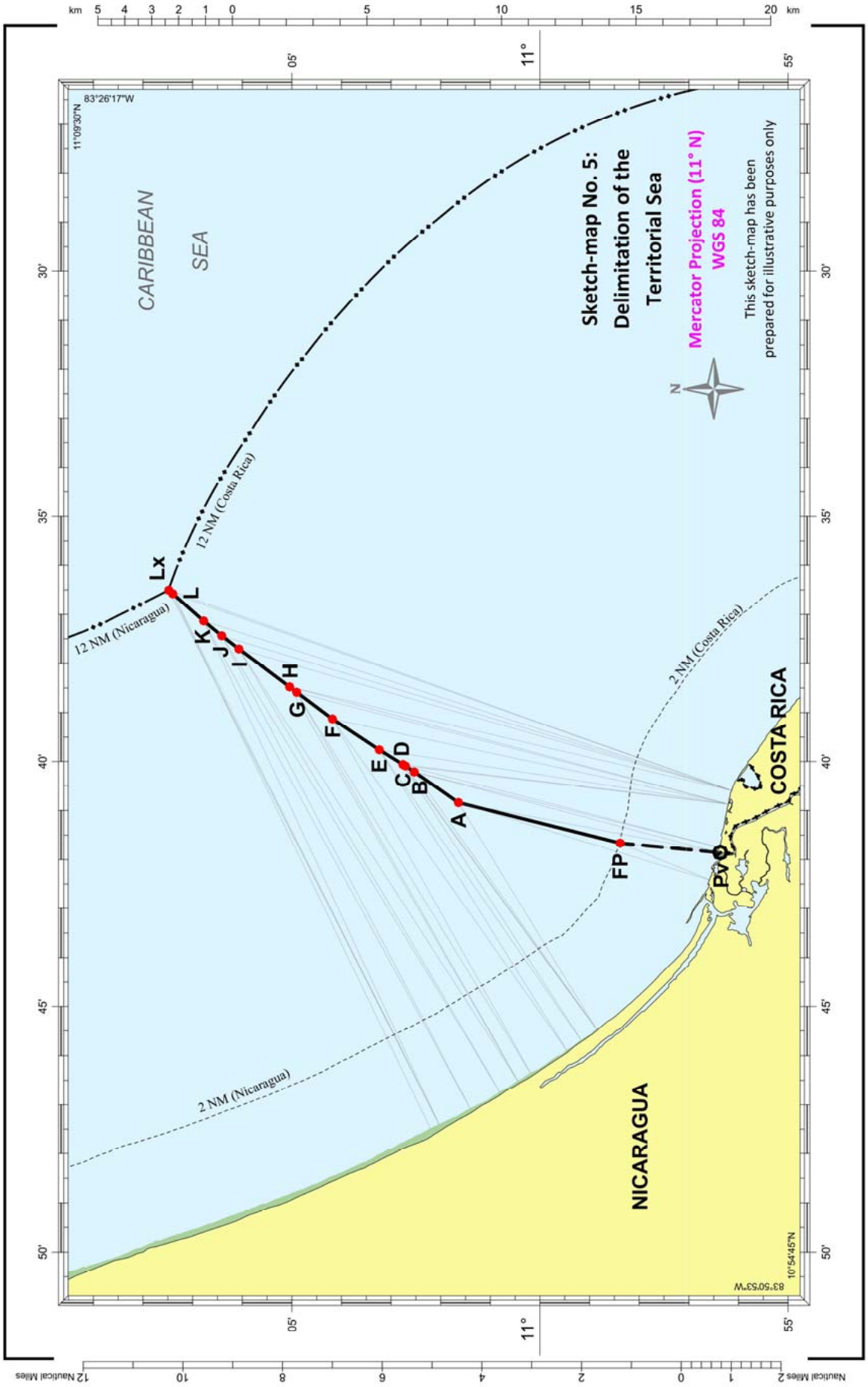
The low threshold of "no gross disproportionality" should not be the only criterion for what amounts to an equitable result.

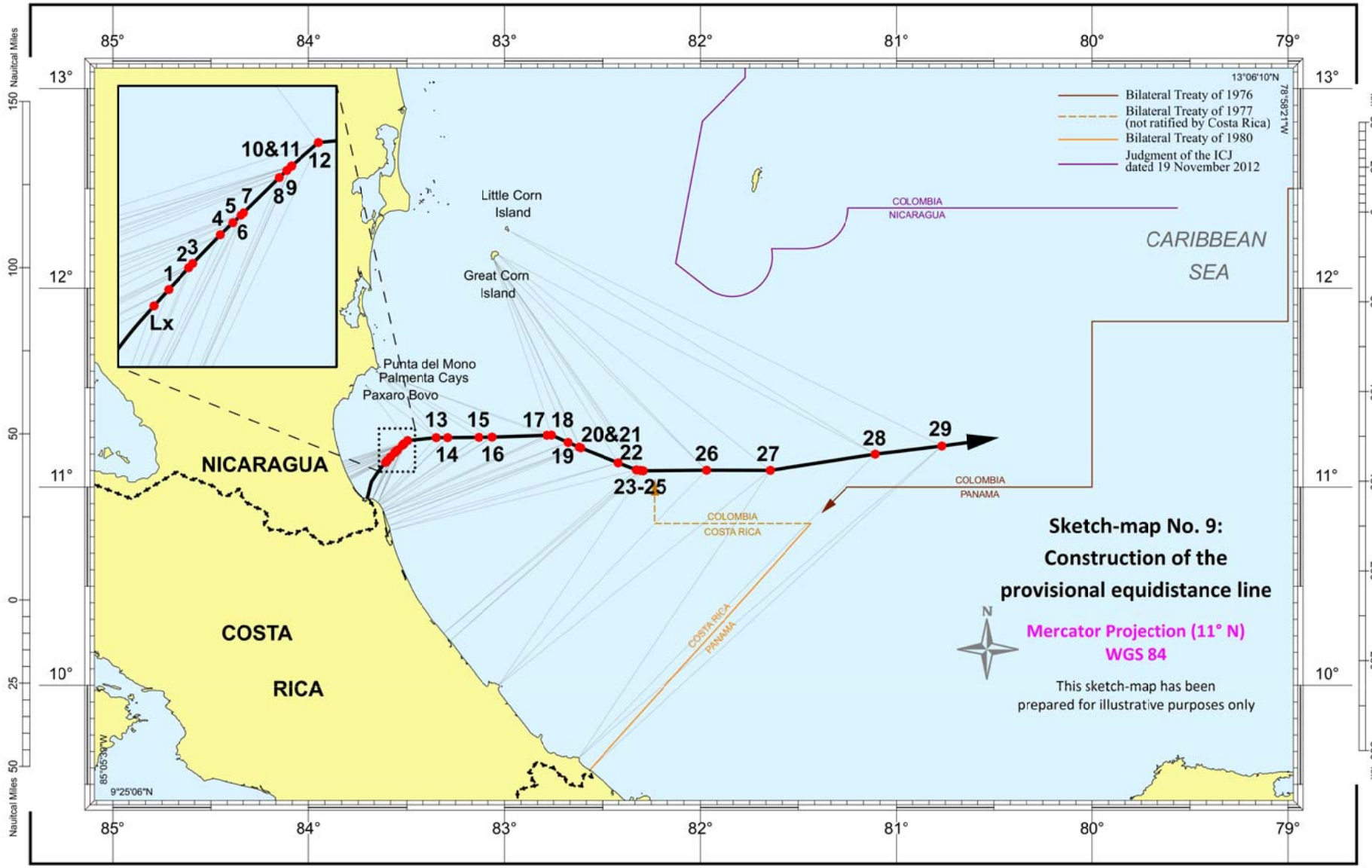
In the case of the Nicoya Peninsula, a more equitable result would have been obtained by giving it considerable but not complete weight with regard to delimitation in the exclusive economic zone and the continental shelf, given that is not qualitatively different from the Santa Elena Peninsula and that considerations other than size, e.g. its proximity to the starting-point of delimitation should be taken into account. This may amount to some refashioning of nature, figuratively speaking, but certainly not a complete one.

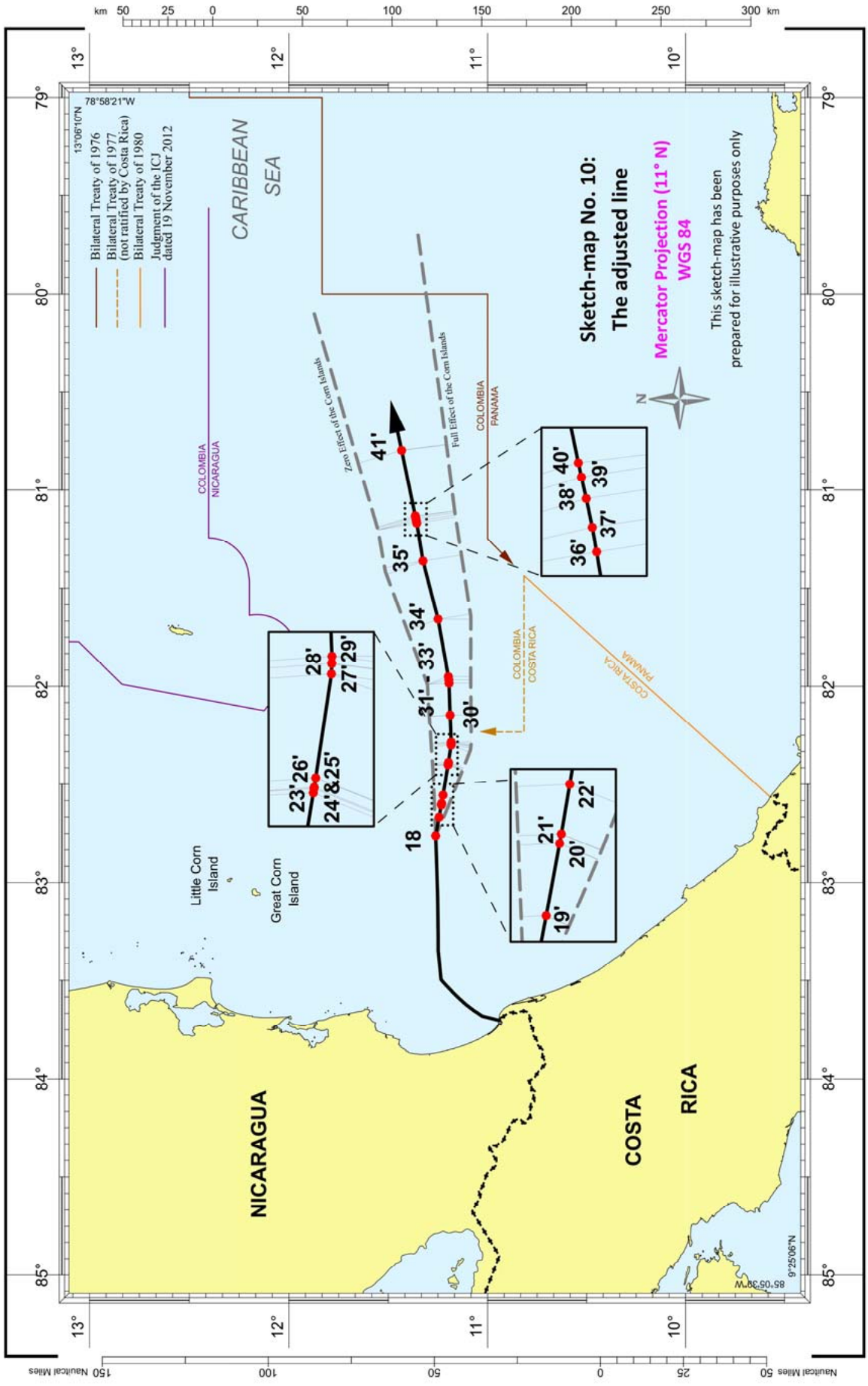
Annex

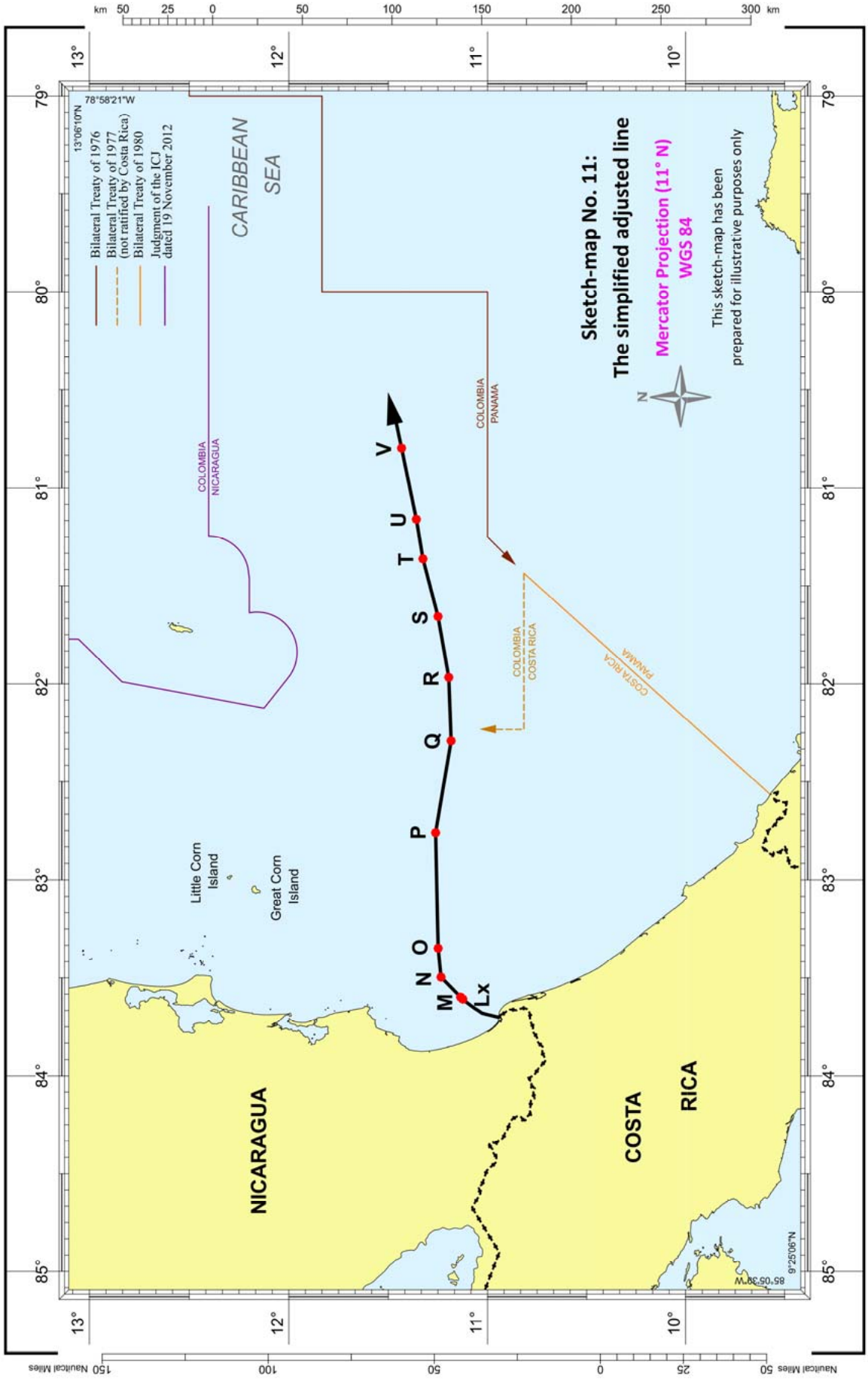
— Sketch-map No. 2: Land Boundary in the Northern Part of Isla Portillos;
— Sketch-map No. 5: Delimitation of the Territorial Sea (Caribbean Sea);
— Sketch-map No. 9: Construction of the provisional equidistance line (Caribbean Sea);
— Sketch-map No. 10: The adjusted line (Caribbean Sea);
— Sketch-map No. 11: The simplified adjusted line (Caribbean Sea);
— Sketch-map No. 13: Course of the maritime boundary (Caribbean Sea);
— Sketch-map No. 15: Delimitation of the Territorial Sea (Pacific Ocean);
— Sketch-map No. 19: Construction of the provisional equidistance line (Pacific Ocean);
— Sketch-map No. 20: The adjusted line (Pacific Ocean);
— Sketch-map No. 21: The simplified adjusted line (Pacific Ocean);
— Sketch-map No. 22: Course of the maritime boundary (Pacific Ocean).

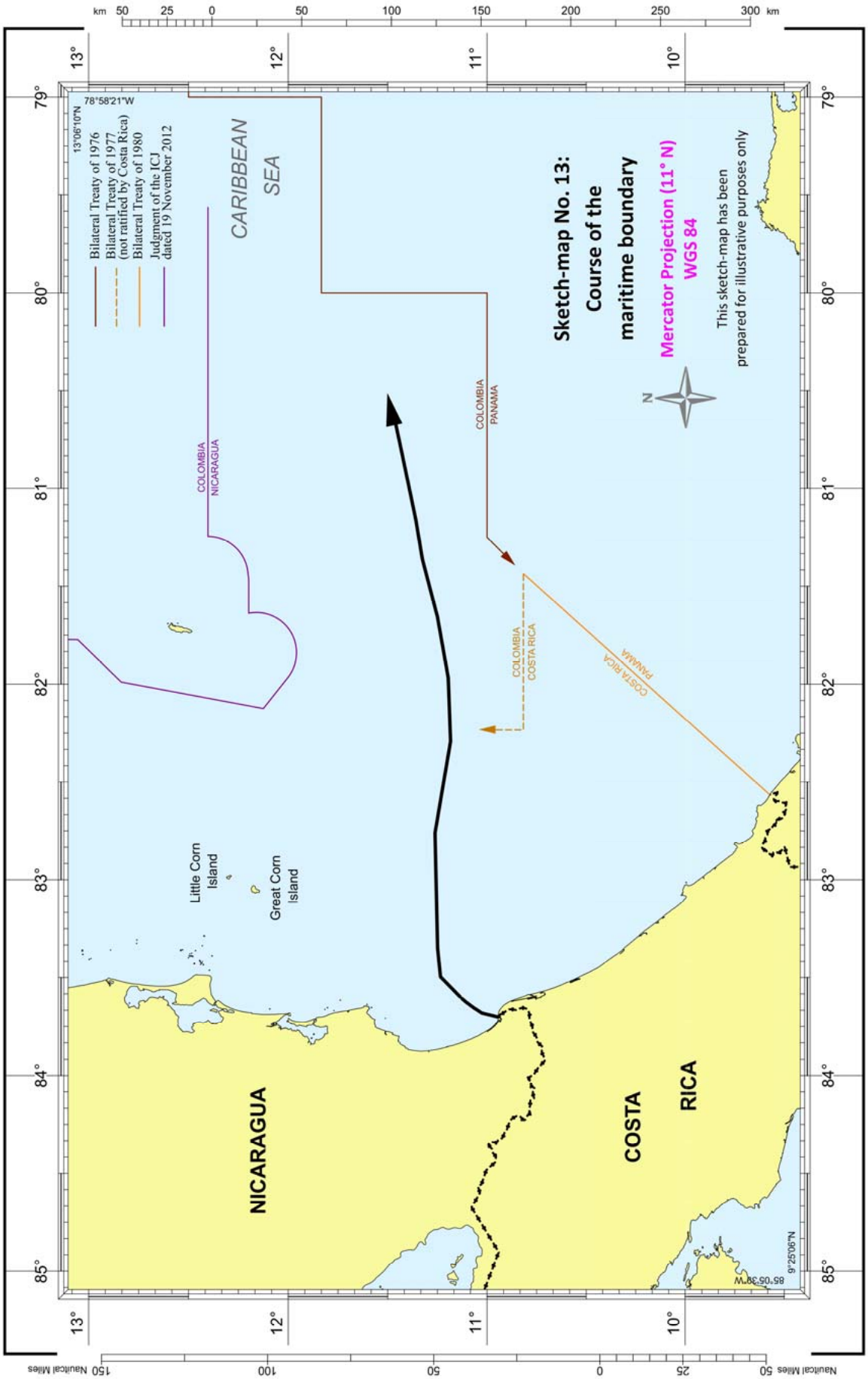

Sketch-map No. 2:
Land Boundary
in the Northern Part
of Isla Portilllos
Mercator Projection (11° N)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
CARIBBEAN
SEA
Sandspit
Río San Juan
NICARAGUA
COSTA
RICA
Plw2
Ple2
Sandbar
Los Portillos /
Harbor Head
Lagoon
(Nicaragua)
42'
41'
40'
56'
10°56'58.9"N
83°39'23.3"W
10°55'23.7"N
83°42'01.2"W
2000 m
1500
1000
500
0
500 m

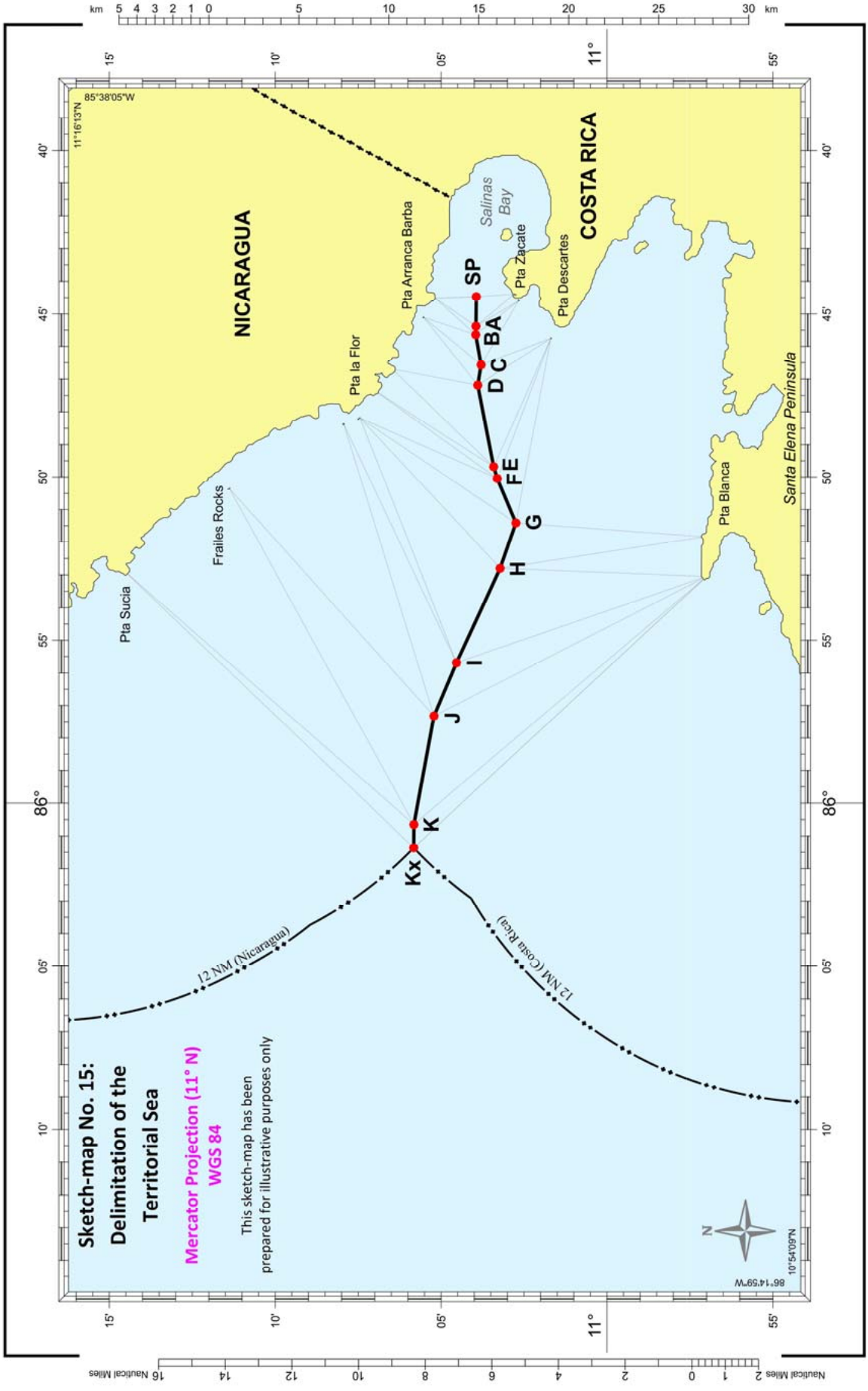

Sketch-map No. 5:
Delimitation of the
Territorial Sea
Mercator Projection (11° N)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
CARIBBEAN
SEA
12 NM (Costa Rica)
12 NM (Nicaragua)
2 NM (Costa Rica)
2 NM (Nicaragua)
Lx
L
K
J
I
H
G
F
E
D
C
B
A
FP
PVC
COSTA RICA
NICARAGUA
83°26'17"W
11°09'30"N
10°54'45"N
83°50'53"W
km
Nautical Miles

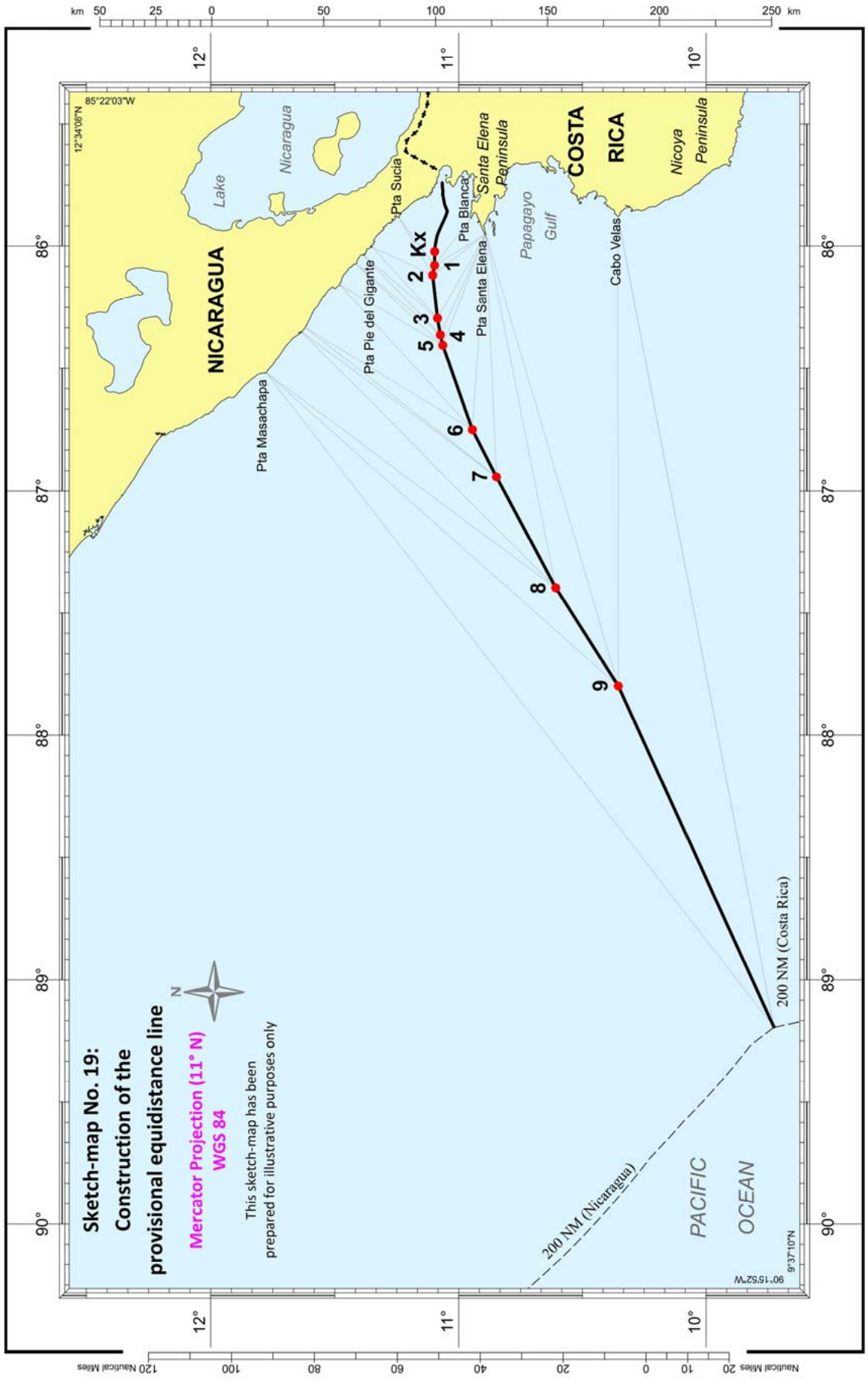

Bilateral Treaty of 1976
Bilateral Treaty of 1977 (not ratified by Costa Rica)
Bilateral Treaty of 1980
Judgment of the ICJ dated 19 November 2012
Sketch-map No. 9:
Construction of the provisional equidistance line
Mercator Projection (11° N)
WGS 84
This sketch-map has been prepared for illustrative purposes only
CARIBBEAN SEA
NICARAGUA
COSTA RICA
Little Corn Island
Great Corn Island
Punta del Mono
Palmenta Cays
Paxaro Bovo
COLOMBIA NICARAGUA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
13°06'10"N
78°56'21"W
9°25'06"N
85°05'30"W
Nautical Miles
km

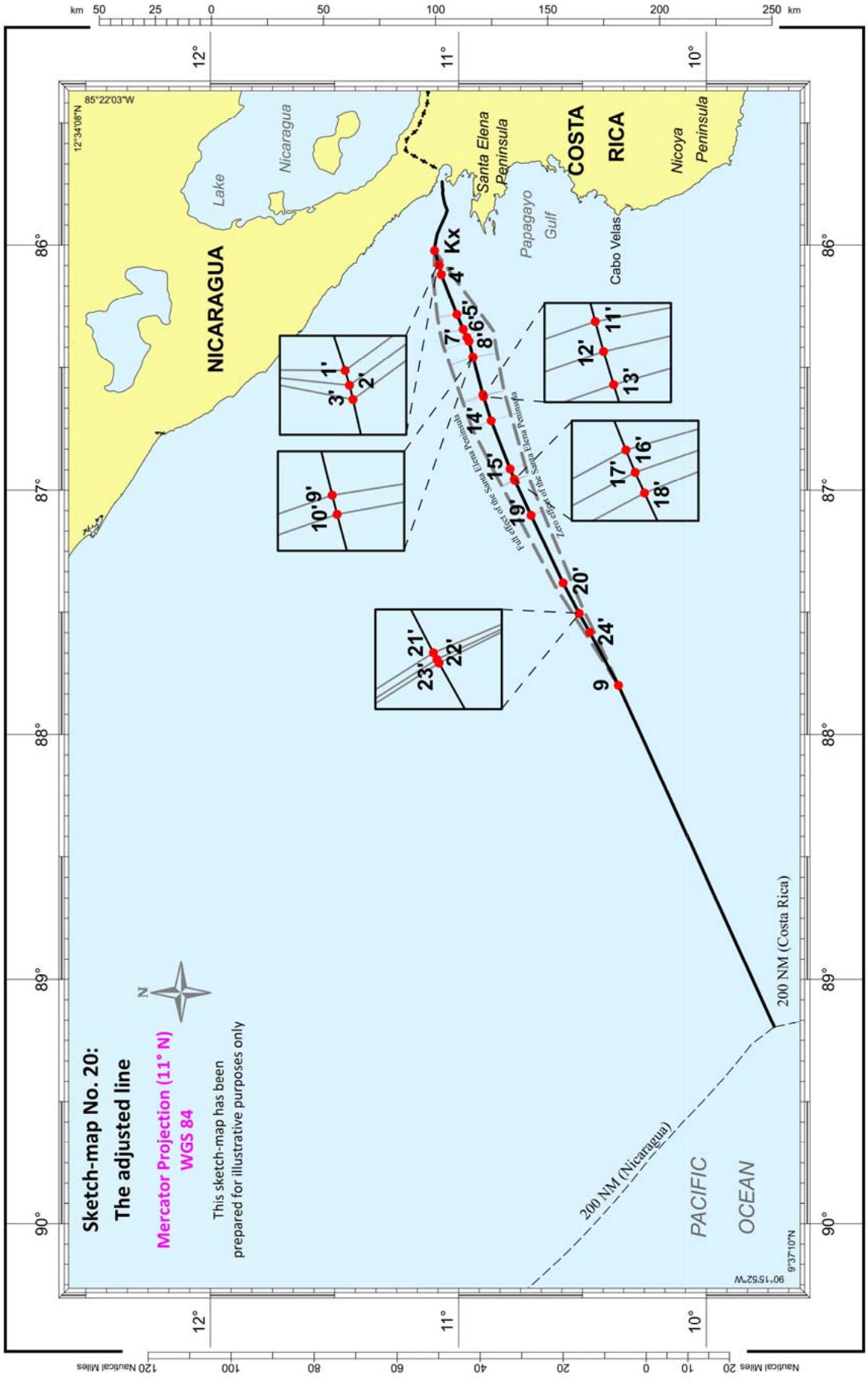

Sketch-map No. 10:
The adjusted line
Mercator Projection (11° N)
WGS 84
This sketch-map has been prepared for illustrative purposes only
Bilateral Treaty of 1976
Bilateral Treaty of 1977 (not ratified by Costa Rica)
Bilateral Treaty of 1980
Judgment of the ICJ dated 19 November 2012
CARIBBEAN SEA
NICARAGUA
COSTA RICA
COLOMBIA
NICARAGUA
COLOMBIA
PANAMA
COLOMBIA
COSTA RICA
COSTA RICA
PANAMA
Zero Effect of the Corn Islands
Full Effect of the Corn Islands
Little Corn Island
Great Corn Island
78°58'21"W
13°06'10"N
85°05'39"W
N.9°25'0.6
41'
35'
34'
33'
31'
30'
18
28'
27'29'
23'26'
24'&25'
21'
22'
20'
19'
38'
40'
39'
37'
36'
km 50 25 0 50 100 150 200 250 300 km
Nautical Miles 50 25 0 50 100 150 Nautical Miles

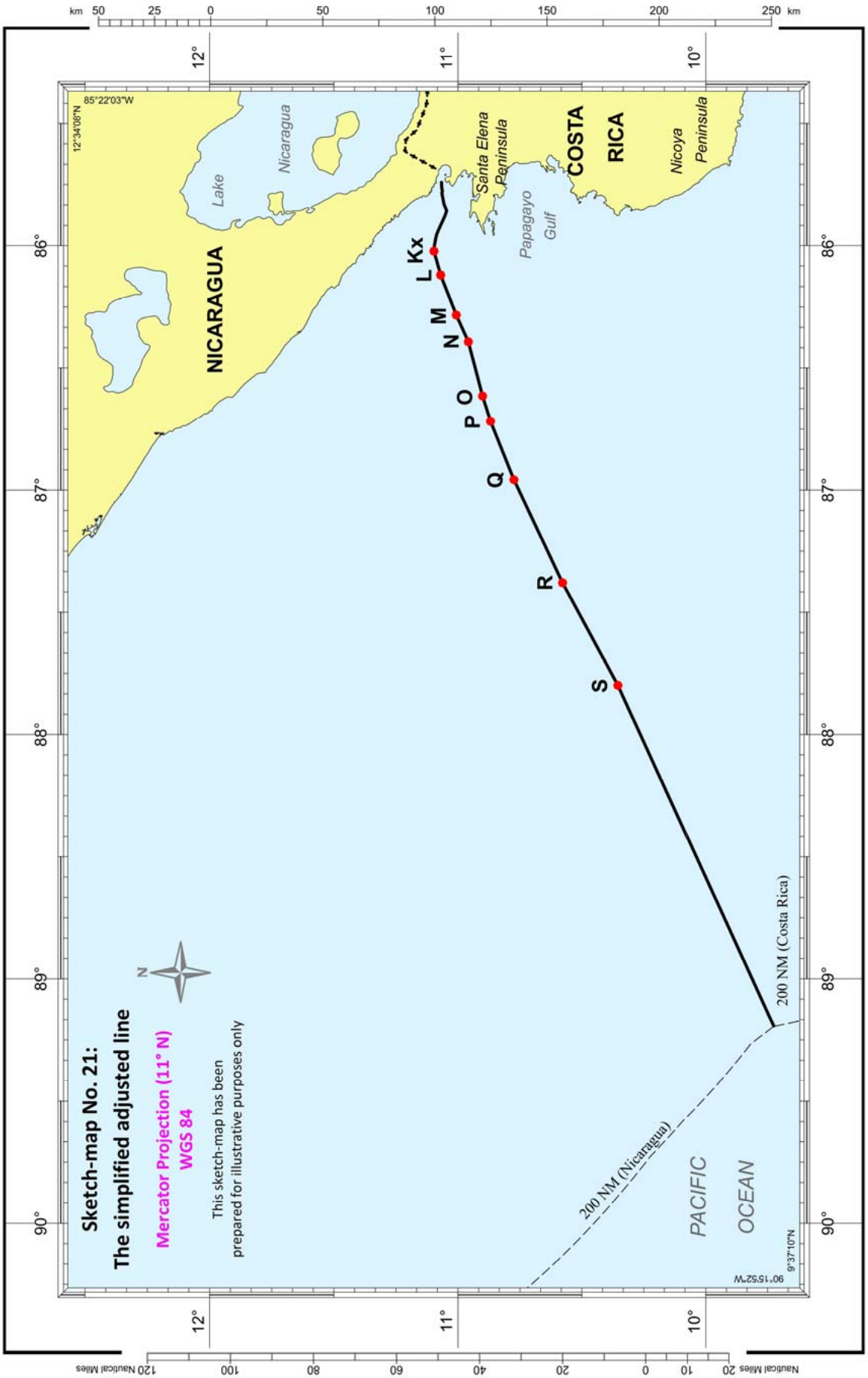

Sketch-map No. 11:
The simplified adjusted line
Mercator Projection (11° N)
WGS 84
This sketch-map has been prepared for illustrative purposes only
Bilateral Treaty of 1976
Bilateral Treaty of 1977 (not ratified by Costa Rica)
Bilateral Treaty of 1980
Judgment of the ICJ dated 19 November 2012
CARIBBEAN SEA
COLOMBIA NICARAGUA
COLOMBIA PANAMA
COLOMBIA COSTA RICA
COSTA RICA PANAMA
Little Corn Island
Great Corn Island
NICARAGUA
COSTA RICA
Lx
M
N
O
P
Q
R
S
T
U
V
78°58'21"W
13°06'10"N
85°05'39"W
N.9052'.6
km 50 25 0 50 100 150 200 250 300 km
Nautical Miles 50 25 0 50 100 150 Nautical Miles
10° 11° 12° 13°
79° 80° 81° 82° 83° 84° 85°

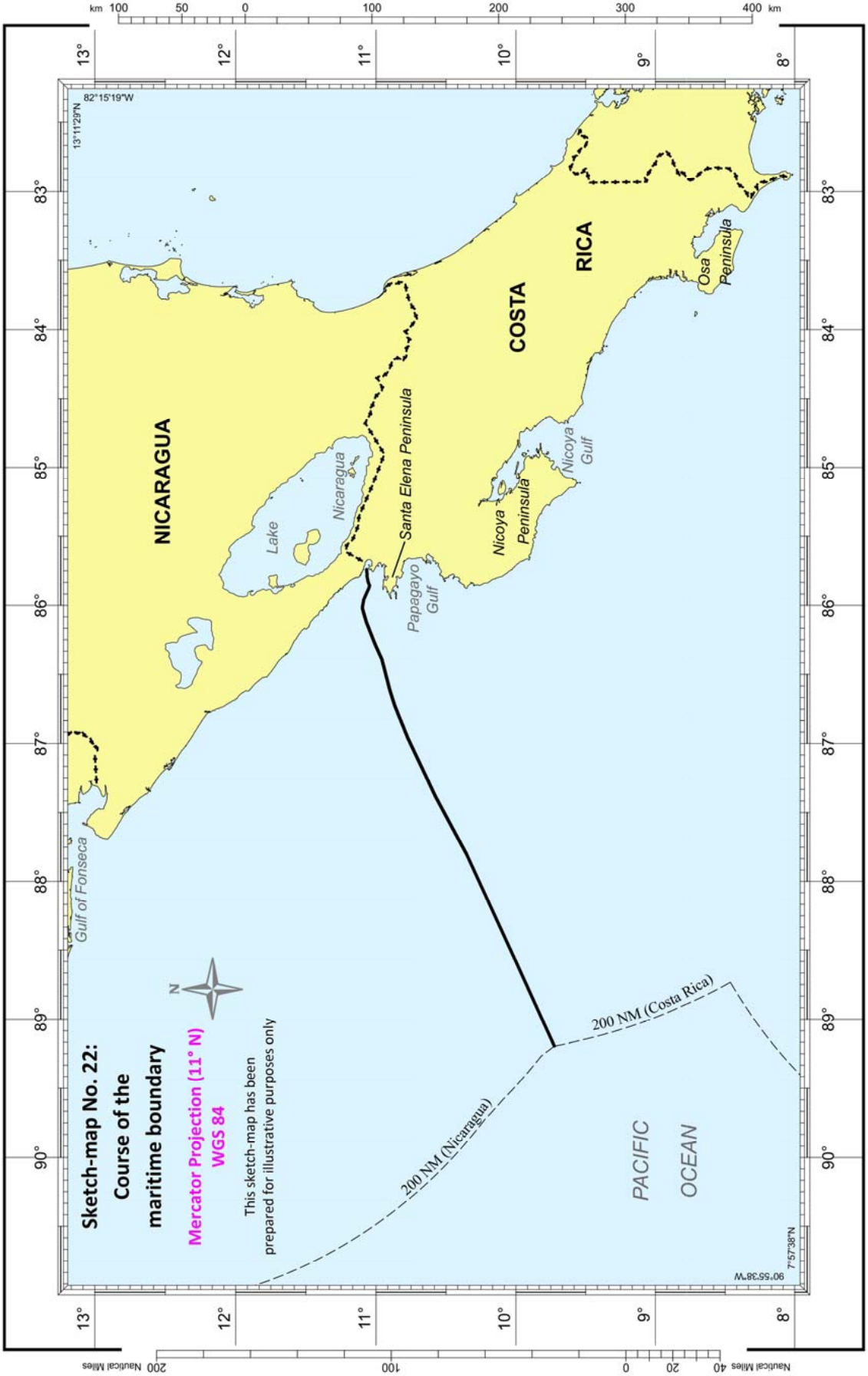

Sketch-map No. 13:
Course of the
maritime boundary
Mercator Projection (11° N)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
Bilateral Treaty of 1976
Bilateral Treaty of 1977
(not ratified by Costa Rica)
Bilateral Treaty of 1980
Judgment of the ICJ
dated 19 November 2012
CARIBBEAN
SEA
COLOMBIA
NICARAGUA
COLOMBIA
PANAMA
COLOMBIA
COSTA RICA
COSTA RICA
PANAMA
Little Corn
Island
Great Corn
Island
NICARAGUA
COSTA
RICA
78°58'21"W
13°06'10"N
85°05'38"W
9°25'06"N
km 50 25 0 50 100 150 200 250 300 km
Nautical Miles 50 25 0 50 100 150 Nautical Miles
13° 12° 11° 10°
79° 80° 81° 82° 83° 84° 85°


NICARAGUA
COSTA RICA
Salinas Bay
Pta Arranca Barba
Pta Zacate
Pta Descartes
Pta la Flor
Frailes Rocks
Pta Sucia
Pta Blanca
Santa Elena Peninsula
SP
BA
C
D
FE
G
H
I
J
K
Kx
12 NM (Nicaragua)
12 NM (Costa Rica)
Sketch-map No. 15:
Delimitation of the
Territorial Sea
Mercator Projection (11° N)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
85°38'05"W
11°16'13"N
86°14'59"W
10°54'09"N


Sketch-map No. 19:
Construction of the
provisional equidistance line
Mercator Projection (11° N)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
NICARAGUA
COSTA
RICA
Lake
Nicaragua
Santa Elena
Peninsula
Nicoya
Peninsula
Papagayo
Gulf
Pta Sucia
Pta Blanca
Pta Santa Elena
Cabo Velas
Pta Pie del Gigante
Pta Masachapa
Kx
1
2
3
4
5
6
7
8
9
200 NM (Costa Rica)
200 NM (Nicaragua)
PACIFIC
OCEAN
85°22'03"W
12°34'06"N
90°15'52"W
9°37'10"N
km 50 25 0 50 100 150 200 250 km
Nautical Miles 20 10 0 20 40 60 80 100 120 Nautical Miles
12°
11°
10°
86°
87°
88°
89°
90°


Sketch-map No. 20:
The adjusted line
Mercator Projection (11° N)
WGS 84
This sketch-map has been prepared for illustrative purposes only
NICARAGUA
COSTA RICA
Lake Nicaragua
Santa Elena Peninsula
Nicoya Peninsula
Papagayo Gulf
Cabo Velas
Kx
4'
5'
6'
7'
8'
9
10'
11'
12'
13'
14'
15'
16'
17'
18'
19'
20'
21'
22'
23'
24'
1'
2'
3'
Full effect of the Santa Elena Peninsula
Zero effect of the Santa Elena Peninsula
200 NM (Costa Rica)
200 NM (Nicaragua)
PACIFIC
OCEAN
85°22'03"W
12°34'08"N
90°15'52"W
9°37'10"N
km 50 25 0 50 100 150 200 250 km
Nautical Miles 20 10 0 20 40 60 80 100 120 Nautical Miles
12° 11° 10°
86° 87° 88° 89° 90°


km 50 25 0 50 100 150 200 250 km
12°
11°
10°
85°22'03"W
12°34'06"N
Lake
Nicaragua
NICARAGUA
Santa Elena Peninsula
COSTA RICA
Nicoya Peninsula
Papagayo Gulf
Kx
L
M
N
O
P
Q
R
S
200 NM (Costa Rica)
200 NM (Nicaragua)
PACIFIC OCEAN
90°15'52"W
9°37'10"N
86°
87°
88°
89°
90°
N
Sketch-map No. 21:
The simplified adjusted line
Mercator Projection (11° N)
WGS 84
This sketch-map has been prepared for illustrative purposes only
Nautical Miles 20 10 0 20 40 60 80 100 120 Nautical Miles


Sketch-map No. 22:
Course of the
maritime boundary
Mercator Projection (11° N)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
NICARAGUA
COSTA
RICA
Lake
Nicaragua
Santa Elena Peninsula
Papagayo
Gulf
Nicoya
Peninsula
Nicoya
Gulf
Osa
Peninsula
Gulf of Fonseca
200 NM (Costa Rica)
200 NM (Nicaragua)
PACIFIC
OCEAN
82°15'19"W
13°11'29"N
7°57'38"N
90°55'38"W
km 100 50 0 100 200 300 400 km
Nautical Miles 200 100 0 20 40 Nautical Miles

226. APPLICATION FOR REVISION OF THE JUDGMENT OF 23 MAY 2008 IN THE CASE CONCERNING *SOVEREIGNTY OVER PEDRA BRANCA/PULAU BATU PUTEH, MIDDLE ROCKS AND SOUTH LEDGE (MALAYSIA/SINGAPORE)* (MALAYSIA *v.* SINGAPORE) [DISCONTINUANCE]

Order of 29 May 2018

On 29 May 2018, the International Court of Justice issued an Order in the case concerning the *Application for Revision of the Judgment of 23 May 2008 in the case concerning* Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (*Malaysia* v. *Singapore*), placing on record the discontinuance of the proceedings and directing the removal of the case from the Court's list.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam; Registrar Couvreur.

*

* *

The Order reads as follows:

"The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and Article 88, paragraph 1, of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 2 February 2017, whereby the Government of Malaysia, referring to Article 61 of the Statute of the Court, requested the Court to revise the Judgment delivered by it on 23 May 2008 in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (*Judgment, I.C.J. Reports 2008*, p. 12),

Having regard to the letters of 14 February 2017, whereby the Registrar informed the Parties that the Court had fixed 14 June 2017 as the time-limit for the filing by the Republic of Singapore (hereinafter "Singapore") of its written observations on the admissibility of the Application for revision, as contemplated by Article 99, paragraph 2, of the Rules of Court,

Having regard to the written observations on the admissibility of the Application for revision submitted by Malaysia, which were filed in the Registry by Singapore on 24 May 2017, within the time-limit fixed for that purpose,

Having regard to the letters of 9 and 23 June 2017, whereby the Co-Agent of Malaysia, referring to Article 99, paragraph 3, of the Rules of Court, requested that the Court afford his Government a further opportunity to present its views on the admissibility of the Application, and indicated that Malaysia wished to present further documentation in support of its Application, as well as to the letters of 13 and 28 June 2017, whereby the Co-Agent of Singapore informed the Court of his Government's objection to the submission by Malaysia of further written observations and documentation,

Having regard to the letters of 9 October 2017, whereby the Registrar informed the Parties that the Court had decided to grant Malaysia's request, and that it had fixed 11 December 2017 as the time-limit within which Malaysia may submit additional written observations and documentation, and 12 February 2018 as the time-limit within which Singapore may submit written comments and supporting documentation on the additional observations of Malaysia,

Having regard to the additional written observations and documentation filed in the Registry by Malaysia on 11 December 2017, within the time-limit fixed for that purpose, and to the written comments and supporting documentation on the additional observations of Malaysia filed in the Registry by Singapore on 12 February 2018, within the time-limit fixed;

Whereas, by a letter dated 28 May 2018, the Co-Agent of Malaysia notified the Court that the Parties had agreed to discontinue the proceedings; and whereas, by a letter dated 29 May 2018, the Agent of Singapore confirmed his Government's agreement to the discontinuance of the proceedings,

Places on record the discontinuance, by agreement of the Parties, of the proceedings instituted on 2 February 2017 by Malaysia against the Republic of Singapore; and

Directs that the case be removed from the List."

227. REQUEST FOR INTERPRETATION OF THE JUDGMENT OF 23 MAY 2008 IN THE CASE CONCERNING *SOVEREIGNTY OVER PEDRA BRANCA/PULAU BATU PUTEH, MIDDLE ROCKS AND SOUTH LEDGE (MALAYSIA/SINGAPORE)* (MALAYSIA *v.* SINGAPORE) [DISCONTINUANCE]

Order of 29 May 2018

On 29 May 2018, the International Court of Justice issued an Order in the case concerning the *Request for Interpretation of the Judgment of 23 May 2008 in the case concerning* Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (*Malaysia* v. *Singapore*), placing on record the discontinuance of the proceedings and directing the removal of the case from the Court's list.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam; Registrar Couvreur.

*

* *

The Order reads as follows:

"The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Article 88, paragraph 1, of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 30 June 2017, whereby the Government of Malaysia, referring to Article 60 of the Statute of the Court and Article 98 of the Rules of Court, requested the Court to interpret the Judgment which it delivered on 23 May 2008 in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (*Judgment, I.C.J. Reports 2008*, p. 12),

Having regard to the letters of 10 July 2017, whereby the Registrar informed the Parties that the Court had fixed 30 October 2017 as the time-limit for the filing by the Republic of Singapore (hereinafter "Singapore") of its written observations on the request for interpretation made by Malaysia, pursuant to Article 98, paragraph 3, of the Rules of Court, and to the written observations filed in the Registry by Singapore on 30 October 2017, within the time-limit fixed for that purpose,

Having regard to the letter of 15 November 2017, whereby the Agent of Malaysia, referring to Article 98, paragraph 4, of the Rules of Court, requested that the Court afford his Government an opportunity to present comments in response to Singapore's written observations, as well as to the letter of 24 November 2017, whereby the Agent of Singapore informed the Court of his Government's objection to Malaysia's request,

Having regard to the letters of 8 December 2017, whereby the Registrar informed the Parties that the Court had decided to grant Malaysia's request, and that the Court had fixed 8 February 2018 as the time-limit within which Malaysia may submit its comments on the written observations of Singapore, and 9 April 2018 as the time-limit within which Singapore may submit its response thereto,

Having regard to the letter of 29 January 2018, whereby the Agent of Malaysia requested that the time-limit for the filing of its comments be extended to 28 February 2018, as well as to the letters of 1 February 2018, whereby the Registrar informed the Parties that the President had decided to extend to 15 February 2018 the time-limit for the filing by Malaysia of its comments, and to 23 April 2018 the time-limit for Singapore's response thereto,

Having regard to Malaysia's comments and Singapore's response thereto which were filed within the time-limits thus extended;

Whereas, by a letter dated 28 May 2018, the Co-Agent of Malaysia notified the Court that the Parties had agreed to discontinue the proceedings; and whereas, by a letter dated 29 May 2018, the Agent of Singapore confirmed his Government's agreement to the discontinuance of the proceedings,

Places on record the discontinuance, by agreement of the Parties, of the proceedings instituted on 30 June 2017 by Malaysia against the Republic of Singapore; and

Directs that the case be removed from the List."

228. IMMUNITIES AND CRIMINAL PROCEEDINGS (EQUATORIAL GUINEA *v.* FRANCE) [PRELIMINARY OBJECTIONS]

Judgment of 6 June 2018

On 6 June 2018, the International Court of Justice rendered its Judgment on the preliminary objections raised by France in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*. The Court upheld the first preliminary objection, rejected the second and third preliminary objections, and declared that it had jurisdiction to entertain the Application in so far as it concerned the status of the building located at 42 Avenue Foch in Paris as premises of the mission, and that this part of the Application was admissible.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Owada, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam; Judge *ad hoc* Kateka; Registrar Couvreur.

*

* *

History of the proceedings (paras. 1–22)

The Court begins by recalling that, on 13 June 2016, Equatorial Guinea filed an Application instituting proceedings against France with regard to a dispute concerning

> "the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security [Mr. Teodoro Nguema Obiang Mangue], and the legal status of the building which houses the Embassy of Equatorial Guinea, both as premises of the diplomatic mission and as State property".

In its Application, Equatorial Guinea seeks to found the Court's jurisdiction, first, on Article 35 of the United Nations Convention against Transnational Organized Crime of 15 November 2000 (hereinafter the "Palermo Convention"), and, second, on Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes of 18 April 1961 (hereinafter the "Optional Protocol to the Vienna Convention").

The Court further recalls that, following the filing of a Request for the indication of provisional measures by Equatorial Guinea on 29 September 2016, it instructed France, in an Order dated 7 December 2016, "pending a final decision in the case", to

> "take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 Avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability".

Finally, the Court recalls that, on 31 March 2017, France raised preliminary objections to the jurisdiction of the Court.

Factual background (paras. 23–41)

The Court explains that, beginning in 2007, a number of associations and private individuals lodged complaints with the Paris public prosecutor against certain African Heads of State and members of their families in respect of allegations of misappropriation of public funds in their country of origin, the proceeds of which had allegedly been invested in France. One of these complaints, filed on 2 December 2008 by the association Transparency International France, was declared admissible by the French courts, and a judicial investigation was opened in respect of "handling misappropriated public funds", "complicity in handling misappropriated public funds, complicity in the misappropriation of public funds, money laundering, complicity in money laundering, misuse of corporate assets, complicity in misuse of corporate assets, breach of trust, complicity in breach of trust and concealment of each of these offences". The Court observes that the investigation focused, in particular, on the methods used to finance the acquisition of movable and immovable assets in France by several individuals, including Mr. Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, who was at the time *Ministre d'Etat* for Agriculture and Forestry of Equatorial Guinea. The investigation more specifically concerned the way in which Mr. Teodoro Nguema Obiang Mangue acquired various objects of considerable value and a building located at 42 Avenue Foch in Paris. In 2011 and 2012, that building was the subject of an attachment order (*saisie pénale immobilière*) and various objects found on the premises were seized, following a finding by the French courts that the building had been wholly or partly paid for out of the proceeds of the offences under investigation and that its real owner was Mr. Teodoro Nguema Obiang Mangue. Equatorial Guinea systematically objected to those actions, claiming that it had previously acquired the building in question and that it constituted part of the premises of its diplomatic mission in France.

The Court notes that Mr. Teodoro Nguema Obiang Mangue, who became Second Vice-President of Equatorial Guinea in charge of Defence and State Security on 21 May 2012, challenged the measures taken against him and on several occasions invoked the immunity from jurisdiction to which he believed he was entitled on account of his functions. Nevertheless, he was indicted by the French judiciary in March 2014. All the legal remedies taken by Mr. Teodoro Nguema Obiang Mangue against that indictment were rejected, as were Equatorial Guinea's diplomatic protests. At the end of the investigation, Mr. Teodoro Nguema Obiang Mangue—who had been appointed as the Vice-President of Equatorial Guinea in charge of National Defence and State Security in June 2016—was referred for trial before the *Tribunal correctionnel de Paris* for alleged money-laundering offences committed in France between 1997 and October 2011.

The Court observes that the hearings on the merits of the case before the *Tribunal correctionnel de Paris* were held from 19 June to 6 July 2017. The tribunal delivered its judgment on 27 October 2017, in which it found Mr. Teodoro Nguema Obiang Mangue guilty of the offences. He was sentenced to a three-year suspended prison term and a suspended fine of

€30 million. The tribunal also ordered the confiscation of all the assets seized during the judicial investigation and of the attached building at 42 Avenue Foch in Paris. Regarding the confiscation of this building, the tribunal, referring to the Court's Order of 7 December 2016 indicating provisional measures, stated that "the … proceedings [pending before the International Court of Justice] make the execution of any measure of confiscation by the French State impossible, but not the imposition of that penalty". Following delivery of the judgment, Mr. Teodoro Nguema Obiang Mangue lodged an appeal against his conviction with the *Cour d'appel de Paris*. This appeal having a suspensive effect, no steps have been taken to enforce the sentences handed down to Mr. Teodoro Nguema Obiang Mangue.

Subject-matter of the dispute (paras. 48–73)

The Court notes that the dispute between the Parties arose from criminal proceedings instituted in France against Mr. Teodoro Nguema Obiang Mangue and that those criminal proceedings were ongoing in French courts on 13 June 2016, when Equatorial Guinea filed its Application with the Court. The facts of the case and submissions of the Parties indicate that there are several distinct claims over which the Parties hold opposing views and which form the subject-matter of the dispute. For convenience, these are described under the bases of jurisdiction that Equatorial Guinea invokes for each claim.

Equatorial Guinea's claims based on the Palermo Convention

The Court notes that the aspect of the dispute for which Equatorial Guinea invokes the Palermo Convention as the title of jurisdiction involves various claims on which the Parties have expressed differing views in their written and oral pleadings. First, they disagree on whether, as a consequence of the principles of sovereign equality and non-intervention in the internal affairs of another State, to which Article 4 of the Palermo Convention refers, Mr. Teodoro Nguema Obiang Mangue, as Vice-President of Equatorial Guinea in charge of National Defence and State Security, is immune from foreign criminal jurisdiction. Second, they hold differing views on whether, as a consequence of the principles referred to in Article 4 of the Palermo Convention, the building at 42 Avenue Foch in Paris is immune from measures of constraint. Third, they differ on whether, by establishing its jurisdiction over the predicate offences associated with the offence of money laundering, France exceeded its criminal jurisdiction and breached its conventional obligation under Article 4 read in conjunction with Articles 6 and 15 of the Palermo Convention.

The Court states that it will ascertain whether this aspect of the dispute between the Parties is capable of falling within the provisions of the Palermo Convention and whether, as a consequence, it is one which the Court has jurisdiction to entertain under the Palermo Convention.

Equatorial Guinea's claims based on the Vienna Convention

The Court further observes that the aspect of the dispute for which Equatorial Guinea invokes the Optional Protocol to the Vienna Convention as the title of jurisdiction involves two claims on which the Parties have expressed differing views. First, they disagree on whether the building at 42 Avenue Foch in Paris constitutes part of the premises of the mission of Equatorial Guinea in France and is thus entitled to the treatment afforded for such premises under Article 22 of the Vienna Convention. They also disagree on whether France, by the action of its authorities in relation to the building, is in breach of its obligations under Article 22. The Court states that it will ascertain whether this aspect of the dispute between the Parties is capable of falling within the Vienna Convention and, consequently, whether it is one which the Court has jurisdiction to entertain under the Optional Protocol to the Vienna Convention.

The first preliminary objection: Jurisdiction under the Palermo Convention (paras. 74–119)

As a preliminary matter, the Court notes that Article 35 of the Palermo Convention lays down certain procedural requirements before a State party may refer a dispute to the Court. States parties are required to attempt to negotiate settlement of the dispute for a reasonable time, then to proceed to arbitration should one of the States parties involved so request, and to attempt, for a period of six months from the request to arbitrate, to organize that arbitration. The Court is satisfied that these procedural requirements have been complied with.

The Court states that it will first proceed to examine Article 4 to determine whether the claim by Equatorial Guinea relating to the immunities of States and State officials falls within the provisions of Article 4. Unless the Court finds that this is the case, the aspect of the dispute between the Parties in relation to the asserted immunities of the Vice-President of Equatorial Guinea and the building at 42 Avenue Foch in Paris as State property cannot be said to concern the interpretation or application of the Palermo Convention.

Second, the Court explains, it will consider Equatorial Guinea's argument that France has violated Article 4 of the Convention by failing to carry out its obligations relating to the criminalization of money laundering and the establishment of its jurisdiction over that offence (pursuant to Articles 6 and 15) in a manner consistent with the principles of sovereign equality and non-intervention referred to in Article 4. The Court will determine whether the actions by France of which Equatorial Guinea complains are capable of falling within the provisions of the Palermo Convention. Unless the Court finds that this is the case, the aspect of the dispute between the Parties in relation to France's alleged overextension of jurisdiction cannot be said to concern the interpretation or application of the Palermo Convention.

The alleged breach by France of the rules on immunities of States and State officials

The Court begins by recalling that, pursuant to customary international law, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the provisions of the Palermo Convention must be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in light of the object and purpose of the Convention. To confirm the meaning resulting from that process, or to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result, recourse may be had to the supplementary means of interpretation which

include the preparatory work of the Convention and the circumstances of its conclusion.

The Court next turns to Article 4 of the Palermo Convention, which provides as follows:

> "*Protection of sovereignty*
>
> 1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
>
> 2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."

The Court considers that Article 4 (1) imposes an obligation on States parties and that it is not preambular in character and does not merely formulate a general aim. However, Article 4 is not independent of the other provisions of the Convention. Its purpose is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States. The Court notes that Article 4 does not refer to the customary international rules, including State immunity, that derive from sovereign equality but to the principle of sovereign equality itself. Article 4 refers only to general principles of international law. The Court considers that, in its ordinary meaning, Article 4 (1) does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules. With regard to context, it notes that none of the provisions of the Palermo Convention relates expressly to the immunities of States and State officials. With regard to the object and purpose of the Convention, the Court observes that the interpretation of Article 4 advanced by Equatorial Guinea, whereby the customary rules relating to immunities of States and State officials are incorporated into the Convention as conventional obligations, is unrelated to the stated object and purpose of the Convention, set out in Article 1, which is the promotion of co-operation to prevent and combat transnational organized crime more effectively.

The Court concludes that, in its ordinary meaning, Article 4, read in its context and in light of the object and purpose of the Convention, does not incorporate the customary international rules on immunities of States and State officials. This interpretation is confirmed by the *travaux préparatoires* of the Palermo Convention.

In light of the above, the Court concludes that Article 4 does not incorporate the customary international rules relating to immunities of States and State officials. Therefore, the aspect of the dispute between the Parties relating to the asserted immunity of the Vice-President of Equatorial Guinea and the immunity claimed for the building at 42 Avenue Foch in Paris from measures of constraint as State property does not concern the interpretation or application of the Palermo Convention. Consequently, the Court lacks jurisdiction in relation to this aspect of the dispute. The Court notes that its determination that Article 4 does not incorporate the customary international rules relating to immunities of States and State officials is without prejudice to the continued application of those rules.

The alleged overextension of jurisdiction by France

The Court is of the opinion that, in assessing whether France was implementing the Convention in taking action against Mr. Teodoro Nguema Obiang Mangue, it is relevant to note that the Palermo Convention recognizes that the definition of offences and related legal rules and procedures is a matter for the domestic law of the prosecuting State. In accordance with that general principle, the Convention helps to co-ordinate but does not direct the actions of States parties in the exercise of their domestic jurisdiction. The scope of action taken in the implementation of the Convention is therefore limited.

The Court then turns to the issue of France's alleged overextension of jurisdiction in relation to the predicate offences of money laundering. It notes that Article 2 (*h*) of the Palermo Convention defines "predicate offence" as "any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention". Article 6 (2) imposes an obligation on States parties to "seek to" establish criminal offences as set out in Article 6 (1) in relation to the "widest range of predicate offences", including offences committed outside the jurisdiction of the State party. The obligation is limited by Article 6 (2) (*c*). Pursuant to that provision, predicate offences committed outside the jurisdiction of a State party may only relate to conduct that is a criminal offence under the domestic law of the State where the conduct occurs. That conduct must also constitute a criminal offence under the domestic law of the State party adopting the measures pursuant to Article 6, had the conduct occurred there.

The Court observes that Article 6 (2) (*c*) is not concerned with the question whether any particular individual has committed a predicate offence abroad, but with the distinct prior question whether the alleged conduct abroad constitutes a criminal offence under the domestic law of the State where it occurred. The Court further observes that Article 6 (2) (*c*) of the Palermo Convention does not provide for the exclusive jurisdiction of the State on whose territory such an offence was committed. It is for each State party to adopt measures to criminalize the Convention offences as required by Article 6, including "the widest range" of predicate offences inside and outside the jurisdiction of that State party. It is also for each State party to adopt such measures as may be necessary to establish their jurisdiction over Convention offences pursuant to Article 15. This is in accordance with the principle stated in Article 15 (6) of the Palermo Convention, which provides that "[w]ithout prejudice to norms of general international law", the Convention does not exclude the exercise of any criminal jurisdiction established by a State party in accordance with its domestic law.

For these reasons, the Court finds that the alleged violations complained of by Equatorial Guinea are not capable of falling within the provisions of the Palermo Convention,

notably Articles 6 and 15. The Court therefore lacks jurisdiction to entertain the aspect of the dispute relating to France's alleged overextension of jurisdiction.

Having analysed the aspect of the dispute in respect of which Equatorial Guinea invoked the Palermo Convention as a basis of jurisdiction, the Court concludes that this aspect of the dispute is not capable of falling within the provisions of the Palermo Convention. The Court therefore lacks jurisdiction pursuant to the Palermo Convention to entertain Equatorial Guinea's Application and must uphold France's first preliminary objection. In the Court's view, its conclusion in relation to France's first preliminary objection makes it unnecessary for it to make any further determinations regarding the scope or content of the obligations on States parties pursuant to Article 4 of the Palermo Convention.

The second preliminary objection: Jurisdiction under the Optional Protocol to the Vienna Convention (paras. 120–138)

The Court recalls that the aspect of the dispute between the Parties, in respect of which Equatorial Guinea invokes the Optional Protocol to the Vienna Convention as the title of jurisdiction, concerns whether the building at 42 Avenue Foch in Paris constitutes part of the premises of the mission of Equatorial Guinea in France and is thus entitled to the treatment provided for under Article 22 of the Vienna Convention. It also concerns whether France, by the actions of its authorities in relation to the building, is in breach of its obligation under Article 22. Equatorial Guinea seeks to found the Court's jurisdiction under Article I of the Optional Protocol to the Vienna Convention.

The Court further recalls that Articles II and III of the Optional Protocol to the Vienna Convention provide that parties to a dispute arising out of the interpretation or application of the Vienna Convention may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but rather to arbitration or conciliation. After the expiry of that period, either party may bring the dispute before the Court by an application.

The Court observes that Equatorial Guinea proposed to France to have recourse to conciliation or arbitration. However, France did not express its readiness to consider that proposal and, instead, expressly stated that it could not pursue it. Thus, Articles II and III of Optional Protocol to the Vienna Convention in no way affect any jurisdiction the Court might have under Article I thereof.

In order to establish jurisdiction over this aspect of the dispute, the Court is required to determine whether this aspect of the dispute is one that arises out of the interpretation or application of the Vienna Convention, as required by the provisions of Article I of the Optional Protocol to the Vienna Convention. Making that determination requires an analysis of the relevant terms of the Vienna Convention in accordance with the rules of customary international law on the interpretation of treaties.

The Court notes that Article 1 (*i*) of the Vienna Convention is prefaced by the following sentence: "For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them." Article 1 (*i*) of the Vienna Convention thus does no more than to define what constitutes "premises of the mission", a phrase used later in Article 22. For the purposes of the Vienna Convention, a building or part of a building "used for the purposes of [a diplomatic] mission", including the residence of the head of mission, is considered "premises of the mission", regardless of ownership.

The Court next notes that Article 22 of the Vienna Convention provides a régime of inviolability, protection and immunity for "premises of [a diplomatic] mission" by obligating the receiving State, *inter alia*, to refrain from entering such premises without the consent of the head of mission, and to protect those premises against intrusion, damage or disturbance of the peace of the mission by agents of the receiving State. The Article also guarantees immunity from search, requisition, attachment or execution for the premises of the mission, their furnishings and other property thereon, as well as means of transportation of the mission.

According to the Court, where, as in this case, there is a difference of opinion as to whether or not the building at 42 Avenue Foch in Paris, which Equatorial Guinea claims is "used for the purposes of its diplomatic mission", qualifies as "premises of the mission" and, consequently, whether it should be accorded or denied protection under Article 22, this aspect of the dispute can be said to "aris[e] out of the interpretation or application of the Vienna Convention" within the meaning of Article I of the Optional Protocol to the said Convention. The Court therefore finds that this aspect of the dispute falls within the scope of the Vienna Convention and that it has jurisdiction under Article I of the Optional Protocol to the Vienna Convention to entertain it.

It then remains for the Court to determine the extent of its jurisdiction. Although the Court has held that an applicant may not introduce, during the course of the proceedings, a new claim which would have the effect of transforming the subject-matter of the dispute originally brought before it, it is not persuaded that Equatorial Guinea, in advancing its argument regarding movable property seized from the premises at 42 Avenue Foch in Paris, has introduced a new claim into the proceedings. It notes that, under Article 22 (3) of the Vienna Convention, it is not only the premises of the mission but also "their furnishings and other property thereon and the means of transport of the mission" that are immune from search, requisition, attachment or execution. The Court concludes that any claims relating to movable property present on the premises at 42 Avenue Foch in Paris and resulting from the alleged violation of the immunity to which the building is said to be entitled, fall within the subject-matter of the dispute and that, as such, the Court is competent to entertain them. The Court thus concludes that it has jurisdiction to entertain the aspect of the dispute relating to the status of the building, including any claims relating to the furnishings and other property present on the premises at 42 Avenue Foch in Paris. France's second preliminary objection is consequently dismissed.

The third preliminary objection: Abuse of process and abuse of rights (paras. 139–152)

The Court recalls that, in its Preliminary Objections, France denies that the Court has jurisdiction, *inter alia*, on the ground that Equatorial Guinea's conduct was an abuse of rights and that its seisin of the Court was an abuse of process. In the oral proceedings, France contended that, regardless of whether the Court viewed its argument relating to abuse of rights and abuse of process as a matter of jurisdiction or admissibility, the Court should decline to hear the dispute between the Parties on the merits. As to abuse of rights, France refers to inconsistencies in correspondence sent and statements made by Equatorial Guinea regarding the date of acquisition by Equatorial Guinea of the building at 42 Avenue Foch in Paris and the use to which it was put. As to abuse of process, France argues that Equatorial Guinea's Application by which it seised the Court constitutes an abuse of process because it was submitted "in the manifest absence of any legal remedy and with the aim of covering abuses of rights committed in other respects".

The Court explains that it will consider France's objection only in relation to the Vienna Convention, since it has found that it lacks jurisdiction under the Palermo Convention.

In the Court's view, France's third preliminary objection is properly characterized as a claim relating to admissibility. This is reflected in the final submissions of France, which refer not only to lack of jurisdiction but also to the inadmissibility of the Application.

Relying on the case law of the Court and its predecessor, the Court observes that an abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of these proceedings. In this case, the Court does not consider that Equatorial Guinea, having established a valid title of jurisdiction, should be barred at the threshold without clear evidence that its conduct could amount to an abuse of process. Such evidence has not been presented to the Court. It is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process. The Court does not consider the present case to be one of those circumstances.

As to the abuse of rights invoked by France, the Court states that it will be for each Party to establish both the facts and the law on which it seeks to rely at the merits phase of the case. The Court considers that abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits. Any argument in relation to abuse of rights will be considered at the stage of the merits of this case.

For these reasons, the Court does not consider Equatorial Guinea's present claim inadmissible on grounds of abuse of process or abuse of rights. France's third preliminary objection is therefore dismissed.

General conclusions (para. 153)

The Court concludes that it lacks jurisdiction pursuant to the Palermo Convention to entertain Equatorial Guinea's Application. The Court further concludes that it has jurisdiction pursuant to the Optional Protocol to the Vienna Convention to entertain the submissions of Equatorial Guinea relating to the status of the building at 42 Avenue Foch in Paris as diplomatic premises, including any claims relating to the seizure of certain furnishings and other property present on the above-mentioned premises. Finally, the Court finds that Equatorial Guinea's Application is not inadmissible on grounds of abuse of process or abuse of rights.

Operative clause (para. 154)

The Court,

(1) By eleven votes to four,

Upholds the first preliminary objection raised by the French Republic that the Court lacks jurisdiction on the basis of Article 35 of the United Nations Convention against Transnational Organized Crime;

In favour: President Yusuf; Judges Owada, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Bhandari, Crawford, Gevorgian, Salam;

Against: Vice-President Xue; Judges Sebutinde, Robinson; Judge *ad hoc* Kateka;

(2) Unanimously,

Rejects the second preliminary objection raised by the French Republic that the Court lacks jurisdiction on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes;

(3) By fourteen votes to one,

Rejects the third preliminary objection raised by the French Republic that the Application is inadmissible for abuse of process or abuse of rights;

In favour: President Yusuf; Vice-President Xue; Judges Owada, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam; Judge *ad hoc* Kateka;

Against: Judge Donoghue;

(4) By fourteen votes to one,

Declares that it has jurisdiction, on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, to entertain the Application filed by the Republic of Equatorial Guinea on 13 June 2016, in so far as it concerns the status of the building located at 42 Avenue Foch in Paris as premises of the mission, and that this part of the Application is admissible.

In favour: President Yusuf; Vice-President Xue; Judges Owada, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam; Judge *ad hoc* Kateka;

Against: Judge Donoghue.

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Vice-President Xue, Judges Sebutinde, Robinson and Judge *ad hoc* Kateka append a joint dissenting opinion to the Judgment of the Court; Judge Owada appends a declaration to the Judgment of the Court; Judge Abraham appends a separate opinion to the Judgment of the Court; Judge Donoghue appends a dissenting opinion to the Judgment of the Court; Judges Gaja and Crawford append declarations to the

Judgment of the Court; Judge Gevorgian appends a separate opinion to the Judgment of the Court.

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Joint dissenting opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka

In this opinion, Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka explain their vote against point (1) of paragraph 154 of the Court's Judgment. They take the view that a dispute concerning whether the prosecution of a high-ranking State official, the Vice-President of a State party to the United Nations Convention against Transnational Organized Crime (the "Palermo Convention") in a foreign State that is also a State party to this Convention which makes explicit reference in Article 4 (1) to the principle of "sovereign equality of States"—a term which necessarily encompasses the issues of foreign State immunity—is a dispute concerning the interpretation or application of the Palermo Convention.

They outline four reasons for their disagreement with the Court's decision. First, that the majority have failed to recognize the overarching and pervasive effect of the obligations contained in Article 4 (1) of the Palermo Convention. Second, that the principle of "sovereign equality of States" in Article 4 (1) of the Convention has a function within the conventional framework, that is separate from and additional to the other two principles enshrined in Article 4, namely, territorial integrity of States and non-interference in the domestic affairs of other States. Third, they question the majority's finding that issues relating to the asserted immunities of the Vice-President of Equatorial Guinea and of the building at 42 Avenue Foch, Paris do not fall within the provision of the Palermo Convention, as this would deprive the term "sovereign equality of States" of its appropriate effect and not be in conformity with the relevant rules of treaty interpretation. Fourth, they indicate that the Court has not precisely identified the subject-matter of the dispute in the case, which the Court has identified in previous cases as being an integral part of its judicial function.

According to the minority, the subject-matter of the dispute is whether France—by prosecuting the Vice-President of Equatorial Guinea for the offence of money laundering and by imposing measures of constraint on the building at 42 Avenue Foch, Paris which Equatorial Guinea claims is State property—acted in a manner consistent with the principles of sovereign equality of States territorial integrity and non-intervention in the internal affairs of another State.

They rely, in part, on a previous Judgment of a Chamber of the Court in *Elettronica Sicula (United States of America* v. *Italy)* in support of the view that in the interpretation and application of Article 4 (1) of the Palermo Convention, since there are no express words which clearly show an intention to dispense with the customary rules on foreign State immunity, those rules remain applicable through the reference in Article 4 (1) to "sovereign equality of States".

Further, they emphasize that the object and purpose of the Convention is the promotion of co-operation to prevent transnational organized crime and that there is a relationship between this object and purpose and the principle of sovereign equality of States. Mutual respect for the principle of sovereign equality of States, and the rules on State immunity derived therefrom, creates and maintains the conditions necessary to efficiently implement the co-operative framework that the Convention aims to establish and operationalize to combat transnational organized crime. Accordingly, they recognize Article 4 (1) as creating an overarching obligation that has a pervasive effect on other obligations that the States parties have agreed to undertake under the Palermo Convention.

In support of their arguments, they trace the development of the principle of sovereign equality from the time of its inclusion in Article 2 of the United Nations Charter, and subsequently the Friendly Relations Declaration of 1970, and emphasize the intrinsic linkage between this principle and the rules of foreign State immunity. This is a link that has been recognized by the Court in its decision in *Jurisdictional Immunities of the State (Germany* v. *Italy; Greece intervening)* and by the European Court on Human Rights in *Al-Adsani* v. *United Kingdom*. In the particular context of the Palermo Convention, the minority find evidence for this linkage between the customary rules on foreign State immunity and the principle of sovereign equality in the *travaux préparatoires* of the Palermo Convention, which expressly declare that "it is not the intention of the Convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations".

They also refer to other international treaties which contain provisions that are similar or identical to Article 4 of the Palermo Convention, namely the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 International Convention for the Suppression of the Financing of Terrorism and the 2003 United Nations Convention against Corruption.

The minority also elaborate on how the pervasive effect of the principle of sovereign equality enshrined in Article 4 impacts the implementation of the treaty obligations by States parties to the Palermo Convention and the role this plays in constraining these States' freedom of action in enacting and implementing domestic legislation.

The minority also examine Equatorial Guinea's claims that the present case concerns the interpretation and application of Article 4 of the Palermo Convention read in conjunction with several provisions of the Convention, namely Articles 6, 11, 12, 14, 15 and 18. They conclude that a dispute arises between the Parties with respect to each of these provisions read in conjunction with Article 4 as the Parties hold opposing views on these issues. Further, the applicability of the customary rules of foreign State immunity is necessarily entailed by a proper interpretation of the principle of sovereign equality under Article 4. They also observe that Article 15 (6), in its reference to "norms of general international law" can be read to include these customary rules on immunity. The actions of a State party that seeks to exercise

jurisdiction over offences criminalized under its domestic law in accordance with the Convention must not prejudice these well-recognized norms of general international law.

Thus, contrary to the findings of the Court, they conclude that a dispute concerning the interpretation or application of the Convention has arisen between the Parties and that the Court has jurisdiction. Consequently, they would have found that the Court has jurisdiction to hear the dispute under the Palermo Convention. They conclude by noting that the joint dissent is an expression of their views on the Court's jurisdiction in the case and that it is not to be seen as in any way reflecting their views on the merits of the case instituted against Mr. Teodoro Nguema Obiang Mangue by the French authorities.

Declaration of Judge Owada

Judge Owada agrees with all the *dispositifs* as contained in paragraph 154 of the Judgment, but he wishes to elaborate his views: (*a*) on the relevance of Article 4 of the Palermo Convention to the alleged violations by France of other provisions of the Convention; and (*b*) on the treatment of France's third preliminary objection based on alleged abuse of rights.

While Judge Owada agrees with the Judgment that Article 4 of the Palermo Convention does not incorporate the rules of customary international law relating to immunities of States and State officials, he is of the view that Article 4 continues to be relevant in interpreting other provisions of the Convention such as Articles 6, 8, 9 and 15. From this perspective, Judge Owada arrives at the conclusion that the acts of France complained of by Equatorial Guinea cannot fall within the scope of these provisions read in conjunction with Article 4. This is because, according to Judge Owada, these provisions of the Convention essentially relate to the *establishment* of criminal jurisdiction by States parties over offences in their respective domestic legal systems, as distinct from the actual *exercise* of such jurisdiction in concrete cases.

With respect to France's third preliminary objection, Judge Owada elaborates his view on the reasons why the Court did not choose the option to declare that the objection based on alleged abuse of rights does not possess an exclusively preliminary character as envisaged in Article 79, paragraph 9, of the Rules of Court. According to Judge Owada, the Respondent was arguing that the Applicant's claim has an essential legal flaw so that it cannot be regarded as a "valid claim". Judge Owada is of the view that such objection is not "preliminary" in its nature and, consequently, cannot fall within the mechanism of preliminary objections as provided by Article 79 of the Rules of Court. It then follows that the Court did not have the option to declare that France's objection based on alleged abuse of rights does not possess an exclusively preliminary character pursuant to paragraph 9 of Article 79.

Separate opinion of Judge Abraham

In his separate opinion, Judge Abraham states that although he voted in favour of all the paragraphs of the operative part of the Judgment, he nonetheless disagrees with the Court's reasoning in finding that the dispute submitted to it does not fall within the scope *ratione materiae* of Article 4 of the Palermo Convention and, consequently, does not fall within the provisions of the compromissory clause of Article 35 of that instrument.

Judge Abraham is of the view that, while the Court was right to conclude that "Article 4 does not incorporate the customary international rules relating to immunities of States and State officials", it could and should have reached that conclusion without making any distinction between the rules relating to immunities and other rules of customary international law deriving from the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States referred to in Article 4, paragraph 1, of the Palermo Convention. In Judge Abraham's opinion, instead of focusing its reasoning on the customary international rules relating to the immunities of States and State officials, as it does in paragraphs 92 to 102 of the Judgment, the Court should have concluded that Article 4 does not incorporate into the Convention any of the principles to which it refers, nor any customary international rule deriving from those principles.

For Judge Abraham, Article 4, as a whole, is a saving clause, which aims neither to create conventional obligations for States parties, nor to incorporate, by reference, pre-existing rules of customary law into the Convention. The aim of that Article is rather to state that nothing in the Convention derogates from the rules of customary international law relating to certain fundamental principles that it sets forth. According to Judge Abraham, that interpretation of Article 4, paragraph 1, is supported both by the object and purpose of the Convention, as stated in Article 1 of that instrument, and by a reading of Article 4 as a whole. It is further substantiated by the *travaux préparatoires* of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, certain provisions of which inspired Article 4 of the Palermo Convention. Judge Abraham observes that, if the Court had adopted what he considers to be the correct interpretation of Article 4, it would have rejected with briefer and less questionable reasoning Equatorial Guinea's claim whereby France had also violated that Article in overextending the jurisdiction of its criminal courts, by the way in which it criminalized the offence of money laundering in its domestic law and defined the jurisdiction of its courts to entertain it.

Dissenting opinion of Judge Donoghue

Judge Donoghue has voted against subparagraphs (3) and (4) of paragraph 154. She agrees that the Court has jurisdiction over the Applicant's claim regarding the building at 42 Avenue Foch, pursuant to the Option Protocol to the Vienna Convention on Diplomatic Relations, but she believes that this claim is inadmissible.

Judge Donoghue considers that France's third preliminary objection raises a serious question—whether the conduct in which Equatorial Guinea engaged as a predicate for the assertion of certain rights is of such a character that the Court should not exercise its jurisdiction to determine whether Equatorial Guinea has these rights. This is a question of admissibility that should have been answered at the present

stage of the proceedings. It does not call for a decision on the existence of such rights, which is a matter for the merits. The relevant facts are not in dispute. They are evident on the face of documents submitted to the Court by Equatorial Guinea, including formal statements of its representatives.

According to Judge Donoghue, there is clear evidence of the sequence of actions that Equatorial Guinea took with respect to the building at 42 Avenue Foch and of the purpose for which they were taken. If those actions are given effect, real property in the territory of France that had been in the hands of an individual facing prosecution will instead be shielded from French authorities as inviolable mission premises that are "immune from search, requisition, attachment or execution" under Article 22 of the Vienna Convention. The President of Equatorial Guinea made clear that the purpose of the Applicant's actions was to address difficulties faced by his son, a personal purpose which is entirely at odds with that of the Vienna Convention. There is no suggestion that Equatorial Guinea's diplomatic functions were threatened by the measures taken by French authorities. Judge Donoghue finds conclusive evidence of the character of the conduct in which the Applicant engaged as a predicate for its assertion of rights in this Court. She considers that, to preserve the integrity of its judicial function, the Court should not allow itself to be used to further this effort by the Applicant State and therefore that it should have declared the Application inadmissible.

Declaration of Judge Gaja

The Judgment does not specify that the issue concerning the ownership of the building located at 42 Avenue Foch in Paris is not covered by the Optional Protocol to the Vienna Convention on Diplomatic Relations. The relevant provisions of the Vienna Convention do not imply that, once a building has been used for a diplomatic mission, the sending State is entitled to continue to use it indefinitely for that purpose. Ownership of the premises may change over time. Issues concerning the ownership of buildings used for a mission are regulated by the municipal law of the host State.

Declaration of Judge Crawford

Judge Crawford agrees with the Judgment of the Court that Article 4 of the Palermo Convention does not incorporate the customary international rules relating to the immunities of States and State officials. Moreover, he agrees that Equatorial Guinea's argument based on exclusive jurisdiction should be rejected. He therefore is of the view that, strictly speaking, it is not necessary for the Court to decide whether Article 4 (1) gives legal effect, for the purposes of the application of the Palermo Convention, to the principles of customary international law to which it refers.

However, it has been suggested that Article 4 (1) is merely a without prejudice clause which does not impose an obligation on States parties to act in conformity with sovereign equality, territorial integrity and non-intervention. Judge Crawford disagrees with this interpretation. In his opinion, Article 4 (1) imposes an obligation; it is in mandatory language ("States Parties shall carry out their obligations") and the principles of sovereign equality, territorial integrity and non-intervention are established legal principles with a determinate content.

Judge Crawford discusses the legislative history of Article 4 of the Palermo Convention and of Article 2 of the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, from which Article 4 was transposed. He argues that this legislative history tends to confirm the conclusion to be drawn from the actual text of Article 4 (1), namely that Article 4 (1) imposes an obligation on States parties in accordance with its terms.

Separate opinion of Judge Gevorgian

In his separate opinion, Judge Gevorgian clarifies his position on certain elements of the reasoning supporting the Court's findings.

His main concern relates to the consequences of the Court's interpretation of Article 4 of the Palermo Convention, which justifies the conclusion on the lack of jurisdiction *ratione materiae* to deal with France's alleged violations of the immunities of States and State officials.

Judge Gevorgian stresses that the Court's jurisdiction is based on Article 35, paragraph 2, of the Palermo Convention, which, as any other compromissory clause, is limited to the substantive content of the treaty to which it refers. In the present case, the central question is whether such a jurisdictional clause entitles Equatorial Guinea to invoke the immunities of States and State officials before the Court. While the present Judgment answers this question in the negative, it bases its conclusion on the premise that "Article 4 [of the Palermo Convention] does not incorporate the customary international rules relating to immunities of States and State officials". In Judge Gevorgian' s opinion, the reference to sovereign equality made in Article 4 of the Palermo Convention was intended to include the protection of such immunities, but does not fall within the scope of the provisions covered by the compromissory clause.

Judge Gevorgian further opines that the scope of the compromissory clause is not as broad as the Applicant pretends. Given the broad nature of the principles of sovereign equality, territorial integrity and non-intervention mentioned in Article 4 of the Palermo Convention, incorporating all the customary rules encompassed by such principles may have the effect of circumventing the principle of consent to the Court's jurisdiction.

Finally, Judge Gevorgian underlines that the Court's Judgment should not be read as in any way undermining the obligations regarding the protection of immunities that are binding on States parties to the Palermo Convention, including those of certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs. In his view, such obligations are reaffirmed in paragraph 102 of the present Judgment.

229. APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (QATAR *v.* UNITED ARAB EMIRATES) [PROVISIONAL MEASURES]

Order of 23 July 2018

On 23 July 2018, the International Court of Justice issued an Order on the Request for the indication of provisional measures submitted by Qatar in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*. In its Order, the Court indicated various provisional measures.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam; Judges *ad hoc* Cot, Daudet; Registrar Couvreur.

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The Court begins by recalling that, on 11 June 2018, Qatar instituted proceedings against the United Arab Emirates with regard to alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention"). Qatar contends in its Application that since 5 June 2017 the UAE has enacted and implemented a series of discriminatory measures directed against Qataris based on their national origin. It maintains in particular that the UAE has expelled all Qataris within its borders and prohibited them from entering the UAE, thereby violating certain rights guaranteed by CERD, including the right to marry and choose a spouse, the right to public health and medical care, the right to education and training, the right to property, work and equal treatment before tribunals. The Application was accompanied by a request for the indication of provisional measures seeking protection of the rights of Qatar under CERD pending a decision on the merits of the case.

1. Prima facie *jurisdiction* (paras. 14–41)

The Court first observes that it may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. It notes that in the present case, Qatar seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.[1] The Court must therefore first determine whether those provisions *prima facie* confer upon it jurisdiction to rule on the merits of the case, enabling it—if the other necessary conditions are fulfilled—to indicate provisional measures.

A. Existence of a dispute concerning the interpretation or application of CERD

Having noted that Qatar and the UAE are both parties to CERD, the Court observes that Article 22 of the Convention makes its jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of CERD. The Court therefore examines whether the acts complained of by Qatar are *prima facie* capable of falling within the provisions of CERD and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.

The Court considers that, as evidenced by the arguments advanced and the documents placed before it, the Parties differ on the nature and scope of the measures taken by the UAE beginning on 5 June 2017, as well as on the question whether they relate to rights and obligations under CERD. It notes that Qatar contends that the measures adopted by the UAE purposely targeted Qataris based on their national origin. Consequently, according to Qatar, the UAE has failed to respect its obligations under Articles 2 (condemnation of racial discrimination), 4 (prohibition of incitement to racial discrimination), 5 (prohibition of racial discrimination in the enjoyment of a number of civil, economic, social and cultural rights), 6 (effective protection and remedies against any acts of racial discrimination) and 7 (undertaking to adopt measures to combat racial discrimination) of CERD. The Court observes that Qatar maintains in particular that, because of the measures taken on 5 June 2017, UAE-Qatari mixed families have been separated, medical care has been suspended for Qataris in the UAE, depriving those who were under medical treatment from receiving further medical assistance, Qatari students have been deprived of the opportunity to complete their education in the UAE and to continue their studies elsewhere, since UAE universities have refused to provide them with their educational records, and that Qataris have not been granted equal treatment before tribunals and other judicial organs in the UAE. For its part, the UAE firmly denies that it has committed any of these violations.

In the Court's view, the acts referred to by Qatar, in particular the statement of 5 June 2017—which allegedly targeted Qataris on the basis of their national origin—whereby the UAE announced that Qataris were to leave its territory within 14 days and that they would be prevented from entry, and the alleged restrictions that ensued, including upon their right to marriage and choice of spouse, to education as well as to medical care and to equal treatment before tribunals, are capable of falling within the scope of CERD *ratione materiae*. The Court considers that, while the Parties differ on the question whether the expression "national … origin" mentioned in Article 1, paragraph 1, of CERD, encompasses discrimination

[1] Article 22 of CERD reads as follows: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

based on the "present nationality" of the individual, it need not decide at this stage of the proceedings, in view of what is stated above, which of these diverging interpretations of the Convention is the correct one.

The Court finds that the above-mentioned elements are sufficient at this stage to establish the existence of a dispute between the Parties concerning the interpretation or application of CERD.

B. Procedural preconditions

The Court recalls that it has previously indicated that the terms of Article 22 of CERD establish procedural preconditions to be met before the seisin of the Court. Under Article 22 of CERD, the dispute referred to the Court must be a dispute "not settled by negotiation or by the procedures expressly provided for in this Convention". In addition, Article 22 states that the dispute may be referred to the Court at the request of any of the parties to the dispute only if the parties have not agreed to another mode of settlement. The Court notes that neither Party contends that they have agreed to another mode of settlement.

Regarding the first precondition, namely the negotiations to which the compromissory clause refers, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is only met when the attempt to negotiate has been unsuccessful or where negotiations have failed, or become futile or deadlocked. In order to meet the precondition of negotiation contained in the compromissory clause of a treaty, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question". At this stage of the proceedings, the Court first has to assess whether it appears that Qatar genuinely attempted to engage in negotiations with the UAE, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under CERD, and whether it appears that Qatar pursued these negotiations as far as possible.

The Court notes that it has not been challenged by the Parties that issues relating to the measures taken by the UAE in June 2017 have been raised by representatives of Qatar on several occasions in international forums, including at the United Nations, in the presence of representatives of the UAE. It further notes that, in a letter dated 25 April 2018 and addressed to the Minister of State for Foreign Affairs of the UAE, the Minister of State for Foreign Affairs of Qatar referred to the alleged violations of CERD arising from the measures taken by the UAE beginning on 5 June 2017 and stated that "it [was] necessary to enter into negotiations in order to resolve these violations and the effects thereof within no more than two weeks". The Court considers that the letter contained an offer by Qatar to negotiate with the UAE with regard to the latter's compliance with its substantive obligations under CERD. In light of the foregoing, and given the fact that the UAE did not respond to that formal invitation to negotiate, the Court is of the view that the issues raised in the present case had not been resolved by negotiations at the time of the filing of the Application.

The Court then turns to the second precondition contained in Article 22 of CERD, relating to "the procedures expressly provided for in the Convention". It is recalled that, according to Article 11 of the Convention, "[i]f a State Party considers that another State Party is not giving effect to the provisions of this Convention", the matter may be brought to the attention of the CERD Committee. The Court notes that Qatar deposited, on 8 March 2018, a communication with the CERD Committee under Article 11 of the Convention. It observes, however, that Qatar does not rely on this communication for the purposes of showing *prima facie* jurisdiction in the present case. Although the Parties disagree as to whether negotiations and recourse to the procedures referred to in Article 22 of CERD constitute alternative or cumulative preconditions to be fulfilled before the seisin of the Court, the Court is of the view that it need not make a pronouncement on the issue at this stage of the proceedings.

The Court thus finds, in view of all the foregoing, that the procedural preconditions under Article 22 of CERD for its seisin appear, at this stage, to have been complied with.

C. Conclusion as to prima facie *jurisdiction*

In light of the foregoing, the Court concludes that, *prima facie*, it has jurisdiction pursuant to Article 22 of CERD to deal with the case to the extent that the dispute between the Parties relates to the "interpretation or application" of the said Convention.

2. The rights whose protection is sought and the measures requested (paras. 43–59)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties in a case, pending its decision on the merits thereof. It follows that it must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. It recalls, as it did in past cases in which CERD was at issue, that there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance with the Convention. It observes that Articles 2, 4, 5, 6 and 7 of CERD are intended to protect individuals from racial discrimination. Consequently, in the context of a request for the indication of provisional measures, a State party to CERD may avail itself of the rights under the above-mentioned Articles only if the acts complained of appear to constitute acts of racial discrimination as defined in Article 1 of the Convention.

In the present case, the Court notes, on the basis of the evidence presented to it by the Parties, that the measures

adopted by the UAE on 5 June 2017 appear to have targeted only Qataris and not other non-citizens residing in the UAE. Furthermore, the measures were directed to all Qataris residing in the UAE, regardless of individual circumstances. Therefore, it appears that some of the acts of which Qatar complains may constitute acts of racial discrimination as defined by the Convention. Consequently, the Court finds that at least some of the rights asserted by Qatar under Article 5 of CERD are plausible. This is the case, for example, with respect to the alleged racial discrimination in the enjoyment of rights such as the right to marriage and to choice of spouse, the right to education, as well as freedom of movement, and access to justice.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested.

The Court has already found that at least some of the rights asserted by Qatar under Article 5 of CERD are plausible. It recalls that Article 5 prohibits discrimination in the enjoyment of a variety of civil, political, economic, social and cultural rights. The Court considers that the measures requested by Qatar are aimed not only at ending any collective expulsion of Qataris from the territory of the UAE, but also at protecting other specific rights contained in Article 5. The Court concludes, therefore, that a link exists between the rights whose protection is being sought and the provisional measures being requested by Qatar (see Press Release No. 2018/26).

3. The risk of irreparable prejudice and urgency (paras. 60–71)

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to the rights in dispute, and that this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights concerned.

The Court considers that certain rights in question in these proceedings—in particular, several of the rights stipulated in Article 5, paragraphs (*a*), (*d*) and (*e*), of CERD—are of such a nature that prejudice to them is capable of causing irreparable harm. On the basis of the evidence presented to it by the Parties, the Court is of the opinion that the situation of Qataris residing in the UAE prior to 5 June 2017 appears to remain vulnerable with regard to their rights under Article 5 of the Convention. In this regard, the Court observes that, following the statement of 5 June 2017, many Qataris residing in the UAE at that time appeared to have been forced to leave their place of residence without the possibility of return. The Court notes that a number of consequences apparently resulted from this situation and that the impact on those affected seem to persist to this date: UAE-Qatari mixed families have been separated; Qatari students have been deprived of the opportunity to complete their education in the UAE and to continue their studies elsewhere, since UAE universities have refused to provide them with their educational records; and Qataris have been denied equal access to tribunals and other judicial organs in the UAE.

As the Court has already observed, individuals forced to leave their own place of residence without the possibility of return could, depending on the circumstances, be subject to a serious risk of irreparable prejudice. The Court is of the view that a prejudice can be considered as irreparable when individuals are subject to temporary or potentially ongoing separation from their families and suffer from psychological distress; when students are prevented from taking their exams due to enforced absence or from pursuing their studies due to a refusal by academic institutions to provide educational records; or when the persons concerned are impeded from being able to physically appear in any proceedings or to challenge any measure they find discriminatory.

The Court notes that the UAE stated, in response to a question posed by a Member of the Court at the end of the oral proceedings, that, following the statement of 5 June 2017 by its Ministry of Foreign Affairs, no administrative orders have been issued under the Immigration Law to expel Qataris. The Court nonetheless notes that it appears from the evidence before it that, as a result of this statement, Qataris felt obliged to leave the UAE resulting in the specific prejudices to their rights described above. Moreover, in view of the fact that the UAE has not taken any official steps to rescind the measures of 5 June 2017, the situation affecting the enjoyment of their above-mentioned rights in the UAE remains unchanged.

The Court thus finds that there is an imminent risk that the measures adopted by the UAE, as set out above, could lead to irreparable prejudice to the rights invoked by Qatar, as specified by the Court.

4. Conclusion and measures to be adopted (paras. 72–76)

The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. Reminding the UAE of its duty to comply with its obligations under CERD, the Court considers that, with regard to the situation described above, the UAE must, pending the final decision in the case and in accordance with its obligations under CERD, ensure that families that include a Qatari, separated by the measures adopted by the UAE on 5 June 2017, are reunited, that Qatari students affected by those measures are given the opportunity to complete their education in the UAE or to obtain their educational records if they wish to continue their studies elsewhere, and that Qataris affected by those measures are allowed access to tribunals and other judicial organs of the UAE.

The Court recalls that Qatar has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with the UAE. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require. In this case, having considered all the circumstances, in addition to the specific measures it has decided to take, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute.

5. Operative clause (para. 79)

The Court,

Indicates the following provisional measures:

(1) By eight votes to seven,

The United Arab Emirates must ensure that

(i) families that include a Qatari, separated by the measures adopted by the United Arab Emirates on 5 June 2017, are reunited;

(ii) Qatari students affected by the measures adopted by the United Arab Emirates on 5 June 2017 are given the opportunity to complete their education in the United Arab Emirates or to obtain their educational records if they wish to continue their studies elsewhere; and

(iii) Qataris affected by the measures adopted by the United Arab Emirates on 5 June 2017 are allowed access to tribunals and other judicial organs of the United Arab Emirates;

In favour: President Yusuf; Vice-President Xue; Judges Abraham, Bennouna, Cançado Trindade, Sebutinde, Robinson; Judge *ad hoc* Daudet;

Against: Judges Tomka, Gaja, Bhandari, Crawford, Gevorgian, Salam; Judge *ad hoc* Cot;

(2) By eleven votes to four,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson; Judge *ad hoc* Daudet;

Against: Judges Crawford, Gevorgian, Salam; Judge *ad hoc* Cot.

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Judges Tomka, Gaja and Gevorgian append a joint declaration to the Order of the Court; Judge Cançado Trindade appends a separate opinion to the Order of the Court; Judges Bhandari, Crawford and Salam append dissenting opinions to the Order of the Court; Judge *ad hoc* Cot appends a dissenting opinion to the Order of the Court.

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Joint declaration of Judges Tomka, Gaja and Gevorgian

Judges Tomka, Gaja and Gevorgian consider that the present dispute does not *prima facie* fall within the scope of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"). Qatar has alleged that certain measures taken by the United Arab Emirates which target persons on the basis of their Qatari nationality amount to violations of CERD. However, Article 1, paragraph 1, of CERD only lists "race, colour, descent, or national or ethnic origin" as the potential bases for racial discrimination within the scope of CERD. "National origin" is not identical to "nationality", and these terms should not be understood as synonymous. Given this distinction, Qatar's claims do not amount to discrimination on the basis of a factor prohibited by CERD. Consequently, the requirements for the indication of provisional measures are not met in the present case.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of 12 parts, Judge Cançado Trindade begins by pointing out that he has concurred with his vote to the adoption of the present Order indicating Provisional Measures of Protection. He adds that, as he attributes great importance to some related issues in the *cas d'espèce*, that in his perception underlie the present decision of the International Court of Justice but are left out of the Court's reasoning, he feels obliged to leave on the records, in the present separate opinion, the identification of such issues and the foundations of his own personal position thereon.

2. Those issues are: (*a*) a new era of international adjudication of human rights cases by the International Court of Justice; (*b*) the relevance of the fundamental principle of equality and non-discrimination; (*c*) non-discrimination and the prohibition of arbitrariness; (*d*) arguments of the contending Parties and their responses to the questions he put to them in the public hearings; (*e*) general assessment as to the *rationale* of the local remedies rule in international human rights protection, and as to implications of a continuing situation; (*f*) the correct understanding of compromissory clauses under human rights Conventions; (*g*) vulnerability of segments of the population; (*h*) towards the consolidation of the autonomous legal régime of provisional measures of protection; (*i*) international law and the temporal dimension; (*j*) provisional measures of protection in continuing situations; and (*k*) recapitulation of the key points of the position he sustains in the present separate opinion.

3. To start with, he recalls that this is the third case on *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (CERD Convention—Qatar *versus* UAE) lodged with the International Court of Justice (ICJ) under the United Nations CERD Convention, following the Court's decisions in the cases of *Georgia versus Russian Federation* (2008–2011) and of *Ukraine versus Russian Federation* (2017). Furthermore—he proceeds—there have been other cases brought before the ICJ, and decided by it, along the last eight years, concerning also other human rights treaties (*e.g.* the cases of the *Obligation to Prosecute or Extradite*, 2009–2012, under the United Nations Convention against Torture; and the case of *A.S. Diallo*, (2010–2012, in respect of, *inter alia*, the United Nations Covenant on Civil and Political Rights, which he examines in part II).

4. Such cases disclose, in Judge Cançado Trindade's perception, that "we are already *within* the new era of international adjudication of human rights cases by the ICJ" (para. 8), and this new case of *Application of the CERD Convention* (Qatar *versus* UAE) bears witness of that. He then moves to the relevance of the fundamental principle of equality and non-discrimination (part III), a point which deserved greater attention in the *cas d'espèce*, as this principle lies in the foundations of the protected rights under human rights treaties (like CERD Convention). He warns:

"It is the principle of equality and non-discrimination which here calls for attention, there being no place for devising or imagining new 'preconditions' for the consideration of provisional measures of protection under a human rights Convention; it makes no sense to intermingle at this

stage the consideration of provisional measures with so-called 'plausible admissibility'" (para. 10).

5. He then examines the history of the principle of equality and non-discrimination in the evolution of the law of nations, and its central place in the International Law of Human Rights and in the Law of the United Nations (paras. 11–15). United Nations supervisory organs, like the CERD Committee, have been giving their constant contribution—of growing importance—to the prohibition of the discrimination *de facto* or *de jure*, in their faithful exercise of their functions of protection of the human person (paras. 16–17).

6. Judge Cançado Trindade then surveys the advances in respect of the basic principle of equality and non-discrimination at normative and jurisprudential levels (*e.g.* the case-law of the Inter-American Court of Human Rights—IACtHR). He warns that such advances have not yet been accompanied by the international legal doctrine, which so far has not dedicated sufficient attention to that fundamental principle: this is "one of the rare examples of international case-law preceding international legal doctrine, and requiring from it due and greater attention" (paras. 18–21).

7. In sequence, he observes that the protection being sought before the ICJ in the *cas d'espèce*, under the CERD Convention, is furthermore against arbitrary measures, against arbitrariness (part IV), a point which has not escaped the attention of international human rights tribunals (*e.g.* the European Court of Human Rights—(ECtHR), particularly in cases of "collective" expulsions (of aliens) (paras. 22–28). Arbitrariness—he continues—is "an issue which has marked presence everywhere along the history of humankind" (para. 28). It is thus not surprising—he adds—that the ancient Greek tragedies (such as Sophocles's *Antigone*, 441 b.C.; and Euripides's *Suppliant Women* (424–419 b.C.), have, along the centuries and until nowadays, always remained contemporary, in the perennial struggle against arbitrariness (paras. 24–27).

8. He then recalls that, already in his Separate Opinion appended to the ICJ's Judgment on the case of *A.S. Diallo* (merits, of 30 November 2010), he devoted much attention to the prohibition of *arbitrariness* in the International Law of Human Rights, and examined the jurisprudential construction on the matter (also of the ECtHR and the IACtHR), pondering, *inter alia*, that human rights treaties "conform a *Law of protection* (*a droit de protection*), oriented towards the safeguard of the ostensibly weaker party, the victim" (paras. 29–31). Hence "the imperative of access to justice *lato sensu*, the *right to the Law* (*le droit au Droit*), the right to the realization of justice in a democratic society" (para. 32).

9. Next, after surveying the arguments of the Parties in the public hearings before the Court (part V), and the responses of the contending Parties to the questions he addressed to them in the ICJ public hearing of 29 June 2018 (part VI, paras. 37–47), Judge Cançado Trindade then presents his own general reassessment of the matter, i.e. the two points addressed, namely, the *rationale* of the local remedies rule in international human rights protection (paras. 48–56), and the implications of a *continuing situation* affecting human rights (paras. 57–61).

10. As to the first point, Judge Cançado Trindade recalls that the local remedies rule is a condition of admissibility of international claims, and that it cannot be invoked as a "precondition" for the consideration of urgent requests of provisional measures of protection. He stresses that the two domains, of international human rights protection and of diplomatic protection, are quite distinct, and the incidence of the local remedies rule in one and the other is certainly distinct—the rule applying with lesser rigour in the former, and greater rigour in the latter (paras. 48–49). And then Judge Cançado Trindade firmly sustains that the *rationale* of the rule

> "is quite distinct in the two contexts. In the domain of the safeguard of the rights of the human person, attention is focused on the need to secure the faithful realization of the object and purpose of human rights treaties, and on the need of effectiveness of local remedies; attention is focused, in sum, on the needs of protection. The *rationale* of the local remedies rule in the context of diplomatic protection is entirely distinct, focusing on the process of exhaustion of such remedies. (…)
>
> The local remedies rule has a *rationale* of its own under human rights treaties; this cannot be distorted by the invocation of the handling of inter-State cases in the exercise of diplomatic protection, where the local remedies rule has an entirely distinct *rationale*. The former stresses *redress*, the latter outlines *exhaustion*. One cannot deprive a human rights Convention of its *effet utile* by using the distinct *rationale* of the rule in diplomatic protection" (paras. 50 and 55).

11. Still on the first point, he adds that the aforementioned *rationale* of the local remedies rule (*rationale* of effectiveness of such remedies and redress) has been consistently sustained by international human rights tribunals as well as United Nations human rights supervisory organs (like the CERD Committee) (paras. 53–56). After all, local remedies

> "form an integral part of the very system of international human rights protection, the emphasis falling on the element of *redress* rather than on the process of exhaustion. The local remedies rule bears witness of the interaction between international law and domestic law in the present context of protection. We are here before a *droit de protection*, with a specificity of its own, fundamentally victim-oriented, concerned with the rights of individual human beings rather than of States" (para. 51).

12. As to the second point, Judge Cançado Trindade finds "regrettable" the attempt to create, as from the so-called "plausibility of rights", which is an "unfortunate invention", yet "an additional precondition for provisional measures of protection"; in a *continuing situation*, as in the *cas d'espèce*: the rights here requiring protection "are clearly known, their being no sense to wonder whether they are 'plausible'" (para. 57–58). He adds that no one knows what exactly "plausibility" means, and, to invoke it as a new "precondition", creating undue difficulties for the granting of provisional measures of protection in relation to a *continuing situation*, "is misleading, it renders a disservice to the realization of justice" (para. 59).

13. He adds that the rights to be protected in the *cas d'espèce* are clearly those invoked under the CERD Convention (Articles 2, 4, 5, 6 and 7), which are *rights of individuals* (experiencing a *continuing situation* of vulnerability

affecting them), and not of States. This is so, irrespective of the matter having been brought to the ICJ by a State Party to the Convention; in doing so,

> "the State Party exercises a collective guarantee under the CERD Convention, making use of its compromissory clause in Article 22, which is not amenable to interpretation raising 'preconditions'. The compromissory clause in Article 22 is to be interpreted bearing in mind the object and purpose of the CERD Convention" (paras. 60–61).

14. Judge Cançado Trindade observes that, just as he pointed out in his lengthy Dissenting Opinion in the earlier case on *Application of the CERD Convention* (Georgia *versus* Russian Federation, Judgment of 01 April 2011), compromissory clauses in human rights treaties, like the CERD Convention, have to be correctly understood, keeping in mind the nature and substance of those treaties, as well as to their object and purpose (para. 62).

15. Rather than pursuing an essentially inter-State, and mostly bilateral, outlook, on the basis of allegedly unfulfilled "preconditions"—he continues—attention is to be turned to "the sufferings and needs of protection of the affected segments of the population", seeking to secure the *effet utile* to the pioneering and universal CERD Convention (paras. 64–67). One is to avoid rendering access to justice under human rights Conventions particularly difficult.

16. In sequence, he considers the issue of the situation of vulnerability of segments of the population (part VIII), rendering necessary provisional measures of protection (para. 68). Cases as the present one of *Application of the CERD Convention* (Qatar *versus* UAE)—he proceeds—like the aforementioned previous cases before the ICJ also under the CERD Convention (as well as under other human rights treaties),

> "disclose the centrality of the position of the human person in the overcoming of the inter-State paradigm in contemporary international law. The request of provisional measures of protection is here intended to put an end to the alleged vulnerability of the affected persons (potential victims).
>
> Human beings in vulnerability are the ultimate beneficiaries of compliance with the ordered provisional measures of protection. However vulnerable, they are subjects of international law. We are here before the new paradigm of the *humanized* international law, the new *jus gentium* of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability" (para. 69–70).

17. Particularly attentive to human beings in situations of vulnerability—he adds—provisional measures of protection under human rights treaties, "endowed with a tutelary character, appear as true jurisdictional guarantees with a preventive dimension" (paras. 72–73 and 77). Judge Cançado Trindade then expresses his confidence that we are at last moving towards the consolidation of the autonomous legal régime of provisional measures of protection, thus enhancing the preventive dimension of international law (part IX).

18. In his understanding, the component elements of this autonomous legal régime are: the rights to be protected (not necessarily the same as those pertaining to the merits); the corresponding obligations; the prompt determination of responsibility (in case of non-compliance), with its legal consequences, encompassing the duty of reparation for damages (without necessarily waiting for the decision on the merits) (paras. 74–76).

19. Accordingly, the notion of victim (or potential victim) itself marks presence already at this stage, irrespective of the decision as to the merits (cf. *supra*). Hence the autonomy of the international responsibility that non-compliance with provisional measures of protection promptly generates. A study of the matter, pursuant to an essentially humanist outlook, encompasses the general principles of law, always of great relevance (paras. 76–77).

20. A consideration of the aforementioned preventive dimension, furthermore, brings to the fore the relationship between international law and the temporal dimension (part X), ineluctably encompassing provisional measures of protection (paras. 78–79). Keeping the passage of time in mind—Judge Cançado Trindade continues—"it is important to prevent or avoid harm that may occur in the future (hence the acknowledgment of *potential* or *prospective* victims), as well as to put an end to *continuing situations* already affecting individual rights. Past, present and future come and go together" (para. 81).

21. He then points to another element of provisional measures of protection in continuing situations (part XI): in the present case of *Application of the CERD Convention* (Qatar *versus* UAE), there have been United Nations reports and other documents (*e.g.*, of the United Nations High Commissioner for Human Rights, the United Nations Special Procedures Mandate Holders of the U.N. Human Rights Council), as well as of experienced non-governmental organizations (*e.g.* Amnesty International, Human Rights Watch), giving accounts of a *continuing situation* affecting human rights under the CERD Convention (paras. 82–88).

22. And he further observes that the *continuing situation* in breach of human rights is a point which has had an incidence in other cases before the ICJ as well, at distinct stages of the proceedings,—and then surveys those ICJ cases, and the humanist position he sustained in each of them (paras. 89–93). The *cas d'espèce*, opposing Qatar to the UAE—he adds—is

> "the third case under the CERD Convention in which provisional measures of protection have been rightly ordered by the ICJ, in this new era of its international adjudication of human rights cases. The fact that a case is an inter-State one, characteristic of the *contentieux* before the ICJ, does not mean that the Court is to reason likewise on a strictly inter-state basis. Not at all. It is the nature of a case that will call for a reasoning, so as to reach a solution. The present case of *Application of the CERD Convention* (Qatar *versus* UAE) concerns the rights protected thereunder, which are the rights of human beings, and not rights of States" (para. 94).

23. This, in his perception, has a direct bearing on the consideration of a request for provisional measures of protection under a human rights Convention. In the epilogue of the present Separate Opinion, Judge Cançado Trindade proceeds, last but not least, to a recapitulation of the main points he has made, and the foundations of his position, on provisional measures of protection, under a human rights treaty like the CERD Convention (part XII). In his understanding, in sum, the determination and ordering of provisional measures of protection under human rights Conventions can only be

properly undertaken "from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarism" (para. 104).

Dissenting opinion of Judge Bhandari

Judge Bhandari could not join the majority of his colleagues in indicating provisional measures. According to Judge Bhandari, there was no sufficiently compelling evidence that the declaration made by the UAE on 5 June 2017 had been implemented. The UAE argued that no implementation followed that declaration, and Qatar could not provide convincing evidence showing the contrary. Judge Bhandari also considered that the statement made by the UAE's Ministry of Foreign Affairs on 5 July 2018 constituted a unilateral undertaking under international law, which removed the risk of irreparable prejudice to the rights of Qatar under CERD. Moreover, the lack of irreparable prejudice also determined the lack of urgency in the request for provisional measures submitted by Qatar.

Dissenting opinion of Judge Crawford

Judge Crawford states that it is not clear from the evidence that the measures announced by the UAE against Qatari nationals on 5 June 2017 are still in effect, or that the measures that are in effect could cause irreparable prejudice to the rights which are the subject of these proceedings. Judge Crawford notes that many of the consequences of the statement of June 2017 (such as family separation, difficulties accessing courts, etc.) appear to have flowed from the fact that Qataris were located outside the UAE and it is not clear from the evidence that individuals are continuing to suffer these consequences in July 2018.

On 5 July 2018 the UAE issued an official statement clarifying that Qatari citizens already resident in the UAE do not need to apply for permission to continue residence in the UAE and that applications for entry clearance to the UAE should be made *via* a telephone hotline that had been announced in June 2017. The Court does not mention this statement of 5 July 2018. Furthermore, the Court does not deal with the UAE's evidence that Qataris have entered or exited the UAE more than 8,000 times since June 2017 and that over 1,300 applications *via* the hotline system to enter the UAE have been granted.

Judge Crawford concludes that the evidence before the Court, including the statement of 5 July 2018, does not warrant a finding that there is a real and imminent risk of irreparable prejudice to the rights which are the subject of these proceedings. The risks that the Court seeks to curb through the measures ordered have been to a large extent removed.

Judge Crawford identifies a legal difficulty with Qatar's request, namely that Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) distinguishes on its face between discrimination on grounds of national origin (prohibited *per se*) and differentiation on grounds of nationality (not prohibited as such). *Prima facie* at least, the UAE's measures target Qataris on account of their present nationality, not their national origin and this differentiation is not apparently covered by the CERD. However, it is unnecessary to decide this issue in view of Judge Crawford's conclusion that there is no risk of irreparable prejudice in this case.

Dissenting opinion of Judge Salam

Judge Salam voted against the indication of provisional measures because he does not agree with the conclusions reached by the majority on the *prima facie* jurisdiction of the Court. In his view, the dispute between the Parties does not appear to fall within the scope *ratione materiae* of CERD.

He points out that Article 1 of CERD states that the expression "racial discrimination" refers to any distinction "based on race, colour, descent, or national or ethnic origin" and makes no mention of discrimination on the basis of "nationality".

Reading that provision in light of Article 31 of the 1969 Vienna Convention on the Law of Treaties, Judge Salam notes that the terms "national or ethnic origin" used in CERD differ in their ordinary meaning to the term nationality, and that, as reflected in its Preamble, CERD was adopted in the historical context of decolonization and post-decolonization, and was thus part of the effort to eliminate all forms of discrimination and racial segregation. He observes that the aim of CERD is to bring an end to all discriminatory manifestations and governmental policies based on racial superiority or hatred, and that it does not concern questions relating to nationality. He concludes that it is forms of "racial" discrimination that constitute the specific object of CERD, and not any form of discrimination "in general".

According to Judge Salam, the distinction that must be made between "nationality" and "national origin" is clear and is, moreover, confirmed by the *travaux préparatoires* of CERD.

Although this is the conclusion he has reached, Judge Salam has taken account of Qatar's claim that Qataris residing in the United Arab Emirates have been in a vulnerable situation since 5 June 2017. In this regard, he observes that, even if the Court should have found that it lacked *prima facie* jurisdiction to indicate provisional measures, this would not have prevented it from underlining, in its reasoning, the need for the Parties not to aggravate or extend the dispute and to ensure the prevention of any human rights violations, as it has done previously in the cases concerning the *Legality of Use of Force (Yugoslavia* v. *United Kingdom), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 839, paras. 37–40 and *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 250, para. 93.

Dissenting opinion of Judge *ad hoc* Cot

1. Judge *ad hoc* Cot voted against both points of the operative clause. In his view, the Court should have rejected Qatar's request for the indication of provisional measures, mainly because there is no imminent risk of irreparable prejudice to the rights claimed by the Applicant, and because provisional measures are unnecessary in the present circumstances of the case, since they go against the principle of presumption of good faith of States.

2. With regard to the lives of UAE-Qatari mixed families, Judge *ad hoc* Cot considers that, although the long-term separation of a family may have an irreparable effect on its unity and integrity, that effect is unlikely to become permanent in the few years before the Court renders its final decision. In other words, he is of the view that it can be concluded that the risk of prejudice to that right, even if it were irreparable, is not imminent.

3. As regards the right to education and training, Judge *ad hoc* Cot notes that the Respondent has presented evidence that the Emirati authorities have asked all post-secondary institutions in the UAE to monitor the situation of Qatari students. According to Judge *ad hoc* Cot, since the UAE authorities are taking measures to remedy the situation, it may be concluded or at least assumed that, even if it existed, the risk of irreparable prejudice to students is not imminent.

4. With respect to equal treatment before tribunals and the right to effective protection and remedies, Judge *ad hoc* Cot considers that, while their absence may cause prejudice to other rights capable of causing irreparable harm, the right of Qatari nationals in the UAE to effective protection and remedies through UAE courts can, as such, theoretically be restored.

5. Judge *ad hoc* Cot is also concerned that this Order indicating provisional measures is not only unnecessary but counter-productive to the settlement of the dispute, since the Court's conclusion on the risk of irreparable prejudice runs counter to the principle of good faith in public international law. He notes that the Court, after finding that the risk in question is one of irreparable prejudice, failed to ascertain whether that risk is in fact "imminent". According to Judge *ad hoc* Cot, if the principle of good faith had been duly applied at this provisional measures stage, the Court would have been unable to confine itself to such a conclusion. In his view, that is particularly rue where the UAE has shown genuine commitment towards its human rights obligations, as demonstrated by the arguments of its Agent and the reply to the joint letter of the six Special Rapporteurs. Judge *ad hoc* Cot therefore concludes that the Respondent should have been presumed to be acting in good faith.

230. OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN (BOLIVIA *v.* CHILE)

Judgment of 1 October 2018

On 1 October 2018, the International Court of Justice delivered its Judgment in the case concerning *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*. In its Judgment, the Court found that the Republic of Chile did not undertake a legal obligation to negotiate a sovereign access to the Pacific Ocean for the Plurinational State of Bolivia and rejected consequently the other final submissions presented by the Plurinational State of Bolivia.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam; Judges *ad hoc* Daudet, McRae; Registrar Couvreur.

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Procedural background (paras. 1–15)

The Court recalls that, on 24 April 2013, the Government of the Plurinational State of Bolivia (hereinafter "Bolivia") filed in the Registry of the Court an Application instituting proceedings against the Republic of Chile (hereinafter "Chile") with regard to a dispute "relating to Chile's obligation to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean". On 15 July 2014, Chile raised a preliminary objection to the jurisdiction of the Court. By its Judgment of 24 September 2015, the Court rejected the preliminary objection raised by Chile and found that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the Application. Public hearings were held from 19 March to 28 March 2018.

I. Historical and factual background (paras. 16–83)

Due to the importance of the historical context of this dispute, the Court begins by examining certain events that have marked the relationship between Bolivia and Chile.

1. Events and treaties prior to 1904, including the 1895 Transfer Treaty (paras. 19–24)

Chile and Bolivia gained their independence from Spain in 1818 and 1825, respectively. At the time of its independence, Bolivia had a coastline of over 400 km along the Pacific Ocean. On 10 August 1866, Chile and Bolivia signed a Treaty of Territorial Limits, which established a demarcation line between the two States, separating their Pacific coast territories. The boundary was confirmed by the Treaty of Limits of 6 August 1874. On 5 April 1879, Chile declared war on Peru and Bolivia. In the course of this war, which became known as the War of the Pacific, Chile occupied Bolivia's coastal territory. Bolivia and Chile put an end to the hostilities between them with the signature of the Truce Pact of 4 April 1884 in Valparaíso, Chile. Under the terms of the Truce Pact, Chile was, *inter alia*, to continue to govern the coastal region of Bolivia. The Treaty of Peace between Chile and Peru signed on 20 October 1883 (also known as the "Treaty of Ancón") brought hostilities formally to an end between Chile and Peru. Pursuant to Article 2 of the Treaty of Ancón, Peru ceded to Chile the coastal province of Tarapacá. In addition, under Article 3, Chile would remain in the possession of the territories of the provinces of Tacna and Arica for a period of ten years, after which a plebiscite would be held to definitively determine sovereignty over those territories. On 18 May 1895, Bolivia and Chile signed three treaties: a Treaty of Peace and Amity, a Treaty on the Transfer of Territory and a Treaty of Commerce. The Treaty of Peace and Amity reaffirmed Chile's sovereignty over the coastal territory it governed in accordance with the Truce Pact of 4 April 1884. Under the Treaty on the Transfer of Territory, Bolivia and Chile agreed, *inter alia*, that the territories of Tacna and Arica were to be transferred to Bolivia if Chile should acquire "dominion and permanent sovereignty" over them either by direct negotiations or by way of the plebiscite envisaged by the 1883 Treaty of Ancón. Should Chile fail to obtain these two territories, Article IV of the Treaty on the Transfer of Territory provided that Chile would cede certain territory to Bolivia. These three treaties were followed by four protocols. By an exchange of Notes of 29 and 30 April 1896, it was agreed that these three treaties of 18 May 1895 were to enter into force on the condition that the Congresses of both Chile and Bolivia approved the protocol on the scope of the obligations in the treaties of 18 May 1895 which clarified the obligations undertaken by the Parties. As this condition was never met, the three treaties of 18 May 1895 never entered into force.

2. The 1904 Peace Treaty (para. 25)

The Treaty of Peace and Friendship of 20 October 1904 (hereinafter the "1904 Peace Treaty") officially ended the War of the Pacific as between Bolivia and Chile. Under the terms of its Article II, the territory occupied by Chile in application of the Truce Pact of 1884 was recognized as belonging "absolutely and in perpetuity" to Chile and the entire boundary between the two States was delimited. Article III provided for the construction, at the expense of Chile, of a railroad between the port of Arica and the plateau of La Paz, which was inaugurated on 13 May 1913. Under Article VI, Chile granted to Bolivia "in perpetuity the amplest and freest right of commercial transit in its territory and its Pacific ports". Under Article VII of the Treaty, Bolivia had "the right to establish customs agencies in the ports which it may designate for its commerce" and indicated for this purpose the ports of Antofagasta and Arica.

3. Exchanges and statements in the 1920s (paras. 26–46)

A. The 1920 "Acta Protocolizada" (paras. 26–31)

On 10 January 1920, the Minister for Foreign Affairs of Bolivia, and the Minister Plenipotentiary of Chile in La Paz met in order to address, *inter alia*, questions relating to Bolivia's access to the sea and documented the series

of meetings in writing. These minutes are referred to by the Parties as "Acta Protocolizada".

B. Follow-up exchanges (1920–1925) (paras. 32–41)

Beginning in November 1920, Bolivia sought the revision of the 1904 Peace Treaty through the League of Nations, in accordance with Article 19 of the Treaty of Versailles which provides that the "Assembly may … advise the reconsideration by Members of the League of treaties which have become inapplicable". The request was deemed inadmissible by a Commission of Jurists because only the contracting States, not the Assembly, were competent to modify treaties. On 8 September 1922, the Bolivian delegate informed the Secretary-General of the League of Nations that Bolivia reiterated the reservation of its right to submit a request "for the revision or the examination" of the 1904 Peace Treaty and that negotiations with Chile had been "fruitless". In 1922 and 1923, parallel to its attempts to revise the 1904 Peace Treaty, Bolivia further continued to negotiate directly with Chile in order to obtain sovereign access to the Pacific Ocean. By an arbitral award of 1925, the President of the United States, Mr. Calvin Coolidge, set forth the terms of the plebiscite over Tacna and Arica provided for in Article 3 of the Treaty of Ancón.

C. The 1926 Kellogg Proposal and the 1926 Matte Memorandum (paras. 42–46)

On 30 November 1926, the Secretary of State of the United States of America, Mr. Frank B. Kellogg, submitted a proposal to Chile and Peru, regarding the question of sovereignty over the provinces of Tacna and Arica. According to the proposal, Chile and Peru would cede to Bolivia, in perpetuity, all right, title and interest which either may have in the Provinces of Tacna and Arica, subject to appropriate guaranties for the protection and preservation, without discrimination, of the personal and property rights of all of the inhabitants of the provinces of whatever nationality. On 2 December 1926, the Minister for Foreign Affairs of Bolivia wrote to the Minister Plenipotentiary of the United States of America in La Paz expressing Bolivia's full acceptance of the Kellogg proposal. By a memorandum of 4 December 1926 (known as the "Matte Memorandum") addressed to the United States Secretary of State, the Minister for Foreign Affairs of Chile stated that the Kellogg Proposal went much farther than the concessions which the Chilean Government was willing to make, since it involved the cession of Chilean territory. By a memorandum dated 12 January 1927, the Minister for Foreign Relations of Peru informed the United States Secretary of State that the Peruvian Government did not accept the United States' proposal regarding Tacna and Arica.

4. Bolivia's reaction to the 1929 Treaty of Lima and its Supplementary Protocol (paras. 47–49)

Due to difficulties arising in the execution of the 1925 arbitral award between Chile and Peru concerning the terms of the plebiscite over Tacna and Arica provided for in Article 3 of the Treaty of Ancón, Chile and Peru agreed to resolve the issue of sovereignty over Tacna and Arica by treaty rather than to hold a plebiscite to determine sovereignty. On 3 June 1929, Chile and Peru concluded the Treaty of Lima, whereby they agreed that sovereignty over the territory of Tacna belonged to Peru, and that over Arica to Chile. In a Supplementary Protocol to this Treaty, Peru and Chile agreed, *inter alia*, to the following:

> "The Governments of Chile and Peru shall not, without previous agreement between them, cede to any third Power the whole or a part of the territories which, in conformity with the Treaty of this date, come under their respective sovereignty, nor shall they, in the absence of such an agreement, construct through those territories any new international railway lines."

In a memorandum to the Secretary of State of the United States of America dated 1 August 1929, upon receipt of this agreement, the Minister for Foreign Affairs of Bolivia affirmed that this new agreement between Chile and Peru would not result in Bolivia renouncing its "policy of restoration of [its] maritime sovereignty".

5. The 1950 exchange of Notes (paras. 50–53)

In the late 1940s, Bolivia and Chile held further discussions regarding Bolivia's access to the sea. Notably, in a Note dated 28 June 1948, the Ambassador of Bolivia in Chile reported to the Minister for Foreign Affairs of Bolivia his interactions with the Chilean President, Mr. Gabriel González Videla, regarding the opening of these negotiations and included a draft protocol containing Bolivia's proposal. In a Note dated 1 June 1950, the Ambassador of Bolivia to Chile made a formal proposal to the Minister for Foreign Affairs of Chile to enter into negotiations "to satisfy Bolivia's fundamental need to obtain its own sovereign access to the Pacific Ocean, solving the problem of Bolivia's landlocked situation on terms that take into account the mutual benefit and genuine interests of both nations". In a Note of 20 June 1950, the Minister for Foreign Affairs of Chile responded that his Government accepted that proposal to enter into negotiations. The negotiations between Chile and Bolivia did not make any further progress in the following years.

6. The 1961 Trucco Memorandum (paras. 54–59)

From 1951 to 1957, the exchanges between the Parties were focused on improving the practical implementation of the régime for Bolivia's access to the Pacific Ocean. On 10 July 1961, upon learning about Bolivia's intention to raise the issue of its access to the Pacific Ocean during the Inter-American Conference which was to take place later that year, Chile's Ambassador in Bolivia, Mr. Manuel Trucco, handed to the Minister for Foreign Affairs of Bolivia a memorandum, known as the "Trucco Memorandum". It emphasized that Chile was open to entering into direct negotiations aimed at searching for a formula that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean and for Chile to obtain compensation of a non-territorial character. In reply to this Memorandum, the Ministry for Foreign Affairs of Bolivia, on 9 February 1962, expressed

> "its full consent to initiate, as soon as possible, direct negotiations aimed at satisfying the fundamental national need of its own sovereign access to the Pacific Ocean, in return for compensation that, without being territorial in character, takes into account the reciprocal benefits and effective interests of both countries".

On 15 April 1962, Bolivia severed diplomatic relations with Chile as a consequence of the latter's use of waters of the River Lauca. On 27 March 1963, the Minister for Foreign Affairs of Chile indicated that Chile "was not willing to enter into discussions that could affect national sovereignty or involve a cession of territory of any kind" and denied that the Trucco Memorandum constituted "an official note", emphasizing that it was merely an "Aide Memoire". On 3 April 1963, the Minister for Foreign Affairs of Bolivia maintained that the 1950 exchange of Notes was constitutive of a "commitment" of the Parties, a contention rejected by Chile in a letter dated 17 November 1963 to the Minister for Foreign Affairs of Bolivia.

7. The Charaña process (paras. 60–70)

On 8 February 1975, a Joint Declaration was signed at Charaña by the Presidents of Bolivia and Chile, known as the Charaña Declaration, in which they committed to continue a dialogue, at different levels, in order to search for formulas to solve the vital issues that both countries faced, such as the landlocked situation that affects Bolivia. In pursuance of the dialogue, Bolivia proposed guidelines for negotiations on 26 August 1975. In December of that year, Chile presented its counter-proposal for guidelines, which included a condition of territorial exchange. By an exchange of Notes of 28 July and 11 August 1976, Chile and Bolivia agreed to establish a mixed permanent commission, which was created on 18 November 1976, "to discuss any issues of common interest to both countries". Throughout 1976, Bolivia confirmed that it was willing to consider transferring certain areas of its territory for an equivalent portion of Chilean territory. On 19 December 1975, Chile asked Peru whether it agreed with the territorial cession envisaged between Bolivia and Chile. In November 1976, Peru replied with a counter-proposal for the creation of an area under tripartite sovereignty, which was not accepted by either Chile or Bolivia. However, Peru refused to change its position on this matter. On 24 December 1976, the President of Bolivia publicly announced that he "propose[d] that the Government of Chile modify its proposal to eliminate the condition regarding an exchange of territory" if they were to continue the negotiations. However, throughout 1977, the negotiations continued on the basis of the exchanges of 1975. On 10 June 1977, the Ministers for Foreign Affairs of Bolivia and Chile issued a Joint Declaration, reaffirming the need to pursue the negotiations. In a letter of 21 December 1977, the President of Bolivia informed his Chilean counterpart that, in order to continue the negotiations, new conditions should be established to achieve the objectives in the Charaña Declaration, notably that both the condition of territorial exchange and Peru's proposal for a zone of shared sovereignty between the three countries should be withdrawn. In January 1978, Chile informed Bolivia that the guidelines for negotiations agreed in December 1975 remained the foundation of any such negotiations. On 17 March 1978, Bolivia informed Chile that it was suspending diplomatic relations between them, given Chile's lack of flexibility with respect to the conditions of the negotiations and Chile's lack of effort to obtain Peru's consent to the exchange of territory.

8. Statements by Bolivia and Chile at the Organization of American States and resolutions adopted by the Organization (paras. 71–75)

On 6 August 1975, the Permanent Council of the Organization of American States (hereinafter the "OAS"), of which Bolivia and Chile are Member States, adopted by consensus resolution CP/RES. 157 which stated that Bolivia's landlocked status was a matter of "concern throughout the hemisphere", and that all American States offered their co-operation in "seeking solutions" in accordance with the principles of international law and the Charter of the OAS. This resolution was followed by 11 other resolutions, reaffirming the importance of dialogue and of the identification of a solution to the maritime problem of Bolivia, adopted by the General Assembly of the OAS between 1979 and 1989. Chile did not vote in favour of any of the 11 resolutions, but did not oppose consensus on three occasions, while making declarations or explanations with respect to the content and legal status of the resolutions adopted.

9. The "fresh approach" of 1986–1987 (paras. 76–77)

After the presidential elections in Bolivia in July 1985, new negotiations were opened between Bolivia and Chile, within the framework of what was called the "fresh approach". In November 1986, the renewal of Bolivia and Chile's negotiations was reported to the General Assembly of the OAS. In a meeting between Bolivia and Chile held from 21 to 23 April 1987 in Montevideo, Uruguay, Bolivia presented two alternative proposals to gain access to the Pacific Ocean, both involving the transfer of a part of Chilean territory. On 9 June 1987, Chile rejected both proposals. On 17 June, before the General Assembly of the OAS, the representative of Bolivia announced the suspension of bilateral negotiations between the two States as a consequence of their inability to reach agreement based on its proposals of April 1987.

10. The Algarve Declaration (2000) and the 13-Point Agenda (2006) (paras. 78–83)

In 1995, the Parties resumed their discussions. They launched a "Bolivian-Chilean mechanism of Political Consultation" to deal with bilateral issues. On 22 February 2000, the Ministers for Foreign Affairs of both countries issued a Joint Communiqué, the "Algarve Declaration", envisaging a working agenda which would include "without any exception, the essential issues in the bilateral relationship". From 2000 to 2003, the Parties engaged in discussions regarding a Chilean concession to Bolivia for the creation of a special economic zone for an initial time period of 50 years, but the project was finally rejected by Bolivia. Following different exchanges throughout 2005 and 2006, on 17 July 2006, the Vice-Ministers for Foreign Affairs of Bolivia and Chile publicly announced a 13-Point Agenda, encompassing "all issues relevant to the bilateral relationship" between the Parties, including the "maritime issue" (Point 6). The topics included in the 13-Point Agenda, notably the question of the maritime issue, were discussed in the subsequent meetings of the Bolivian-Chilean mechanism of Political Consultation until 2010. In 2009 and 2010, the creation of a Bolivian enclave on the Chilean coast was discussed between the Parties. In January 2011, the

Parties agreed to continue the discussions with the establishment of a High Level Bi-National Commission. On 7 February 2011, the Bolivian and Chilean Ministers for Foreign Affairs issued a joint declaration stating that

> "[t]he High level Bi-National Commission examined the progress of the Agenda of the 13 Points, especially the maritime issue … The Ministers of Foreign Affairs have also set out future projects which, taking into account the sensitivity of both Governments, will aim at reaching results as soon as possible, on the basis of concrete, feasible, and useful proposals for the whole of the agenda."

On 17 February 2011, the President of Bolivia requested "a concrete proposal by 23 March [2011] … as a basis for a discussion". During a meeting on 28 July 2011, the President of Chile reiterated to his Bolivian counterpart the terms of his proposal based on the three following conditions: the compliance with the 1904 Peace Treaty, the absence of grant of sovereignty and the modification of the provision of the Bolivian Constitution referring to the right of Bolivia to an access to the Pacific Ocean. Given the divergent positions of the Parties, the negotiations came to an end.

II. Preliminary considerations (paras. 84–90)

Before examining the legal bases invoked by Bolivia with regard to Chile's alleged obligation to negotiate Bolivia's sovereign access to the Pacific Ocean, the Court analyses the meaning and scope of Bolivia's submissions. The Court recalls that, in its submissions, which have remained unchanged since the Application, Bolivia requested the Court to adjudge and declare that "Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean". The Court observes that, while States are free to resort to negotiations or put an end to them, they may agree to be bound by an obligation to negotiate. In that case, States are required under international law to enter into negotiations and to pursue them in good faith. As the Court has recalled, States "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification". Each of them "should pay reasonable regard to the interests of the other".

The Court notes that negotiations between States may lead to an agreement that settles their dispute, but, generally, "an obligation to negotiate does not imply an obligation to reach an agreement". When setting forth an obligation to negotiate, the parties may, as they did for instance in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, establish an "obligation to achieve a precise result". Bolivia's submissions could be understood as referring to an obligation with a similar character. As the Court observed in its Judgment of 24 September 2015 on the preliminary objection raised by Chile, "Bolivia does not ask the Court to declare that it has a right to sovereign access to the sea". What Bolivia claims in its submissions is that Chile is under an obligation to negotiate "in order to reach an agreement granting Bolivia a fully sovereign access". The Court recalls that, in its Judgment on Chile's preliminary objection, the Court determined "that the subject-matter of the dispute is whether Chile is obligated to negotiate in good faith Bolivia's sovereign access to the Pacific Ocean". As the Court observed, this alleged obligation does not include a commitment to reach an agreement on the subject-matter of the dispute.

The Court further observes that the term "sovereign access" as used in Bolivia's submissions could lead to different interpretations. When answering a question raised by a Member of the Court at the end of the hearings on Chile's preliminary objection, Bolivia defined sovereign access as meaning that "Chile must grant Bolivia its own access to the sea with sovereignty in conformity with international law". In its Reply, Bolivia further specified that a "sovereign access exists when a State does not depend on anything or anyone to enjoy this access" and that "sovereign access is a regime that secures the uninterrupted way of Bolivia to the sea—the conditions of this access falling within the exclusive administration and control, both legal and physical, of Bolivia".

III. The alleged legal bases of an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean (paras. 91–174)

The Court explains that, in international law, the existence of an obligation to negotiate has to be ascertained in the same way as that of any other legal obligation. Negotiation is part of the usual practice of States in their bilateral and multilateral relations. However, the fact that a given issue is negotiated at a given time is not sufficient to give rise to an obligation to negotiate. In particular, for there to be an obligation to negotiate on the basis of an agreement, the terms used by the parties, the subject-matter and the conditions of the negotiations must demonstrate an intention of the parties to be legally bound. This intention, in the absence of express terms indicating the existence of a legal commitment, may be established on the basis of an objective examination of all the evidence.

The Court observes that Bolivia invokes a variety of legal bases on which an obligation for Chile to negotiate Bolivia's sovereign access to the Pacific Ocean allegedly rests. The Court states that it will first analyse whether any of the instruments invoked by the Applicant, in particular bilateral agreements, or declarations and other unilateral acts, gives rise to an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. The Court will then examine, if necessary, the other legal bases invoked by the Applicant, namely acquiescence, estoppel and legitimate expectations. Finally, the Court will address, if warranted, the arguments based on the Charter of the United Nations and on the Charter of the OAS.

1. Bilateral agreements (paras. 94–139)

The Court recalls that Bolivia's claim mainly rests on the alleged existence of one or more bilateral agreements that would impose on Chile an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. According to Bolivia, the Parties reached some agreements that either establish or confirm Chile's obligation to negotiate. These alleged agreements occurred in different periods of time and will be analysed separately in chronological order. The Court notes that, according to customary international law, as reflected in Article 3 of the Vienna Convention, "agreements not in written form" may also have "legal force". Irrespective of the form that agreements may take, they require an intention of

the parties to be bound by legal obligations. This applies also to tacit agreements. In this respect, the Court recalls that "[e]vidence of a tacit legal agreement must be compelling".

A. The diplomatic exchanges of the 1920s (paras. 98–107)

The Court analyses the diplomatic exchanges between the Parties in the 1920s, in particular the "Acta Protocolizada", i.e. the minutes of a meeting held in January 1920 between the Minister for Foreign Affairs of Bolivia and the Minister Plenipotentiary of Chile in La Paz, as well as the follow-up exchanges to that meeting. The Court recalls that in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, it had found that signed minutes of a discussion could constitute an agreement if they "enumerate[d] the commitments to which the Parties ha[d] consented" and did not "merely give an account of discussions and summarize points of agreement and disagreement". The Court observes that the "Acta Protocolizada" does not enumerate any commitments and does not even summarize points of agreement and disagreement. Moreover, the penultimate clause of these minutes records that the Foreign Minister of Bolivia stated that "the present declarations do not contain provisions that create rights, or obligations for the States whose representatives make them". The Chilean Minister Plenipotentiary did not contest this point. Thus, even if a statement concerning an obligation to resort to negotiations had been made by Chile, this would not have been part of an agreement between the Parties. The Court further observes that the exchanges that took place between the Parties after the "Acta Protocolizada" also do not indicate that there was an agreement under which Chile entered into a commitment to negotiate Bolivia's sovereign access to the Pacific Ocean.

B. The 1950 exchange of Notes (paras. 108–119)

The Court then turns to a 1950 exchange of diplomatic Notes between the Parties regarding Bolivia's access to the sea, as well as to a 1961 memorandum by Chile's Ambassador in Bolivia, Mr. Manuel Trucco, which was handed to the Minister for Foreign Affairs of Bolivia, referred to by the Parties as the "Trucco Memorandum". It states that the Notes exchanged do not contain the same wording nor do they reflect an identical position, in particular with regard to the crucial issue of negotiations concerning Bolivia's sovereign access to the Pacific Ocean. Therefore, the exchange of Notes cannot be considered an international agreement. The Court also observes that the Trucco Memorandum does not create or reaffirm any obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

C. The 1975 Charaña Declaration (paras. 120–127)

With regard to a Joint Declaration signed by the Presidents of Bolivia and Chile at Charaña on 8 February 1975, the Court states that the wording of the Declaration does not convey the existence or the confirmation of an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. The engagement "to continue the dialogue, at different levels, in order to search for formulas to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia", cannot constitute a legal commitment to negotiate Bolivia's sovereign access to the sea, which is not even specifically mentioned. The Court concludes that an obligation for Chile to negotiate Bolivia's sovereign access to the sea cannot be inferred from the Charaña Declaration or the statements that followed the adoption of that instrument.

D. The communiqués of 1986 (paras. 128–132)

The Court next examines communiqués issued by the Ministers for Foreign Affairs of Bolivia and Chile in November 1986. It recalls that in the *Aegean Sea Continental Shelf* case *(Greece* v. *Turkey)*, it had observed that there is "no rule of international law which might preclude a joint communiqué from constituting an international agreement" and that whether such a joint communiqué constitutes an agreement "essentially depends on the nature of the act or transaction to which the Communiqué gives expression". The Court notes that the two communiqués are separate instruments, that the wording used in them is not the same and that, moreover, neither of these documents includes a reference to Bolivia's sovereign access to the sea. In any event, the Court does not find in the two communiqués referred to by Bolivia nor in the Parties' subsequent conduct any indication that Chile accepted an obligation to negotiate the question of Bolivia's sovereign access to the Pacific Ocean.

E. The Algarve Declaration (2000) (paras. 133–135)

With respect to the "Algarve Declaration" issued by the Ministers for Foreign Affairs of Bolivia and Chile on 22 February 2000, the Court considers that it does not contain an agreement which imposes on Chile an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. The Court reaches the same conclusion with respect to a Joint Communiqué issued by the Presidents of Bolivia and Chile on 1 September 2000.

F. The 13-Point Agenda (2006) (paras. 136–139)

The Court then analyses the "13-Point Agenda" drawn up during a July 2006 meeting of the Bolivia-Chile Working Group on Bilateral Affairs and publicly announced by the Vice-Ministers for Foreign Affairs of Bolivia and Chile. It notes that the item "maritime issue" included in the 13-Point Agenda is a subject-matter that is wide enough to encompass the issue of Bolivia's sovereign access to the Pacific Ocean. The short text in the minutes of the Working Group concerning the maritime issue only states that "[b]oth delegations gave succinct reports on the discussions that they had on this issue in the past few days and agreed to leave this issue for consideration by the Vice-Ministers at their meeting". As was remarked by the Head of the Bolivian delegation to the General Assembly of the OAS, "[t]he Agenda was conceived as an expression of the political will of both countries to include the maritime issue". In the Court's view, the mere mention of the "maritime issue" does not give rise to an obligation for the Parties to negotiate generally and even less so with regard to the specific issue of Bolivia's sovereign access to the Pacific Ocean.

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On the basis of an examination of the arguments of the Parties and the evidence produced by them, the Court

concludes, with regard to bilateral instruments invoked by Bolivia, that these instruments do not establish an obligation on Chile to negotiate Bolivia's sovereign access to the Pacific Ocean.

2. Chile's declarations and other unilateral acts (paras. 140–148)

With respect to Bolivia's argument that declarations and other unilateral acts of Chile create an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean, the Court notes that Chile's declarations and other unilateral acts on which Bolivia relies are expressed not in terms of undertaking a legal obligation but of willingness to enter into negotiations on the issue of Bolivia's sovereign access to the Pacific Ocean. For instance, Chile declared that it was "willing to seek that Bolivia acquire its own outlet to the sea" and "to give an ear to any Bolivian proposal aimed at solving its landlocked condition". On another occasion, Chile stated its "unchanging purpose of studying, together with that brother country, within the framework of a frank and friendly negotiation, the obstacles that limit Bolivia's development on account of its landlocked condition". The wording of these texts does not suggest that Chile has undertaken a legal obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. With regard to the circumstances of Chile's declarations and statements, the Court further observes that there is no evidence of an intention on the part of Chile to assume an obligation to negotiate. The Court therefore concludes that an obligation to negotiate Bolivia's sovereign access to the sea cannot rest on any of Chile's unilateral acts referred to by Bolivia.

3. Acquiescence (paras. 149–152)

The Court next considers Bolivia's assertion that Chile has acquiesced to negotiating Bolivia's sovereign access to the Pacific Ocean. It notes that Bolivia has not identified any declaration requiring a response or reaction on the part of Chile in order to prevent an obligation from arising. In particular, the statement by Bolivia, when signing the United Nations Convention on the law of the sea, that referred to "negotiations on the restoration to Bolivia of its own sovereign outlet to the Pacific Ocean" did not imply the allegation of the existence of any obligation for Chile in that regard. Thus, acquiescence cannot be considered a legal basis of an obligation to negotiate Bolivia's sovereign access to the sea.

4. Estoppel (paras. 153–159)

Concerning Bolivia's contention that an obligation of Chile to negotiate Bolivia's sovereign access to the Pacific Ocean may be based on estoppel, the Court recalls that the "essential elements required by estoppel" are "a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it". It finds that in the present case the essential conditions required for estoppel are not fulfilled. Although there have been repeated representations by Chile of its willingness to negotiate Bolivia's sovereign access to the Pacific Ocean, such representations do not point to an obligation to negotiate. Bolivia has not demonstrated that it changed its position to its own detriment or to Chile's advantage, in reliance on Chile's representations. Therefore, estoppel cannot provide a legal basis for Chile's obligation to negotiate Bolivia's sovereign access to the sea.

5. Legitimate expectations (paras. 160–162)

The Court then examines an argument by Bolivia that Chile's denial of its obligation to negotiate and its refusal to engage in further negotiations with Bolivia "frustrates Bolivia's legitimate expectations". The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained.

6. Article 2, paragraph 3, of the Charter of the United Nations and Article 3 of the Charter of the Organization of American States (paras. 163–167)

The Court then considers whether an obligation to negotiate could be based on Article 2, paragraph 3, of the United Nations Charter or Article 3 of the OAS Charter. It recalls that, according to Article 2, paragraph 3, of the United Nations Charter, "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". For the Court, this paragraph sets forth a general duty to settle disputes in a manner that preserves international peace and security, and justice, but there is no indication in this provision that the parties to a dispute are required to resort to a specific method of settlement, such as negotiation. The Court holds that no obligation to negotiate Bolivia's sovereign access to the Pacific Ocean arises for Chile under the United Nations Charter. Concerning the OAS Charter, the Court recalls that its Article 3 (*i*) provides that "[c]ontroversies of an international character arising between two or more American States shall be settled by peaceful procedures". The Court also does not consider that this provision could be the legal basis of an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

7. The resolutions of the General Assembly of the Organization of American States (paras. 168–171)

The Court next turns to Bolivia's argument that 11 resolutions of the OAS General Assembly which dealt with the issue of its sovereign access to the Pacific Ocean confirm Chile's commitment to negotiate that issue. It notes that none of the relevant resolutions indicates that Chile is under an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. These resolutions merely recommend to Bolivia and Chile that they enter into negotiations over the issue. Moreover, as both Parties acknowledge, resolutions of the General Assembly of the OAS are not per se binding and cannot be the source of an international obligation. Chile's participation in the consensus for adopting some resolutions therefore does not imply that Chile has accepted to be bound under international law by the content of these resolutions. Thus, the Court cannot infer from the content of these resolutions nor from Chile's position with

respect to their adoption that Chile has accepted an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

8. The legal significance of instruments, acts and conduct taken cumulatively (paras. 172–174)

Finally, the Court examines Bolivia's argument that, even if there is no instrument, act or conduct from which, if taken individually, an obligation to negotiate its sovereign access to the Pacific Ocean arises, all these elements may cumulatively have "decisive effect" for the existence of such an obligation. The Court notes that Bolivia's argument of a cumulative effect of successive acts by Chile is predicated on the assumption that an obligation may arise through the cumulative effect of a series of acts, even if it does not rest on a specific legal basis. However, given that the Court's analysis shows that no obligation to negotiate Bolivia's sovereign access to the Pacific Ocean has arisen for Chile from any of the invoked legal bases taken individually, a cumulative consideration of the various bases cannot add to the overall result. It is not necessary for the Court to consider whether continuity existed in the exchanges between the Parties since that fact, if proven, would not in any event establish the existence of an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

IV. General conclusion on the existence of an obligation to negotiate sovereign access to the Pacific Ocean (paras. 175–176)

The Court observes that Bolivia and Chile have a long history of dialogue, exchanges and negotiations aimed at identifying an appropriate solution to the landlocked situation of Bolivia following the War of the Pacific and the 1904 Peace Treaty. The Court is however unable to conclude, on the basis of the material submitted to it, that Chile has "the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean". Accordingly, the Court cannot accept the other final submissions presented by Bolivia, which are premised on the existence of such an obligation, namely that the Court adjudge and declare that Chile has breached that obligation and that Chile must perform that obligation in good faith, promptly, formally, within a reasonable time and effectively. The Court adds that its finding should not be understood as precluding the Parties from continuing their dialogue and exchanges, in a spirit of good neighbourliness, to address the issues relating to the landlocked situation of Bolivia, the solution which both have recognized to be a matter of mutual interest. With willingness on the part of the Parties, meaningful negotiations can be undertaken.

Operative clause (para. 177)

The Court,

(1) By twelve votes to three,

Finds that the Republic of Chile did not undertake a legal obligation to negotiate a sovereign access to the Pacific Ocean for the Plurinational State of Bolivia;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Gevorgian; Judge *ad hoc* McRae;

Against: Judges Robinson, Salam; Judge ad hoc Daudet;

(2) By twelve votes to three,

Rejects consequently the other final submissions presented by the Plurinational State of Bolivia.

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Gevorgian; Judge *ad hoc* McRae;

Against: Judges Robinson, Salam; Judge *ad hoc* Daudet.

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President Yusuf appends a declaration to the Judgment of the Court; Judges Robinson and Salam append dissenting opinions to the Judgment of the Court; Judge *ad hoc* Daudet appends a dissenting opinion to the Judgment of the Court.

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Declaration of President Yusuf

1. President Yusuf agrees with the Court's Judgment on the merits that led the Court to its decision. Nevertheless, he is of the view that the background and circumstances of the present dispute call for certain observations to be made.

2. An obligation to negotiate, like any other obligation in international law, can only arise from a binding commitment assumed by a party in the context of a bilateral agreement or as a unilateral undertaking. On the basis of the evidence made available by the Parties, the Court was unable to find that Chile had undertaken a legal obligation to negotiate Bolivia's "sovereign access" to the Pacific Ocean.

3. This, however, may not put to an end the issues which divide the Parties or remove all the uncertainties affecting their relations. Indeed, the law cannot claim to apprehend all aspects of disputes or the reality of all types of relations between States. There are certain differences or divergence of opinions between States which inherently elude judicial settlement through the application of the law.

4. In such circumstances, it is not inappropriate for the Court to draw the attention of the Parties to the possibility of exploring or continuing to explore other avenues for the settlement of their dispute in the interest of peace and harmony amongst them (see para. 176 of the Judgment).

5. According to President Yusuf, this means that the Court has done what it could as a court of law, but that it is cognizant of the fact that relations between States cannot be limited to their bare legal aspects, and that certain disputes may usefully benefit from other means of resolution that may be available to the parties. In that respect, the Court's work facilitates the peaceful settlement of disputes above and beyond the realm of the strictly legal.

Dissenting opinion of Judge Robinson

In this opinion, Judge Robinson explains his vote against the Court's finding that the Republic of Chile did not undertake a legal obligation to negotiate a sovereign access to the

Pacific Ocean for the Plurinational State of Bolivia and the Court's rejection of the other final submissions of Bolivia.

Judge Robinson has identified the Trucco Memorandum along with Bolivia's response and the Charaña Declarations as giving rise to a legal obligation on the part of Chile to negotiate sovereign access to the Pacific for Bolivia.

In his view, these two sets of instruments establish treaties within the meaning of the Vienna Convention on the Law of Treaties ("VCLT") obliging Chile to negotiate Bolivia's sovereign access to the Pacific Ocean.

In his opinion, in the instant case, the critically important question is whether one can discern in the exchanges between the Parties an intention to be legally bound under international law. For Judge Robinson what is important is the intention of the Parties to be bound under international law, objectively ascertained from the text, and the context or what the Court described in *Aegean Sea* as "the particular circumstances in which [the particular instrument] was drawn up".

For Judge Robinson an expression of willingness to negotiate can take on the character of a legal obligation if the particular circumstances or the context in which the words are used evidence an intention to be legally bound.

He disagrees with the majority's approach to the 1950 Notes for the following reasons. The majority have failed to carry out any meaningful examination of the content of the 1950 Notes and the "particular circumstances" or context in which they were drawn up in order to determine whether the Notes constitute a treaty within the meaning of Article 2 (1) (*a*) of the VCLT. While agreeing that the 1950 Notes are not binding, he does so on the basis of Bolivia's failure to accept Chile's offer of compensation of a non-territorial character, rather than for the reason that they are not an exchange of Notes within the meaning of Article 13 of the VCLT. The 1950 diplomatic Notes do not constitute a treaty—not because they do not meet the requirements for a traditional exchange of Notes, but more simply because Bolivia's non-acceptance of Chile's counter-proposal leaves the Notes without an essential ingredient for treaty making, that is, *consensus ad idem* or a mutuality of commitment between the Parties as to the content of their obligation.

Turning to the Trucco Memorandum and the Bolivian response, Judge Robinson observes that the majority have spent little time analysing the Trucco Memorandum and, in fact, have not analysed the Bolivian response at all. Judge Robinson then conducts an examination of the content and particular circumstances in which they were made. In his view, in the Trucco Memorandum and the Bolivian response, the intention of the Parties to be legally bound is illustrated, *inter alia*, by the following factors:

(i) The stress placed by both Parties on the formality of the negotiations.

(ii) The identification by the Parties of a clear object for the negotiations, that is, the search for a formula that would give Bolivia sovereign access to the Pacific.

(iii) The commitment of the Parties to "direct negotiations", that is, negotiations that would not involve international or regional bodies.

(iv) The embrace of the loaded phrase "sovereign access", used for the first time in the 1950 Notes, indicating that Chile was considering cession of territory to Bolivia for that purpose.

(v) With Bolivia's acceptance of Chile's insistence on compensation of a non-territorial character, the Parties were agreed on the most important element of the negotiations, namely, the search for a formula that would give Bolivia sovereign access to the Pacific in return for compensation of a non-territorial character for Chile.

In his opinion, the Trucco Memorandum cannot be read on its own. It must be read together with Bolivia's response. Consequently, by not analysing Bolivia's response, the majority disregarded the brand-new element of Bolivia's acceptance of the requirement for compensation, and the potential that that response had for creating a binding legal obligation on the part of Chile to negotiate Bolivia's sovereign access to the Pacific.

Judge Robinson therefore concludes that the Trucco Memorandum of 10 July 1961 and the Bolivian response of 9 February 1962 are two related instruments, wherein the Parties have signified their intention to be legally bound and therefore constitute a treaty within the terms of Article 2 (1) (*a*) VCLT; more specifically they constitute two instruments in which Chile has undertaken a legal obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

Judge Robinson concludes that under the 1975 and 1977 Charaña Declarations, Chile has incurred an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

Judge Robinson holds that the obligation incurred by Chile is to find a formula or solution that will enable Bolivia to have sovereign access to the Pacific.

The exchanges between the Parties from 1962 to 2011 demonstrate that Chile's obligation has not been discharged and still exists today.

Therefore, the Court should have granted Bolivia a declaration that Chile has a legal obligation to negotiate directly with Bolivia to find a formula or solution that will enable Bolivia to have sovereign access to the Pacific Ocean.

Dissenting opinion of Judge Salam

In his dissenting opinion, Judge Salam expresses his disagreement with the Court's Judgment on key aspects of its analysis of a number of documents presented by the Parties.

First, noting that an exchange of letters may constitute an international agreement creating rights and obligations for the parties involved, he observes that the Notes exchanged in 1950 by the Bolivian Ambassador to Chile and the Chilean Minister for Foreign Affairs were drafted by persons who were capable of committing their respective States. In his view, Chile's Note reproduced the core terms of the undertaking proposed by Bolivia, namely to "formally enter into direct negotiations" on the question of granting Bolivia sovereign access to the Pacific Ocean, with the aim of conferring "mutual benefit" on both Parties. Judge Salam also draws attention to the reason underlying Chile's commitment and considers that these points

should have led the Court to interpret the exchange of Notes as establishing an obligation to negotiate between the Parties.

He adds that this interpretation is confirmed by the Parties' subsequent practice and, in particular, by the reference to the Note of 20 June 1950 made by the Chilean Ambassador in La Paz in a Memorandum of 10 July 1961 addressed to the Bolivian Foreign Minister. In that Memorandum, Chile states that it is still "willing … to examine directly with Bolivia, the possibility of satisfying" the latter's aspirations. In its reply, Bolivia expresses its "full consent to initiate, as soon as possible, direct negotiations aimed at satisfying the fundamental national need for its own sovereign access to the Pacific Ocean". Judge Salam concludes that, given the terms used and the context in which these Notes were drafted, this exchange should be interpreted as renewing the Parties' 1950 agreement to negotiate.

Judge Salam then notes that Chile's obligation to negotiate with Bolivia a solution to its landlocked situation is also confirmed by unilateral declarations made by Chile. He points, in particular, to the letter sent by the Chilean President to his Bolivian counterpart, in which the former writes of his Government's "intention of promoting the ongoing negotiation aimed at satisfying the longings of the brother country to obtain a sovereign outlet to the Pacific Ocean". Recalling that declarations taking the form of unilateral acts may have the effect of creating legal obligations where the person making the declaration is capable of committing the State, Judge Salam considers that these words clearly reflect Chile's intention to fulfil its undertaking to negotiate with Bolivia.

Thus, in Judge Salam's opinion, the events which followed the 1950 exchange of Notes, and in particular the Trucco Memorandum, the Charaña Declaration, the letter of 18 January 1978 from the Chilean President to the Bolivian President, and Chile's participation in subsequent rounds of negotiations (in particular, the period of the so-called "fresh approach", the Chilean-Bolivian mechanism for political consultation introduced in the early 1990s, the 13-Point Agenda of July 2006 and the establishment in 2011 of a binational commission for ministerial-level negotiations) constitute a set of actions from which it may reasonably be inferred that Chile and Bolivia were bound by a continuing obligation to negotiate the question of granting Bolivia sovereign access to the Pacific Ocean. He adds that the failure of a round of negotiations does not suffice in itself to infer that such an obligation is extinguished.

Judge Salam reaches this conclusion without reference to the principles of estoppel, acquiescence and legitimate expectations, however, since he does not believe that the conditions for their application are satisfied in this case.

Lastly, Judge Salam examines the nature and scope of the undertaking given, and recalls that this undertaking is limited and cannot be an obligation of result, as frequently claimed by Bolivia.

Dissenting opinion of Judge *ad hoc* Daudet

The Court did not uphold any of the grounds claimed by the Applicant to be capable of creating an obligation for Chile to negotiate sovereign access to the sea for Bolivia. In his dissenting opinion, Judge *ad hoc* Daudet considers that at least three elements should nonetheless have been regarded as constituting such an obligation, namely the 1920 "Acta Protocolizada", the 1950 exchange of Notes and the Charaña process of 1975–1978, each of which he examines in turn. However, he agrees with the Court's finding that Bolivia's reliance on other elements, and on estoppel and the principle of legitimate expectations, cannot be upheld.

More generally, Judge *ad hoc* Daudet is of the view that the main point of law in the Court's decision concerns preserving the integrity of the legal nature of international negotiation, which, according to the Court, "is part of the usual practice of States in their bilateral and multilateral relations". The concern to preserve that integrity underlies the Court's position that a State cannot be compelled to enter into international negotiations which do not arise from a legally binding commitment to do so, but from a mere political option.

Judge *ad hoc* Daudet believes that, in applying this principle to the case in hand, the Court has not taken due care to contextualize the rule of law, failing to take into account the cumulative effect of the successive elements invoked by Bolivia and making an overly rigid distinction between legal obligations and moral or political and diplomatic ones. A significant part of his dissenting opinion explores how, on the contrary, when taken cumulatively, legal elements produce legal effects.

As regards the moral aspects, Judge *ad hoc* Daudet is of the view that they have not been satisfactorily addressed through a closer consideration of the effects of the principle of good faith, which is another fundamental component of international negotiations. Judge *ad hoc* Daudet observes that in certain situations, legal rules and moral rules coincide, as is only natural in a system of law including principles which themselves derive from moral rules. Although a mere intention to negotiate is not an obligation to do so, Judge *ad hoc* Daudet questions whether, when an intention is repeated over the years, and frequently by a State's senior officials, the line between moral intention and legal obligation becomes blurred.

Judge *ad hoc* Daudet adds that it would undoubtedly have been helpful to further clarify the measure of ambiguity surrounding Bolivia's position on the nature of the obligation to negotiate, a notion which, moreover, has specific characteristics and raises questions.

Finally, Judge *ad hoc* Daudet welcomes the fact that, in the last paragraph of its Judgment, the Court does not draw a line under the question of Bolivia's sovereign access to the sea, stating that its decision must be understood as signifying that the Parties may continue their negotiations on a question which they have both recognized to be a matter of mutual interest and thereby bring an end to this dispute.

231. ALLEGED VIOLATIONS OF THE 1955 TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS (ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA) [PROVISIONAL MEASURES]

Order of 3 October 2018

On 3 October 2018, the International Court of Justice issued an Order on the Request for the indication of provisional measures submitted by Iran in the case concerning *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America)*. In its Order, the Court indicated various provisional measures.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judges *ad hoc* Brower, Momtaz; Registrar Couvreur.

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Procedural context (paras. 1–15)

The Court begins by recalling that, on 16 July 2018, Iran instituted proceedings against the United States with regard to alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States (hereinafter the "Treaty of Amity" or the "1955 Treaty"). The same day, Iran also submitted a Request for the indication of provisional measures aimed at preserving its rights under the 1955 Treaty, pending the Court's final decision in the case.

I. Factual background (paras. 16–23)

The Court then sets out the factual background of the case. It notes in this regard that, on 8 May 2018, the President of the United States issued a National Security Presidential Memorandum announcing the end of its participation in the Joint Comprehensive Plan of Action (JCPOA)—an agreement on Iran's nuclear programme reached on 14 July 2015 by Iran, the five permanent members of the United Nations Security Council, plus Germany and the European Union—and directing the reimposition, with regard to Iran, of "sanctions lifted or waived in connection with the JCPOA". In the Memorandum, the President indicated in particular that Iran had publicly declared that it would deny the International Atomic Energy Agency access to military sites, and that, in 2016, Iran had twice violated the JCPOA's heavy-water stockpile limits. It was announced that "sanctions" would be reimposed in two steps. Upon expiry of a first wind-down period of 90 days, ending on 6 August 2018, the United States would reimpose a certain number of "sanctions" concerning, in particular, financial transactions, trade in metals, the importation of Iranian-origin carpets and foodstuffs, and the export of commercial passenger aircraft and related parts. Following a second wind-down period of 180 days, ending on 4 November 2018, the United States would reimpose additional "sanctions".

Thus, on 6 August 2018, the President of the United States issued Executive Order 13846 "Reimposing Certain Sanctions" on Iran and Iranian nationals. In particular, Section 1 concerns "Blocking Sanctions Relating to Support for the Government of Iran's Purchase or Acquisition of U.S. Bank Notes or Precious Metals; Certain Iranian Persons; and Iran's Energy, Shipping, and Shipbuilding Sectors and Port Operators". Section 2 concerns "Correspondent and Payable-Through Account Sanctions Relating to Iran's Automotive Sector; Certain Iranian Persons; and Trade in Iranian Petroleum, Petroleum Products; and Petrochemical Products". Sections 3, 4 and 5 provide for the modalities of "'Menu-based' Sanctions Relating to Iran's Automotive Sector and Trade in Iranian Petroleum, Petroleum Products, and Petrochemical Products". Section 6 concerns "Sanctions Relating to the Iranian Rial". Section 7 relates to "Sanctions with Respect to the Diversion of Goods Intended for the People of Iran, the Transfer of Goods or Technologies to Iran that are Likely to be Used to Commit Human Rights Abuses, and Censorship". Section 8 relates to "Entities Owned or Controlled by a United States Person and Established or Maintained Outside the United States". Earlier Executive Orders implementing United States commitments under the JCPOA are revoked in Section 9. Section 2 (*e*) of Executive Order 13846 provides that certain subsections of Section 3 shall not apply with respect to any person for conducting or facilitating a transaction for the provision (including any sale) of agricultural commodities, food, medicine or medical devices to Iran.

II. Prima facie *jurisdiction* (paras. 24–52)

The Court first observes that it may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded; it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. The Court notes that, in the present case, Iran seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article XXI, paragraph 2, of the 1955 Treaty[1]. The Court must first determine whether it has *prima facie* jurisdiction to rule on the merits of the case, enabling it—if the other necessary conditions are fulfilled—to indicate provisional measures.

1. Existence of a dispute as to the interpretation or application of the Treaty of Amity (paras. 27–44)

The Court notes that Article XXI, paragraph 2, of the 1955 Treaty makes the jurisdiction of the Court conditional on the existence of a dispute as to the interpretation or application of the Treaty. The Court must therefore verify *prima*

[1] Article XXI, paragraph 2, of the 1955 Treaty reads as follows:
"Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

facie two different requirements, namely whether there exists a dispute between the Parties and whether this dispute concerns the "interpretation or application" of the 1955 Treaty. The Court observes that, in the present case, while the Parties do not contest that a dispute exists, they differ on the question whether this dispute relates to the "interpretation or application" of the 1955 Treaty. In order to determine whether that is the case, the Court must ascertain whether the acts complained of by the Applicant are *prima facie* capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court could have jurisdiction *ratione materiae* to entertain.

The Court considers that the fact that the dispute between the Parties arose in connection with and in the context of the decision of the United States to withdraw from the JCPOA does not in and of itself exclude the possibility that the dispute relates to the interpretation or application of the Treaty of Amity. In its view, to the extent that the measures adopted by the United States following its decision to withdraw from the JCPOA might constitute violations of certain obligations under the 1955 Treaty, such measures relate to the interpretation or application of that instrument. The Court also observes that the JCPOA does not grant exclusive competence to the dispute settlement mechanism it establishes with respect to measures adopted in its context and which may fall under the jurisdiction of another dispute settlement mechanism. Therefore, the Court considers that the JCPOA and its dispute settlement mechanism do not remove the measures complained of from the material scope of the Treaty of Amity nor exclude the applicability of its compromissory clause.

The Court observes that Article XX, paragraph 1, defines a limited number of instances in which, notwithstanding the provisions of the Treaty, the Parties may apply certain measures. This includes measures relating to "fissionable materials, the radioactive by-products thereof, or the sources thereof" (subparagraph (*b*)). It also includes measures "necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests" (subparagraph (*d*)). The Court considers that whether and to what extent those exceptions have lawfully been relied on by the Respondent in the present case is a matter which is subject to judicial examination and, hence, forms an integral part of the material scope of the Court's jurisdiction as to the "interpretation or application" of the Treaty under Article XXI, paragraph 2.

The Court further considers that the 1955 Treaty contains rules providing for freedom of trade and commerce between the United States and Iran, including specific rules prohibiting restrictions on the import and export of products originating from the two countries, as well as rules relating to the payment and transfer of funds between them. In the Court's view, measures adopted by the United States, for example, the revocation of licences and authorizations granted for certain commercial transactions between Iran and the United States, the ban on trade of certain items, and limitations to financial activities, might be regarded as relating to certain rights and obligations of the Parties to that Treaty. The Court is therefore satisfied that at least the aforementioned measures which were complained of by Iran are indeed *prima facie* capable of falling within the material scope of the 1955 Treaty.

The Court finds that the above-mentioned elements are sufficient at this stage to establish that the dispute between the Parties relates to the interpretation or application of the Treaty of Amity.

2. The issue of satisfactory adjustment by diplomacy under Article XXI, paragraph 2, of the Treaty of Amity (paras. 45–51)

The Court recalls that, under the terms of Article XXI, paragraph 2, of the 1955 Treaty, the dispute submitted to it must not have been "satisfactorily adjusted by diplomacy". The Court concludes from the wording of this provision that there is no need for it to examine whether formal negotiations have been engaged in or whether the lack of diplomatic adjustment is due to the conduct of one party or the other. It is sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to it.

In the present case, the communications sent by the Government of Iran to the Embassy of Switzerland (Foreign Interests Section) in Tehran on 11 and 19 June 2018 did not prompt any response from the United States, and there is no evidence in the case file of any direct exchange on this matter between the Parties. As a consequence, the Court notes that the dispute had not been satisfactorily adjusted by diplomacy, within the meaning of Article XXI, paragraph 2, of the 1955 Treaty, prior to the filing of the Application on 16 July 2018.

3. Conclusion as to prima facie *jurisdiction* (para. 52)

In light of the foregoing, the Court concludes that, *prima facie*, it has jurisdiction pursuant to Article XXI, paragraph 2, of the 1955 Treaty to deal with the case, to the extent that the dispute between the Parties relates to the "interpretation or application" of the said Treaty.

III. The rights whose protection is sought and the measures requested (paras. 53–76)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties in a given case, pending its final decision. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible.

The Court notes that, under the provisions of the 1955 Treaty, both contracting Parties enjoy a number of rights with regard to financial transactions, the import and export of products to and from each other's territory, the treatment of nationals and companies of the Parties and, more generally, freedom of commerce and navigation. The Court further notes that the United States does not, as such, contest that Iran holds these rights under the 1955 Treaty, or that the measures adopted are capable of affecting these rights. Instead, the United States claims that Article XX, paragraph 1, of the 1955 Treaty, entitles it to apply certain measures, *inter alia*,

to protect its essential security interests, and argues that the plausibility of the alleged rights of Iran must be assessed in light of the plausibility of the rights of the United States.

The Court notes that the rights whose preservation is sought by Iran appear to be based on a possible interpretation of the 1955 Treaty and on the *prima facie* evidence of the relevant facts. Further, in the Court's view, some of the measures announced on 8 May 2018 and partly implemented by Executive Order 13846 of 6 August 2018, such as the revocation of licences granted for the import of products from Iran, the limitation of financial transactions and the prohibition of commercial activities, appear to be capable of affecting some of the rights invoked by Iran under certain provisions of the 1955 Treaty.

However, in assessing the plausibility of the rights asserted by Iran under the 1955 Treaty, the Court must also take into account the invocation by the United States of Article XX, paragraph 1, subparagraphs (*b*) and (*d*), of the Treaty. The Court need not carry out at this stage of the proceedings a full assessment of the respective rights of the Parties under the 1955 Treaty. However, the Court considers that, in so far as the measures complained of by Iran could relate "to fissionable materials, the radio-active by-products thereof, or the sources thereof", or could be "necessary to protect … essential security interests" of the United States, the application of Article XX, paragraph 1, subparagraphs (*b*) or (*d*), might affect at least some of the rights invoked by Iran under the Treaty of Amity.

Nonetheless, the Court is of the view that other rights asserted by Iran under the 1955 Treaty would not be so affected. In particular, Iran's rights relating to the importation and purchase of goods required for humanitarian needs, and to the safety of civil aviation, cannot plausibly be considered to give rise to the invocation of Article XX, paragraph 1, subparagraphs (*b*) or (*d*).

In light of the foregoing, the Court concludes that, at this stage of the proceedings, some of the rights asserted by Iran under the 1955 Treaty are plausible in so far as they relate to the importation and purchase of goods required for humanitarian needs, such as (i) medicines and medical devices, and (ii) foodstuffs and agricultural commodities, as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested.

The Court recalls that Iran has requested the suspension of the implementation and enforcement of all measures announced on 8 May 2018 and the full implementation of transactions already licensed. Iran has further requested the Court to order that the United States must, within three months, report on the action taken with regard to those measures and assure "Iranian, US and non-US nationals and companies that it will comply with the Order of the Court" and that it "shall cease any and all statements or actions that would dissuade US and non-US persons and entities from engaging or continuing to engage economically with Iran and Iranian nationals or companies". Finally, Iran has requested that the United States refrain from taking any other measure that might prejudice the rights of Iran and Iranian nationals under the 1955 Treaty.

The Court has already found that at least some of the rights asserted by Iran under the 1955 Treaty are plausible. It recalls that this is the case with respect to the asserted rights of Iran, in so far as they relate to the importation and purchase of goods required for humanitarian needs, such as (i) medicines and medical devices, and (ii) foodstuffs and agricultural commodities, as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft. In the view of the Court, certain aspects of the measures requested by Iran aimed at ensuring freedom of trade and commerce, particularly in the above-mentioned goods and services, may be considered to be linked to those plausible rights whose protection is being sought.

The Court concludes, therefore, that a link exists between some of the rights whose protection is being sought and certain aspects of the provisional measures being requested by Iran.

IV. Risk of irreparable prejudice and urgency (paras. 77–94)

The Court recalls that it has the power to indicate provisional measures when there is a risk that irreparable prejudice could be caused to rights which are the subject of judicial proceedings, or when the alleged disregard of such rights may entail irreparable consequences. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case.

The Court notes that the decision announced on 8 May 2018 appears to have already had an impact on the import and export of products originating from the two countries as well as on the payments and transfer of funds between them, and that its consequences are of a continuing nature. The Court notes that, as of 6 August 2018, contracts concluded before the imposition of measures involving a commitment on the part of Iranian airline companies to purchase spare parts from United States companies (or from foreign companies selling spare parts partly constituted of United States components) appear to have been cancelled or adversely affected. In addition, companies providing maintenance for Iranian aviation companies have been prevented from doing so when it involved the installation or replacement of components produced under United States licences.

Furthermore, the Court notes that, while the importation of foodstuffs, medical supplies and equipment is in principle exempted from the United States' measures, it appears to have become more difficult in practice, since the announcement of the measures by the United States, for Iran, Iranian companies and nationals to obtain such imported foodstuffs, supplies and equipment. In this regard, the Court observes that, as a result of the measures, certain foreign banks have withdrawn from financing agreements or suspended co-operation with Iranian banks. Some of these banks also refuse

to accept transfers or to provide corresponding services. It follows that it has become difficult if not impossible for Iran, Iranian companies and nationals to engage in international financial transactions that would allow them to purchase items not covered, in principle, by the measures, such as foodstuffs, medical supplies and medical equipment.

The Court considers that certain rights of Iran under the 1955 Treaty invoked in these proceedings, which it has found to be plausible, are of such a nature that disregard of them may entail irreparable consequences. This is the case in particular for those rights relating to the importation and purchase of goods required for humanitarian needs, such as (i) medicines and medical devices, (ii) foodstuffs and agricultural commodities, and goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft.

The Court is of the view that a prejudice can be considered as irreparable when the persons concerned are exposed to danger to health and life. In its opinion, the measures adopted by the United States have the potential to endanger civil aviation safety in Iran and the lives of its users to the extent that they prevent Iranian airlines from acquiring spare parts and other necessary equipment, as well as from accessing associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft. The Court further considers that restrictions on the importation and purchase of goods required for humanitarian needs, such as foodstuffs and medicines, including life-saving medicines, treatment for chronic disease or preventive care, and medical equipment, may have a serious detrimental impact on the health and lives of individuals on the territory of Iran.

The Court notes that, during the oral proceedings, the United States offered assurances that its Department of State would "use its best endeavours" to ensure that "humanitarian or safety of flight-related concerns which arise following the reimposition of the United States sanctions" receive "full and expedited consideration by the Department of the Treasury or other relevant decision-making agencies". While appreciating these assurances, the Court considers nonetheless that, in so far as they are limited to an expression of best endeavours and to co-operation between departments and other decision-making agencies, the said assurances are not adequate to address fully the humanitarian and safety concerns raised by the Applicant. Therefore, the Court is of the view that there remains a risk that the measures adopted by the United States, as set out above, may entail irreparable consequences.

The Court further notes that the situation resulting from the measures adopted by the United States, following the announcement of 8 May 2018, is ongoing, and that there is, at present, little prospect of improvement. Moreover, the Court considers that there is urgency, taking into account the imminent implementation by the United States of an additional set of measures scheduled for after 4 November 2018.

V. Conclusion and measures to be adopted (paras. 95–101)

The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Iran, as identified above. In the present case, having examined the terms of the provisional measures requested by Iran and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

The Court considers that the United States, in accordance with its obligations under the 1955 Treaty, must remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of Iran of goods required for humanitarian needs, such as (i) medicines and medical devices, and (ii) foodstuffs and agricultural commodities, as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft. To this end, the United States must ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to above.

The Court recalls that Iran has requested that it indicate measures aimed at ensuring the non-aggravation of its dispute with the United States. When indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require. In this case, having considered all the circumstances, in addition to the specific measures it has decided to take, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute.

Moreover, the Court reaffirms that its orders on provisional measures have binding effect and create international legal obligations for any party to whom the provisional measures are addressed. It further notes that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves.

VI. Operative clause (para. 102)

The Court,

Indicates the following provisional measures:

(1) Unanimously,

The United States of America, in accordance with its obligations under the 1955 Treaty of Amity, Economic Relations, and Consular Rights, shall remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of

(i) medicines and medical devices;

(ii) foodstuffs and agricultural commodities; and

(iii) spare parts, equipment and associated services (including warranty, maintenance, repair

services and inspections) necessary for the safety of civil aviation;

(2) Unanimously,

The United States of America shall ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to in point (1);

(3) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

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Judge Cançado Trindade appends a separate opinion to the Order of the Court; Judge *ad hoc* Momtaz appends a declaration to the Order of the Court.

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Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of 15 parts, Judge Cançado Trindade begins by pointing out that he has concurred with his vote to the adoption by unanimity by the ICJ of its present Order indicating Provisional Measures of Protection. He adds that, as he attributes great importance to some related issues in the *cas d'espèce*, that in his perception underlie the present decision of the ICJ but are not entirely dealt with in the Court's reasoning, he feels obliged to leave on the records, in the present Separate Opinion, the identification of such issues and the foundations of his personal position thereon.

2. His reflections address mainly key points pertaining to provisional measures of protection (part I). Before turning to his examination of them, he deems it fit to start with his initial considerations of a hermeneutical and axiological nature, dwelling upon three points he regards as also significant in the proper handling of the *cas d'espèce*, namely: (*a*) international peace: treaties as living instruments, in the progressive development of international law; (*b*) provisional measures: the existence of the Court's *prima facie* jurisdiction; and (*c*) the prevalence of the imperative of the realization of justice over the invocation of "national security interests".

3. His following considerations, focused on provisional measures of protection, are, at a time, conceptual and epistemological, juridical and philosophical, always attentive to human values. The first part of them, of a conceptual and epistemological character, comprises: (*a*) transposition of provisional measures of protection from comparative domestic procedural law onto international legal procedure; (*b*) juridical nature of provisional measures of protection; (*c*) the evolution of provisional measures of protection; (*d*) provisional measures of protection and the preventive dimension of international law; and (*e*) provisional measures of protection and continuing situations of vulnerability.

4. The second part of his reflections on provisional measures of protection, of a juridical and philosophical nature, encompasses: (*a*) human vulnerability: humanitarian considerations; (*b*) beyond the strict inter-State outlook: attention to peoples and individuals; (*c*) continuing risk of irreparable harm; (*d*) continuing situation affecting rights and the irrelevance of the test of their so-called "plausibility"; and (*e*) considerations on international security and urgency of the situation. Last but not least, he presents, in an epilogue, a recapitulation of the key points of the position he sustains in the present Separate Opinion.

5. Judge Cançado Trindade at first observes, as to international peace, that international treaties, encompassing the 1955 Treaty of Amity, are *living* instruments, to be understood on the basis of circumstances in which they are to be applied. This is in accordance with the ICJ's *jurisprudence constante*. This evolutionary approach to treaty interpretation stems from Article 31 of the 1969 Vienna Convention on the Law of Treaties.

6. He adds that, in their interpretation and application, the object and purpose of treaties are to be kept in mind (part II). Their evolutionary interpretation ensuing therefrom has contributed to the progressive development of international law. As to the present case, the object and purpose of the 1955 Treaty (Article I) (a firm and enduring peace and friendship between the parties) have likewise been addressed by the ICJ in earlier cases, so as to assist in its interpretation.

7. In ordering provisional measures of protection—Judge Cançado Trindade proceeds—the ICJ (and other international tribunals), even when faced with allegations of "national security interests", pursues, on the basis of its Statute and *interna corporis*, its mission of realization of justice. This is confirmed by the ICJ's relevant *jurisprudence constante* (part III). *Prima facie* jurisdiction is autonomous from jurisdiction on the merits, as acknowledged also by a more lucid trend of international legal doctrine.

8. There is, in his understanding, the prevalence of the imperative of the realization of justice over the invocation of "national security interests" or strategies (part IV). This is revealed by the case-law of the ICJ itself. In Judge Cançado Trindade's words,

> "The idea of objective justice and human values stands above facts, which *per se* do not generate law-creating effects; *ex conscientia jus oritur*. The imperative of the realization of justice prevails over manifestations of a State's 'will' … My position, in the realm of provisional measures of protection, has been a consistently anti-voluntarist one. Conscience stands above the 'will'" (para. 26).

9. The gradual formation of the *autonomous legal regime* of provisional measures of protection—which Judge Cançado Trindade has been sustaining for many years—has presented distinct component elements, starting with the transposition of those measures from comparative domestic procedural law onto international legal procedure (part V). They have a juridical nature of their own: directly related to the realization of justice itself, provisional measures of protection, being anticipatory in nature, in evolving from *precautionary* to *tutelary*, have been contributing to the progressive development of international law (part VI).

10. When the basic requisites—of gravity and urgency, and the needed prevention of irreparable harm—of

provisional measures are met—Judge Cançado Trindade ponders—"they have been ordered (by international tribunals), in the light of the needs of protection, and have thus conformed a true *jurisdictional guarantee of a preventive character*" (para. 35). The autonomous legal regime of provisional measures of protection is configured—he recalls,

> "by the *rights* to be protected (not necessarily identical to those vindicated later in the merits stage), by the *obligations* emanating from the provisional measures of protection, generating autonomously State *responsibility*, with its legal consequences, and by the presence of (potential) victims already at the stage of provisional measures of protection" (para. 36).

11. The notion of victim (or of *potential* victim), or injured party, can accordingly emerge also in the context proper to provisional measures of protection, irrespective of the decision as to the merits of the case at issue (part. VII). He adds that

> "the duty of compliance with provisional measures of protection (another element configuring their autonomous legal regime) keeps on calling for further elaboration, as non-compliance with them generates *per se* State responsibility and entails legal consequences" (para. 37).

In his perception, provisional measures have been extending protection to growing numbers of individuals (potential victims) in situations of vulnerability; they have thus been transformed into a true jurisdictional *guarantee* with a preventive character (part VIII).

12. Judge Cançado Trindade then draws attention to a significant point, namely, that the ICJ case-law—to which the present Order is added—reveals the great need and relevance of provisional measures of protection in *continuing situations* of tragic vulnerability of human beings. In the present case, for example, the sanctions imposed by the respondent State as from 8 May 2018 appear to have already had an impact and consequences of a "continuing nature" (part IX). The situation resulting therefrom, is "ongoing" and without prospect of improvement. Hence the needed provisional measures of protection that the Court has just indicated in the present Order (para. 49).

13. Given the continuing situation of human vulnerability, wherein provisional measures of protection assume particular importance, Judge Cançado Trindade moves on to his "humanitarian considerations" (part X). He recalls, in historical perspectives, thinkers warning, along the centuries, against the vulnerability of human beings in face of extreme violence and destruction (such as, e.g., in ancient Greece, the tragedies by Aeschylus, Sophocles and Euripides, singling out cruelty, human vulnerability and loneliness) (paras. 52–55 and 58).

14. In fact, awareness of the dictates of justice (in the line of jusnaturalist thinking) was already present in the writings of ancient Greek tragedians. They nourished the prevalence of human conscience over the will, of jusnaturalism over legal positivism (para. 53), which marked its presence in the *jus gentium* (*droit des gens*) at the time of its "founding fathers" (in the Sixteenth and Seventeenth centuries) (para. 55). From ancient times to nowadays, there has been support for the prevalence of human conscience over the will, of jusnaturalism over legal positivism.

15. After all—he continues—the conscience of the sense of human dignity clarifies that, one "cannot impose suffering upon foreigners, or vulnerable persons" (para. 57). In effect, "the lessons from the ancient Greek tragedies have remained topical and perennial to date" (para. 58). And Judge Cançado Trindade adds that "[s]ome 24 centuries after they were written and performed, thinkers kept on writing on human suffering in face of cruelty, at times as if being in search of salvation for humankind", in the Nineteenth and Twentieth centuries (paras. 58–59).

16. Yet—he adds—despite their warnings, "lessons have not been learned from the past" (para. 59), as shown by the

> "human capacity for devastation or destruction [that] has become unlimited in the Twentieth and Twenty-first centuries (with weapons of mass destruction, in particular nuclear weapons). (…)
>
> It should not pass unnoticed that human vulnerability here, in relation to the factual context of the present case of *Alleged Violations of the 1955 Treaty of Amity*, encompasses the whole international community, indeed humankind as a whole, in face of the deadliness of nuclear weapons. There is a great need not only of their non-proliferation, but also and ultimately of nuclear disarmament, as a universal obligation. (…)
>
> Neither theology, nor psychology, nor philosophy, have succeeded in providing answers or persuasive explanation of the persistence of evil and cruelty in human conduct. The matter has been addressed at length in literature. But the growing capacity of human beings for destruction in our times has, at least, generated a reaction of human conscience against evil actions … in the form of the elaboration and cultivation and enforcement of *responsibility* for all such evil actions. Here international law has a role to play, without prescinding from the inputs of those other branches of human knowledge" (paras. 60–61 and 63).

17. Judge Cançado Trindade further recalls that, as he has sustained his three Dissenting Opinions in the recent cases on *Obligations of Nuclear Disarmament* (Marshall Islands *versus* United Kingdom, India and Pakistan, Judgments of 05 October 2016), the imperative of respect for life and the relevance of humanist values require more attention. And he then stresses that the needed prevalence of human conscience, the universal juridical conscience, over State voluntarism is much needed, in the sense that

> "it is the universal juridical conscience that is the ultimate material source of international law … [O]ne cannot face the new challenges confronting the whole international community keeping in mind only State susceptibilities; such is the case with the obligation to render the world free of nuclear weapons, an imperative of *recta ratio* and not a derivative of the 'will' of States. In effect, to keep hope alive it is necessary to bear always in mind humankind as a whole" (para. 64).

18. Judge Cançado Trindade reiterates that the imperatives of *recta ratio*, of the universal juridical conscience, overcome the invocations of *raison d'État*. Furthermore, the protection, by means of provisional measures, of the human person (individuals and groups in vulnerability), goes beyond the strict inter-State dimension. And he recalls that the 1945 United Nations Charter itself, followed three years later by

the 1948 Universal Declaration of Human Rights, is attentive to "the peoples of the United Nations", surpassing the reductionist inter-State outlook; and proclaims, in its preamble, the determination of "the *peoples* of the United Nations" to "*save succeeding generations* from the scourge of war" (para. 68).

19. In the present case opposing Iran to the United States—he proceeds—the 1955 Treaty of Amity between them refers, *inter alia*, to the obligation of each State Party to care for "the health and welfare of its people" (Article VII (1)); it also addresses the obligations of the two States Parties always to "accord fair and equitable treatment to nationals and companies" of each other, thus refraining from applying "discriminatory measures" (Article IV (1)). Stressing this point, it further refers to the obligation of the two States Parties to accord fair treatment to their "nationals and companies", without discriminatory measures (Article IX (2) (3)). (para. 69).

20. Judge Cançado Trindade further underlines that there is in the *cas d'espèce* a *continuing situation* of risk of irreparable harm, affecting at a time the rights of the applicant State and its nationals (part XII). A *continuing situation* of the kind has had an incidence in earlier cases before the ICJ as well (part XIII); in his Separate Opinion in the case of *Application of the ICSFT Convention and of the CERD Convention* (Ukraine *versus* Russian Federation, Order of 19 April 2017), he emphasized that the continuing "tragedy of human vulnerability" (and not the test of so-called "plausibility") paved the way for the indication of provisional measures of protection (para. 74).

21. He also refers to his Separate Opinion in the case of *Jadhav* (India *versus* Pakistan, Order of 18 May 2017), where he pondered that the right to information on consular assistance is, in the circumstances of the *cas d'espèce*, "inextricably linked to the right to life itself, a fundamental and non-derogable right, rather than a simply 'plausible' one" (para. 75). In such a *continuing situation* as in the *Jadhav* case, the rights being affected and requiring protection "are clearly known, there being no sense to wonder whether they are 'plausible'. The test of 'plausibility' is here irrelevant" (para. 76). In cases, like the present one opposing Iran to the United States, where the rights—the protection of which is sought by means of provisional measures—"are clearly defined in a treaty [the Treaty of Amity of 1955], to invoke 'plausibility' makes no sense" (para. 77).

22. Judge Cançado Trindade then turns to his remaining line of considerations, on international security and urgency of the situation (part XIV). The Joint Comprehensive Plan of Action (JCPOA) was endorsed by United Nations Security Council resolution 2231, of 20 July 2015, which *inter alia* referred to principles of international law and the rights under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons [NPT] "and other relevant instruments". Among these latter—observes Judge Cançado Trindade—the international community counts today also on the 2017 Treaty on the Prohibition of Nuclear Weapons (para. 81). And he adds:

> "This evolution shows that non-proliferation has never been its final stage; beyond it, it is nuclear *disarmament* that can secure the survival of humankind itself as a whole; there is a universal obligation of nuclear disarmament. Nuclear weapons are unethical and unlawful, an affront to humankind. The persistence of modernized arsenals of them in some countries is a cause of great concern and regret of the international community as a whole. National perceptions cannot lose sight of international security" (para. 82).

23. He advances the view that, in the present case, it is necessary to keep in mind international security, as it concerns the international community as a whole (paras. 78–82). He then recalls that concerns in this respect have recently been expressed by other States parties to the JCPOA, by the United Nations Secretary General, by the IAEA Director General, by the United Nations OHCHR's Special *Rapporteur*; it is indeed a matter of international concern (paras. 83–89).

24. Judge Cançado Trindade points out that, in ordering the present provisional measures of protection, the ICJ has duly taken into account the *humanitarian needs* of the affected population and individuals, so as to indicate measures in order to safeguard their rights (paras. 90–92). This is a case, like previous ones before the ICJ, where provisional measures of protection have been ordered in situations of human vulnerability. Among the rights for which provisional measures of protection have here been vindicated, and have been duly ordered by the ICJ in the *cas d'espèce* so as to safeguard them, are the rights related to human life and human health, which thus pertain to individuals, to human beings (para. 92).

25. Last but not least, Judge Cançado Trindade then concludes (part XV) that the fact that the matter at issue in the *cas d'espèce* has been handled on an inter-State basis—characteristic of the *contentieux* before the ICJ—does not at all mean that the Court is to reason likewise on a strictly inter-State basis; to him, it is "the nature of a case that will call for a reasoning, so as to reach a solution. The present case of *Alleged Violations of the 1955 Treaty of Amity* concerns not only State rights, but rights of human beings as well" (para. 94).

26. Such ordering of provisional measures of protection by the ICJ can only be properly undertaken from a humanist perspective (para. 93), thus necessarily avoiding the pitfalls of an outdated and impertinent attachment to State voluntarism. Once again—he stresses—"in the present case and always, human beings stand in need, ultimately, of protection against evil, which lies within themselves" (para. 106). In this perspective, "the *raison d'humanité* is to prevail over the *raison d'État*", and "[t]he humanized international law (*droit des gens*) prevails over alleged 'national security' interests or strategies" (para. 106).

Declaration of Judge *ad hoc* Momtaz

Judge *ad hoc* Momtaz states that he voted in favour of the three provisional measures indicated by the Court in paragraph 102 of its Order. However, he fears that the first two provisional measures are not sufficient to protect the rights of Iran as a matter of urgency or to avoid irreparable prejudice being caused to those rights. He is thus of the view that the first provisional measure should also have applied to the purchase of aircraft and to the orders which have already been placed by Iran and which are subject to the sanctions reimposed by the United States. As regards the second provisional measure, Judge *ad hoc* Momtaz believes that it would have

been desirable for the Court to request that the United States refrain from taking any measures aimed at discouraging the companies and nationals of third States from maintaining trade relations with Iran, in particular to enable Iran to purchase new civil aircraft. Although Judge *ad hoc* Momtaz agrees with the reasoning set out in the Court's Order, he raises three questions on which the Court did not rule.

First, Judge *ad hoc* Momtaz considers that Security Council resolution 2231 (2015) forms part of the factual background of the dispute submitted to the Court. That resolution endorsed the Joint Comprehensive Plan of Action (JCPOA) and imposed obligations on all United Nations Member States, including the United States. Moreover, on the basis of reports by the International Atomic Energy Agency (IAEA), which was mandated by the Security Council to verify and monitor Iran's compliance with its nuclear-related commitments under the JCPOA, Judge *ad hoc* Momtaz questions the validity of the arguments put forward by the United States to justify the reimposition of sanctions.

Second, Judge *ad hoc* Momtaz questions the lawfulness of the secondary sanctions adopted by the United States. Those sanctions have an extraterritorial scope and aim to influence directly the choice of sovereign States in formulating their external relations, which constitutes a violation of the fundamental principle of non-intervention, as enshrined in the Charter of the United Nations. Further, Judge *ad hoc* Momtaz considers that those secondary sanctions may also be in violation of the United States' obligations within the framework of the World Trade Organization (WTO). He also takes the view that the United States cannot rely on the exception provided for in Article XX, paragraph 1 (*d*), of the Treaty of Amity, Economic Relations, and Consular Rights of 15 August 1955, nor that set out in Article XXI of the General Agreement on Tariffs and Trade (GATT).

Third, Judge *ad hoc* Momtaz believes that the provisional measure concerning the non-aggravation of the dispute set out in point (3) of paragraph 102, the operative part of the Court's Order, is not sufficient to hope to achieve a conciliatory climate between the Parties. If, as is the case here, there is no Security Council resolution calling on the parties to a given dispute to comply with international law, it falls to the Court to do so, with a view to re-establishing and preserving international peace and security in the region. The Court, the principal judicial organ of the United Nations, in so doing "does not … arrogate any powers excluded by its Statute when, otherwise than by adjudication, it assists, facilitates or contributes to the peaceful settlement of disputes between States, if offered the occasion at any stage of the proceedings" (*Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, separate opinion of Judge Lachs, p. 20).

232. CERTAIN IRANIAN ASSETS (ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA) [PRELIMINARY OBJECTIONS]

Judgment of 13 February 2019

On 13 February 2019, the International Court of Justice rendered its Judgment on the preliminary objections raised by the United States of America in the case concerning *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judges *ad hoc* Brower, Momtaz; Registrar Couvreur.

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History of the proceedings (paras. 1–17)

The Court recalls that, on 14 June 2016, the Government of the Islamic Republic of Iran (hereinafter "Iran" or the "Applicant") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter the "United States" or the "Respondent") with regard to a dispute concerning alleged violations by the United States of the Treaty of Amity, Economic Relations, and Consular Rights, which was signed by the two States in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter the "Treaty of Amity" or "Treaty"). The Court notes that, in its Application, Iran seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article XXI, paragraph 2, of the Treaty of Amity.

The Court further recalls that, after Iran filed its Memorial in the case, the United States raised preliminary objections to the admissibility of the Application and the jurisdiction of the Court. Consequently, by an Order of 2 May 2017, the President of the Court, noting that by virtue of Article 79, paragraph 5, of the Rules the proceedings on the merits were suspended, fixed 1 September 2017 as the time-limit within which Iran could present a written statement of its observations and submissions on the preliminary objections raised by the United States. Iran filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections. Public hearings were held from 8 to 12 October 2018.

I. Factual background (paras. 18–27)

The Court begins by setting out the factual background of the case. It recalls in this regard that Iran and the United States ceased diplomatic relations in 1980, following the Iranian revolution in early 1979 and the seizure of the United States Embassy in Tehran on 4 November 1979. In October 1983, United States Marine Corps barracks in Beirut, Lebanon, were bombed, killing 241 United States servicemen who were part of a multinational peacekeeping force. The United States claims that Iran is responsible for this bombing and for subsequent acts of terrorism and violations of international law; Iran rejects these allegations.

The Court notes that, in 1984, the United States designated Iran as a "State sponsor of terrorism", a designation which has been maintained ever since. In 1996, the United States amended its Foreign Sovereign Immunities Act (hereinafter the "FSIA") so as to remove the immunity from suit before its courts of States designated as "State sponsors of terrorism" in certain cases involving allegations of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support for such acts; it also provided exceptions to immunity from execution applicable in such cases. Plaintiffs then began to bring actions against Iran before United States courts for damages arising from deaths and injuries caused by acts allegedly supported, including financially, by Iran. These actions gave rise in particular to the *Peterson* case, concerning the above-mentioned bombing of the United States barracks in Beirut. Iran declined to appear in these lawsuits on the ground that the United States legislation was in violation of the international law on State immunities.

The Court further notes that, in 2002, the United States adopted the Terrorism Risk Insurance Act, which established enforcement measures for judgments entered following the 1996 amendment to the FSIA. The United States further amended the FSIA in 2008, enlarging, *inter alia*, the categories of assets available for the satisfaction of judgment creditors. In 2012, the President of the United States issued Executive Order 13599, which blocked all assets ("property and interests in property") of the Government of Iran, including those of the Central Bank of Iran (Bank Markazi) and of financial institutions owned or controlled by Iran, where such assets are within United States territory or "within the possession or control of any United States person, including any foreign branch". Also in 2012, the United States adopted the Iran Threat Reduction and Syria Human Rights Act, Section 502 of which, *inter alia*, made the assets of Bank Markazi subject to execution in order to satisfy default judgments against Iran in the *Peterson* case. Bank Markazi challenged the validity of this provision before United States courts; the Supreme Court of the United States ultimately upheld its constitutionality.

Finally, the Court observes that, following the measures taken by the United States, many default judgments and substantial damages awards have been entered by United States courts against the State of Iran and, in some cases, against Iranian State-owned entities. Further, the assets of Iran and Iranian State-owned entities, including Bank Markazi, are now subject to enforcement proceedings in various cases in the United States or abroad, or have already been distributed to judgment creditors.

II. Jurisdiction of the Court (paras. 29–99)

The Court then turns to the question of its jurisdiction. Recalling that Iran seeks to rely on Article XXI, paragraph 2, of the Treaty of Amity, the Court notes that it is not contested that the Treaty was in force between the Parties on the

date of the filing of Iran's Application, namely 14 June 2016, and that the denunciation of the Treaty announced by the United States on 3 October 2018 has no effect on the jurisdiction of the Court in the present case. The Court observes that it is also not contested that several of the conditions laid down by Article XXI, paragraph 2, of the Treaty are met: a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy; and the two States have not agreed to settlement by some other pacific means. The Court notes that the Parties disagree, however, on the question whether the dispute concerning the United States' measures of which Iran complains is a dispute "as to the interpretation or application" of the Treaty of Amity. Relying on its jurisprudence, the Court observes that it must ascertain whether the acts of which Iran complains fall within the provisions of the Treaty of Amity and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2, thereof.

The Court examines in turn the three preliminary objections to jurisdiction raised by the United States.

A. The first objection: Iran's claims arising from measures taken by the United States to block Iranian assets (paras. 38–47)

In its first objection to jurisdiction, the United States asks the Court to "[d]ismiss as outside the Court's jurisdiction all claims that U.S. measures that block the property and interests in property of the Government of Iran or Iranian financial institutions (as defined in Executive Order 13599 and regulatory provisions implementing Executive Order 13599) violate any provision of the Treaty". In its view, these claims fall outside the scope of the Treaty by virtue of Article XX, paragraph 1, subparagraphs (*c*) and (*d*), thereof.

After summarizing the Parties' arguments, the Court recalls that it previously had occasion to observe in its Judgment on the preliminary objection in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America) (Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 20), and more recently in its Order indicating provisional measures in the case concerning *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America) (Provisional Measures, Order of 3 October 2018*, para. 41), that the Treaty of Amity contains no provision expressly excluding certain matters from its jurisdiction. It also took the view that Article XX, paragraph 1, subparagraph (*d*), did not restrict its jurisdiction but was confined to affording the Parties a possible defence on the merits to be used should the occasion arise" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 20). Seeing no reason in the present case to depart from its earlier findings, and being of the opinion that Article XX, paragraph 1, subparagraph (*c*), of the Treaty should be interpreted, in this respect, in the same way as subparagraph (*d*), the Court concludes that these provisions do not restrict its jurisdiction but merely afford the Parties a defence on the merits. It thus rejects the first objection to jurisdiction raised by the United States.

B. The second objection: Iran's claims concerning sovereign immunities (paras. 48–80)

In its second objection to jurisdiction, the United States asks the Court to dismiss "as outside the Court's jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on the United States' purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities".

The Court thus examines each of the provisions the violation of which Iran alleges, and which, according to the Applicant, are capable of bringing within the jurisdiction of the Court the question of the United States' respect for the immunities to which certain Iranian State entities are said to be entitled.

Article IV, paragraph 2, of the Treaty of Amity (paras. 53–58)

The Court notes that Iran relies on the explicit mention of the "require[ments of] international law" contained in the opening sentence of Article IV, paragraph 2, of the Treaty to argue that this provision incorporates by reference the rules of customary international law on sovereign immunities into the obligation it lays down. The United States disputes this interpretation. In its view, the "require[ments of] international law" referred to in Article IV, paragraph 2, concern the minimum standard of treatment for the property of aliens in the host State—a well-known concept in the field of investment protection—and not immunity protections of any kind.

The Court begins by stating that it will leave aside the question whether Bank Markazi, in respect of which Iran claims sovereign immunity, is a "company" within the meaning of Article IV, paragraph 2. Addressing this point later in its decision (see Section II.C below), the Court considers that the question to be answered at this stage is whether, assuming that this entity constitutes a "company" within the meaning of the Treaty—which the United States disputes—Article IV, paragraph 2, obliges the Respondent to respect the sovereign immunity to which Bank Markazi or the other Iranian State-owned entities concerned in this case would allegedly be entitled under customary international law.

The Court observes in this regard that Iran's proposed interpretation of the phrase referring to the "require[ments of] international law" in the provision at issue is not consistent with the object and purpose of the Treaty of Amity. As stated in the Treaty's preamble, the Parties intended to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and [to] regulat[e] consular relations". In addition, the title of the Treaty does not suggest that sovereign immunities fall within the object and purpose of the instrument concerned. Such immunities cannot therefore be considered as included in Article IV, paragraph 2. The Court considers that the "international law" in question in this provision is that which defines the minimum standard of protection for property belonging to the "nationals" and "companies" of one Party engaging in economic activities within the territory of the other, and not that governing the protections enjoyed by State entities by virtue of the principle of sovereign equality of States. In addition,

the provision in Article IV, paragraph 2, relied on by Iran must be read in the context of Article IV as a whole. After examining each paragraph of Article IV in turn, the Court is of the view that, taken together, these provisions clearly indicate that the purpose of Article IV is to guarantee certain rights and minimum protections for the benefit of natural persons and legal entities engaged in activities of a commercial nature. It cannot therefore be interpreted as incorporating, by reference, the customary rules on sovereign immunities.

Article XI, paragraph 4, of the Treaty of Amity
(paras. 59–65)

With regard to Article XI, paragraph 4, of the Treaty, the Court notes, in agreement with Iran's argument on this point, that this provision, which solely excludes from all "immunity" publicly owned enterprises engaging in commercial or industrial activities, does not affect the immunities enjoyed under customary international law by State entities which engage in activities *jure imperii*. It observes, however, that Iran goes further in contending that this provision imposes an implied obligation to uphold those immunities. The Applicant adopts, in this regard, an *a contrario* reading of Article XI, paragraph 4, whereby, in excluding from immunity only publicly owned enterprises engaging in commercial or industrial activities, this provision implicitly seeks to guarantee the sovereign immunity of public entities when they engage in activities *jure imperii*.

Recalling its jurisprudence whereby an *a contrario* reading of a treaty provision is only warranted when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty, the Court considers that the interpretation put forward by Iran cannot be adopted. It is one thing for Article XI, paragraph 4, to leave intact, by not barring them, the immunities enjoyed under customary law by State entities when they engage in activities *jure imperii*. It is quite another for it to have the effect, as Iran claims it does, of transforming compliance with such immunities into a treaty obligation, a view not supported by the text or context of the provision. In the opinion of the Court, if Article XI, paragraph 4, mentions only publicly owned enterprises which engage in "commercial, industrial, shipping or other business activities", this is because, in keeping with the object and purpose of the Treaty, it pertains only to economic activities and seeks to preserve fair competition among economic actors operating in the same market. The question of activities *jure imperii* is simply not germane to the concerns underlying the drafting of Article XI, paragraph 4. The argument that this provision incorporates sovereign immunities into the Treaty thus cannot be upheld.

Article III, paragraph 2, of the Treaty of Amity
(paras. 66–70)

As regards Article III, paragraph 2, of the Treaty, the Court considers—once again assuming for the purposes of the present discussion that Bank Markazi is a "company"—that it must ascertain whether the alleged breach of the immunities which that bank and the other Iranian State entities concerned are said to enjoy under customary international law, should that breach be established, would constitute a violation of the right to have "freedom of access to the courts" guaranteed by that provision. The Court observes that it is only if the answer to this question is in the affirmative that it could be concluded that the application of Article III, paragraph 2, requires the Court to examine the question of sovereign immunities, and that such an examination thus falls, to that extent, within its jurisdiction as defined by the compromissory clause of the Treaty of Amity.

The Court is not convinced that a link of the nature alleged by Iran exists between the question of sovereign immunities and the right guaranteed by Article III, paragraph 2. In its view, it is true that the mere fact that Article III, paragraph 2, makes no mention of sovereign immunities, and that it also contains no *renvoi* to the rules of general international law, does not suffice to exclude the question of immunities from the scope *ratione materiae* of the provision at issue. However, for that question to be relevant, the breach of international law on immunities would have to be capable of having some impact on compliance with the right guaranteed by Article III, paragraph 2. According to the Court, that is not the case. The provision at issue does not seek to guarantee the substantive or even the procedural rights that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party, but only to protect the possibility for such a company to have access to those courts or authorities with a view to pursuing the (substantive or procedural) rights it claims to have. The wording of Article III, paragraph 2, does not point towards the broad interpretation suggested by Iran. The rights therein are guaranteed "to the end that prompt and impartial justice be done". Access to a Contracting Party's courts must be allowed "upon terms no less favorable" than those applicable to the nationals and companies of the Party itself "or of any third country". There is nothing in the language of Article III, paragraph 2, in its ordinary meaning, in its context and in light of the object and purpose of the Treaty of Amity, to suggest or indicate that the obligation to grant Iranian "companies" freedom of access to United States courts entails an obligation to uphold the immunities that customary international law is said to accord—if that were so—to some of these entities. The two questions are clearly distinct.

Article IV, paragraph 1, of the Treaty of Amity
(paras. 71–74)

Regarding Article IV, paragraph 1, of the Treaty, the Court states that, for reasons similar to those set out regarding Iran's reliance on Article IV, paragraph 2, of the Treaty of Amity, it does not consider that the requirements of Article IV, paragraph 1, include an obligation to respect the sovereign immunities of the State and those of its entities which can claim such immunities under customary international law. It cannot therefore uphold on this point Iran's argument that the question of sovereign immunities falls within the scope *ratione materiae* of this provision and, consequently, within the jurisdiction of the Court under the compromissory clause of the Treaty of Amity.

Article X, paragraph 1, of the Treaty of Amity
(paras. 75–79)

The Court then turns to Article X, paragraph 1, of the Treaty. It recalls in this regard that, in its Judgment on the preliminary objection in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*

(Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 803), it had to rule on the scope of the concept of "freedom of commerce" within the meaning of that paragraph. It stated on that occasion that the word "commerce" within the meaning of the provision at issue refers not just to maritime commerce, but to commercial exchanges in general; that, in addition, the word "commerce", both in its ordinary usage and in its legal meaning, is not limited to the mere acts of purchase and sale; and that commercial treaties cover a wide range of matters ancillary to commerce, such as the right to establish and operate businesses, protection from molestation, and acquisition and enjoyment of property. The Court concluded that "it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general—not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce".

The Court sees no reason to depart now from the interpretation of the concept of "freedom of commerce" that it adopted in the case quoted above. Nevertheless, even if understood in this sense, freedom of commerce cannot cover matters that have no connection, or too tenuous a connection, with the commercial relations between the States Parties to the Treaty. In this regard, the Court is not convinced that the violation of the sovereign immunities to which certain State entities are said to be entitled under international law in the exercise of their activities *jure imperii* is capable of impeding freedom of commerce, which by definition concerns activities of a different kind. Consequently, the violations of sovereign immunities alleged by Iran do not fall within the scope of Article X, paragraph 1, of the Treaty.

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The Court concludes from its analysis that none of the provisions the violation of which Iran alleges, and which, according to the Applicant, are capable of bringing within the jurisdiction of the Court the question of the United States' respect for the immunities to which certain Iranian State entities are said to be entitled, is of such a nature as to justify such a finding. Consequently, the Court finds that Iran's claims based on the alleged violation of the sovereign immunities guaranteed by customary international law do not relate to the interpretation or application of the Treaty of Amity and, as a result, do not fall within the scope of the compromissory clause in Article XXI, paragraph 2. Thus, in so far as Iran's claims concern the alleged violation of rules of international law on sovereign immunities, the Court does not have jurisdiction to consider them. It considers that the second objection to jurisdiction raised by the United States must therefore be upheld.

C. The third objection: Iran's claims alleging violations of Articles III, IV or V of the Treaty in relation to Bank Markazi (paras. 81–97)

In its third objection to jurisdiction, the United States requests the Court to dismiss "as outside the Court's jurisdiction all claims of purported violations of Articles III, IV, or V of the Treaty of Amity that are predicated on treatment accorded to the Government of Iran or Bank Markazi".

After recalling the Parties' arguments, the Court observes that, although the wording of this objection refers to "treatment accorded to the Government of Iran or Bank Markazi", the question before it is solely that of whether Bank Markazi is a "company" within the meaning of the Treaty of Amity and is thereby justified in claiming the rights and protections afforded to "companies" by Articles III, IV and V. Consequently, the Court endeavours solely to establish whether the characterization of "company" within the meaning of the Treaty of Amity is applicable to Bank Markazi.

The Court notes that Articles III, IV and V of the Treaty of Amity guarantee certain rights and protections to "nationals" and "companies" of a Contracting Party, which must be respected by the other Party. It further notes that the term "national" applies to natural persons, whose status is not at issue in the difference between the Parties as regards the third preliminary objection. The term "company" is defined thus in Article III, paragraph 1: "As used in the present Treaty, 'companies' means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." On the basis of this definition, the Court considers that two points are not in doubt and, moreover, give no cause for disagreement between the Parties. First, an entity may only be characterized as a "company" within the meaning of the Treaty if it has its own legal personality, conferred on it by the law of the State where it was created, which establishes its legal status. In this regard, Article III, paragraph 1, begins by stating that "[c]ompanies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party". Secondly, an entity which is wholly or partly owned by a State may constitute a "company" within the meaning of the Treaty. The definition of "companies" provided by Article III, paragraph 1, makes no distinction between private and public enterprises. The possibility of a public enterprise constituting a "company" within the meaning of the Treaty is confirmed by Article XI, paragraph 4, which deprives of immunity any enterprise of either Contracting Party "which is publicly owned or controlled" when it engages in commercial or industrial activities within the territory of the other Party, so as to avoid placing such an enterprise in an advantageous position in relation to private enterprises with which it may be competing.

In the Court's view, two conclusions may be drawn from the above. In the first place, the United States cannot contest the fact that Bank Markazi was endowed with its own legal personality by Article 10, paragraph (*c*), of Iran's 1960 Monetary and Banking Act, as amended—and indeed it does not do so. In the second place, the fact that Bank Markazi is wholly owned by the Iranian State, and that the State exercises a power of direction and close control over the bank's activities—as pointed out by the United States and not contested by Iran—does not, in itself, exclude that entity from the category of "companies" within the meaning of the Treaty.

That being so, it remains to be determined by the Court whether, by the nature of its activities, Bank Markazi may be characterized as a "company" according to the definition given by Article III, paragraph 1, read in its context and in light of the object and purpose of the Treaty of Amity.

In this regard, the Court considers that it cannot accept the interpretation put forward by Iran in its main argument, whereby the nature of the activities carried out by a particular entity is immaterial for the purpose of characterizing that entity as a "company". According to Iran, whether an entity carries out functions of a sovereign nature, i.e., acts of sovereignty or public authority, or whether it engages in activities of a commercial or industrial nature, or indeed a combination of both types of activity, is of no relevance when it comes to characterizing it as a "company". It would follow that having a separate legal personality under the domestic law of a Contracting Party would be a sufficient condition for a given entity to be characterized as a "company" within the meaning of the Treaty of Amity.

In the opinion of the Court, such an interpretation would fail to take account of the context of the definition provided by Article III, paragraph 1, and the object and purpose of the Treaty of Amity. As stated above in respect of the second objection to jurisdiction raised by the United States, an analysis of all those provisions of the Treaty which form the context of Article III, paragraph 1, points clearly to the conclusion that the Treaty is aimed at guaranteeing rights and affording protections to natural and legal persons engaging in activities of a commercial nature, even if this latter term is to be understood in a broad sense. The same applies to the object and purpose of the Treaty, as set out in the preamble, and an indication of which can also be found in the title of the Treaty (Treaty of Amity, Economic Relations, and Consular Rights). The Court therefore concludes that an entity carrying out exclusively sovereign activities, linked to the sovereign functions of the State, cannot be characterized as a "company" within the meaning of the Treaty and, consequently, may not claim the benefit of the rights and protections provided for in Articles III, IV and V.

The Court notes, however, that there is nothing to preclude, *a priori*, a single entity from engaging both in activities of a commercial nature (or, more broadly, business activities) and in sovereign activities. In such a case, since it is the nature of the activity actually carried out which determines the characterization of the entity engaged in it, the legal person in question should be regarded as a "company" within the meaning of the Treaty to the extent that it is engaged in activities of a commercial nature, even if they do not constitute its principal activities.

The Court observes that it must therefore address the question of the nature of the activities engaged in by Bank Markazi. More precisely, it must examine Bank Markazi's activities within the territory of the United States at the time of the measures which Iran claims violated Bank Markazi's alleged rights under Articles III, IV and V of the Treaty.

After examining the Parties' arguments in this regard, the Court considers that it does not have before it all the facts necessary to determine whether Bank Markazi was carrying out, at the relevant time, activities of the nature of those which permit characterization as a "company" within the meaning of the Treaty of Amity, and which would have been capable of being affected by the measures complained of by Iran by reference to Articles III, IV and V of the Treaty. Since those elements are largely of a factual nature and are, moreover, closely linked to the merits of the case, the Court considers that it will be able to rule on the third objection only after the Parties have presented their arguments in the following stage of the proceedings, should it find the Application to be admissible. The Court therefore concludes that the third objection to jurisdiction does not possess, in the circumstances of the case, an exclusively preliminary character.

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Given that the Court has jurisdiction to entertain part of the claims made by Iran, which, moreover, were not covered in their entirety by the three objections to jurisdiction raised by the United States, the Court then considers the objections to admissibility raised by the Respondent, which seek the rejection of the Application as a whole.

III. Admissibility of the Application (paras. 100–125)

The Court notes that the United States initially raised two objections to the admissibility of the Application, namely, first, that Iran's reliance on the Treaty to found the Court's jurisdiction in this case is an abuse of right and, secondly, that Iran's "unclean hands" preclude the Court from proceeding with this case. The Court observes, however, that, during the oral proceedings, the United States clarified that its first objection to admissibility was an objection based on "abuse of process" and not on "abuse of right".

The Court recalls that, in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, it considered that "[a]lthough the basic concept of an abuse may be the same, the consequences of an abuse of rights or an abuse of process may be different" (*Preliminary Objections, Judgment of 6 June 2018*, para. 146). It further stated that "[a]n abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of these proceedings" (*ibid*., para. 150) and that "abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits" (*ibid*., para. 151).

The Court notes that, in its oral pleadings, the United States submitted that the dispute did not fall within the scope of the Treaty of Amity and that Iran could not therefore seek to found the jurisdiction of the Court on that instrument. In the Court's view, the objection based on abuse of process is not a new objection, but merely a recharacterization of a position already set out by the United States in its Preliminary Objections.

A. The objection based on abuse of process (paras. 107–115)

With regard to the first objection, after presenting the Parties' arguments, the Court recalls that, in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, it stated that only in exceptional circumstances should the Court reject a claim based on a valid title of jurisdiction on the ground of abuse of process. In this regard, there has to be clear evidence that the applicant's conduct amounts to an abuse of process (*Preliminary Objections, Judgment of 6 June 2018*, para. 150) (see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, para. 38). The Court notes that it has already observed that the Treaty of Amity was in force between the Parties on the date of the filing of Iran's Application, *i.e*., 14 June 2016, and that the Treaty includes a

compromissory clause in Article XXI providing for its jurisdiction. The Court does not consider that in the present case there are exceptional circumstances which would warrant rejecting Iran's claim on the ground of abuse of process. The Court therefore finds that the first objection to admissibility raised by the United States must be rejected.

B. The objection based on "unclean hands" (paras. 116–124)

As regards the second objection, the Court notes that the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity, upon which its Application is based. Without having to take a position on the "clean hands" doctrine, the Court considers that, even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient *per se* to uphold the objection to admissibility raised by the Respondent on the basis of the "clean hands" doctrine (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 38, para. 47; *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 52, para. 142). It observes that such a conclusion is however without prejudice to the question whether the allegations made by the United States, concerning notably Iran's alleged sponsoring and support of international terrorism and its presumed actions in respect of nuclear non-proliferation and arms trafficking, could, eventually, provide a defence on the merits. The Court concludes that the second objection to admissibility raised by the United States cannot be upheld.

Operative clause (para. 126)

The Court,

(1) Unanimously,

Rejects the first preliminary objection to jurisdiction raised by the United States of America;

(2) By eleven votes to four,

Upholds the second preliminary objection to jurisdiction raised by the United States of America;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Crawford, Salam, Iwasawa; Judge *ad hoc* Brower;

Against: Judges Bhandari, Robinson, Gevorgian; Judge *ad hoc* Momtaz;

(3) By eleven votes to four,

Declares that the third preliminary objection to jurisdiction raised by the United States of America does not possess, in the circumstances of the case, an exclusively preliminary character;

In favour: President Yusuf; Vice-President Xue; Judges Abraham, Bennouna, Cançado Trindade, Bhandari, Robinson, Gevorgian, Salam, Iwasawa; *Judge ad hoc* Momtaz;

Against: Judges Tomka, Gaja, Crawford; Judge *ad hoc* Brower;

(4) Unanimously,

Rejects the preliminary objections to admissibility raised by the United States of America;

(5) Unanimously,

Finds that it has jurisdiction, subject to points (2) and (3) of the present operative clause, to rule on the Application filed by the Islamic Republic of Iran on 14 June 2016, and that the said Application is admissible.

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Judges Tomka and Crawford append a joint separate opinion to the Judgment of the Court; Judge Gaja appends a declaration to the Judgment of the Court; Judges Robinson and Gevorgian append separate opinions to the Judgment of the Court; Judges *ad hoc* Brower and Momtaz append separate opinions to the Judgment of the Court.

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Joint separate opinion of Judges Tomka and Crawford

Judges Tomka and Crawford disagree with the Court's decision to join the United States' third preliminary objection to the merits. In their view, whether Bank Markazi is a "company" for the purpose of the Treaty of Amity is an exclusively preliminary question which should have been determined at this stage.

The predecessor to Article 79 of the Rules of Court allowed the Court greater latitude to defer objections to the merits phase of a case. Since the 1972 amendments to the Rules of Court, objections may only be deferred to the merits stage of proceedings if they do not possess an exclusively preliminary character.

In the opinion of Judges Tomka and Crawford, whether Bank Markazi is a "company" for the purpose of the Treaty of Amity has been fully argued and the relevant facts are known. In particular, the Court does not need to determine what activities Bank Markazi was carrying out at the time its assets were seized in execution of judgments of United States federal courts against the Government of Iran. Consequently, the third preliminary objection has an exclusively preliminary character and should have been determined at this stage of the proceedings.

Declaration of Judge Gaja

The Court should have rejected the third preliminary objection concerning jurisdiction. What is required for that purpose is to determine whether a reasonable case has been made that Bank Markazi, as a company constituted under the law of Iran, enjoys rights conferred by Articles III, IV and V of the Treaty of Amity, in particular the right to the recognition of its juridical status, and that these rights may have been violated. Some of a central bank's activities are not different from those executed by any commercial bank and, in performing them, Bank Markazi should be granted the same protection under the Treaty of Amity. Article XI, paragraph 4, confirms that State corporations, agencies and instrumentalities are covered by the Treaty generally, not only when they exercise business activities.

Separate opinion of Judge Robinson

1. In his separate opinion, Judge Robinson explains his disagreement with the finding in point (2) of paragraph 126 of the *dispositif*, which upholds the second preliminary objection to jurisdiction made by the United States of America. In his view, the question of a violation of an obligation to accord

sovereign immunity from jurisdiction and/or enforcement to State entities engaged in acts *jure imperii* arises under Article XI, paragraph 4, of the Treaty of Amity.

2. Judge Robinson expresses the view that in precluding only a State enterprise engaging in commercial activities from enjoying immunities from suit or other liability to which private companies would be subject, Article XI, paragraph 4, of the Treaty of Amity does not, in its terms, say or imply that State enterprises carrying out acts *jure imperii* would also be deprived of the immunity they would otherwise enjoy under customary international law. Rather, it compellingly implies that State enterprises carrying out acts *jure imperii* enjoy sovereign immunity by virtue of the Treaty.

3. Judge Robinson is of the view that the question is whether an interpretation of the Treaty, in accordance with Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, yields the conclusion that an allegation of a breach of immunity for State enterprises carrying out acts *jure imperii* falls within the provisions of the Treaty. In effect the question is whether there is a "reasonable connection" between the Treaty and the claim of sovereign immunity.

4. According to Judge Robinson, there is an innate and organic connectedness between acts *jure imperii* and *jure gestionis* which is endemic to the Treaty, foreseen and embraced by it, and therefore governed by it in all its aspects, including recourse to the customary rules of immunity. It is this interrelatedness that brings into the conventional régime of the Treaty the customary rules on immunity for a State entity carrying out acts *jure imperii,* and dictates recourse to inferential reasoning.

5. For Judge Robinson, this conclusion is wholly consistent with the object and purpose of the Treaty to maximize trade, investment and economic relations between the peoples of the two countries. The immunity of State-owned companies engaged in sovereign, governmental acts is as important to and necessary for the achievement of this object and purpose as is the denial of immunity for State companies engaged in commercial activities. A State entity such as the central bank of one Party will have to carry out in the territory of the other Party several sovereign, governmental activities in the lawful discharge of its functions. These activities are as vital to the achievement of the above-mentioned object and purpose of the Treaty as are the activities of a private company.

6. He concludes that the third preliminary objection must be rejected because the question of sovereign immunities and their alleged breach can, on a fair reading of the Treaty, be said to be covered by it, and those immunities can, on a fair reading of the Treaty, be said to be part of the Treaty's object and purpose. In his view, there is a reasonable relationship between the question of sovereign immunities for State entities and the Treaty; the two are sufficiently connected through the Treaty's object and purpose to give the Court jurisdiction. An allegation of failure to accord Bank Markazi sovereign immunity from jurisdiction or enforcement falls within the scope of Article XI, paragraph 4. Consequently, in his view, the Court should have found that there is a dispute between the Parties as to the interpretation or application of the Treaty, thereby conferring on the Court jurisdiction under Article XXI, paragraph 2.

Separate opinion of Judge Gevorgian

In his separate opinion, Judge Gevorgian explains the reasons for his disagreement with the Court's findings on its lack of jurisdiction over Iran's claims concerning the immunities of Bank Markazi, based on the assumption that the Iran-US 1955 Treaty of Amity, Economic Relations, and Consular Rights does not cover the norm of customary international law on the immunities of the assets of a country's central bank. In his opinion, the legislative and executive measures adopted by the United States against Iran that resulted in the seizure of assets of Bank Markazi (Iran's Central Bank) fall within the scope of at least two provisions of the 1955 Treaty.

First, the United States restrictions of Bank Markazi's immunities may have violated this entity's right of access to courts as protected by Article III, paragraph 2, of the 1955 Treaty. Second, given the essential role of Iran's Central Bank in the realization of commercial activities by Iranian companies in the United States, the attachment of Bank Markazi's assets may have rendered illusory Iran's freedom of commerce with the United States, as protected by Article X, paragraph 1, of the 1955 Treaty.

Separate opinion of Judge *ad hoc* Brower

Judge *ad hoc* Brower believes that the arguments of the Respondent in respect of the "clean hands" doctrine made incomplete references to the writings of the former President of the Court, Judge Schwebel, and of Professor John Dugard. A thorough reading of those writings shows that their authors were not convinced that the "clean hands" doctrine applies to inter-State dispute settlement. Moreover, the Respondent referred to the individual opinion of Judge Hudson in *Diversion of Waters from the Meuse*, which discussed principles of equity under international law. However, by the Respondent's own admission, one of the requirements for the application of such principles, said to be akin to the "clean hands" doctrine, was not fulfilled.

According to Judge *ad hoc* Brower, an additional reason for deciding that Article XX of the Treaty of Amity is not a jurisdictional limitation is that it is not self-judging. Self-judging clauses have been inserted into a number of commercial treaties, and if the Parties had wished for Article XX to be self-judging, they would have made it explicit in its text.

Judge *ad hoc* Brower is of the view that, since the Treaty of Amity makes express grants of immunity in relation to consular and diplomatic intercourse, it could not be purported implicitly to provide for the immunity of States and State entities. This conclusion emerges from the application of the canon of interpretation *expressio unius est exclusio alterius*. Moreover, Judge *ad hoc* Brower considers that reading State immunity into the Treaty of Amity by reference to Article 31, paragraph 3 (*c*), of the Vienna Convention on the Law of Treaties would amount to rewriting the Treaty itself. Additionally, Judge *ad hoc* Brower notes that the words repeatedly used in the Treaty of Amity confirm the Treaty's purely commercial character. Judge *ad hoc* Brower is also of the view that the authorities on which the Applicant relied to support its *a contrario* reading of Article XI, paragraph 4, of the Treaty of Amity are of no avail, as they show, to the

contrary, that an *a contrario* reading of a provision cannot supersede its plain meaning.

Judge *ad hoc* Brower disagrees with the Court with respect to the third objection to jurisdiction. He is of the view that the objection is of an exclusively preliminary character and therefore should have been decided. According to him, Iran adduced no proof that Bank Markazi actually has engaged in commercial activities, which is necessary for it to be a "company" within the meaning of the Treaty of Amity. Iran's Monetary and Banking Act 1972, as amended, confirms that Bank Markazi is not entitled to engage in anything other than sovereign activity. Moreover, Iran consistently has argued before United States courts that Bank Markazi carried out sovereign activities at the relevant time. Judge *ad hoc* Brower believes that the Applicant cannot "blow hot and cold at the same time". He concludes that the Court had all of the relevant facts before it and, based on the material made available to the Court by the Parties at this stage of the proceedings, he cannot see how the Court could have found otherwise than that Bank Markazi is not a "company" within the meaning of the Treaty of Amity.

Separate opinion of Judge *ad hoc* Momtaz

Introduction

The Parties disagreed as to the meaning and scope of Article XI, paragraph 4, of the Treaty of Amity in both their written pleadings and their oral arguments. There is no question that this dispute, which could not be satisfactorily adjusted by diplomacy, falls within the jurisdiction of the Court pursuant to the compromissory clause in Article XXI, paragraph 2, of that Treaty. The Court should therefore have rejected the second preliminary objection to jurisdiction raised by the United States and settled the said dispute at the merits stage, by interpreting Article XI, paragraph 4, in light of the rules of international law.

I. Interpretation in light of the object and purpose of the Treaty

According to the Treaty's preamble, the Parties wished to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples". The Court concluded from this that the object and purpose of the Treaty of Amity was not to regulate peaceful and friendly relations between the two States. Thus, Article I of the Treaty, which states that there will be firm and enduring peace and sincere friendship between the Parties, and which the Court considers gives meaning to the entire Treaty, must, in case of doubt, "incline the Court to the construction which seems more in consonance with its overall objective of achieving friendly relations over the entire range of activities covered by the Treaty" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 820, para. 52). Since the violation of the sovereign immunity of Iran's Central Bank in relation to its activities in a sovereign capacity *(jure imperii)* is capable of impeding freedom of commerce between the Parties, it is my view that Article XI, paragraph 4, should be interpreted in light of the Treaty's general objective.

II. The interpretation of Article XI, paragraph 4, in light of Article 31, paragraph 3, subparagraph (*c*), of the Vienna Convention on the Law of Treaties

According to Article 31, paragraph 3, subparagraph (*c*), of the Vienna Convention on the Law of Treaties, interpretation should also take account of "[a]ny relevant rules of international law applicable in the relations between the parties". In the *Oil Platforms* case, the Court did not hesitate to rely on the rules on the use of force to interpret Article XX, paragraph 1, subparagraph (*d*), of the Treaty and consider the lawfulness of the measures applied by the United States to protect its essential security interests (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 182, para. 41). There is no reason, in the dispute between the Parties to the present case, for the Court not to rely on the rules on immunity to interpret Article XI, paragraph 4, of the Treaty.

III. The a contrario interpretation of Article XI, paragraph 4

In the Court's view, such an interpretation is only warranted "when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty" (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 35). In this case, an *a contrario* interpretation of Article XI, paragraph 4, might lead the Court to conclude that the Treaty's scope of application, and in particular the scope of the term "company", does not exclude entities carrying out activities *jure imperii*. This interpretation would, moreover, be consistent with Article III, paragraph 1, of the Treaty, which gives a broad and fluid definition of that term. In the recent past, the Court has noted that generic terms in treaties may have "a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64).

Conclusion

It should be noted that the basis for the enforcement measures taken against the Central Bank, namely the 1996 amendment to the Foreign Sovereign Immunities Act (FSIA) depriving a State of its immunity by reason of the gravity of the act perpetrated, is contrary to international law. According to the Court, "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" (*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 139, para. 91).

233. LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965

Advisory Opinion of 25 February 2019

On 25 February 2019, the International Court of Justice gave its Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.

The Court was composed as follows: President Yusuf; Vice President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa; Registrar Couvreur.

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I. History of the proceedings (paras. 1–24)

The Court first recalls that the questions on which the advisory opinion of the Court has been requested are set forth in resolution 71/292 adopted by the General Assembly of the United Nations on 22 June 2017. It further recalls that these questions read as follows:

> (*a*) "Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?";
>
> (*b*) "What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?".

II. Events leading to the adoption of the request for the advisory opinion (paras. 25–53)

The Court begins by recalling that the Chagos Archipelago consists of a number of islands and atolls. The largest island is Diego Garcia, located in the south-east of the archipelago. Between 1814 and 1965, the Chagos Archipelago was administered by the United Kingdom as a dependency of the colony of Mauritius.

On 14 December 1960, the General Assembly adopted resolution 1514 (XV) entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples". On 27 November 1961, the General Assembly, by resolution 1654 (XVI), established the Committee of Twenty-Four, a special committee on decolonization, to monitor the implementation of resolution 1514 (XV).

In February 1964, discussions commenced between the United States of America and the United Kingdom regarding the use by the United States of certain British-owned islands in the Indian Ocean. The United States expressed an interest in establishing military facilities on the island of Diego Garcia. On 29 June 1964, the United Kingdom also commenced talks with the Premier of the colony of Mauritius regarding the detachment of the Chagos Archipelago from Mauritius. At Lancaster House, talks between representatives of the colony of Mauritius and the United Kingdom Government led to the conclusion on 23 September 1965 of an agreement in which the Premier and other representatives of Mauritius agreed to the principle of detachment of the Chagos Archipelago from the territory of Mauritius for the purpose of establishing a military facility on the island of Diego Garcia, it being understood, however, that the archipelago could be returned to Mauritius at a later date.

On 8 November 1965, by the British Indian Ocean Territory Order 1965, the United Kingdom established a new colony known as the British Indian Ocean Territory (the "BIOT") consisting of the Chagos Archipelago, detached from Mauritius, and the Aldabra, Farquhar and Desroches islands, detached from Seychelles. On 16 December of the same year, the General Assembly adopted resolution 2066 (XX) on the "Question of Mauritius", in which it expressed deep concern about the detachment of certain islands from the territory of Mauritius for the purpose of establishing a military base and invited the "administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".

On 20 December 1966, the General Assembly adopted resolution 2232 (XXI) on a number of territories including Mauritius. The resolution reiterated that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)". The talks between the United Kingdom and the United States resulted in the conclusion on 30 December 1966 of the "Agreement concerning the Availability for Defence Purposes of the British Indian Ocean Territory" and the conclusion of an Agreed Minute of the same date. Based on the Agreement, both States agreed that the Government of the United Kingdom would take any "administrative measures" necessary to ensure that their defence needs were met. The Agreed Minute provided that, among the administrative measures to be taken, was "resettling any inhabitants" of the islands.

On 15, 17 and 19 June 1967, the Committee of Twenty-Four adopted a resolution on Mauritius. In this resolution, the Committee "[d]eplores the dismemberment of Mauritius and Seychelles by the administering Power which violates their territorial integrity, in contravention of General Assembly resolutions 2066 (XX) and 2232 (XXI) and calls upon the administering Power to return to these Territories the islands detached therefrom". Between 1967 and 1973, the entire population of the Chagos Archipelago was either prevented from returning or forcibly removed and prevented from returning

by the United Kingdom. The main forcible removal of Diego Garcia's population took place in July and September 1971.

On 12 March 1968, Mauritius became an independent State and on 26 April 1968 was admitted to membership in the United Nations. Sir Seewoosagur Ramgoolam became the first Prime Minister of the Republic of Mauritius. Section 111, paragraph 1, of the 1968 Constitution of Mauritius, promulgated by the United Kingdom Government before independence on 4 March 1968, defined Mauritius as "the territories which immediately before 12th March 1968 constituted the colony of Mauritius". This definition did not include the Chagos Archipelago in the territory of Mauritius.

In July 1980, the Organisation of African Unity ("OAU") adopted resolution 99 (XVII) (1980) in which it "demands" that Diego Garcia be "unconditionally returned to Mauritius". On 9 October 1980, the Mauritian Prime Minister, at the thirty-fifth session of the United Nations General Assembly, stated that the BIOT should be disbanded and the territory restored to Mauritius as part of its natural heritage. In July 2000, the OAU adopted a decision expressing its concern that the Chagos Archipelago was excised by the colonial Power from Mauritius prior to its independence in violation of United Nations resolution 1514.

On 30 December 2016, the 50-year period covered by the 1966 Agreement came to an end; however, it was extended for a further period of twenty years, in accordance with its terms. On 30 January 2017, the Assembly of the African Union adopted resolution AU/Res.1 (XXVIII) on the Chagos Archipelago which resolved, among other things, to support Mauritius with a view to ensuring "the completion of the decolonization of the Republic of Mauritius". On 23 June 2017, the General Assembly adopted resolution 71/292 requesting an advisory opinion from the Court.

III. Jurisdiction and discretion (paras. 54–91)

When the Court is seised of a request for an advisory opinion, it must first consider whether it has jurisdiction to give the opinion requested and, if so, whether there is any reason why the Court should, in the exercise of its discretion, decline to answer the request.

The Court's jurisdiction to give an advisory opinion is based on Article 65, paragraph 1, of its Statute which provides that "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". The Court notes that the General Assembly is competent to request an advisory opinion by virtue of Article 96, paragraph 1, of the Charter, which provides that "[t]he General Assembly … may request the International Court of Justice to give an advisory opinion on any legal question".

The Court then turns to the requirement in Article 96 of the Charter and Article 65 of its Statute that the advisory opinion must be on a "legal question". In the present proceedings, the first question put to the Court is whether the process of decolonization of Mauritius was lawfully completed having regard to international law when it was granted independence following the separation of the Chagos Archipelago. The second question relates to the consequences arising under international law from the continued administration by the United Kingdom of the Chagos Archipelago. The Court considers that a request from the General Assembly for an advisory opinion to examine a situation by reference to international law concerns a legal question. The Court therefore concludes that the request has been made in accordance with the Charter and that the two questions submitted to it are legal in character. The Court accordingly has jurisdiction to give the advisory opinion requested by resolution 71/292 of the General Assembly.

The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it. The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met. The discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations. The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused". Thus, the consistent jurisprudence of the Court is that only "compelling reasons" may lead the Court to refuse its opinion in response to a request falling within its jurisdiction.

Some participants in the present proceedings have argued that there are "compelling reasons" for the Court to exercise its discretion to decline to give the advisory opinion requested. Among the reasons raised by these participants are that, first, advisory proceedings are not suitable for determination of complex and disputed factual issues; secondly, the Court's response would not assist the General Assembly in the performance of its functions; thirdly, it would be inappropriate for the Court to re-examine a question already settled by the Arbitral Tribunal constituted under Annex VII of UNCLOS in the *Arbitration regarding the Chagos Marine Protected Area*; and fourthly, the questions asked in the present proceedings relate to a pending bilateral dispute between two States which have not consented to the settlement of that dispute by the Court. The Court will thus examine whether such reasons exist in these proceedings.

1. Whether advisory proceedings are suitable for determination of complex and disputed factual issues

The Court observes that an abundance of material has been presented before it, including a voluminous dossier from the United Nations. Moreover, many participants have submitted written statements and written comments, and made oral statements which contain information relevant to answering the questions. Thirty-one States and the African Union filed written statements, ten of those States and the African Union submitted written comments thereon, and twenty-two States and the African Union made oral statements. The Court notes that information provided by participants includes the various official records from the 1960s, such as those from the United Kingdom concerning the detachment of the Chagos Archipelago and the accession of Mauritius to independence. The Court is therefore satisfied that there is in the present proceedings sufficient information on the facts before it for the

Court to give the requested opinion. Accordingly, the Court cannot decline to answer the questions put to it.

2. Whether the Court's response would assist the General Assembly in the performance of its functions

The Court considers that it is not for the Court itself to determine the usefulness of its response to the requesting organ. Rather, it should be left to the requesting organ, the General Assembly, to determine whether it needs the opinion for the proper performance of its functions. It follows that in the present proceedings the Court cannot decline to answer the questions posed to it by the General Assembly in resolution 71/292 on the ground that its opinion would not assist the General Assembly in the performance of its functions.

3. Whether it would be appropriate for the Court to re-examine a question allegedly settled by the Arbitral Tribunal constituted under UNCLOS Annex VII in the Arbitration regarding the Chagos Marine Protected Area

The Court recalls that its opinion is given not to States, but to the organ which is entitled to request it. The Court also observes that the principle of *res judicata* does not preclude it from rendering an advisory opinion. In any event, the Court further notes that the issues that were determined by the Arbitral Tribunal in the *Arbitration regarding the Chagos Marine Protected Area* are not the same as those that are before the Court in these proceedings. It follows from the foregoing that the Court cannot decline to answer the questions on this ground.

4. Whether the questions asked relate to a pending dispute between two States, which have not consented to its settlement by the Court

The Court notes that the questions put to it by the General Assembly relate to the decolonization of Mauritius. The General Assembly has not sought the Court's opinion to resolve a territorial dispute between two States. Rather, the purpose of the request is for the General Assembly to receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius.

Moreover, the Court observes that there may be differences of views on legal questions in advisory proceedings. However, the fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to the request, the Court is dealing with a bilateral dispute. In these circumstances, the Court does not consider that to give the opinion requested would have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State. The Court therefore cannot, in the exercise of its discretion, decline to give the opinion on that ground.

In light of the foregoing, the Court concludes that there are no compelling reasons for it to decline to give the opinion requested by the General Assembly.

IV. The factual context of the separation of the Chagos Archipelago from Mauritius (paras. 92–131)

Before addressing the questions submitted to it by the General Assembly relating to the separation of the Chagos Archipelago from Mauritius and the legal consequences arising from the continued administration by the United Kingdom of the Chagos Archipelago, the Court deems it important to examine the factual circumstances surrounding the separation of the archipelago from Mauritius, as well as those relating to the removal of the Chagossians from this territory. In this regard, the Court notes that, prior to the separation of the Chagos Archipelago from Mauritius, there were formal discussions between the United Kingdom and the United States and between the Government of the United Kingdom and the representatives of the colony of Mauritius.

In February 1964, the United Kingdom and the United States thus commenced formal discussions during which the latter expressed an interest in establishing a military communication facility on Diego Garcia. It was agreed that the United Kingdom delegation would recommend to its Government that it should be responsible for acquiring land, resettling the population and providing compensation at the United Kingdom Government's expense; that the Government of the United States would be responsible for construction and maintenance costs and that the United Kingdom Government would assess quickly the feasibility of the transfer of the administration of Diego Garcia and the other islands of the Chagos Archipelago from Mauritius. These formal discussions led to the conclusion of the 1966 Agreement for the establishment of a military base by the United States on the Chagos Archipelago.

Discussions were also held between the Government of the United Kingdom and the representatives of the colony of Mauritius with respect to the Chagos Archipelago. During the Fourth Constitutional Conference, which commenced in London on 7 September 1965 and ended on 24 September 1965, there were several private meetings on defence matters. At the first such meeting, held on 13 September 1965, the Premier of Mauritius stated that Mauritius preferred a lease rather than a detachment of the Chagos Archipelago. Following the meeting, the United Kingdom Foreign Secretary and the Defence Secretary concluded that if Mauritius would not agree to the detachment, they would have to adopt their Government's recommendation of forcible detachment and compensation. On 20 September 1965, during a meeting on defence matters chaired by the United Kingdom Secretary of State, the Premier of Mauritius reiterated his position. As an alternative, the Premier of Mauritius proposed that the United Kingdom first concede independence to Mauritius and thereafter allow the Mauritian Government to negotiate with the Governments of the United Kingdom and the United States on the question of Diego Garcia. During those discussions, the Secretary of State indicated that a lease would not be acceptable to the United States and that the Chagos Archipelago would have to be made available on the basis of its detachment.

On 23 September 1965, a meeting on defence matters was held at Lancaster House between Premier Ramgoolam, three other Mauritian Ministers and the United Kingdom Secretary of State. At the end of that meeting, the United Kingdom Secretary of State enquired whether the Mauritian Ministers could agree to the detachment of the Chagos Archipelago on the basis of undertakings that he would recommend to the Cabinet, which included the payment of compensation totalling up to £3 million to Mauritius over

and above direct compensation to landowners and the cost of resettling others affected in the Chagos Archipelago, and the return of the latter to Mauritius when the need for the facilities there disappeared. The Premier of Mauritius informed the Secretary of State for the Colonies that the proposals put forward by the United Kingdom were acceptable in principle, but that he would discuss the matter with his other ministerial colleagues. On 24 September 1965, the Government of the United Kingdom announced that it was in favour of granting independence to Mauritius. On 6 October 1965, the Secretary of State for the Colonies communicated to the Governor of Mauritius the United Kingdom's acceptance of the additional understanding that had been sought by the Premier of Mauritius, including that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to Mauritius. This additional understanding was eventually incorporated into the final record of the meeting at Lancaster House and formed part of the Lancaster House agreement. On 5 November 1965, the Governor of Mauritius informed the United Kingdom Secretary of State that the Mauritius Council of Ministers confirmed agreement to the detachment of the Chagos Archipelago.

Between 1967 and 1973, the inhabitants of the Chagos Archipelago who had left the islands were prevented from returning. The other inhabitants were forcibly removed and prevented from returning to the islands. On 16 April 1971, the BIOT Commissioner enacted an ordinance which made it unlawful for any person to enter or remain in the Chagos Archipelago without a permit (the "Immigration Ordinance 1971"). By virtue of an agreement concluded between Mauritius and the United Kingdom on 4 September 1972, Mauritius accepted payment of the sum of £650,000 in full and final discharge of the United Kingdom's undertaking given in 1965 to meet the cost of resettlement of persons displaced from the Chagos Archipelago.

On 7 July 1982, an agreement was concluded between the Governments of Mauritius and the United Kingdom, for the payment by the United Kingdom of the sum of £4 million on an *ex gratia* basis, with no admission of liability on the part of the United Kingdom, in full and final settlement of all claims whatsoever of the kind referred to in the Agreement against the United Kingdom by or on behalf of the Ilois. This Agreement also required Mauritius to procure from each member of the Ilois community in Mauritius a signed renunciation of the claims.

In 1998, Mr. Louis Olivier Bancoult, a Chagossian, instituted proceedings in the United Kingdom courts challenging the validity of legislation denying him the right to reside in the Chagos Archipelago. On 3 November 2000, judgment was given in his favour by the Divisional Court which ruled that the relevant provisions of the 1971 Ordinance be quashed. The United Kingdom Government did not appeal the ruling and it repealed the 1971 Ordinance that had prohibited Chagossians from returning to the Chagos Archipelago. The United Kingdom's Foreign Secretary announced that the United Kingdom Government was examining the feasibility of resettling the Ilois. On the same day that the Divisional Court rendered the judgment in Mr. Bancoult's favour, the United Kingdom made another immigration ordinance applicable to the Chagos Archipelago, with the exception of Diego Garcia. The ordinance provided that restrictions on entry into and residence in the archipelago would not apply to the Chagossians, given their connection to the Chagos Islands. Chagossians were however not permitted to enter or reside in Diego Garcia.

On 6 December 2001, the Human Rights Committee, in considering the periodic reports submitted by the United Kingdom under Article 40 of the International Covenant on Civil and Political Rights, noted "the State party's acceptance that its prohibition of the return of Ilois who had left or been removed from the territory was unlawful". It recommended that "the State party should, to the extent still possible, seek to make exercise of the Ilois' right to return to their territory practicable".

In June 2002, a feasibility study commissioned by the BIOT Administration concerning the Chagos Archipelago was completed. The study indicated that, while it may be feasible to resettle the islanders in the short term, the costs of maintaining a long-term inhabitation were likely to be prohibitive. Even in the short term, natural events such as periodic flooding from storms and seismic activity were likely to make life difficult for a resettled population. In 2004, the United Kingdom issued two orders in Council: the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004. These orders declared that no person had the right of abode in the BIOT nor the right without authorization to enter and remain there. That same year, Mr. Bancoult challenged the validity of these orders in the courts of the United Kingdom. He succeeded in the High Court. An appeal was brought by the Secretary of State for Foreign and Commonwealth Affairs against the decision of the High Court. The Court of Appeal upheld the High Court's decision.

On 30 July 2008, the Human Rights Committee, in considering another periodic report submitted by the United Kingdom, took note of the aforementioned decision of the Court of Appeal. On the basis of Article 12 of the International Covenant on Civil and Political Rights, the Committee recommended that: "The State party should ensure that the Chagos islanders can exercise their right to return to their territory and should indicate what measures have been taken in this regard. It should consider compensation for the denial of this right over an extended period."

The Secretary of State for Foreign and Commonwealth Affairs appealed the decision of the Court of Appeal upholding Mr. Bancoult's challenge of the validity of the British Indian Ocean Territory (Constitution) Order 2004. On 22 October 2008, the House of Lords upheld the appeal by the Secretary of State for Foreign and Commonwealth Affairs.

On 20 December 2012, the United Kingdom announced a review of its policy on resettlement of the Chagossians who were forcibly removed from, or prevented from returning to, the Chagos Archipelago. A second feasibility study, carried out between 2014 and 2015, was commissioned by the BIOT Administration to analyse the different options for resettlement in the Chagos Archipelago. The feasibility study concluded that resettlement was possible although there would be significant challenges including high and very uncertain costs, and long-term liabilities for the United Kingdom taxpayer. Thereafter, on 16 November 2016, the United Kingdom

decided against resettlement on the "grounds of feasibility, defence and security interests and cost to the British taxpayer".

To date, the Chagossians remain dispersed in several countries, including the United Kingdom, Mauritius and Seychelles. By virtue of United Kingdom law and judicial decisions of that country, they are not allowed to return to the Chagos Archipelago.

V. The questions put to the Court by the General Assembly (paras. 132–182)

The Court considers that there is no need for it to reformulate the questions submitted to it for an advisory opinion in these proceedings. Indeed, the first question is whether the process of decolonization of Mauritius was lawfully completed in 1968, having regard to international law, following the separation of the Chagos Archipelago from its territory in 1965. The General Assembly's reference to certain resolutions which it adopted during this period does not, in the Court's view, prejudge either their legal content or scope. In Question (*a*), the General Assembly asks the Court to examine certain events which occurred between 1965 and 1968, and which fall within the framework of the process of decolonization of Mauritius as a non-self-governing territory. It did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius. In Question (*b*), which is clearly linked to Question (*a*), the Court is asked to state the consequences, under international law, of the continued administration by the United Kingdom of the Chagos Archipelago. By referring in this way to international law, the General Assembly necessarily had in mind the consequences for the subjects of that law, including States.

It is for the Court to state the law applicable to the factual situation referred to it by the General Assembly in its request for an advisory opinion. There is thus no need for it to interpret restrictively the questions put to it by the General Assembly. When the Court states the law in the exercise of its advisory function, it lends its assistance to the General Assembly in the solution of a problem confronting it. In giving its advisory opinion, the Court is not interfering with the exercise of the General Assembly's own functions.

1. Whether the process of decolonization of Mauritius was lawfully completed having regard to international law (Question (a))

The Court explained that, in order to pronounce on whether the process of decolonization of Mauritius was lawfully completed having regard to international law, it must determine, first, the relevant period of time for the purpose of identifying the applicable rules of international law and, secondly, the content of that law. In addition, since the General Assembly has referred to some of the resolutions it adopted, the Court, in determining the obligations reflected in these resolutions, must examine the functions of the General Assembly in conducting the process of decolonization.

(*a*) *The relevant period of time for the purpose of identifying the applicable rules of international law*

In Question (*a*), the General Assembly situates the process of decolonization of Mauritius in the period between the separation of the Chagos Archipelago from its territory in 1965 and its independence in 1968. It is therefore by reference to this period that the Court is required to identify the rules of international law that are applicable to that process. The Court is of the view that, while its determination of the applicable law must focus on the period from 1965 to 1968, this will not prevent it, particularly when customary rules are at issue, from considering the evolution of the law on self-determination since the adoption of the Charter of the United Nations and of resolution 1514 (XV) of 14 December 1960. Indeed, State practice and *opinio* juris, *i.e.* the acceptance of that practice as law (Article 38 of the Statute of the Court), are consolidated and confirmed gradually over time. The Court may also rely on legal instruments which postdate the period in question, when those instruments confirm or interpret pre-existing rules or principles.

(*b*) *Applicable international law*

The Court notes that it must determine the nature, content and scope of the right to self-determination applicable to the process of decolonization of Mauritius, a non-self-governing territory recognized as such, from 1946 onwards, both in United Nations practice and by the administering Power itself.

It begins by recalling that "respect for the principle of equal rights and self-determination of peoples" is one of the purposes of the United Nations (Article 1, paragraph 2, of the Charter). Such a purpose concerns, in particular, the "Declaration regarding non-self-governing territories" (Chapter XI of the Charter), since the "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government" are obliged to "develop [the] self-government" of those peoples (Article 73 of the Charter). In the Court's view, it follows that the legal régime of non-self-governing territories, as set out in Chapter XI of the Charter, was based on the progressive development of their institutions so as to lead the populations concerned to exercise their right to self-determination.

Having made respect for the principle of equal rights and self-determination of peoples one of the purposes of the United Nations, the Charter included provisions that would enable non-self-governing territories ultimately to govern themselves. It is in this context that the Court must ascertain when the right to self-determination crystallized as a customary rule binding on all States.

The adoption of resolution 1514 (XV) of 14 December 1960 represents a defining moment in the consolidation of State practice on decolonization, in so far as this resolution clarifies the content and scope of the right to self-determination. The Court notes that the decolonization process accelerated in the 1960s, as the peoples of numerous non-self-governing territories exercised their right to self-determination and achieved independence. In the Court's view, there is a clear relationship between resolution 1514 (XV) and the process of decolonization following its adoption.

The Court considers that resolution 1514 (XV) has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the

conditions of its adoption. It also has a normative character, in so far as it affirms that "[a]ll peoples have the right to self-determination". Its preamble proclaims "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations" and its first paragraph states that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the Charter of the United Nations". Resolution 1514 (XV) further provides that "[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire". In order to prevent any dismemberment of non-self-governing territories, paragraph 6 of resolution 1514 (XV) provides that: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

The nature and scope of the right to self-determination of peoples, including respect for "the national unity and territorial integrity of a State or country", were reiterated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. By recognizing the right to self-determination as one of the "basic principles of international law", the Declaration confirmed its normative character under customary international law.

The means of implementing the right to self-determination in a non-self-governing territory, described as "geographically separate and … distinct ethnically and/or culturally from the country administering it", were set out in Principle VI of General Assembly resolution 1541 (XV), adopted on 15 December 1960: "A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (*a*) Emergence as a sovereign independent State; (*b*) Free association with an independent State; or (*c*) Integration with an independent State". The Court recalls that, while the exercise of self-determination may be achieved through one of the options laid down by resolution 1541 (XV), it must be the expression of the free and genuine will of the people concerned. However, "[t]he right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized".

The Court recalls that the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory. Both State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination. No example has been brought to the attention of the Court in which, following the adoption of resolution 1514 (XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule. States have consistently emphasized that respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law. The Court considers that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.

In the Court's view, the law on self-determination constitutes the applicable international law during the period under consideration, namely between 1965 and 1968. The Court has in the past noted the consolidation of that law.

(*c*) *The functions of the General Assembly with regard to decolonization*

The General Assembly has played a crucial role in the work of the United Nations on decolonization, in particular, since the adoption of resolution 1514 (XV). It has overseen the implementation of the obligations of Member States in this regard, such as they are laid down in Chapter XI of the Charter and as they arise from the practice which has developed within the Organization. It is in this context that the Court is asked in Question (*a*) to consider, in its analysis of the international law applicable to the process of decolonization of Mauritius, the obligations reflected in General Assembly resolutions 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967.

In resolution 2066 (XX) of 16 December 1965, entitled "Question of Mauritius", having noted "with deep concern that any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration, and in particular of paragraph 6 thereof", the General Assembly, in the operative part of the text, invites "the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity". In resolutions 2232 (XXI) and 2357 (XXII), which are more general in nature and relate to the monitoring of the situation in a number of non-self-governing territories, the General Assembly "[r]eiterates its declaration that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)".

In the Court's view, by inviting the United Kingdom to comply with its international obligations in conducting the process of decolonization of Mauritius, the General Assembly acted within the framework of the Charter and within the scope of the functions assigned to it to oversee the application of the right to self-determination. The General Assembly assumed those functions in order to supervise the implementation of obligations incumbent upon administering Powers under the Charter. It thus established a special committee tasked with examining the factors that would enable it to decide "whether any territory is or is not a territory whose people have not yet attained a full measure of self government" (resolution 334 (IV) of 2 December 1949). It has been the Assembly's consistent practice to adopt resolutions to pronounce on the

specific situation of any non-self-governing territory. Thus, immediately after the adoption of resolution 1514 (XV), it established the Committee of Twenty-Four tasked with monitoring the implementation of that resolution and making suggestions and recommendations thereon (resolution 1654 (XVI) of 27 November 1961). The General Assembly also monitors the means by which the free and genuine will of the people of a non-self-governing territory is expressed, including the formulation of questions submitted for popular consultation. Finally, the General Assembly has consistently called upon administering Powers to respect the territorial integrity of non-self-governing territories, especially after the adoption of resolution 1514 (XV) of 14 December 1960.

The Court then examines the circumstances relating to the detachment of the Chagos Archipelago from Mauritius and determines whether it was carried out in accordance with international law.

(*d*) *Application in the present proceedings*

The Court begins by recalling that, at the time of its detachment from Mauritius in 1965, the Chagos Archipelago was clearly an integral part of that non-self-governing territory. In the Lancaster House agreement of 23 September 1965, the Premier and other representatives of Mauritius, which was still under the authority of the United Kingdom as administering Power, agreed in principle to the detachment of the Chagos Archipelago from the territory of Mauritius on condition that the archipelago could be returned to Mauritius at a later date.

The Court observes that when the Council of Ministers agreed in principle to the detachment from Mauritius of the Chagos Archipelago, Mauritius was, as a colony, under the authority of the United Kingdom. Having reviewed the circumstances in which the Council of Ministers of the colony of Mauritius agreed in principle to the detachment of the Chagos Archipelago on the basis of the Lancaster House agreement, the Court considers that this detachment was not based on the free and genuine expression of the will of the people concerned.

In its resolution 2066 (XX) of 16 December 1965, adopted a few weeks after the detachment of the Chagos Archipelago, the General Assembly deemed it appropriate to recall the obligation of the United Kingdom, as the administering Power, to respect the territorial integrity of Mauritius. The Court considers that the obligations arising under international law and reflected in the resolutions adopted by the General Assembly during the process of decolonization of Mauritius require the United Kingdom, as the administering Power, to respect the territorial integrity of that country, including the Chagos Archipelago.

The Court concludes that, as a result of the Chagos Archipelago's unlawful detachment and its incorporation into a new colony, known as the BIOT, the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968.

2. The consequences under international law arising from the continued administration by the United Kingdom of the Chagos Archipelago (Question (b))

Having established that the process of decolonization of Mauritius was not lawfully completed in 1968, the Court must now examine the consequences, under international law, arising from the United Kingdom's continued administration of the Chagos Archipelago (Question (*b*)).

The Court having found that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State. It is an unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius.

The modalities necessary for ensuring the completion of the decolonization of Mauritius fall within the remit of the United Nations General Assembly, in the exercise of its functions relating to decolonization. As the Court has stated in the past, it is not for it to "determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps".

Since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right. The Court considers that, while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect. As regards the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius.

In response to Question (*b*) of the General Assembly, relating to the consequences under international law that arise from the continued administration by the United Kingdom of the Chagos Archipelago, the Court concludes that the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, and that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius.

VI. Operative paragraph (para. 183)

The Court,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By twelve votes to two,

Decides to comply with the request for an advisory opinion;

In favour: President Yusuf; Vice-President Xue; Judges Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

Against: Judges Tomka, Donoghue;

(3) By thirteen votes to one,

Is of the opinion that, having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

Against: Judge Donoghue;

(4) By thirteen votes to one,

Is of the opinion that the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

Against: Judge Donoghue;

(5) By thirteen votes to one,

Is of the opinion that all Member States are under an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius.

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

Against: Judge Donoghue.

*

Vice-President Xue appends a declaration to the Advisory Opinion of the Court; Judges Tomka and Abraham append declarations to the Advisory Opinion of the Court; Judge Cançado Trindade appends a separate opinion to the Advisory Opinion of the Court; Judges Cançado Trindade and Robinson append a joint declaration to the Advisory Opinion of the Court; Judge Donoghue appends a dissenting opinion to the Advisory Opinion of the Court; Judges Gaja, Sebutinde and Robinson append separate opinions to the Advisory Opinion of the Court; Judges Gevorgian, Salam and Iwasawa append declarations to the Advisory Opinion of the Court.

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Declaration of Vice-President Xue

While in full agreement with the Advisory Opinion of the Court, Vice-President Xue highlights some aspects with regard to the application of the non-circumvention principle in this case. She notes that the dispute between Mauritius and the United Kingdom concerning the issue of the Chagos Archipelago has been going on for decades, but the two States hold divergent views on the nature of the subject-matter of the issue. Whether this bilateral dispute constitutes a compelling reason for the Court to exercise its discretional power to decline to give a reply to the questions put to it by the General Assembly is one of the core issues that was intensely debated in the proceedings.

Vice-President Xue recalls the Court's jurisprudence on the fundamental importance of the principle of consent, according to which there is a compelling reason to decline to give an advisory opinion, if "to give a reply would have the effect of circumventing the principle that a State is not obligated to allow its disputes to be submitted to judicial settlement without its consent" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 191, para. 37; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 158, para. 47). This non-circumvention principle equally applies to the present case.

Vice-President Xue notes, however, that the fact of a pending bilateral dispute, by itself, is not considered a compelling reason for the Court to decline to give an advisory opinion. What is decisive is the object and nature of the request. In light of its consistent jurisprudence, the Court has to examine whether the object of the request is for the General Assembly to "obtain enlightenment as to the course of action it should take", or to assist the peaceful settlement of the dispute (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71), and whether the legal controversy arose during the proceedings of the General Assembly and in relation to matters with which it was dealing, or arose independently in bilateral relations (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 34).

Vice-President Xue concurs with the Court's conclusion that the questions submitted by the General Assembly relate to the decolonization of Mauritius; the object of the Request is not to resolve a territorial dispute between Mauritius and the United Kingdom, but to assist the General Assembly in the discharge of its functions relating to the decolonization of Mauritius; therefore, to give the requested opinion would not have the effect of circumventing the principle of consent.

Vice-President Xue takes this position on the basis of the following considerations. First of all, the scope of Question (*a*) put to the Court by the General Assembly is specifically defined. The Court is requested to determine, at the particular time when Mauritius was granted independence, whether the decolonization process of Mauritius was lawfully completed. The issue of the Chagos Archipelago has to be examined on the basis of the facts and the law as existed at that time and against the historical background of the decolonization of Mauritius.

She notes that the evidence submitted to the Court demonstrates that the detachment of the Chagos Archipelago by the United Kingdom was not simply the result of a normal administrative restructuring of a colony by the administering Power, but part of a defensive strategy particularly designed in view of the prospective independence of the colonial Territories in the western Indian Ocean. In other words, the very root cause of the separation of the Chagos Archipelago lies in the decolonization of Mauritius. Whether the "consent" of Mauritius' Council of Ministers, which was still under the authority of the administering Power, can be regarded as representing the free and genuine will of the people of Mauritius is a crucial issue that the Court has to determine in accordance with the principle of self-determination under international law, as it has a direct bearing on Question (*a*).

She observes that both the United Kingdom itself and the United Nations treated the detachment of the Chagos Archipelago as a matter of decolonization rather than a territorial issue. The archives of the Foreign Office of the

United Kingdom reveal that at the time when the detachment plan was being contemplated, the United Kingdom officials were aware, and even acknowledged, that by detaching the Chagos Archipelago and other islands to set up the British Indian Ocean Territory, the United Kingdom was actually creating a new colony.

Declaration of Judge Tomka

While Judge Tomka agrees with the conclusions of the Court that the process of decolonization of Mauritius was not lawfully completed and that the United Kingdom is under an obligation to bring its administration of the Chagos Archipelago to an end, he does not agree with the reasoning by which the Court has reached its answer to the second question of the General Assembly. He considers that the Court's answer goes further than necessary to assist the General Assembly and intrudes upon the bilateral dispute concerning the Chagos Archipelago between Mauritius and the United Kingdom.

He is concerned that the advisory proceedings are becoming a way of bringing before the Court contentious matters upon an initiative taken by one of the Parties to the dispute. In the present case, there is a bilateral dispute between Mauritius and the United Kingdom concerning the Chagos Archipelago. The present advisory proceedings have their origin in that dispute. These proceedings are the result of an initiative of Mauritius and the questions asked were drafted by Mauritius. In these circumstances, Judge Tomka believes that the Court must exercise caution not to go further than is strictly necessary and useful for the General Assembly in order to avoid circumventing the principle that a State is not bound to submit a dispute for judicial settlement without its consent.

In the present advisory proceedings, taking into account the equally authentic French text of the first question of the General Assembly, the Assembly has asked whether the conditions necessary for the complete decolonization of Mauritius have been met. In Judge Tomka's view, in answering the second question, it is thus not necessary for the Court to go beyond a conclusion that decolonization remains to be completed. In ruling on the conduct of the United Kingdom, the Court deals with questions of the law of State responsibility. He considers that the United Nations Charter is a source of obligations for the administering Powers of non-self-governing territories and not customary rules of international law on State responsibility.

Declaration of Judge Abraham

In his declaration, Judge Abraham voices his reservations about what he considers to be the somewhat ambiguous manner in which the Court deals with the principle of "territorial integrity" in the context of the decolonization process.

Judge Abraham agrees with the idea that the obligation, for an administering Power, to respect the territorial integrity of a non-self-governing territory is "a corollary of the right to self-determination", as stated in paragraph 160 of the Advisory Opinion. In his view, that obligation must, however, be understood as aiming to prevent the dismantling of that territory by a unilateral decision of the administering Power, at the time of or in the period immediately preceding accession to independence, for the political, strategic or other interests of that Power.

Judge Abraham considers that, in these proceedings, there was no need for the Court to go beyond this conclusion in order to respond to the questions put to it, once it had found that the detachment of the Chagos Archipelago was not based on the free and genuine expression of the will of the people of Mauritius. He is concerned that certain passages of the Opinion might be interpreted as giving the principle of territorial integrity a near absolute scope, which would be questionable under customary international law as it existed in the period under consideration.

Given the sometimes arbitrary and mobile nature of the boundaries of colonial entities defined by the administering Powers, it cannot be ruled out that the populations of the geographical subunits of a single colonial entity might have differing aspirations in the choice of their future. In such circumstances, according to Judge Abraham, the principle of territorial integrity does not preclude agreeing to the partition of a territory based on the freely expressed will of the different components of the population of that territory. If the population of the Chagos Archipelago had been consulted, which it was not, and if it had freely expressed its will not to be integrated into the new independent State of Mauritius, the parameters of the question submitted to the Court would, in Judge Abraham's view, have been substantially different.

Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of 19 parts, Judge Cançado Trindade begins by pointing out that, though he supports the conclusions reached by the International Court of Justice (ICJ) and set forth in the resolutory points of the *dispositif* of the present Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, he does so on the basis of a reasoning at times clearly distinct from that of the Court. There are some points,—he adds,—which have not been sufficiently dealt with by the ICJ, or deserve more attention, and even relevant points which have not been considered at all by the Court.

2. He thus dwells upon them, develops his own reasoning and presents the foundations of his own personal position thereon. He starts examining the successive General Assembly resolutions, from 1950 onwards, evidencing the long-standing United Nations acknowledgment of, and commitment to, the fundamental right to self-determination of peoples (part II, paras. 6–29). Among the many resolutions surveyed are the landmark General Assembly resolutions 1514 (XV) of 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples) and 2625(XXV) of 1970 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations).

3. Judge Cançado Trindade recalls that, in the period between those two Declarations, General Assembly

resolution 2066(XX) of 1965 warned against any step taken by the "administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base", which would be in "contravention" of the 1960 Declaration, which made it clear that the submission of peoples to foreign domination constituted "a denial of fundamental human rights" contrary to the United Nations Charter. And General Assembly resolution 2621(XXV), of 1970, in its paragraph 1, typified the continuation of colonialism as a *crime*.

4. In Judge Cançado Trindade's perception, the historical formation of the international law of decolonization (part IV, paras. 38–55) stands as a manifestation of the historical process of *humanization* of contemporary international law. Subsequent resolutions, from 1970 to 2017, condemned colonialism as a denial and breach of fundamental human rights, contrary to the United Nations Charter itself. The right to self-determination emerged and crystallized as a true human right in itself, a right of peoples (paras. 29–37).

5. There were, likewise,—he adds,—the successive resolutions of the old Organization of African Unity and African Union (1980–2015) condemning categorically the military basis established in the island Diego Garcia (in Chagos) as a "threat to Africa", and calling upon an "expeditious end" of the United Kingdom's "unlawful occupation of the Chagos Archipelago" with a view to enable Mauritius to exercise its sovereignty over the Archipelago (paras. 52–55).

6. Judge Cançado Trindade then singles out the historical significance of the insertion of the right to self-determination in Article 1 of the two United Nations Covenants on Human Rights of 1966, and the contribution of the Human Rights Committee on the matter (in its General Comments, its Observations on Reports by States Parties to the Covenant on Civil and Political Rights, focusing on Chagos islanders, and its Views on communications), in support of the rights of Chagos islanders, including their right to reparations, victimized for a prolonged period of time since their forced displacement from their islands (part V, paras. 56–68).

7. Attention is then turned by Judge Cançado Trindade to the acknowledgment of the right to self-determination in the case-law of the ICJ (paras. 69–76), as well as by the Second United Nations World Conference on Human Rights held in Vienna in 1993 (paras. 77–86). He observes that the final document of that memorable United Nations World Conference of 1993 went further than the 1970 Declaration of Principles, in proscribing discrimination "of any kind", thus enlarging the framework of the right to self-determination (para. 78). We can behold nowadays,—Judge Cançado Trindade proceeds,—

> "the new *ethos* of our times, reflected in the new *jus gentium* of our times, wherein the human persons and peoples occupy a central position (…) bearing always in mind the pressing needs of protection of the victims (in particular those in situations of vulnerability or even defencelessness) (…).
>
> Such *corpus juris* is a true *law of protection (droit de protection)* of the rights of human beings and peoples, and not of States,—a development which could hardly have been anticipated some decades ago. (…) Hence (…) the utmost importance of the right of access to justice *lato sensu*, with the new primacy of the *raison d'humanité* over the old *raison d'État*, in the framework of the new *jus gentium* of our times" (paras. 85–86).

8. In sequence, he focuses then on the question he put to all participating Delegations in the ICJ's oral advisory proceedings, in the public sitting of 5 September 2018, and to their written answers, and comments thereon (parts VIII-IX, paras. 87–119). Judge Cançado Trindade's question concerned the legal consequences ensuing from the formation of customary international law with the significant presence of *opinio juris communis* for ensuring compliance with the obligations stated in relevant General Assembly resolutions.

9. The fundamental right of peoples to self-determination,—he continues,—is endowed with *jus cogens* character in contemporary international law, as expressly acknowledged by the participating Delegations in their responses to his question. To them, moreover, the relevant General Assembly resolutions in support of it disclose an *opinio* juris communis, with *erga* omnes duties (of compliance with the fundamental right of self-determination). And Judge Cançado Trindade adds:

> "In my understanding, there is no reason nor justification for the ICJ, in its present Advisory Opinion, not having expressly held that the fundamental right of peoples to self-determination belongs to the realm of *jus cogens*.
>
> This is a point which has been made by several participating Delegations throughout the present advisory proceedings, and has not been taken into account by the ICJ in its own reasoning. It is a matter which deserves careful consideration, to which I shall next turn attention. It could never have been left out of the reasoning of the present Advisory Opinion of the ICJ; there is no justification for not having addressed it. The fundamental right of peoples to self-determination indeed belongs to the realm of *jus cogens*, and entails obligations *erga* omnes, with all legal consequences ensuing therefrom" (paras. 118–119).

10. This being so, Judge Cançado Trindade, accordingly, dedicates the following three parts (X, XI and XII) of the present Separate Opinion to an in-depth study of the matter, starting with the fundamental right to self-determination in the domain of *jus cogens*, from its early acknowledgment (paras. 120–128) to reassertions of *jus cogens* made by participating Delegations in the course of the present advisory proceedings (paras. 129–150). He considers "significant" such reassertions of *jus cogens*, though "unfortunately" not having been addressed the Court in the present Advisory Opinion (para. 150).

11. Judge Cançado Trindade then proceeds to his criticism of the insufficiencies in the ICJ's case-law relating to *jus cogens* (paras. 151–169). In his understanding, "the ICJ cannot at all keep on overlooking the legal consequences of *jus cogens*, obsessed with the consent of individual States to the exercise of its own jurisdiction" (para. 155). He sustains that *jus cogens* goes beyond the law of treaties, and there is here need of a people-centred approach, with the *raison d'humanité* prevailing over the *raison d'État* (para. 158).

12. Judge Cançado Trindade recalls that, in his successive Individual Opinions within the ICJ, he has been devoting special attention to the incidence of *jus cogens* with its legal consequences (paras. 156 and 159–162). Having been dedicating considerable attention to the importance and the

expansion of the material content of *jus cogens* in the contemporary law of nations, he feels obliged to express here his criticism that

> "the case-law of the ICJ relating to the matter has appeared reluctant and far too slow; the ICJ could and should have developed much further its considerations as to the legal consequences of a breach of *jus cogens*, in particular when faced,—as it is now in the present Advisory Opinion, and in successive cases in recent years,—with situations of grave violations of the rights of the human person and of peoples" (para. 163).

13. He further ponders that, though the issue of *jus cogens* has been brought to the ICJ's attention for a long time, almost half a century, "the Court could and should have developed much further its jurisprudential construction thereon" (para. 167). He reiterates his criticism that to him it was "most regrettable" that in the present Advisory Opinion

> "the ICJ has not even mentioned the very important issue of the *jus cogens* character of the fundamental right to self-determination and its legal consequences, extensively dealt with by participating Delegations, in several of their written and oral submissions (in support of *jus cogens*) in the course of the present advisory proceedings (…).
>
> The Court, for reasons which escape my comprehension, in face of such an important matter as that of the present request by the General Assembly of its Advisory Opinion, has avoided even mentioning *jus cogens*, limiting itself to refer *in passim* (in para. 180) to 'respect for the right to self-determination' as 'an obligation *erga* omnes'" (paras.168–169).

14. Accordingly, Judge Cançado Trindade then dedicates his following reflections to *jus cogens* and the existence of *opinio* juris *comunis* (paras. 170–174), and to the *recta ratio* in respect of *jus cogens* and the primacy of conscience above the "will" (paras. 175–201). To him,—as he has been sustaining along many years,—the invocation of State "consent" "cannot deprive *jus cogens* of all its legal effects, nor of the legal consequences of its breach" (paras. 171–172). The evolving general international law emanates not from State "will", but rather from human conscience, and he adds that

> "General or customary international law emanates not so much from the practice of States (not devoid of ambiguities and contradictions), but rather from the *opinio* juris communis of all the subjects of international law (States, international organizations, human beings, peoples, and humankind as a whole)" (para. 174).

15. Judge Cançado Trindade then turns attention to *recta ratio*: *jus cogens* and the primacy of conscience above the "will". He emphasizes that above the "will" stands the human conscience, the universal juridical conscience (para. 175), recalling that the most lucid international legal doctrine has upheld this as from the lessons of the "founding fathers" of the law of nations, who already at their time sustained that the *jus* gentium could not derive from the "will" of States, as it was a *lex praeceptiva* (proper of natural law) and apprehended a *recta ratio* inherent to humankind (paras. 176–178). *Jus necessarium*, ensuing from the *recta ratio* and not from the "will" of States, transcends the limitations of the *jus voluntarium* (paras. 179 and 196).

16. Hence the importance attributed to fundamental general principles of law, and to rights and duties of all *inter se*, well above State sovereignty (paras. 179 and 192). The duty of reparation for injuries,—he proceeds,—was clearly seen as a response to an *international need*, in conformity with the *recta ratio*,—whether the beneficiaries were (emerging) States, peoples, groups or individuals (para. 185). In their humanist outlook, the "founding fathers" of the *droit des gens*, as from the Sixteenth century, envisioned redress for damages as fulfilling an international need in conformity with *recta ratio* (para. 186).

17. Judge Cançado Trindade warns that legal positivist thinking—as from the late Nineteenth century—unduly placed the "will" of States above *recta ratio*. It is in jusnaturalist thinking that "the notion of *justice* has always occupied a central position, orienting *law* as a whole; *justice*, in sum, is at the beginning of all *law*, being, moreover, its ultimate end" (para. 190). To him, general principles of law, guiding all legal norms and standing above the "will" of States, "emanate, like *jus cogens*, from human conscience, rescuing international law from the pitfalls of State voluntarism and unilateralism, incompatible with the foundations of a true international legal order" (para. 195). And he adds:

> "There is pressing need today for the ICJ to elaborate its reasoning on *jus cogens* (not only obligations *erga* omnes) and its legal consequences, taking into account the progressive development of international law. It cannot keep on referring only to obligations *erga* omnes without focusing and elaborating on *jus cogens* wherefrom they ensue. Furthermore, in my understanding, the situation of the forcefully displaced Chagossians, in inter-generational perspective, is to be kept carefully in mind, in the light of the successive resolutions of the United Nations General Assembly examined in the present Separate Opinion" (para. 201).

18. Judge Cançado Trindade, sustaining that the rights of peoples are beyond the strict inter-State outlook, recalls the historical antecedents to be taken into account, such as the minorities and mandates systems at the time of the League of Nations, followed by non-self-governing territories and the trusteeship system under the United Nations Charter (paras. 203 and 205). He further recalls pertinent examples of resort to peoples' rights before the ICJ (paras. 206–213), demonstrating that when the matter lodged with it concerns the *rights of peoples*, "the ICJ reasoning is to transcend ineluctably the strictly inter-State outlook. Otherwise justice cannot be done. The nature of the matters lodged with the ICJ is to lead to its proper reasoning" (paras. 214–215).

19. This brings Judge Cançado Trindade to the consideration of conditions of living and the longstanding tragedy of imposed human suffering. He examines at first the statement made in the ICJ's public hearing of 3 September 2018, by the representative of the Chagossian community (Ms. M. Liseby Elysé). He does so in the light of his own conception that "the right to life—of forcefully displaced Chagossians and their descendants—comprises the right to dignified conditions of living" (para. 219).

20. He warns that "[i]mposed human suffering is perennial, as much as the presence of good and evil are, everywhere" (para. 223); thus, it has kept being studied, as from the ancient Greek tragedies (paras. 220–222 and 226), along the

centuries (paras. 224–225 and 227), with attention "turned to human fate, given the imperfection of human justice" (para. 223). Judge Cançado Trindade adds that the aforementioned statement made before the Court by the representative of the Chagossian community

> "brings to the fore, in my perception, the concern of ancient Greek tragedies with the painful human condition aggravated by violence and the imposition of human suffering, to the detriment of the vulnerable victims. (…)
>
> (…) The United Nations, (…) since its earlier years in the fifties, engaged itself in support of the prevalence of the fundamental right of peoples to self-determination, conscious of the need to put an end to the cruelty and evil of colonialism, the persistence of which amounts, in my understanding, to a continuing breach of *jus cogens* nowadays" (paras. 228 and 230).

21. He adds, as to the matter here presented to the ICJ by the United Nations General Assembly's request for the present Advisory Opinion, that "the Chagossians expelled from their homeland were abandoned in other islands in extreme poverty, in slums and empty prisons,—in chronic poverty with social marginalization or exclusion which led even to suicides" (para. 231). And he ponders that contemporary *jus gentium*, attentive to fundamental principles and the realm of *jus cogens*, "is not indifferent to the sufferings of the population" (para. 231).

22. In the following part (XV) of his Separate Opinion, Judge Cançado Trindade examines the *opinio juris communis* found in successive United Nations General Assembly resolutions, contributing remarkably to the "universal acknowledgment", consolidation and vindication of the right of peoples to self-determination (paras. 232–234). He further surveys the arguments, presented by several participating Delegations, in the course of the present advisory proceedings of the ICJ, stressing the incompatibility with successive United Nations General Assembly's resolutions of the detachment of Chagos from Mauritius and the forced displacement of the Chagossians in the period 1967–1973, and the pressing need to put an end to such continuing situation in breach of international law (paras. 235–241).

23. In logical sequence, the following issue of reflections on the part of Judge Cançado Trindade concerns the duty to provide reparations for breaches of the right of peoples to self-determination (part XVI). He begins by observing that this issue can be properly approached in historical perspective, as the duty of redress to victims is deeply-rooted in the law of nations, wherein humanist thinking has never faded, and keeps on flourishing in its most lucid doctrine (para. 242). In a world of violence amidst the misuses of language, endeavours continue for the preservation of lucidity (para. 243).

24. In this respect, Judge Cançado Trindade recalls that the United Nations Declaration on the Rights of Indigenous Peoples (of 2007) has some provisions on the duty of redress or reparation for damages in respect of the right of peoples to self-determination; the Declaration expressly refers to reparations in distinct forms, such as restitution, or, when this is not possible, just, fair and equitable compensation, or other appropriate redress (para. 244).

25. He considers "reassuring" that, in the course of the present ICJ's advisory proceedings, several participating Delegations have expressly addressed the right to reparations (in their forms), stressing the need of providing adequate redress (para. 245). After surveying their arguments to this effect (paras. 246–256), he observes that it should be kept in mind that "the resettlement of Chagossians on the Archipelago of Chagos is directly linked to *restitutio in integrum* as a form of reparation" (para. 256).

26. Judge Cançado Trindade further underlines that, as so much attention was carefully given by some participating Delegations to the provision of appropriate reparations to the victims, "clearly necessary and ineluctable here", there is "no justification for the ICJ not having addressed in the present Advisory Opinion the right to reparations, in its distinct forms, to those forcibly expelled from Chagos and their descendants" (para. 257, and cf. para. 286).

27. Even more so, as the ICJ correctly asserted, in the present Advisory Opinion,—he continues,—the occurrence of breaches by the "administering power", the United Kingdom, in the detachment of the Chagos Archipelago without consultation with the local population, and in disrespect of the territorial integrity of Mauritius (paras. 172–173), as pointed out in successive resolutions of the United Nations General Assembly (para. 258).

28. This has led the ICJ further to assert (in para. 177), also correctly,—he adds,—that the United Kingdom's continued administration of the Chagos Archipelago "constitutes a wrongful act entailing the international responsibility of that State", and (in para. 178) that the United Kingdom is thus under the obligation to bring an end rapidly to its administration of the Chagos Archipelago, thus enabling Mauritius to complete the decolonization of its territory "in a manner consistent with the right of peoples to self-determination". And the ICJ added (in para. 182) that "all States must co-operate with the United Nations to complete the decolonization of Mauritius" (para. 259, and cf. para. 287).

29. The ICJ thus responded here to the two questions contained in the request for its Advisory Opinion by the General Assembly,—he proceeds,—though in an incomplete way, as it has not addressed the breach of *jus cogens*, nor the due reparations (in its distinct forms) to those victimized (para. 260). Judge Cançado Trindade recalls the position he has been sustaining, within the ICJ on distinct occasions, that the breach of a right and the duty of prompt reparation form an indissoluble whole; the duty of redress cannot be overlooked (paras. 261–263). In Judge Cançado Trindade's conception, there is an "indissoluble whole of breaches of the right and duty of prompt reparations", and

> "a proper consideration of reparations cannot at all limit itself only to compensation; it has to consider reparations in all its forms (…) namely: *restitutio in integrum*, appropriate compensation, satisfaction (including public apology), rehabilitation of the victims, guarantee of no-repetition of the harmful acts or omissions" (para. 263).

30. Judge Cançado Trindade then notes that there is, nowadays, vindication of, besides rights of individuals and groups, also of rights of peoples, encompassing reparations; this

brings to the fore the mission of contemporary international tribunals in this respect (para. 264). This being so, he proceeds to a detailed examination of the relevant jurisprudence of international tribunals (Inter-American, African and European Courts) of human rights on the matter (paras. 265–284), showing the existence of elements in international jurisprudence in support of the vindication of the rights of peoples, accompanied by the provision of due reparations. Thus, he adds,

> "there was no reason for the ICJ, in the present Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, not to have taken into due account this significant issue of the vindication of the rights of peoples with due reparations, in pursuance of the mission of contemporary international tribunals" (para. 285).

31. The remaining point that he examines is the vindication of the rights of individuals and of peoples and the important role of general principles of law in the realization of justice (part XVIII), as fundamental principles are "the foundations of the realization of justice itself, and jusnaturalist thinking has always stressed their importance" (para. 288). They are of the utmost relevance as they inform and conform the norms of international law (para. 289). Thus,—he adds,—

> "The basic posture of an international tribunal can only be *principiste*, without making undue concessions to State voluntarism. Legal positivism has always attempted, in vain, to minimize the role of general principles of law, but the truth is that, without those principles, there is no legal system at all.
>
> Those principles assume a great importance, in face of the growing contemporary tragedy of forced displaced persons, or undocumented migrants, in situations of utmost vulnerability, in distinct parts of the world. Such continuing and growing human tragedy shows that lessons from the past seem to be largely forgotten. This reinforces the relevance of fundamental principles and values, already guiding the action of the United Nations—in particular its General Assembly (…),—as well as international jurisprudence (mainly of the [Inter-American Court of Human Rights]) on the matter" (paras. 290–291).

32. He then refers to his considerations on this point, developed in the present Separate Opinion, as well as in other Individual Opinions he presented in previous Advisory Opinions of the ICJ and, earlier on, of the Inter-American Court of Human Rights (paras. 292–293). In sequence, Judge Cançado Trindade criticizes the addition, in Article 38(1)(*c*) of the Permanent Court of International Justice (PCIJ)/ICJ Statute, to general principles of law, of the qualification "recognized by civilized nations": such addition was, in his perception, distracted, done "without reflection and without a minimal critical spirit", as it is impossible to determine which are the "civilized nations"; one can only identify the countries which behave in a "civilized" way for some time, and while they so behave (para. 294), with due respect to the rights of the human person and of peoples (para. 296).

33. Such additional qualification to "general principles of law",—he proceeds,—was made in Article 38 of the Statute of the PCIJ in 1920 by "mental lethargy", and was maintained in the Statute of the ICJ in 1945, wherein it remains until now, by "mental inertia, and without a critical spirit" (para. 295). And Judge Cançado Trindade adds that

> "We ought to have some more courage and humility, much needed, in relation to our human condition, given the notorious human propensity to unlimited cruelty. From the ancient Greek tragedies to contemporary ones, human existence has always been surrounded by tragedy. (…)
>
> The ICJ cannot here keep on pursuing a strictly inter-State outlook, as it is used to: in the present General Assembly's request for its Advisory Opinion, we are in face of the relevant *rights of peoples*,—which the United Nations General Assembly has always been attentive and sensitive to,—on the foundation of the United Nations Charter itself. The focus here is on the importance of the rights of peoples, such as their right to self-determination, which count on the firm support of the great majority of participating Delegations" (paras. 295 and 297).

34. He further criticizes the attention shown by the ICJ,—as it is used to,—to individual States' "consent", even referring to "consent" as being a "principle" (in para. 90). He recalls that for years, within the Court, he has been sustaining that "consent" is not—cannot be—a "principle" (paras. 298–300). Moreover, the arguments of a "tiny minority" of participating Delegations overlooking or minimizing the rights of the human person and of peoples (such as their right to self-determination), could even have been dismissed by the Court, which however gave space to them in its own reasoning (*e.g.*, in paras. 133–134). In this respect, in his view the narration by the ICJ of the arguments presented to it by participating Delegations could have been more precise (paras. 301–304).

35. In any case,—Judge Cançado Trindade proceeds,—the conclusions of the ICJ, set forth in the *dispositif*, are constructive and deserving of attention, in addition to its findings of the occurrence of a continuing "wrongful act" entailing the international responsibility of the State concerned, and of the identification of the issue of "the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin", as pertaining to "the protection of the human rights of those concerned", to be duly "addressed by the General Assembly during the completion of the decolonization of Mauritius". Judge Cançado Trindade is thus confident that "this Advisory Opinion of the ICJ, despite its insufficiencies, may assist, with its conclusions in the *dispositif*, the United Nations General Assembly in seeking the realization of justice for those victimized in the Chagos Archipelago, in conformity with the United Nations Charter and the general principles of international law" (para. 305).

36. Last but not least, in his epilogue (part XIX), Judge Cançado Trindade proceeds to a recapitulation of the main points (seventy of them) sustained in his present Separate Opinion (paras. 308–335) with a reasoning clearly distinct from the Court, grounded not only on the assessment of the arguments produced before the Court by the participating Delegations, and above all on considerations of principle and fundamental values, to which he attaches greater importance. He expresses the feeling of being in peace with his own conscience, in laying the foundations of his own personal position on the matter dealt with in the present Advisory Opinion (para. 306).

37. After all, it is a matter which concerns the *rights of peoples*, requiring the ICJ reasoning "to transcend ineluctably the strictly inter-State outlook; otherwise justice cannot be done" (para. 325). Judge Cançado Trindade concludes that general principles of law (*prima principia*) and fundamental values stand well above State consent, conferring to the international legal order its ineluctable axiological dimension; fundamental principles are, in his conception, the foundations of the realization of justice, giving expression to the idea of an *objective justice* for the application of the *universal* international law, the humanized new *jus gentium* of our times (paras. 331, 333 and 335).

Joint declaration of Judges Cançado Trindade and Robinson

1. Judges Cançado Trindade and Robinson, in addition to their respective separate opinions, present their joint declaration, stressing the significance of the normative content of General Assembly resolutions, since the fifties, providing a foundation for the right of peoples to self-determination.

2. Such resolutions demonstrate that the General Assembly clearly intended to make effective and universal the right of peoples to self-determination in international law. The General Assembly has acknowledged, along the years, the importance of the crystallization of the right of peoples to self-determination in general international law. Its successive resolutions led to the implementation of almost complete decolonization around the world. In their view, the present Advisory Opinion is to be viewed within this framework.

3. The Court should have given greater emphasis on the normative value of such General Assembly resolutions, which demonstrate the continuing development of the *opinio juris communis* on the matter in customary international law.

4. Last but not least, Judges Cançado Trindade and Robinson, stress that, given the relevance of *jus cogens* to the issues raised in the proceedings, the Court should have pronounced on the *jus cogens* character of the right of peoples to self-determination.

Dissenting opinion of Judge Donoghue

Judge Donoghue agrees that the Court has jurisdiction to give the requested Advisory Opinion. However, she considers that the Advisory Opinion has the effect of circumventing the absence of United Kingdom consent to judicial settlement of its bilateral dispute with Mauritius regarding sovereignty over the Chagos Archipelago and therefore that it undermines the integrity of the Court's judicial function. In her opinion, this is a compelling reason for the Court to exercise its discretion to decline to give the Advisory Opinion.

Separate opinion of Judge Gaja

The request of the General Assembly concerning the completion of the decolonization of Mauritius could have been answered without inquiring into the status of the principle of self-determination in 1968. What occurred in the Chagos Archipelago could not possibly be taken as a form of decolonization. In the process leading to the separation of the Chagos Archipelago from Mauritius, the Chagossians were never consulted or even represented. The representatives of Mauritius did not accept a definitive separation of the Archipelago.

For the purpose of decolonization, the principle of territorial integrity (expressed in particular in paragraph 6 of General Assembly resolution 1514 (XV)) requires that the whole colonial territory be considered. However, this does not imply that the non-self-governing territory be attributed to one and the same newly independent State.

In reply to an implied question of the General Assembly, the Court has stated that there exists an obligation for the administering Power to decolonize the Chagos Archipelago. However, the determination of how decolonization is to be effected, and not only the "modalities necessary for ensuring the completion of the decolonization of Mauritius", should have been left to the General Assembly.

In order to specify further consequences under international law of the continued administration of the Chagos Archipelago by the United Kingdom, it would be necessary for the General Assembly to determine first how the process of decolonization has to be completed.

Separate opinion of Judge Sebutinde

The Advisory Opinion omits certain important facts from its narrative, which facts have a direct bearing upon the first question posed by the General Assembly. The Court has also missed the opportunity to recognize that the right to self-determination within the context of decolonization, has attained peremptory status (*jus cogens)*, whereby no derogation therefrom is permitted. As a direct corollary of that right is the *erga omnes* obligation to respect that right. A failure to recognize the peremptory status of the said right has led to the failure of the Court to properly and fully consider the consequences of its violation when answering Question (*b*). Judge Sebutinde's separate opinion addresses these issues.

Separate opinion of Judge Robinson

1. In his separate opinion, Judge Robinson indicates that while he has voted in favour of all the findings in the operative paragraph of the Court's Opinion, the purpose of his opinion is to address issues that have either not been dealt with in the Court's Advisory Opinion or, in his view, not sufficiently stressed, clarified or elaborated.

2. In his opinion he addresses four areas. First he analyses General Assembly resolutions during the period 1950 to 1957 and comments on their impact in the development of the customary international law of the right to self-determination. Second he analyses the Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV)) (which due to its impact and historic significance, he refers to as simply "1514") and its impact on the development of the right to self-determination. Third he addresses the status of the right of self-determination as a norm of *jus cogens* and the consequences for such a status on

Mauritius' purported consent to the detachment of the Chagos Archipelago and its impact on any treaty that may conflict with that norm against the background that decolonization must reflect the free and genuine expression of the will of the peoples concerned. Fourth he examines the plight of the Chagossians.

3. Judge Robinson argues that an analysis of the General Assembly resolutions over the seven-year period 1950 to 1957 is capable of showing that State practice and *opinio juris* combined to establish the right to self-determination as a rule of customary international law by 1957. He concludes that even though it is arguable that the right to self-determination became a rule of customary international law in 1957, it may be safer to conclude that its crystallization as a rule of customary international law took place in 1960 with the adoption of resolution 1514.

4. In his examination of resolution 1514 Judge Robinson comments on the Court's clarification that its Advisory Opinion is confined to the right to self-determination in the context of decolonization. He argues that the fact that the right to self-determination set out in paragraph 2 of resolution 1514 is not only included in the two Covenants, (International Covenant on Civil and Political Rights (CCPR) and International Covenant on Economic Social and Cultural Rights) but is included as the first article in both, speaks to its significance not only as a fundamental human right, but as one that is seen as indispensable for the enjoyment of all the rights set out in the two Covenants. In his view, the incorporation of the right to self-determination as the first article in these two international covenants solidifies its development as a fundamental human right, and indeed, the foundation for all other human rights. He concludes that resolution 1514 is a normative laden declaration, rich with ore protective of values fundamental to the international community and that it is as potent a force for liberation and justice as was emancipation following the abolition of enslavement in many parts of the world in the 1830s.

5. Judge Robinson points out that the Court in its Advisory Opinion has offered no comment on the status of the right to self-determination as a norm of *jus cogens*. He conducts an analysis of the case law of the Court and of Article 53 of the Vienna Convention on the Law of Treaties and concludes, using the Court's approach in its case law, the Court should have characterized the right to self-determination as a norm of *jus cogens*. He cites a plethora of evidentiary material which in his view, establishes the peremptory status of the right to self-determination.

6. In light of his characterization of the norm as one of *jus cogens*, he examines the consequences of that characterization having regard to information before the Court in the advisory proceedings. One relevant issue is the Exchange of Notes constituting an Agreement concerning the Availability for Defence Purposes of the British Indian Ocean Territory (with Annexes) between the United Kingdom and the United States. The other is the inclusion in the Exchange of Notes of an obligation on the United Kingdom to remove and resettle the inhabitants of the Archipelago. He concludes that that Exchange of Notes conflicts with the norm of the right to self-determination which has a *jus cogens* character.

7. Turning to the situation of the Chagossians, which he describes as "a human tragedy that has no place in the twenty-first century" he states that the right to return to one's country is a basic human right protected by Article 12 of the CCPR. While noting the apology of the United Kingdom for the treatment of the Chagossians, he pointed to the post World War II development of a body of law based on respect for the inherent dignity and worth of the human person. The United Kingdom itself was a significant actor in that development, which, he argues, must now be made by all those concerned to work to the advantage of the Chagossians.

Declaration of Judge Gevorgian

In his declaration, Judge Gevorgian, while fully agreeing with the Court's reasoning and findings as made in the Opinion, expresses his disapproval with the Court's statement of responsibility made in paragraph 177, which he considers unsupported by the Court's case law. Judge Gevorgian considers that a dispute exists between Mauritius and the United Kingdom concerning sovereignty over Chagos, as shown by Mauritius' attempts to bring this case before the Court by way of contentious proceedings. Accordingly, the Court's task in the present case was to consider the lawfulness of Mauritius' decolonization process and the possible consequences that may arise therefrom, and not to adjudicate State responsibility, a matter that is outside the Court's advisory function.

Declaration of Judge Salam

Judge Salam voted in favour of all the subparagraphs of the operative part of the present Advisory Opinion. Although he essentially concurs with the Court's reasoning, he notes two points that should have been addressed by the Court.

Firstly, Judge Salam observes that in seeking to ascertain at what point the right to self-determination became crystallized as a customary rule in order to answer the first question submitted to it, the Court noted the normative value of General Assembly resolution 1514 (XV). He agrees with this reasoning but thinks that the Court should have gone further. In this regard, Judge Salam recalls several Security Council resolutions which confirm, affirm and reaffirm General Assembly resolution 1514 (XV). He concludes that the fact that it was clearly endorsed by the Security Council attests to its binding nature.

Secondly, Judge Salam considers it regrettable that in answering the second question submitted to it, the Court did not raise the possibility of compensation for the Chagossians. He notes in this regard that the Court has already addressed such question in the past and refers to the Court's Advisory Opinion in the *Wall* case.

Declaration of Judge Iwasawa

1. While Judge Iwasawa agrees with the conclusions drawn by the Court, he wishes to offer his understanding of the Court's reasoning and to elaborate upon his reasons for supporting the conclusions.

2. Judge Iwasawa points out that the free and genuine expression of the will of the people concerned is a cardinal element of the right to self-determination. In response to Question (*a*), the Court concludes that the process of decolonization of Mauritius was not lawfully completed in 1968. It is Judge Iwasawa's understanding that the Court draws this conclusion on two grounds: first, that the detachment of the Chagos Archipelago was not based on the free and genuine expression of the will of the people concerned; and, second, that the detachment was contrary to the principle of territorial integrity. A separation or split of a non-self-governing territory is not contrary to the principle of territorial integrity as long as it is based on the free and genuine will of the people concerned. The Opinion suggests that, in the case of Mauritius, the detachment of the Chagos Archipelago was contrary to the principle of territorial integrity because it was not based on the free and genuine will of the people concerned.

3. Judge Iwasawa observes that, in response to Question (*b*), the Court highlights the obligations of the United Kingdom and all Member States under international law relating to decolonization. As the administering Power, the United Kingdom has international obligations with respect to the Chagos Archipelago, including an obligation to respect the right of peoples to self-determination and obligations arising from Chapter XI of the Charter. In the present proceedings, it follows from these obligations that the United Kingdom has an obligation to bring to an end its continued administration of the Chagos Archipelago as rapidly as possible. As the right of peoples to self-determination has an *erga omnes* character, all States have the duty to promote its realization and to render assistance to the United Nations in carrying out its responsibilities to implement that right. In the present proceedings, it follows from this duty that all Member States have an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius.

4. In its Advisory Opinion, the Court states that the decolonization of Mauritius should be completed "in a manner consistent with the right of peoples to self-determination" without elaboration. The Court neither determines the eventual legal status of the Chagos Archipelago, nor indicates detailed modalities by which the right to self-determination should be implemented in respect of the Chagos Archipelago. The Court gives an opinion on the questions requested by the General Assembly to the extent necessary to assist the General Assembly in carrying out its function concerning decolonization. Giving the opinion in this way does not amount to adjudication of a territorial dispute between the United Kingdom and Mauritius.

234. APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (QATAR *v.* UNITED ARAB EMIRATES) [PROVISIONAL MEASURES]

Order of 14 June 2019

On 14 June 2019, the International Court of Justice issued an Order on the Request for the indication of provisional measures submitted by the United Arab Emirates in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*. In its Order, the Court rejected the request for provisional measures.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judges *ad hoc* Cot, Daudet; Registrar Couvreur.

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The Court begins by recalling that, on 11 June 2018, Qatar instituted proceedings against the United Arab Emirates (hereinafter the "UAE") with regard to alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention"). The Application was accompanied by a Request for the indication of provisional measures. By an Order dated 23 July 2018, the Court indicated certain provisional measures directed at the UAE and ordered that both Parties refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve. On 22 March 2019, the UAE in turn submitted a Request for the indication of provisional measures, in order to "preserve the UAE's procedural rights" and to "prevent Qatar from further aggravating or extending the dispute between the Parties pending a final decision in th[e] case".

I. Prima facie *jurisdiction* (paras. 15–16)

The Court observes that it may indicate provisional measures only if there is, *prima facie*, a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. That is so whether the request for the indication of provisional measures is made by the applicant or by the respondent in the proceedings on the merits. The Court recalls that, in its Order of 23 July 2018 indicating provisional measures in the present case, it concluded that, "*prima facie*, it has jurisdiction pursuant to Article 22 of CERD to deal with the case to the extent that the dispute between the Parties relates to the 'interpretation or application' of the said Convention". The Court sees no reason to revisit its previous finding in the context of the present Request.

II. The provisional measures requested by the UAE (paras. 17–29)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. It observes that, at this stage of the proceedings, it is not called upon to determine definitively whether the rights which the UAE wishes to see protected exist; it need only decide whether the rights claimed by the UAE, and for which it is seeking protection, are plausible rights, taking account of the basis of the Court's *prima facie* jurisdiction in the present proceedings. Thus, these alleged rights must have a sufficient link with the subject of the proceedings before the Court on the merits of the case.

With respect to the first provisional measure requested, namely that the Court order that Qatar immediately withdraw its Communication submitted to the Committee on the Elimination of Racial Discrimination (hereinafter the "CERD Committee") and take all necessary measures to terminate consideration thereof by that Committee, the Court considers that this measure does not concern a plausible right under CERD, but rather the interpretation of the compromissory clause in Article 22 of CERD and the permissibility of proceedings before the CERD Committee when the Court is seised of the same matter. The Court has already examined this issue in its Order of 23 July 2018, noting that:

> "Although the Parties disagree as to whether negotiations and recourse to the procedures referred to in Article 22 of CERD constitute alternative or cumulative preconditions to be fulfilled before the seisin of the Court, the Court is of the view that it need not make a pronouncement on the issue at this stage of the proceedings … Nor does it consider it necessary, for the present purposes, to decide whether any *electa una via* principle or *lis pendens* exception are applicable in the present situation."

The Court does not see any reason to depart from these views at the current stage of the proceedings in this case.

Regarding the second measure requested that "Qatar immediately desist from hampering the UAE's attempts to assist Qatari citizens, including by un-blocking in its territory access to the website by which Qatari citizens can apply for a permit to return to the UAE" the Court considers that this measure relates to obstacles allegedly created by Qatar to the implementation by the UAE of the provisional measures indicated in the Order of 23 July 2018. It does not concern plausible rights of the UAE under CERD which require protection pending the final decision of the Court in the case. As the Court has already stated, "[t]he judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures".

Since the first two provisional measures requested do not relate to the protection of plausible rights of the UAE under

CERD pending the final decision in the case, the Court considers that there is no need for it to examine the other conditions necessary for the indication of provisional measures.

The third and fourth provisional measures requested by the UAE relate to the non-aggravation of the dispute. In this connection, the Court recalls that measures aimed at preventing the aggravation or extension of a dispute can only be indicated as an addition to specific measures to protect rights of the parties. With regard to the present Request, the Court has not found that the conditions for the indication of specific provisional measures are met and thus it cannot indicate measures solely with respect to the non-aggravation of the dispute. The Court further recalls that it has already indicated in its Order of 23 July 2018 that the Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" and that this measure remains binding on the Parties.

III. Conclusion (paras. 30–31)

The Court concludes from the foregoing that the conditions for the indication of provisional measures under Article 41 of its Statute are not met. It also recalls that its decision in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case, any questions relating to the admissibility of the Application, or any issues to be decided at the merits stage. It leaves unaffected the right of the Governments of Qatar and the UAE to submit arguments in respect of those questions.

Operative clause (para. 32)

The Court,

By fifteen votes to one,

Rejects the Request for the indication of provisional measures submitted by the United Arab Emirates on 22 March 2019.

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judge *ad hoc* Daudet;

Against: Judge *ad hoc* Cot.

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Vice-President Xue appends a declaration to the Order of the Court; Judges Tomka, Gaja and Gevorgian append a joint declaration to the Order of the Court; Judges Abraham and Cançado Trindade append separate opinions to the Order of the Court; Judge Salam appends a declaration to the Order of the Court; Judge *ad hoc* Cot appends a dissenting opinion to the Order of the Court.

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Declaration of Vice-President Xue

Vice-President Xue voted in favour of the Court's decision to reject the UAE's Request for the indication of provisional measures, but disagrees with some of the Court's reasoning as regards the Court's rejection of the third and fourth measures requested by the UAE.

Vice-President Xue is of the view that the third and fourth measures, which are each characterized as relating to the non-aggravation of the dispute, are sufficiently covered by the Court's Order of 23 July 2018, by which the Parties are required to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 434, para. 79 (2)). The third and fourth measures requested by the UAE are therefore superfluous, and may be rejected on this ground.

The Court, however, reasons that measures aimed at the non-aggravation of the dispute *can only be indicated as an addition to specific measures aimed* at protecting the rights of the parties. Since the Court has declined to indicate any specific measures in the present case, it concludes that it cannot indicate the third and fourth measures requested by the UAE, which relate solely to non-aggravation. Vice-President Xue considers that adding such a restrictive qualification to the Court's power to indicate provisional measures may unduly restrain the power of the Court under Article 41 of the Statute and Article 75 of the Rules of Court.

Provisional measures proceedings, which exist in almost all legal systems, are intended to ensure due administration of justice and effective settlement of disputes. At the international level, however, these proceedings have another dimension. As the principal judicial organ of the United Nations, the Court is entrusted to settle disputes between States in accordance with international law, and in so doing it contributes to the maintenance of international peace and security. As the Court observed in its provisional measures Order in the *Frontier Dispute (Burkina Faso/Mali)* case, incidents may occur which not only aggravate or extend a dispute, but also comprise a resort to force which is irreconcilable with the principle of the peaceful settlement of disputes. In these situations, the Court has not only the power, but also the duty to indicate such provisional measures as may conduce to the due administration of justice.

In the practice of the Court, it is not unusual that, in cases involving use of force or serious violations of human rights and international humanitarian law, a provisional measure of non-aggravation of the dispute is requested or considered as the primary measure to be taken in light of the circumstances. Moreover, the questions whether a provisional measure of non-aggravation may be indicated alone and whether the Court should exercise its power to do so *proprio motu* have long been debated among the judges of the Court, as evidenced by many dissenting and separate opinions dealing with these issues.

It is noted that, since the *Pulp Mills* case, the Court has consistently treated measures of non-aggravation as ancillary to measures for the purpose of preserving specific rights. It is on the basis of this jurisprudential development that the present Order is intended to further clarify the issue. This effort, in Vice-President Xue's view, is too big of a step, and the Court may find its hands tied in future situations calling for an active response.

Joint declaration of Judges Tomka, Gaja and Gevorgian

Judges Tomka, Gaja and Gevorgian have voted with the majority for the rejection of the Respondent's Request for the indication of provisional measures, but do not agree with the statement made in the Order concerning *prima facie* jurisdiction. Referring to their previous joint declaration concerning the Request for the indication of provisional measures submitted by the Applicant, they consider that the present dispute still does not fall within the scope of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD") and, *prima facie*, the Court lacks jurisdiction.

They consider that the same conclusion should be made when the Court examines further requests for the indication of provisional measures submitted in the same case, irrespective of whether a request is submitted by the Applicant or the Respondent.

Accordingly, the present Request for the indication of provisional measures should be rejected. Furthermore, they consider that the Court should have completed its analysis in view of assessing whether the rights claimed by the Respondent are based on CERD.

Separate opinion of Judge Abraham

In his separate opinion, Judge Abraham expresses his reservations concerning, first, the Court's treatment of the question of *prima facie* jurisdiction and, second, the reasons for which the Court rejects the first two provisional measures requested by the United Arab Emirates.

As regards the first point, Judge Abraham considers that, in the present case, the Court was not required to address the question of *prima facie* jurisdiction, in so far as it found that the other conditions necessary for the indication of provisional measures were not met. Judge Abraham recalls that the Court's jurisdiction to entertain a request for provisional measures, which derives from Article 41 of its Statute, and its jurisdiction to entertain the merits of a case, which is based on the title of jurisdiction invoked in the principal claim, should not be confused. Judge Abraham notes that since *prima facie* jurisdiction to entertain the principal proceedings is one of the cumulative conditions required for the Court to be able to *indicate* provisional measures, in finding that a request should be rejected, it is sufficient for one of those conditions not to be met to dispense the Court from having to rule on the others. Furthermore, Judge Abraham finds it regrettable that the Court's reasoning on this question does not make it sufficiently clear that, in the present case, the Court had no choice but to find that it has *prima facie* jurisdiction, as it did in its Order on the requests submitted by Qatar in the same case, due to the requirement of equal treatment of the Parties.

As regards the reasons for rejecting the first two measures requested, Judge Abraham considers that the Court appears to have adopted too restrictive a definition of the purpose of provisional measures proceedings, limiting the measures that can be ordered to those aimed at protecting the parties' rights under the substantive provisions of the legal instrument forming the basis of jurisdiction over the merits of the case. In Judge Abraham's opinion, the Court would thus appear to unduly exclude measures aimed at protecting each party's procedural rights during the judicial process. According to Judge Abraham, the first two measures requested had to be rejected not, as the Court found, because they did not aim to protect a plausible right of the United Arab Emirates under CERD, but because the procedural rights at issue in the present case are not exposed to any risk of irreparable harm.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of nine parts, Judge Cançado Trindade begins by pointing out that in the handling of the present case of the *Application of the CERD Convention* (Qatar *versus* United Arab Emirates UAE), the International Court of Justice (ICJ) has faced an unfortunate sequence with the lodging with it of the present Request; in his perception, attention is to be kept on the importance of the provisional measures of protection indicated in the ICJ's previous Order of 23.07.2018, which remain in force, and are to be complied with.

2. The concern, in his view, is to remain in respect of the safeguard of human rights under the CERD Convention. The present Request has not invoked such rights. Judge Cançado Trindade adds that, as he attributes great importance to some related issues in the *cas d'espèce* , that in his perception underlie the present decision of the ICJ but are left out of the Court's reasoning, he feels obliged to leave on the records, in the present separate opinion, the identification of such issues and the foundations of his own personal position thereon.

3. Those issues are: (*a*) provisional measures of protection already ordered to secure respect for some human rights safeguarded under the CERD Convention; (*b*) the problem of the absence of link in the present Request; (*c*) the problem of its inconsistencies as to the CERD Convention and as to the CERD Committee; (*d*) relevance and persistence of provisional measures of protection of persons in continuing situations of vulnerability; (*e*) the longstanding importance of the fundamental principle of equality and non-discrimination; and (*f*) recapitulation of the key points that he sustains in the present separate opinion.

4. To start with, he recalls that the provisional measures of protection already ordered by the ICJ on 23.07.2018 remain in force, so as to secure the safeguard of the rights protected under Articles 2, 4, 5, 6 and 7 of the CERD Convention. This was duly requested by Qatar in its Request, as acknowledged by the ICJ's Order of 23.07.2018. Contrariwise, the UAE, in its subsequent Request, does not invoke rights under Articles 2, 4, 5, 6 and 7, protected by the CERD Convention; it simply alleges a violation of the compromissory clause (Article 22) of the CERD Convention.

5. In sequence, Judge Cançado Trindade observes that the present Request of the UAE does not establish the existence of a link between the rights whose protection is sought in the *cas d'espèce* under the CERD Convention and the provisional measures requested by the UAE. Furthermore, Judge Cançado Trindade adds that the arguments contained in the present Request of provisional measures disclose certain

inconsistencies, which pertain to the rights (under the CERD Convention) to be protected, as well as to proceedings before the CERD Committee (para. 11).

6. In respect of the CERD Convention, it appears inconsistent to request the ICJ as the UAE does to order provisional measures by extending its *prima facie* jurisdiction and, at the same time, to object to its jurisdiction *ratione materiae* (para. 12). Moreover, the present Request does not address the safeguard of the human rights set forth in the CERD Convention, thus appearing to fall outside the scope of the CERD Convention.

7. The UAE incurs into inconsistencies arguing first that Qatar should have exhausted the CERD Committee procedure before seising the ICJ, and then also arguing that the ICJ should order Qatar to withdraw its submission before the CERD Committee and put an end to it (paras. 14–15). The UAE has thus raised contradictory arguments in respect of Qatar's Request of provisional measures in 2018, and in respect of its own present Request in 2019. The ICJ has clarified that it was not necessary to incur here into consideration of *electa una via* or *lis pendens* (paras. 16–18).

8. Judge Cançado Trindade then dwells upon the relevance and persistence in the *cas d'espèce* of provisional measures of protection in *continuing situations* (part V), recalling the earlier reflections he presented to the ICJ, in this respect, *e.g.* in his previous separate opinion in the present case of the *Application of the CERD Convention* (Qatar *versus* UAE, Order of 23.07.2018); in his dissenting opinion in the case concerning the *Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, Order of 28.05.2009); in his subsequent separate opinion in the same case of the *Obligation to Prosecute or Extradite* (Judgment of 20.07.2012); in his dissenting opinions in the case on *Jurisdictional Immunities of the State* (Germany *versus* Italy, Order of 06.07.2010, and Judgment of 03.02.2012); in his separate opinions in the case of *A.S. Diallo* (Guinea *versus* D.R. Congo, Judgments of 30.11.2010, and of 19.06.2012); in his dissenting opinion in the case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia, Judgment of 03.02.2015) (paras. 19–25).

9. Judge Cançado Trindade then refers to some of his own considerations developed in his aforementioned dissenting and separate opinions, among which his ponderation that

> "a *continuing situation* affecting or in breach of human rights has had an incidence at distinct stages of the proceedings before the ICJ, namely, in provisional measures (like in the present case of the *Application of the CERD Convention*, twice already), as well as in counter-claims, merits, and reparations" (para. 26).

10. Judge Cançado Trindade proceeds in underlining another related point (part VI), namely: "A *continuing situation* affecting human rights under the CERD Convention duly stressed by Qatar in its own *Request* which led to the ICJ's Order of 23.07.2018 leads to the *continuing vulnerability* of victimized human beings, or potential victims. Under the CERD Convention and other human rights treaties, attention is focused on human beings affected, not on their States, nor on strictly inter-State relations. (…)

11. Hence the provisional measures of protection which were ordered by the ICJ last 23.07.2018, which remain in force, so as to safeguard some of the rights protected under the CERD Convention. The present *Request* by the UAE, unlike the previous *Request* by Qatar, does not refer to those rights. The question of human vulnerability counts on the attention of both contending parties in the present proceedings, but in distinct factual contexts addressed by the UAE and Qatar.

12. Qatar keeps on invoking the protection of rights under the CERD Convention. But, in the case of the position of the UAE, it does not relate vulnerability to the rights safeguarded under the CERD Convention. The UAE's present *Request* cannot thus be dealt with by the ICJ in the same way as the previous *Request* by Qatar. Hence the distinct decisions of the Court as to one request and the other. The important point is that the provisional measures of protection indicated in the ICJ's Order of last 23.07.2018 remain in force, to the benefit of human beings protected under the CERD Convention in respect of some rights (under Articles 2, 4, 5, 6 and 7)" (paras. 27 and 29–30).

13. Judge Cançado Trindade then moves his attention to the longstanding importance of the fundamental principle of equality and non-discrimination (part VII), which he warns "has received much more attention in the proceedings pertaining to the previous Order of the ICJ (of 23.07.2018, as to Qatar's *Request*), than in the current proceedings (as to the UAE's *Request*)" (para. 32). He further points out that the CERD Committee, in its practice, has been particularly attentive to the prohibition of discriminatory measures against members of vulnerable groups (such as, *e.g.* migrants).

14. This can be said also he adds of the practice of other Committees under U.N. human rights Conventions (*e.g.* the Human Rights Committee; the Committee on the Elimination of Discrimination against Women (CEDAW); the Committee against Torture (CAT), among others). He further recalls that, in cases pertaining to the protection of human rights, the ICJ has been attentive to the work and decisions of such U.N. Committees (paras. 33–34).

15. Judge Cançado Trindade adds that "the idea of human equality, underlying the conception of the unity of the human kind, has marked its presence since the historical origins of the law of nations up to the present" (para. 36). And he continues:

> "In recent years, the principle of equality and non-discrimination, and the prohibition of arbitrariness, have also marked presence in international case-law, including that of the ICJ (as I have pointed out, *e.g.*, in my Separate Opinion in the ICJ's Judgments on the case of *A.S. Diallo*, merits, 2010, and reparations, 2012 [Guinea *versus* D.R. Congo]; in my Separate Opinion in the ICJ's Advisory Opinion on the *Declaration of Independence of Kosovo,* 2010; in my Dissenting Opinion in the case of the *Application of the CERD Convention*, 2011 [Georgia *versus* Russian Federation]; in my Separate Opinion in the ICJ's Advisory Opinion on *Judgment of the ILO Administrative Tribunal on a Complaint against IFAD*, 2012; in my Dissenting Opinion in the case of the *Application of the Convention against Genocide,* 2015 [Croatia *versus* Serbia]; in my three Dissenting Opinions in the three cases of *Obligations Concerning Negotiations Relating to Cessation*

of the Nuclear Arms Race and to Nuclear Disarmament, 2016 [Marshall Islands *versus* United Kingdom, India and Pakistan]; and in my Separate Opinion in the ICJ's very recent Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* of 25.02.2019)" (para. 37).

16. He further recalls that this issue has been properly addressed in the ICJ's prior Order of last 23.07.2018 in the present case of *the Application of the CERD Convention,* to which he has devoted much attention in his separate opinion appended thereto, having warned, *inter alia,* that this is "one of the rare examples of international case-law preceding international legal doctrine, and requiring from it due and greater attention" (para. 38).

17. In the present case of the *Application of the CERD Convention,* Judge Cançado Trindade points out, in pursuance to Qatar's *Request,* the ICJ indicated provisional measures of protection of some rights under the CERD Convention; but the present *Request* by the UAE, making no reference to rights protected under the CERD Convention, has not provided the ICJ the occasion to do the same. And he then adds that

> "[i]n dismissing this request, the ICJ could have made it clearer that the provisional measures that it has already ordered (on 23.07.2018) remain in force, and are to be complied by the contending parties, to the benefit of human beings protected under the relevant provisions of the CERD Convention" (para. 39).

18. In the light of the basic principle of equality and non-discrimination, the rights protected under the CERD Convention "are endowed with a fundamental character, with all legal consequences ensuing therefrom"; Judge Cançado Trindade then finds it

> "disheartening that, in its reasoning in the present Order, the ICJ once again indulges repeatedly into what it beholds as 'plausible rights' (paras. 17, 21, 24, 25 and 26). Fundamental rights protected under the CERD Convention cannot be regarded or labelled as 'plausible' or 'implausible': they are fundamental rights" (para. 40).

19. This is a point corresponding to the position which he has been sustaining for a long time within the ICJ as illustrated by the very recent examples of his separate opinion in the case of *Jadhav* (India *versus* Pakistan, Order of 18.05.2017); his separate opinion in the case of the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the U.N. Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine *versus* Russian Federation, Order of 19.04.2017); his separate opinion in the present case of *Application of the CERD Convention* (Order of 23.07.2018) (paras. 41–43). And Judge Cançado Trindade adds that

> "[i]n effect, continuing human vulnerability has marked permanent presence in human history, drawing attention to the need of protection of vulnerable persons and groups. Awareness of human vulnerability can be clearly found, *e.g.*, in ancient Greek tragedies, which remain so contemporary in our days. (…) In the XXIst century, human vulnerability persists, and seems to increase" (para. 44).

20. In the epilogue of the present separate opinion (part IX), Judge Cançado Trindade clarifies that in this third recent case before the ICJ under the CERD Convention, the rights protected thereunder are the rights of human beings, and not rights of States.

21. The present Request by the UAE of provisional measures, dismissed by the ICJ, does not invoke any of the human rights protected under the CERD Convention. Such rights are already safeguarded under the provisional measures of protection (requested by Qatar) that have already been indicated by the ICJ in the *cas d'espèce,* in its previous Order of 23.07.2018, and remain in force. In rightly dismissing the present Request, the Court made references in the present Order (paras. 16–18, 25–26 and 29) to its previous Order of 23.07.2018. Yet, in Judge Cançado Trindade's understanding, the ICJ

> "could have gone further beyond that, in expressly stressing the maintenance of the provisional measures of protection that it had previously ordered, to be duly complied with, given the importance of the human rights safeguarded under the CERD Convention" (para. 46).

22. In sustaining once again his humanist outlook, Judge Cançado Trindade proceeds, last but not least, to a recapitulation of the main points he makes in the present separate opinion, and the foundations of his own position, on provisional measures of protection, under a human rights treaty like the CERD Convention. He stresses the importance of the existence, in the *cas d'espèce* , of a *continuing situation* affecting some human rights under the CERD Convention, bringing to the fore *the continuing vulnerability* of the affected human beings, or potential victims, and underlining the relevance of the provisional measures of protection in force since the ICJ's Order of 23.07.2018.

23. He concludes that the fundamental principle of equality and non-discrimination, and the prohibition of arbitrariness, lying in the foundations of the CERD Convention itself, require particular attention. He reiterates that such attention "is already present at normative and jurisprudential levels, but it remains still insufficiently examined by the international legal doctrine, which should become more attentive and devoted to the matter" (para. 50). The provisional measures of protection indicated by the ICJ's Order of 23.07.2018, he reiterates, "remain in force and are to be duly complied with" (para. 50).

Declaration of Judge Salam

Judge Salam voted in favour of the operative clause of the present Order rejecting the requested measures, in line with the position expressed in his dissenting opinion appended to the Court's Order of 23 July 2018 indicating provisional measures in the present case, where he took the view that the Court lacks jurisdiction in this case. However, he joins the Court in emphasizing the need for the Parties not to aggravate the present dispute.

Dissenting opinion of Judge *ad hoc* Cot

1. Judge *ad hoc* Cot voted against the operative part of the Order. In his opinion, the Court should have upheld at least the first provisional measure requested by the United Arab Emirates.

2. Judge *ad hoc* Cot considers that, in light of the doctrine of *lis pendens,* the procedural rights asserted by the United Arab Emirates are at least plausible under the

International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"). In his view, the provisions of CERD, in particular Article 22, allow an application of *lis pendens*. He further considers that an adaptive approach should be taken to the doctrine of *lis pendens,* so that it may also be applied to issues of concurrency between judicial and quasi-judicial bodies. According to Judge *ad hoc* Cot, such an approach is particularly important when interpreting conventional provisions such as Article 22 of CERD, which provides for multiple methods of dispute settlement, but is rather ambiguous as to how they interrelate.

3. Judge *ad hoc* Cot believes that one possible interpretation of Article 22 of CERD is that the dispute resolution mechanism provided for by the Convention should be exhausted before the case is brought before the Court. In his view, if a treaty provides for several methods of dispute settlement to be followed in a certain order, the parties to a dispute concerning that treaty have the procedural right to expect that order to be respected. In Judge *ad hoc* Cot's opinion, it follows that, under Article 22, the parties to a dispute concerning CERD may legitimately expect that the dispute cannot be pending simultaneously before the Court and the Committee on the Elimination of Racial Discrimination. He points out that the Order made by the Court today does not preclude that this interpretation of Article 22 is at least plausible.

4. As regards the measure to be adopted to address the *lis pendens* situation in this case appropriately, Judge *ad hoc* Cot considers that an immediate withdrawal of Qatar's Communication to the Committee on the Elimination of Racial Discrimination was not the only way to resolve the situation. In his opinion, if the measure requested by the United Arab Emirates risked having a disproportionate effect on Qatar, the Court could have made an order providing for the suspension of the proceedings before the Committee on the Elimination of Racial Discrimination, by directing Qatar to take all measures at its disposal to ensure that the proceedings before the Committee are suspended pending the final decision in this case. In the alternative, Judge *ad hoc* Cot believes that the Court could have exercised its power under Article 75, paragraph 1, of the Rules of Court to conclude, for example, that it should suspend the present proceedings until the Committee on the Elimination of Racial Discrimination has issued its concluding observations on the Communication submitted by Qatar.

235. JADHAV CASE (INDIA *v.* PAKISTAN)

Judgment of 17 July 2019

On 19 July 2019, the International Court of Justice delivered its Judgment in the *Jadhav* case *(India* v. *Pakistan)*.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judge *ad hoc* Jillani; Deputy-Registrar Fomété.

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Procedural background (paras. 1–19)

The Court recalls that, on 8 May 2017, the Government of the Republic of India (hereinafter "India") filed an Application instituting proceedings against the Islamic Republic of Pakistan (hereinafter "Pakistan") alleging violations of the Vienna Convention on Consular Relations of 24 April 1963 (hereinafter the "Vienna Convention") "in the matter of the detention and trial of an Indian national, Mr. Kulbhushan Sudhir Jadhav", sentenced to death by a military court in Pakistan in April 2017. On the same day, India submitted a Request for the indication of provisional measures.

By an Order of 18 May 2017, the Court indicated the following provisional measures:

> "Pakistan shall take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present Order."

It further decided that, "until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order".

I. Factual Background (paras. 20–32)

The Court begins by setting out the factual background of the case. It recalls that since 3 March 2016, an individual named Kulbhushan Sudhir Jadhav (hereinafter "Mr. Jadhav") has been in the custody of Pakistani authorities. The circumstances of his apprehension remain in dispute between the Parties. According to India, Mr. Jadhav was kidnapped from Iran and subsequently transferred to Pakistan and detained for interrogation. Pakistan contends that Mr. Jadhav, whom it accuses of performing acts of espionage and terrorism on behalf of India, was arrested in Balochistan near the border with Iran after illegally entering Pakistani territory. Pakistan explains that, at the moment of his arrest, Mr. Jadhav was in possession of an Indian passport bearing the name "Hussein Mubarak Patel". India denies these allegations.

The Court notes that, on 25 March 2016, Pakistan raised the issue with the High Commissioner of India in Islamabad and released a video in which Mr. Jadhav appears to confess to his involvement in acts of espionage and terrorism in Pakistan at the behest of India's foreign intelligence agency "Research and Analysis Wing" (also referred to by its acronym "RAW"). The circumstances under which the video was recorded are unknown to the Court. On the same day, Pakistan notified the permanent members of the Security Council of the United Nations of the matter.

Also on the same day, by means of a Note Verbale from the High Commission of India in Islamabad to the Ministry of Foreign Affairs of Pakistan, India noted the "purported arrest of an Indian" and requested consular access "at the earliest" to "the said individual". Subsequently, and at least until 9 October 2017, India sent more than ten Notes Verbales in which it identified Mr. Jadhav as its national and sought consular access to him.

The trial of Mr. Jadhav started on 21 September 2016 and, according to Pakistan, was conducted before a Field General Court Martial. Various details of the trial were made public by means of a press release and a statement dated 10 and 14 April 2017 respectively. On the basis of this information (from the only source made available to the Court), it appears that Mr. Jadhav was tried under Section 59 of the Pakistan Army Act of 1952 and Section 3 of the Official Secrets Act of 1923. According to Pakistan, after the trial had begun, he was given an additional period of three weeks in order to facilitate the preparation of his defence, for which "a law qualified field officer" was specifically appointed.

On 23 January 2017, the Ministry of Foreign Affairs of Pakistan sent a "Letter of Assistance for Criminal Investigation against Indian National Kulbhushan Sudhair Jadhev" to the High Commission of India in Islamabad, seeking, in particular, support in "obtaining evidence, material and record for the criminal investigation" of Mr. Jadhav's activities.

On 21 March 2017, the Ministry of Foreign Affairs of Pakistan sent a Note Verbale to the High Commission of India in Islamabad indicating that India's request for consular access would be considered "in the light of Indian side's response to Pakistan's request for assistance in investigation process and early dispensation of justice". On 31 March 2017, India replied that "[c]onsular access to Mr. Jadhav would be an essential pre-requisite in order to verify the facts and understand the circumstances of his presence in Pakistan". The Parties raised similar arguments in subsequent diplomatic exchanges.

On 10 April 2017, Pakistan announced that Mr. Jadhav had been sentenced to death.

On 26 April 2017, the High Commission of India in Islamabad transmitted to Pakistan, on behalf of Mr. Jadhav's mother, an "appeal" under Section 133 (B) and a petition to the Federal Government of Pakistan under Section 131 of the Pakistan Army Act. On 22 June 2017, the Inter Services Public Relations of Pakistan issued a press release announcing that Mr. Jadhav had made a mercy petition to the Chief of Army Staff after the rejection of his appeal by the Military Appellate Court. India claims that it has received no clear information on the circumstances of this appeal or the status of any appeal or petition concerning Mr. Jadhav's sentence.

II. Jurisdiction (paras. 33–38)

The Court begins by observing that India and Pakistan have been parties to the Vienna Convention since 28 December 1977 and 14 May 1969 respectively and were, at the time of the filing of the Application, parties to the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (hereinafter the "Optional Protocol") without any reservations or declarations. India seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute and on Article I of the Optional Protocol, which provides:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

In the Court's view, the dispute between the Parties concerns the question of consular assistance with regard to the arrest, detention, trial and sentencing of Mr. Jadhav. The Court notes that Pakistan has not contested that the dispute relates to the interpretation and application of the Vienna Convention.

With regard to India's submissions asking the Court to declare that Pakistan has violated Mr. Jadhav's "elementary human rights", "which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights", the Court observes that its jurisdiction in the present case arises from Article I of the Optional Protocol and therefore does not extend to the determination of breaches of international law obligations other than those under the Vienna Convention.

This conclusion does not preclude the Court from taking into account other obligations under international law in so far as they are relevant to the interpretation of the Vienna Convention.

In light of the foregoing, the Court finds that it has jurisdiction under Article I of the Optional Protocol to entertain India's claims based on alleged violations of the Vienna Convention.

III. Admissibility (paras. 39–66)

Pakistan has raised three objections to the admissibility of India's Application. These objections are based on India's alleged abuse of process, abuse of rights and unlawful conduct. The Court addresses each of these in turn.

A. First objection: abuse of process (paras. 40–50)

In its first objection to the admissibility of India's Application, Pakistan asks the Court to rule that India has abused the Court's procedures. Pakistan advances two main arguments to this end. First, it alleges that when requesting the indication of provisional measures on 8 May 2017, India failed to draw the Court's attention to the existence of a constitutional right to lodge a clemency petition. Secondly, Pakistan submits that, prior to instituting proceedings on 8 May 2017, India had failed to give consideration to other dispute settlement mechanisms envisaged in Articles II and III of the Optional Protocol.

The Court observes, in relation to Pakistan's first argument, that in its Order indicating provisional measures, it took into account the possible consequences for Mr. Jadhav's situation of the availability under Pakistani law of any appeal or petition procedure, including the clemency petition to which Pakistan refers in support of its claim. In this regard, it concluded *inter alia* that "[t]here [was] considerable uncertainty as to when a decision on any appeal or petition could be rendered and, if the sentence is maintained, as to when Mr. Jadhav could be executed". Therefore, there is no basis to conclude that India abused its procedural rights when requesting the Court to indicate provisional measures in this case.

In relation to the second argument, the Court notes that none of the provisions of the Optional Protocol relied on by Pakistan contain preconditions to the Court's exercise of its jurisdiction. It follows that India was under no obligation in the present case to consider other dispute settlement mechanisms prior to instituting proceedings before the Court on 8 May 2017. Thus, Pakistan's objection based on the alleged non-compliance by India with Articles II and III of the Optional Protocol cannot be upheld.

Accordingly, the Court finds that Pakistan's first objection to the admissibility of India's Application must be rejected.

B. Second objection: abuse of rights (paras. 51–58)

In its second objection to the admissibility of India's Application, Pakistan requests the Court to rule that India has abused various rights it has under international law. In its pleadings, Pakistan has based this objection on three main arguments. First, it refers to India's refusal to "provide evidence" of Mr. Jadhav's Indian nationality by means of his "actual passport in his real name", even though it has a duty to do so. Secondly, Pakistan mentions India's failure to engage with its request for assistance in relation to the criminal investigations into Mr. Jadhav's activities. Thirdly, Pakistan alleges that India authorized Mr. Jadhav to cross the Indian border with a "false cover name authentic passport" in order to conduct espionage and terrorist activities. In relation to these arguments, Pakistan invokes various counter-terrorism obligations set out in Security Council resolution 1373 (2001).

The Court recalls that in its Judgment on the preliminary objections in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, the Court ruled that abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits. The Court notes, however, that by raising the argument that India has not provided the Court with his actual passport in his real name, Pakistan appears to suggest that India has failed to prove Mr. Jadhav's nationality.

In this respect, the Court observes that the evidence before it shows that both Parties have considered Mr. Jadhav to be an Indian national. Consequently, the Court is satisfied that the evidence before it leaves no room for doubt that Mr. Jadhav is of Indian nationality.

Pakistan further refers to various alleged breaches of India's obligations under Security Council resolution 1373 (2001), contending, in particular, that India failed to respond to Pakistan's request for mutual legal assistance

with its criminal investigations into Mr. Jadhav's espionage and terrorism activities. The Court observes that, in essence, Pakistan seems to argue that India cannot request consular assistance with respect to Mr. Jadhav, while at the same time it has violated other obligations under international law as a result of the aforementioned acts. While Pakistan has not clearly explained the link between these allegations and the rights invoked by India on the merits, in the Court's view, such allegations are properly a matter for the merits and therefore cannot be invoked as a ground of inadmissibility.

For these reasons, the Court finds that Pakistan's second objection to the admissibility of India's Application must be rejected. The second and third arguments advanced by Pakistan are addressed when dealing with the merits.

C. Third objection: India's alleged unlawful conduct (paras. 59–65)

In its third objection to the admissibility of India's Application, Pakistan asks the Court to dismiss the Application on the basis of India's alleged unlawful conduct, relying on the doctrine of "clean hands" and the principles of "*ex turpi causa non oritur actio*" and "*ex injuria jus non oritur*". In particular, Pakistan contends that India has failed to respond to its request for assistance with the investigation into Mr. Jadhav's activities, that it has provided him with a "false cover name authentic passport" and, more generally, that it is responsible for Mr. Jadhav's espionage and terrorism activities in Pakistan.

The Court does not consider that an objection based on the "clean hands" doctrine may by itself render an application based on a valid title of jurisdiction inadmissible. The Court therefore concludes that Pakistan's objection based on the said doctrine must be rejected.

With regard to the argument based on a principle to which it refers as "*ex turpi causa* [*non oritur actio*]", the Court is of the view that Pakistan has not explained how any of the wrongful acts allegedly committed by India may have prevented Pakistan from fulfilling its obligation in respect of the provision of consular assistance to Mr. Jadhav. The Court therefore finds that Pakistan's objection based on the principle of "*ex turpi causa non oritur actio*" cannot be upheld.

This finding leads the Court to a similar conclusion with regard to the principle of *ex injuria jus non oritur*, which stands for the proposition that unlawful conduct cannot modify the law applicable in the relations between the Parties. In the view of the Court, this principle is inapposite to the circumstances of the present case.

Accordingly, the Court finds that Pakistan's third objection to the admissibility of India's Application must be rejected.

In light of the foregoing, the Court concludes that the three objections to the admissibility of the Application raised by Pakistan must be rejected and that India's Application is admissible.

IV. The alleged violations of the Vienna Convention on Consular relations (paras. 67–124)

The Court notes that Pakistan advances several contentions concerning the applicability of certain provisions of the Vienna Convention to the case of Mr. Jadhav.

A. Applicability of Article 36 of the Vienna Convention on Consular Relations (paras. 68–98)

The Court observes that Pakistan's contentions regarding the applicability of the Vienna Convention are threefold. First, Pakistan argues that Article 36 of the Vienna Convention does not apply in *prima facie* cases of espionage. Secondly, it contends that customary international law governs cases of espionage in consular relations and allows States to make exceptions to the provisions on consular access contained in Article 36 of the Vienna Convention. Thirdly, Pakistan maintains that it is the 2008 Agreement on Consular Access between India and Pakistan (hereinafter the "2008 Agreement"), rather than Article 36 of the Vienna Convention, which regulates consular access in the present case. The Court examines each of these arguments in turn.

1. Alleged exception to Article 36 of the Vienna Convention based on charges of espionage (paras. 69–86)

(*a*) *Interpretation of Article 36 of the Vienna Convention in accordance with the ordinary meaning of its terms* (paras. 72–75)

With regard to Pakistan's first contention, the Court observes that neither Article 36 nor any other provision of the Vienna Convention contains a reference to cases of espionage. Nor does Article 36 exclude from its scope, when read in its context and in light of the object and purpose of the Convention, certain categories of persons, such as those suspected of espionage.

The object and purpose of the Vienna Convention as stated in its preamble is to "contribute to the development of friendly relations among nations". The purpose of Article 36, paragraph 1, of the Convention as indicated in its introductory sentence is to "facilitat[e] the exercise of consular functions relating to nationals of the sending State". Consequently, consular officers may in all cases exercise the rights relating to consular access set out in that provision for the nationals of the sending State. It would run counter to the purpose of that provision if the rights it provides could be disregarded when the receiving State alleges that a foreign national in its custody was involved in acts of espionage.

The Court thus concludes that, when interpreted in accordance with the ordinary meaning to be given to the terms of the Vienna Convention in their context and in the light of its object and purpose, Article 36 of the Convention does not exclude from its scope certain categories of persons, such as those suspected of espionage.

(*b*) *The* travaux préparatoires *of Article 36* (paras. 76–86)

In the Court's view, the *travaux préparatoires* (in particular, the discussions of the International Law Commission in 1960 on the topic of "consular intercourse and immunities" and the discussions at the United Nations Conference on Consular Relations held in Vienna from 4 March to 22 April 1963) serve to confirm the interpretation that Article 36 does not exclude from its scope certain categories of persons, such as those suspected of espionage.

2. Alleged espionage exception under customary international law (paras. 87–90)

Turning to Pakistan's second argument, the Court notes that the preamble of the Vienna Convention states that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention". Article 36 of the Convention expressly regulates the question of consular access to, and communication with, nationals of the sending State and makes no exception with regard to cases of espionage. The Court therefore considers that Article 36 of the Convention, and not customary international law, governs the matter at hand in the relations between the Parties.

Having reached this conclusion, the Court does not find it necessary to determine whether, when the Vienna Convention was adopted in 1963, there existed the rule of customary international law that Pakistan advances.

3. Relevance of the 2008 Agreement on Consular Access between India and Pakistan (paras. 91–97)

The Court next turns to Pakistan's third contention that the 2008 Agreement governs consular access in the present case.

The Court recalls that point (vi) of the 2008 Agreement provides that "[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits". It also recalls that, in the preamble of the Agreement, the Parties declared that they were "desirous of furthering the objective of humane treatment of nationals of either country arrested, detained or imprisoned in the other country". The Court is of the view that point (vi) of the Agreement cannot be read as denying consular access in the case of an arrest, detention or sentence made on political or security grounds. Given the importance of the rights concerned in guaranteeing the humane treatment of nationals of either country arrested, detained or imprisoned in the other country, if the Parties had intended to restrict in some way the rights guaranteed by Article 36, one would expect such an intention to be unequivocally reflected in the provisions of the Agreement. The Court considers that this is not the case.

Moreover, any derogation from Article 36 of the Vienna Convention for political or security grounds may render the right related to consular access meaningless as it would give the receiving State the possibility of denying such access.

Account should also be taken of Article 73, paragraph 2, of the Vienna Convention for the purpose of interpreting the 2008 Agreement. This paragraph provides that "[n]othing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof". The language of this paragraph indicates that it refers to subsequent agreements to be concluded by parties to the Vienna Convention. The Court notes that the Vienna Convention was drafted with a view to establishing, to the extent possible, uniform standards for consular relations. The ordinary meaning of Article 73, paragraph 2, suggests that it is consistent with the Vienna Convention to conclude only subsequent agreements which confirm, supplement, extend or amplify the provisions of that instrument, such as agreements which regulate matters not covered by the Convention.

The Court notes that the Parties have negotiated the 2008 Agreement in full awareness of Article 73, paragraph 2, of the Vienna Convention. Having examined that Agreement and in light of the conditions set out in Article 73, paragraph 2, the Court is of the view that the 2008 Agreement is a subsequent agreement intended to "confirm, supplement, extend or amplify" the Vienna Convention. Consequently, the Court considers that point (vi) of that Agreement does not, as Pakistan contends, displace the obligations under Article 36 of the Vienna Convention.

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For these reasons, the Court finds that none of the arguments raised by Pakistan concerning the applicability of Article 36 of the Vienna Convention to the case of Mr. Jadhav can be upheld. The Court thus concludes that the Vienna Convention is applicable in the present case, regardless of the allegations that Mr. Jadhav was engaged in espionage activities.

B. Alleged violations of Article 36 of the Vienna Convention on Consular Relations (paras. 99–120)

India contends in its final submissions that Pakistan acted in breach of its obligations under Article 36 of the Vienna Convention (i) by not informing India, without delay, of the detention of Mr. Jadhav; (ii) by not informing Mr. Jadhav of his rights under Article 36; and (iii) by denying consular officers of India access to Mr. Jadhav.

1. Alleged failure to inform Mr. Jadhav of his rights under Article 36, paragraph 1 (b) (paras. 100–102)

With respect to India's first submission, the Court recalls that Article 36, paragraph 1 (*b*), of the Vienna Convention provides that the competent authorities of the receiving State must inform a foreign national in detention of his rights under that provision. The Court therefore needs to determine whether the competent Pakistani authorities informed Mr. Jadhav of his rights in accordance with this provision. In this respect, the Court observes that Pakistan has not contested India's contention that Mr. Jadhav was not informed of his rights under Article 36, paragraph 1 (*b*), of the Convention. To the contrary, in the written and oral proceedings, Pakistan consistently maintained that the Convention does not apply to an individual suspected of espionage. The Court infers from this position of Pakistan that it did not inform Mr. Jadhav of his rights under Article 36, paragraph 1 (*b*), of the Vienna Convention, and thus concludes that Pakistan breached its obligation to inform Mr. Jadhav of his rights under that provision.

2. Alleged failure to inform India, without delay, of the arrest and detention of Mr. Jadhav (paras. 103–113)

Turning to India's second submission, the Court recalls that Article 36, paragraph 1 (*b*), of the Vienna Convention provides that if a national of the sending State is arrested or detained, and "if he so requests", the competent authorities of the receiving State must, "without delay", inform the consular post of the sending State. To examine India's claim that Pakistan breached its obligation under this provision, the

Court considers, first, whether Mr. Jadhav made such a request and, secondly, whether Pakistan informed India's consular post of the arrest and detention of Mr. Jadhav. Finally, if the Court finds that notification was provided by Pakistan, it will examine whether it was made "without delay".

Interpreting Article 36, paragraph 1 (*b*), in accordance with the ordinary meaning of the terms used, the Court notes that there is an inherent connection between the obligation of the receiving State to inform a detained person of his rights under Article 36, paragraph 1 (*b*), and his ability to request that the consular post of the sending State be informed of his detention. Unless the receiving State has fulfilled its obligation to inform a detained person of his rights under Article 36, paragraph 1 (*b*), he may not be aware of his rights and consequently may not be in a position to make a request that the competent authorities of the receiving State inform the sending State's consular post of his arrest.

The Court observes that Article 36, paragraph 1 (*b*), of the Convention provides that if a detained person "so requests", the competent authorities of the receiving State must inform the consular post of the sending State. The phrase "if he so requests" must be read in conjunction with the obligation of the receiving State to inform the detained person of his rights under Article 36, paragraph 1 (*b*). The Court has already found that Pakistan failed to inform Mr. Jadhav of his rights. Consequently, the Court is of the view that Pakistan was under an obligation to inform India's consular post of the arrest and detention of Mr. Jadhav in accordance with Article 36, paragraph 1 (*b*), of the Convention.

Moreover, the Court observes that, when a national of the sending State is in prison, custody or detention, an obligation of the authorities of the receiving State to inform the consular post of the sending State is implied by the rights of the consular officers under Article 36, paragraph 1 (*c*), to visit the national, to converse and correspond with him and to arrange for his legal representation.

The Court then proceeds to the second question, that of whether Pakistan informed India of the arrest and detention of Mr. Jadhav. The Court observes that Article 36, paragraph 1 (*b*), does not specify the manner in which the receiving State should inform the consular post of the sending State of the detention of one of its nationals. What is important is that the information contained in the notification is sufficient to facilitate the exercise by the sending State of the consular rights envisaged by Article 36, paragraph 1, of the Vienna Convention. Pakistan's action on 25 March 2016 enabled India to make a request for consular access on the same day. Under the circumstances, the Court considers that Pakistan notified India on 25 March 2016 of the arrest and detention of Mr. Jadhav, as required by Article 36, paragraph 1 (*b*), of the Vienna Convention.

The Court turns to the final question, that of whether the notification was given "without delay". Pakistan claims that at the time of his arrest on 3 March 2016, Mr. Jadhav was in possession of an Indian passport bearing the name "Hussein Mubarak Patel". In the circumstances of the present case, the Court considers that there were sufficient grounds at the time of the arrest on 3 March 2016 or shortly thereafter for Pakistan to conclude that the person was, or was likely to be, an Indian national, thus triggering its obligation to inform India of his arrest in accordance with Article 36, paragraph 1 (*b*), of the Vienna Convention.

There was a delay of some three weeks between Mr. Jadhav's arrest on 3 March 2016 and the notification made to India on 25 March 2016. The Court recalls that neither the terms of the Vienna Convention as normally understood, nor its object and purpose, suggest that "without delay" is to be understood as "immediately upon arrest and before interrogation". It also recalls that there is no suggestion in the *travaux* that the phrase "without delay" might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 (*b*). Taking account of the particular circumstances of the present case, the Court considers that the fact that the notification was made some three weeks after the arrest in this case constitutes a breach of the obligation to inform "without delay", as required by Article 36, paragraph 1 (*b*), of the Vienna Convention.

3. Alleged failure to provide consular access (paras. 114–119)

The Court then addresses India's third submission concerning the alleged failure of Pakistan to provide consular access to Mr. Jadhav. The Court recalls that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person.

In the present case, it is undisputed that Pakistan has not granted any Indian consular officer access to Mr. Jadhav. India has made a number of requests for consular access since 25 March 2016. Pakistan responded to India's request for consular access for the first time in its Note Verbale dated 21 March 2017, in which it stated that "the case for the consular access to the Indian national, Kulbushan Jadhev shall be considered, in the light of Indian side's response to Pakistan's request for assistance in investigation process and early dispensation of justice". The Court is of the view that the alleged failure by India to co-operate in the investigation process in Pakistan does not relieve Pakistan of its obligation to grant consular access under Article 36, paragraph 1, of the Convention, and does not justify Pakistan's denial of access to Mr. Jadhav by consular officers of India.

Article 36, paragraph 1 (*c*), provides that consular officers have the right to arrange legal representation for a detained national of the sending State. The provision presupposes that consular officers can arrange legal representation based on conversation and correspondence with the detained person. In the view of the Court, Pakistan's contention that Mr. Jadhav was allowed to choose a lawyer for himself, but that he opted to be represented by a defending officer qualified for legal representation, even if it is established, does not dispense with the consular officers' right to arrange for his legal representation.

The Court therefore concludes that Pakistan has breached the obligations incumbent on it under Article 36, paragraph 1 (*a*) and (*c*), of the Vienna Convention, by denying consular officers of India access to Mr. Jadhav, contrary to their right to visit him, to converse and correspond with him, and to arrange for his legal representation.

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Having concluded that Pakistan acted in breach of its obligations under Article 36, paragraph 1 (*a*), (*b*) and (*c*), of the Vienna Convention, the Court turns to examine Pakistan's contentions based on abuse of rights.

C. Abuse of rights (paras. 121–124)

In light of the foregoing, the Court addresses the question whether India's alleged violations of international law invoked by Pakistan in support of its contentions based on abuse of rights may constitute a defence on the merits. In essence, Pakistan argues that India cannot request consular assistance with respect to Mr. Jadhav, while at the same time it has failed to comply with other obligations under international law.

In this respect, the Court recalls that the Vienna Convention "lays down certain standards to be observed by all States parties, with a view to the 'unimpeded conduct of consular relations'", and that Article 36 on consular assistance to and communication with nationals undergoing criminal proceedings sets forth rights both for the State and the individual which are interdependent. In the Court's view, there is no basis under the Vienna Convention for a State to condition the fulfilment of its obligations under Article 36 on the other State's compliance with other international law obligations. Otherwise, the whole system of consular assistance would be severely undermined.

For these reasons, the Court concludes that none of Pakistan's allegations relating to abuse of rights by India justifies breaches by Pakistan of its obligations under Article 36 of the Vienna Convention. Pakistan's arguments in this respect must therefore be rejected.

V. Remedies (paras. 125–148)

In summary, India requests the Court to adjudge and declare that Pakistan acted in breach of Article 36 of the Vienna Convention on Consular Relations. Pursuant to the foregoing, India asks the Court to declare that the sentence of Pakistan's military court is violative of international law and the provisions of the Vienna Convention, and that India is entitled to *restitutio in integrum*. It also requests the Court to annul the decision of the military court and restrain Pakistan from giving effect to the sentence or conviction, to direct Pakistan to release Mr. Jadhav and to facilitate his safe passage to India. In the alternative, and if the Court were to find that Mr. Jadhav is not to be released, India requests the Court to annul the decision of the military court and restrain Pakistan from giving effect to the sentence awarded by that court. In the further alternative, India asks the Court to direct Pakistan to take steps to annul the decision of the military court. In either event, it requests the Court to direct a trial under ordinary law before civilian courts, after excluding Mr. Jadhav's confession and in strict conformity with the provisions of the International Covenant on Civil and Political Rights, with full consular access and with a right for India to arrange for Mr. Jadhav's legal representation.

The Court notes that it has already found that Pakistan acted in breach of its obligations under Article 36 of the Vienna Convention: first, by not informing Mr. Jadhav of his rights under Article 36, paragraph 1 (*b*); secondly, by not informing India, without delay, of the arrest and detention of Mr. Jadhav; and thirdly, by denying access to Mr. Jadhav by consular officers of India, contrary to their right, *inter alia*, to arrange for his legal representation.

The Court considers that the first and third breaches by Pakistan, as just set out, constitute internationally wrongful acts of a continuing character. Accordingly, the Court is of the view that Pakistan is under an obligation to cease those acts and to comply fully with its obligations under Article 36 of the Vienna Convention. Consequently, Pakistan must inform Mr. Jadhav without further delay of his rights under Article 36, paragraph 1 (*b*), and allow Indian consular officers to have access to him and to arrange for his legal representation, as provided by Article 36, paragraph 1 (*a*) and (*c*).

With regard to India's submission that the Court declare that the sentence handed down by Pakistan's military court is violative of international law and the provisions of the Vienna Convention, the Court recalls that its jurisdiction has its basis in Article I of the Optional Protocol. This jurisdiction is limited to the interpretation or application of the Vienna Convention and does not extend to India's claims based on any other rules of international law. The Court notes, however, that the remedy to be ordered in this case has the purpose of providing reparation only for the injury caused by the internationally wrongful act of Pakistan that falls within the Court's jurisdiction, namely its breach of obligations under Article 36 of the Vienna Convention on Consular Relations, and not of the Covenant.

With regard to India's contention that it is entitled to *restitutio in integrum* and its request to annul the decision of the military court and to restrain Pakistan from giving effect to the sentence or conviction, and its further request to direct Pakistan to take steps to annul the decision of the military court, to release Mr. Jadhav and to facilitate his safe passage to India, the Court reiterates that it is not the conviction and sentence of Mr. Jadhav which are to be regarded as a violation of Article 36 of the Vienna Convention. The Court also recalls that it is not to be presumed that partial or total annulment of conviction or sentence provides the necessary and sole remedy in cases of violations of Article 36 of the Vienna Convention. Thus, the Court finds that these submissions made by India cannot be upheld.

The Court considers the appropriate remedy in this case to be effective review and reconsideration of the conviction and sentence of Mr. Jadhav. The Court notes that Pakistan acknowledges that this is the appropriate remedy in the present case. Special emphasis must be placed on the need for the review and reconsideration to be effective. The review and reconsideration of the conviction and sentence of Mr. Jadhav, in order to be effective, must ensure that full weight is given to the effect of the violation of the rights set forth in Article 36, paragraph 1, of the Convention and guarantee that the violation and the possible prejudice caused by the violation are fully examined. It presupposes the existence of a procedure which is suitable for this purpose. The Court observes that it is normally the judicial process which is suited to the task of review and reconsideration.

The Court notes that, according to Pakistan, the High Courts of Pakistan can exercise review jurisdiction. The Court observes, however, that Article 199, paragraph 3, of the

Constitution of Pakistan has been interpreted by the Supreme Court of Pakistan as limiting the availability of such review for a person who is subject to any law relating to the Armed Forces of Pakistan, including the Pakistan Army Act of 1952. The Supreme Court has stated that the High Courts and the Supreme Court may exercise judicial review over a decision of the Field General Court Martial on "the grounds of *coram non judice*, without jurisdiction or suffering from *mala fides*, including malice in law only". Article 8, paragraph 1, of the Constitution provides that any law which is inconsistent with fundamental rights guaranteed under the Constitution is void, but this provision does not apply to the Pakistan Army Act of 1952 by virtue of a constitutional amendment. Thus, it is not clear whether judicial review of a decision of a military court is available on the ground that there has been a violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention.

The Court considers that the clemency process is not sufficient in itself to serve as an appropriate means of review and reconsideration but that appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention.

The Court takes full cognizance of the representations made by Pakistan. During the oral proceedings, the Agent of Pakistan declared that the Constitution of Pakistan guarantees, as a fundamental right, the right to a fair trial; that the right to a fair trial is "absolute" and "cannot be taken away"; and that all trials are conducted accordingly and, if not, "the process of judicial review is always available". Counsel for Pakistan assured the Court that the High Courts of Pakistan exercise effective review jurisdiction, giving as an example a decision of the Peshawar High Court in 2018. The Court points out that respect for the principles of a fair trial is of cardinal importance in any review and reconsideration, and that, in the circumstances of the present case, it is essential for the review and reconsideration of the conviction and sentence of Mr. Jadhav to be effective. The Court considers that the violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process. In particular, any potential prejudice and the implications for the evidence and the right of defence of the accused should receive close scrutiny during the review and reconsideration.

The Court notes that the obligation to provide effective review and reconsideration can be carried out in various ways. The choice of means is left to Pakistan. Nevertheless, freedom in the choice of means is not without qualification. The obligation to provide effective review and reconsideration is an obligation of result which must be performed unconditionally. Consequently, Pakistan shall take all measures to provide for effective review and reconsideration, including, if necessary, by enacting appropriate legislation.

To conclude, the Court finds that Pakistan is under an obligation to provide, by means of its own choosing, effective review and reconsideration of the conviction and sentence of Mr. Jadhav, so as to ensure that full weight is given to the effect of the violation of the rights set forth in Article 36 of the Vienna Convention, taking account of paragraphs 139, 145 and 146 of the Court's Judgment.

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Finally, the Court recalls that it indicated a provisional measure directing Pakistan to take all measures at its disposal to ensure that Mr. Jadhav is not executed pending the final decision in the present proceedings. The Court considers that a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr. Jadhav.

Operative clause (para. 149)

The Court,

(1) Unanimously,

Finds that it has jurisdiction, on the basis of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963, to entertain the Application filed by the Republic of India on 8 May 2017;

(2) By fifteen votes to one,

Rejects the objections by the Islamic Republic of Pakistan to the admissibility of the Application of the Republic of India and *finds* that the Application of the Republic of India is admissible;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

Against: Judge *ad hoc* Jillani;

(3) By fifteen votes to one,

Finds that, by not informing Mr. Kulbhushan Sudhir Jadhav without delay of his rights under Article 36, paragraph 1 (*b*), of the Vienna Convention on Consular Relations, the Islamic Republic of Pakistan breached the obligations incumbent upon it under that provision;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

Against: Judge *ad hoc* Jillani;

(4) By fifteen votes to one,

Finds that, by not notifying the appropriate consular post of the Republic of India in the Islamic Republic of Pakistan without delay of the detention of Mr. Kulbhushan Sudhir Jadhav and thereby depriving the Republic of India of the right to render the assistance provided for by the Vienna Convention to the individual concerned, the Islamic Republic of Pakistan breached the obligations incumbent upon it under Article 36, paragraph 1 (*b*), of the Vienna Convention on Consular Relations;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

Against: Judge *ad hoc* Jillani;

(5) By fifteen votes to one,

Finds that the Islamic Republic of Pakistan deprived the Republic of India of the right to communicate with and have access to Mr. Kulbhushan Sudhir Jadhav, to visit him in detention and to arrange for his legal representation, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 (*a*) and (*c*), of the Vienna Convention on Consular Relations;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

Against: Judge *ad hoc* Jillani;

(6) By fifteen votes to one,

Finds that the Islamic Republic of Pakistan is under an obligation to inform Mr. Kulbhushan Sudhir Jadhav without further delay of his rights and to provide Indian consular officers access to him in accordance with Article 36 of the Vienna Convention on Consular Relations;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

Against: Judge *ad hoc* Jillani;

(7) By fifteen votes to one,

Finds that the appropriate reparation in this case consists in the obligation of the Islamic Republic of Pakistan to provide, by the means of its own choosing, effective review and reconsideration of the conviction and sentence of Mr. Kulbhushan Sudhir Jadhav, so as to ensure that full weight is given to the effect of the violation of the rights set forth in Article 36 of the Convention, taking account of paragraphs 139, 145 and 146 of this Judgment;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

Against: Judge *ad hoc* Jillani;

(8) By fifteen votes to one,

Declares that a continued stay of execution constitutes an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr. Kulbhushan Sudhir Jadhav.

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa;

Against: Judge *ad hoc* Jillani.

*

Judge Cançado Trindade appends a separate opinion to the Judgment of the Court; Judges Sebutinde, Robinson and Iwasawa append declarations to the Judgment of the Court; Judge *ad hoc* Jillani appends a dissenting opinion to the Judgment of the Court.

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Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of 12 parts, Judge Cançado Trindade begins by pointing out that, though he supports the adoption of the present Judgment (of 17.07.2019) of the International Court of Justice (ICJ) in the case of *Jadhav* (India *versus* Pakistan), he follows a reasoning at times clearly distinct from that of the Court. There are some points—he adds—which have not been sufficiently dealt with by the ICJ, or which deserve more attention, and there are even relevant points which have not been considered by the Court. He thus dwells upon them, develops his own reasoning and presents the foundations of his own personal position thereon, grounded above all on issues of principle, to which he attaches much importance, in the search for the realization of justice.

2. He starts by addressing a point that was brought to the attention of the ICJ by the contending Parties, in the course of the present proceedings in the case of *Jadhav*, namely, the jurisprudential construction with the legacy of the pioneering Advisory Opinion n. 16 (1999) of the Inter-American Court of Human Rights (IACtHR) on the matter at issue, followed by the Advisory Opinion n. 18 (2003) of the IACtHR. The Advisory Opinion n. 16 (1999) of the IACtHR upholds the right to information on consular assistance (Article 36 (1) (*b*) of the Vienna Convention on Consular Relations VCCR) as directly related to the International Law of Human Rights, and in particular to the right to life and the guarantees of due process of law (Articles 6 and 14 of the United Nations Covenant on Civil and Political Rights CCPR).

3. Judge Cançado Trindade then ponders that the IAtCHR thus linked the right to information on consular assistance to the evolving guarantees of due process of law, and adds that

> "its non-observance in cases of imposition and execution of death penalty amounts to an arbitrary deprivation of the right to life itself (…), with all the juridical consequences inherent to a violation of the kind, that is, those pertaining to the international responsibility of the State and to the duty of reparation (…). This historical Advisory Opinion n. 16 (1999) of the IACtHR, truly pioneering, has served as inspiration for the emerging international case-law, *in statu nascendi*, on the matter (…)" (para. 9).

4. The following Advisory Opinion n. 18 (2003) of the IACtHR was constructed on the basis of the evolving concepts of *jus cogens* (encompassing the fundamental principle of equality and non-discrimination) and obligations *erga omnes* of protection. Judge Cançado Trindade adds that the IACtHR, as from its earlier and historical Advisory Opinion n. 16 (1999), became the first international tribunal "to warn that non-compliance with Article 36 (1) (*b*) of the VCCR would be to the detriment not only of a State Party but also of the human beings concerned", as well as "to affirm the existence of an individual right to information on consular assistance in the framework of the guarantees of the due process of law" (para. 15).

5. Turning then to the case law of the ICJ itself (cases *LaGrand*, 2001; *Avena*, 2004; and *Jadhav*, 2019), subsequent to the Advisory Opinion n. 16 (1999) of the IACtHR, Judge Cançado Trindade recalls in detail that in the contentious proceedings of these three cases, the applicant States brought to the attention of the ICJ the historical importance of the

construction of the pioneering Advisory Opinion n. 16 (1999) of the IACtHR which, however, has not been taken into account by the ICJ in its three aforementioned Judgments.

6. In these three cases of *LaGrand*, *Avena* and *Jadhav* (paras. 24–26, as to this latter), Judge Cançado Trindade further recalls that the ICJ acknowledged the "individual rights" under Article 36 of the VCCR, but it avoided to consider their character as human rights despite the fact that the individual rights under Article 36 of the VCCR are directly related to the right to life and to the human rights to due process of law and a fair trial (CCPR, Articles 6 and 14). Ever since the ICJ's decisions in the cases of *LaGrand* (2001) and of *Avena* (2004), its attitude of apparent indifference to the legacy of the pioneering contribution of the IACtHR's Advisory Opinion n. 16 (1999), continuously brought to its attention by the contending Parties, promptly generated strong and reiterated criticism in expert writing (paras. 19, 21 and 23).

7. Judge Cançado Trindade further points out that, ever since the first years of the last decade, "a gradually larger understanding was being formed that the right to consular assistance accorded to the detained foreign national a human rights safeguard, there being interrelationship between consular law and human rights" (para. 22). Drawing attention to the limitations of the ICJ's reasoning in the cases of *LaGrand* (2001) and of *Avena* (2004), Judge Cançado Trindade sustains that there is no reason for the ICJ to have adopted its insufficient approach to the matter at issue (also in the present case of *Jadhav*); beyond what the ICJ has held, there is an ineluctable interrelationship between the right to information on consular assistance and the human rights to due process of law and fair trial, with an incidence on the fundamental right to life (paras. 27–31).

8. In Judge Cançado Trindade's understanding, there is need to proceed in this constructive hermeneutics, so as to keep on fostering the current historical process of humanization of consular law, and, ultimately, of international law itself. After all, one is here "in the realm not only of the VCCR (Article 36) but also of human rights in general or customary international law"; in his view, "the right to information on consular assistance under the VCCR (Article 36) is an individual right, is undoubtedly interrelated with human rights" (para. 37). In the present case of *Jadhav* (2019) he adds the ICJ should have acknowledged that it has before itself the "ineluctable interrelationship" between the right to information on consular assistance, and the human rights to due process of law and fair trial, "with all legal consequences ensuing therefrom" (para. 42).

9. Judge Cançado Trindade then addresses in detail the trend towards the abolition of the death penalty, as seen nowadays in the *corpus juris gentium* (international treaties and instruments, and general international law) on the wrongfulness in death penalty as a breach of human rights; there is likewise the case law of the IACtHR to this effect (part VII). In logical sequence, he examines in detail (part VIII) the initiatives and endeavours in the United Nations in condemnation of death penalty at world level (*e.g.* the operation of the Human Rights Committee under the CCPR, of the former United Nations Commission on Human Rights, and of the United Nations Council on Human Rights). And he adds:

> "This factual context, in my perception, cannot simply be overlooked in the handling by the ICJ of the present case of *Jadhav*. One cannot at all dissociate the violation of the individual human right under Article 36(1)(*b*) of the VCCR rightly established by the ICJ in the present Judgment from its effects on the human rights under Articles 6 and 14 (right to life and procedural guarantees) of the CCPR. It is, in my view, a duty to consider these effects, so as to render possible the proper and necessary consideration of *redress*." (Para. 66.)

10. The following observations by Judge Cançado Trindade focus on the large extent of the harm done to human rights by death penalty; he points out that, in face of this, the ICJ has pursued (as from its own jurisdiction) a very restrictive reasoning. He then warns that it is to be kept in mind that law and justice come together, this being essential when human rights are affected (part IX). The way is then paved for his careful consideration of longstanding humanist thinking, in its denunciation of the cruelty of death penalty as a breach of human rights (part X).

11. Judge Cançado Trindade observes that, underlying the aforementioned *corpus juris gentium* condemning the wrongfulness in death penalty as a breach of human rights,

> "there are the foundations of humanist thinking, which in my view cannot be overlooked: for a long time such precious thinking has been warning against the cruelty of death penalty, and calling for its abolition all over the world. After all, an arbitrary deprivation of life can occur by means of 'legal' actions and omissions of organs of the State on the basis of a law which by itself is the source of arbitrariness." (Para. 71.)

12. For a long time he continues—humanist thinking has emerged against State arbitrariness in the execution of death penalty, with lucid jurists, philosophers and writers condemning the wrongfulness in death penalty, and converging in making it clear that "law and justice come together, they cannot be separated one from the other", their interrelationship being ineluctable. It is "necessary to keep this point always in mind, including in our World Court, which is the International Court of *Justice*" (para. 83).

13. Judge Cançado Trindade then addresses the importance of providing *redress* (part XI). He begins by warning that in order "to keep law and justice together, one cannot accept being restrained by legal positivism: one is to transcend its regrettable limitations" (para. 85). Thus, even when death penalty is executed in conformity with positive law, despite its arbitrariness, this in no way justifies it; after all, legal positivism has always been a subservient servant of established power (irrespective of the orientation of this latter), paving the way for decisions that do not realize justice. He adds that no such distortions can be acquiesced with, as positive law cannot prescind from justice.

14. Accordingly—he proceeds—it is necessary to address the issue of redress for the unlawful act established by the ICJ in the present case of *Jadhav*, ensuing from the breach of Article 36 (1) (*b*) of the VCCR. The necessary redress is meant to wipe out all consequences of the unlawful act (the condemnation of Mr. K.S. Jadhav to death by a military court). Redress in the *cas d'espèce* goes well beyond the simple "review and reconsideration", as ordered by the ICJ, of

the death sentence of the military court following a breach of consular law (paras. 86–88).

15. According to Judge Cançado Trindade, the State's duty of redress amounts to *restoration* of the situation existing before the occurrence of the unlawful act, encompassing putting an end to it and preventing any continuing effects ensuing therefrom. "Review and reconsideration", once again repeated by the ICJ in the present case of *Jadhav* (like earlier in the cases of *LaGrand* and of *Avena*), are manifestly insufficient and inadequate, leaving the whole matter in the hands of the respondent State.

16. Judge Cançado Trindade expresses his concern that the ICJ, though overtaken by uncertainties, nonetheless points to "remedies" essentially at domestic law level, limiting itself to "review and reconsideration" of the death penalty. In Judge Cançado Trindade's assessment,

> "In view of the lack of evidence before it, I find its position on this particular point unsatisfactory, if not untenable. My own position is that the facts of the present case of *Jadhav*, as presented to the Court, bar the execution of the death penalty against Mr. K.S. Jadhav, and call for redress for the violation of Article 36(1) of the VCCR." (Para. 93.)

17. Thus, to him, the respondent State's effective "review and reconsideration" of the death sentence against Mr. K.S. Jadhav cannot constitute again a death sentence. In the understanding of Judge Cançado Trindade, the ICJ, as the principal judicial organ of the United Nations, is to render justice in line with the progressive development of international law on the prohibition and the abolition of the death penalty. Last but not least, he proceeds, in an epilogue (part XII), to a recapitulation of the points of his personal position sustained in my present separate opinion.

18. In so doing, he underlines that he thus purports herein to make it quite clear that his own understanding goes beyond the ICJ's reasoning. Judge Cançado Trindade adds that, in this understanding (his own), he focuses on the need of transcending the strictly inter-State outlook, and, moreover, on the right to information on consular assistance in the framework of the guarantees of the due process of law transcending the nature of an individual right, as a true human right, with all legal consequences ensuing therefrom.

Declaration of Judge Sebutinde

Judge Sebutinde voted with the majority in the operative part (*dispositif*) of the Judgment but is of the view that several aspects in the reasoning of the Court deserved more in-depth explanations to provide the reader with a better understanding of the decision of the Court. The first aspect relates to whether the two passports allegedly found in the possession of Mr. Jadhav upon his arrest, have any bearing on proof of his nationality, for purposes of Article 36 of the Vienna Convention on Consular Relations, 1963 ("Vienna Convention"). Judge Sebutinde concludes that the issue of Mr. Jadhav's nationality for purposes of consular access under Article 36 of the Vienna Convention should not be confused with his identity.

The second aspect relates to the applicability of Article 36 of the Vienna Convention to persons suspected of espionage or terrorism, in light of the provisions of the bilateral Agreement on Consular Access concluded by India and Pakistan on 21 May 2008 ("the 2008 Agreement"). Applying the customary rules of international law applicable to the interpretation of treaties and analysing the context and *travaux préparatoires* of the 2008 Agreement, Judge Sebutinde reaches the conclusion that the Parties did not intend to exclude persons accused of espionage or terrorism, from the right to consular access. Paragraph (vi) of the 2008 Agreement permits the receiving State to examine, when determining the release and repatriation of a person "arrested, detained or sentenced on political or security grounds", to examine each case on its own merits. The paragraph does not displace or derogate from the rights and privileges envisaged in Article 36 of the Vienna Convention.

The third aspect relates to the impact of domestic law on the right of consular access under the Vienna Convention. While she agrees that the exercise of the right to consular access should be done in accordance with the domestic laws of the receiving State, as provided for in Article 5 (*i*) and (*m*) and Article 36 (2) of the Vienna Convention, Judge Sebutinde underlines the proviso to Article 36 (2), which enjoins the receiving State to ensure that its domestic laws and regulations, in turn, enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Declaration of Judge Robinson

1. In his declaration, Judge Robinson examines two areas. First, the relationship between the Vienna Convention on Consular Relations ("the Vienna Convention") and the International Covenant on Civil and Political Rights ("the Covenant") and second, the 2008 Agreement on Consular Access between India and Pakistan in light of Article 73 (2) of the Vienna Convention.

2. In respect of the first, he advances several propositions regarding the relationship between the Vienna Convention and the Covenant, arguing that there is a strong and meaningful legal connection between Article 36 of the Vienna Convention and Article 14 of the Covenant. Those propositions may be summarized as follows:

> (1) There is a legal connection between Article 36 of the Vienna Convention and Article 14 of the Covenant that may impact the issue of the Court's jurisdiction.
>
> (2) The Covenant, being a human rights treaty, is a leading conventional instrument for the protection of the rights of the individual.
>
> (3) The rights in Article 14 of the Covenant apply to "everyone" including persons in a foreign country and apply in full equality so that a national in a foreign country is entitled to the same protection through the rights set out in Article 14 as a national of his own country or a national in the receiving State.
>
> (4) The bundle of rights in Article 14 (3) of the Covenant comprises "minimum guarantees" and is not an exhaustive list of those rights.
>
> (5) The right to a fair trial in Article 14 of the Covenant and the notion of equality before the law means that persons must be granted an equal access to the Court without

any distinction based on the factors in Article 2 (1) of the Covenant including national or social origin.

(6) The rights to consular access and protection under Article 36 of the Vienna Convention is as much a human right as any of the seven rights in Article 14 (3) of the Covenant.

(7) Article 36 of the Vienna Convention therefore should be seen as providing a kind of foreign parity with the rights enjoyed by a person facing a criminal charge in the receiving State.

(8) The right to consular access and the corresponding obligation to grant it whether under Article 36 of the Vienna Convention or under any of the other mentioned treaties therein have passed into customary international law.

(9) The right of a consular officer under Article 36 (1) (*c*) of the Vienna Convention to visit, converse and correspond with, and arrange for the legal representation of a national of the sending State who is in prison, custody or detention, ensures for the benefit of the foreign national in prison, custody or detention who may be in need of legal representation in a forthcoming trial. Without a foreign national's consular officer being able to arrange for his legal representation, it is very likely that none of the seven rights set out in Article 14 of the Covenant would be given effect. In that bundle, the right that is most at peril in relation to a person in a foreign country facing a criminal charge is the right under Article 14 (3) (*b*) "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing"; it is also a right that is closely connected to the right of the foreign national to have that national's consular officer arrange for his legal representation.

(10) It is difficult to accept the submission that "unlike legal assistance, consular assistance is not regarded as a predicate to a criminal proceeding".

(11) The Convention must be interpreted in light of that grand development of international law following the Second World War which focused on the rights of individuals in their relations with States. Support for such an interpretation that views the Convention through a global lens comes from what McLachlan calls the "general principle of treaty interpretation, namely that of *systemic integration* within the international legal system", reflected in Article 31 (3) (*c*) of the Vienna Convention on the Law of Treaties; and

(12) It follows therefore that a breach of the obligations under Article 36 (1) of the Vienna Convention and in particular, of Article 36 (1) (*c*) is a breach of a human right closely connected to a breach of the fair trial rights of an accused person under Article 14 (3) of the Covenant, and in particular, a breach of the right set out in Article 14 (3) (*b*).

3. In respect of the second, Judge Robinson examines the 2008 Agreement and argues that the issue as to whether the 2008 Agreement is consistent with Article 73 (2) of the Vienna Convention is not resolved by presuming that the Parties must have intended the 2008 Agreement to be consistent on the ground that they were aware of the provisions of the 2008 Agreement. At most, any such presumption would be rebuttable and is rebutted by point (vi) of the Agreement.

Declaration of Judge Iwasawa

1. While Judge Iwasawa agrees with the findings of the Court, he wishes to offer additional explanations for his support of the findings and set forth his views on some issues not dealt with by the Court in the Judgment.

2. In the circumstances of the present case, Judge Iwasawa agrees that Pakistan's objection based on the clean hands doctrine does not by itself render India's Application inadmissible. In his view, an objection based on the clean hands doctrine may make an Application inadmissible only in exceptional circumstances.

3. With respect to the right to consular access, Judge Iwasawa points out that subsequent to the conclusion of the Vienna Convention on Consular Relations in 1963 ("Vienna Convention"), States have concluded a number of anti-terrorism conventions in which they have included the right of a person suspected of terrorism to have consular access without delay. In his view, while terrorism and espionage are different crimes, these anti-terrorism conventions provide additional support for the interpretation that Article 36 of the Convention requires consular access without delay also for persons suspected of espionage.

4. As regards the relationship between the Vienna Convention and the 2008 Agreement, Judge Iwasawa recalls that the purpose of the Vienna Convention was to set, to the extent possible, uniform and minimum standards on consular relations. He considers that Article 73, paragraph 2, of the Vienna Convention does not allow the parties to the Convention to conclude agreements which would derogate from the obligations of the Convention. If a subsequent agreement derogates from the obligations of the Convention, that agreement is inapplicable and the Convention applies to the relations between the parties concerned. Accordingly, in his view, even if the 2008 Agreement was intended to allow limitation of consular access in case of espionage, Article 36 of the Vienna Convention would prevail over the 2008 Agreement and would apply in the relations between India and Pakistan.

Dissenting opinion of Judge *ad hoc* Jillani

Judge *ad hoc* Jillani considers that the Court should have found India's Application to be inadmissible in light of its conduct in the present case, which amounts to an abuse of rights. In his view, India's reliance on the Vienna Convention on Consular Relations ("Vienna Convention") in the present case is misplaced and subverts the very object and purpose of that instrument. The Vienna Convention having been concluded with the view to contributing "to the development of friendly relations among nations", it can hardly be the case that its drafters intended for its rights and obligations to apply to spies and nationals of the sending State (India) on secret missions to threaten and undermine the national security of the receiving State (Pakistan). Mr. Jadhav was in possession of an authentic Indian passport with a false Muslim identity, namely Hussein Mubarak Patel. Even the three renowned Indian journalists, namely Mr. Karan Thapar, Mr. Praveen Swami and Mr. Chandan Nandy, debunked the Government's defence on the passport issue. Mr. Jadhav made a confession

before a magistrate in which he admitted to have organized and executed acts of terror causing loss of lives and property, at the behest of RAW. By ignoring this aspect, the Court's Judgment sets a dangerous precedent in a time in which States are increasingly confronted with transnational terrorist activities and impending threats to national security. Terrorism has become a systemic weapon of war and nations that ignore it, do so at their own peril. Such threats may legitimately justify certain limits to be imposed on the scope of application of Article 36 of the Vienna Convention, in the bilateral relations between any two States at any given time.

Despite Pakistan's several requests, India did not assist with the investigation of the case, which is in violation of the United Nations Security Council resolution 1373 that enjoins Member States to provide assistance in connection with any criminal investigation relating to the financing or suppression of terrorist acts.

According to Judge *ad hoc* Jillani, the Court has misconstrued and rendered meaningless Article 73, paragraph 2, of the Vienna Convention, which does not preclude States parties from entering into subsequent bilateral agreements. Notwithstanding that, the Court ignored the legal effect of the 2008 Agreement and specifically its point (vi), which provides that "[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits". In his view, by concluding the 2008 Agreement, the Parties aimed to clarify the application of certain provisions of the Vienna Convention to the extent of their bilateral relations, namely by recognizing that each contracting State may consider, on the merits, whether to allow access and consular assistance to nationals of the other contracting State, arrested or detained on "political or security grounds". This provision is further consistent with customary international law, which provides for an exception to consular access and assistance in respect of the nationals of the sending States that have engaged in espionage and terrorist activities in the receiving State.

Judge *ad hoc* Jillani also regrets that the Court did not take into account the rather strained historical and political context which has defined the diplomatic relations between the two countries and despite which they executed the 2008 Agreement. In its Memorial, India itself referred to a press briefing by a Pakistani spokesman on human rights violations in Kashmir. The underlying cause of the increasing public unrest in Kashmir, which has also marred the relations between the two neighbouring countries, is the non-implementation of United Nations Security Council resolution 47 of 1948, which, *inter alia*, mandated the holding of a plebiscite in order to decide the future of Kashmir. The situation was further confounded by acts of terror perpetrated by non-State actors and led to the exchange of allegations and counter-allegations of interference. Sometimes nationals of either country cross borders inadvertently and sometimes they are arrested in cases which have a "political" or a "security" dimension. Such incidents need to be investigated and each State may be sensitive about providing either immediate consular access or release. As the Vienna Convention does not specifically deal with arrest and detention on "political" and "security" grounds (point (vi) of the 2008 Agreement), India and Pakistan negotiated and entered into an agreement within the meaning of Article 73, paragraph 2, of the Vienna Convention with a view to "supplement[ing]" and "amplify[ing]" its provisions. The case of Mr. Jadhav is a classic example of the kind of situations/cases both countries had in mind when inserting point (vi) in the 2008 Agreement.

Even if the Vienna Convention is applicable to the case of Mr. Jadhav, Judge *ad hoc* Jillani is of the view that Pakistan's conduct does not constitute a breach of its obligations under paragraph 1 of Article 36 thereof. Having regard to the seriousness of the offences committed by Mr. Jadhav, the threat these have posed to the national security of Pakistan and the fact that several of his named accomplices were still to be investigated, as well as India's consistent non-co-operation in the investigation, Judge *ad hoc* Jillani is of the view that Pakistan's conduct does not constitute a breach of Article 36, paragraph 1, of the Vienna Convention.

Finally, Judge *ad hoc* Jillani considers that the existing judicial review procedures in Pakistan already substantially respond to the relief ordered by the Court. In his view, noting that Pakistan should, if necessary, adopt appropriate legislation for effective review and reconsideration, is uncalled for and the Court's reasoning deviates from its existing jurisprudence. It sets a dangerous precedent of dictating to the States the ways in which they must perform their obligations.

236. APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (UKRAINE *v.* RUSSIAN FEDERATION) [PRELIMINARY OBJECTIONS]

Judgment of 8 November 2019

On 8 November 2019, the International Court of Justice rendered its Judgment on the preliminary objections raised by the Russian Federation in the case concerning *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)*.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; Judges *ad hoc* Pocar, Skotnikov; Registrar Gautier.

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I. History of the proceedings (paras. 1–22)

The Court begins by recalling that, on 16 January 2017, Ukraine filed in the Registry of the Court an Application instituting proceedings against the Russian Federation with regard to alleged violations by the latter of its obligations under the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (the "ICSFT") and the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 ("CERD"). In its Application, Ukraine seeks to found the Court's jurisdiction on Article 24, paragraph 1, of the ICSFT and on Article 22 of CERD, on the basis of Article 36, paragraph 1, of the Statute of the Court.

The Court goes on to recall that, following the filing of a Request for the indication of provisional measures by Ukraine on the same day, by an Order of 19 April 2017, it indicated the following provisional measures:

> "(1) With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, (*a*) Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis; (*b*) Ensure the availability of education in the Ukrainian language; (2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

Finally, the Court recalls that, on 12 September 2018, the Russian Federation raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application.

II. Introduction (paras. 23–37)

A. Subject-matter of the dispute (paras. 23–32)

The Court explains that the present proceedings were instituted by Ukraine following the events which occurred in eastern Ukraine and in Crimea from the spring of 2014. With regard to the events in eastern Ukraine, the Applicant has brought proceedings only under the ICSFT. With regard to the situation in Crimea, Ukraine's claims are based solely upon CERD. The Court observes that the Parties have expressed divergent views as to the subject-matter of the dispute brought by Ukraine before it.

The Court notes that one aspect of the subject-matter of the dispute is whether the Russian Federation had the obligation, under the ICSFT, to take measures and to co-operate in the prevention and suppression of the alleged financing of terrorism in the context of events in eastern Ukraine and, if so, whether the Russian Federation breached such an obligation. The other aspect of the subject-matter of the dispute is whether the Russian Federation breached its obligations under CERD through discriminatory measures allegedly taken against the Crimean Tatar and Ukrainian communities in Crimea.

B. Bases of jurisdiction invoked by Ukraine (paras. 33–37)

The Court recalls that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them. To establish the Court's jurisdiction in the present case, Ukraine invokes Article 24, paragraph 1, of the ICSFT and Article 22 of CERD. The first of these provisions reads as follows:

> "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court."

Article 22 of CERD provides that:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

The Court observes that the Russian Federation contests its jurisdiction to entertain the dispute, arguing in this regard that it is not one which the Court has jurisdiction *ratione materiae* to entertain, either under Article 24, paragraph 1, of the ICSFT or under Article 22 of CERD, and that the procedural preconditions set out in these provisions were not met by Ukraine before it seised the Court. The Respondent further contends that Ukraine's claims under CERD are inadmissible, since, in its view, available local remedies had not been exhausted before Ukraine filed its Application with the Court.

III. The International Convention for the Suppression of the Financing of Terrorism (paras. 38–77)

The Court begins by examining whether it has jurisdiction ratione materiae under Article 24, paragraph 1, of the ICSFT and whether the procedural preconditions set forth in that provision have been met.

A. Jurisdiction ratione materiae *under the ICSFT* (paras. 39–64)

The Court recalls that, in order to determine the Court's jurisdiction *ratione materiae* under a compromissory clause concerning disputes relating to the interpretation or application of a treaty, it is necessary to ascertain whether the acts of which the applicant complains "fall within the provisions" of the treaty containing the clause. This may require the interpretation of the provisions that define the scope of the treaty. In the present case, the ICFT has to be interpreted according to the rules contained in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969, to which both Ukraine and the Russian Federation are parties as of 1986.

The Court states that, at the present stage of the proceedings, an examination by it of the alleged wrongful acts or of the plausibility of the claims is not generally warranted. Its task is to consider the questions of law and fact that are relevant to the objection to its jurisdiction. It observes that the ICSFT imposes obligations on States parties with respect to offences committed by a person when "that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" acts of terrorism as described in Article 2, paragraph 1 (*a*) and (*b*). As stated in the preamble, the purpose of the Convention is to adopt "effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators". The ICSFT addresses offences committed by individuals. In particular, Article 4 requires each State party to the Convention to establish the offences set forth in Article 2 as criminal offences under its domestic law and to make those offences punishable by appropriate penalties. The financing by a State of acts of terrorism is not addressed by the ICSFT. However, it has never been contested that if a State commits a breach of its obligations under the ICSFT, its responsibility would be engaged. The Court adds that the conclusion that the financing by a State of acts of terrorism lies outside the scope of the ICSFT does not mean that it is lawful under international law. It recalls that, in resolution 1373 (2001), the United Nations Security Council, acting under Chapter VII of the Charter, decided that all States shall "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts".

The Court notes that, when defining the perpetrators of offences of financing acts of terrorism, Article 2 of the ICSFT refers to "any person". According to its ordinary meaning, this term covers individuals comprehensively. The Convention applies both to persons who are acting in a private capacity and to those who are State agents. As the Court noted, State financing of acts of terrorism is outside the scope of the ICSFT; therefore, the commission by a State official of an offence described in Article 2 does not in itself engage the responsibility of the State concerned under the Convention. However, all States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person. Should a State breach such an obligation, its responsibility under the Convention would arise.

The Court observes that, as the title of the ICSFT indicates, the Convention specifically concerns the support given to acts of terrorism by financing them. Article 2, paragraph 1, refers to the provision or collection of "funds". It notes that since no specific objection to the Court's jurisdiction was made by the Russian Federation with regard to the scope of the term "funds", this issue relating to the scope of the ICSFT need not be addressed at the present stage of the proceedings. The Court adds that an element of an offence under Article 2, paragraph 1, of the ICSFT is that the person concerned has provided funds "with the intention that they should be used or in the knowledge that they are to be used" to commit an act of terrorism. The existence of the requisite intention or knowledge raises complex issues of law and especially of fact that divide the Parties and are properly a matter for the merits. The same may be said of the question whether a specific act falls within the meaning of Article 2, paragraph 1 (*a*) or (*b*). This question is largely of a factual nature and is properly a matter for the merits of the case. The Court considers that, within the framework of the ICSFT, questions concerning the existence of the requisite mental elements do not affect the scope of the Convention and therefore are not relevant to the Court's jurisdiction *ratione materiae*.

In light of the above, the Court concludes that the objection raised by the Russian Federation to its jurisdiction *ratione materiae* under the ICSFT cannot be upheld.

B. Procedural preconditions under Article 24 of the ICSFT (paras. 65–77)

The Court must then ascertain whether the procedural preconditions set forth in Article 24, paragraph 1, of the ICSFT have been fulfilled. In this context, it examines whether the dispute between the Parties could not be settled through negotiation within a reasonable time and, if so, whether the Parties were unable to agree on the organization of an arbitration within six months from the date of the request for arbitration.

1. Whether the dispute between the Parties could not be settled through negotiation (paras. 66–70)

The Court considers that Article 24, paragraph 1, of the ICSFT requires, as a first procedural precondition to the Court's jurisdiction, that a State make a genuine attempt to settle through negotiation the dispute in question with the other State concerned. According to the same provision, the precondition of negotiation is met when the dispute "cannot be settled through negotiation within a reasonable time". As has previously been observed, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question".

The Court recalls that, on 28 July 2014, Ukraine wrote a Note Verbale to the Russian Federation, stating that

> "under the provisions of the 1999 International Convention for the Suppression of the Financing of Terrorism, the Russian Party is under an obligation to take such measures, which may be necessary under its domestic law to investigate the facts contained in the information submitted by the Ukrainian Party, as well as to prosecute persons involved in financing of terrorism",

and proposing "to conduct negotiations on the issue of interpretation and application of the [ICSFT]". On 15 August 2014, the Russian Federation informed Ukraine of its "readiness to conduct negotiations on the issue of interpretation and application of the [ICSFT]". While exchanges of Notes and meetings between the Parties did not always focus on the interpretation or application of the ICSFT, negotiations over Ukraine's claims relating to this Convention were a substantial part. In particular, in a Note Verbale of 24 September 2014, Ukraine contended that

> "the Russian Side illegally, directly and indirectly, intentionally transfers military equipment, provides the funds for terrorists training on its territory, gives them material support and send[s] them to the territory of Ukraine for participation in the terrorist activities of the DPR and the LPR *etc*.".

On 24 November 2014, the Russian Federation contested that the acts alleged by Ukraine could constitute violations of the ICSFT, but accepted that the agenda for bilateral consultations include the "international legal basis for suppression of financing of terrorism as applicable to the Russian-Ukrainian relations". After that Note, several others followed; moreover, four meetings were held in Minsk, the last one on 17 March 2016. Little progress was made by the Parties during their negotiations. The Court therefore concludes that the dispute could not be settled through negotiation in what has to be regarded as a reasonable time and that the first precondition is accordingly met.

2. Whether the Parties were unable to agree on the organization of an arbitration (paras. 71–77)

The Court recalls that, nearly two years after the start of negotiations between the Parties over the dispute, Ukraine sent a Note Verbale on 19 April 2016, in which it stated that those negotiations had "failed" and that, "pursuant to Article 24, paragraph 1 of the Financing Terrorism Convention, [it] request[ed] the Russian Federation to submit the dispute to arbitration under terms to be agreed by mutual consent". Negotiations concerning the organization of the arbitration were subsequently held until a period of six months expired. During these negotiations, Ukraine also suggested to refer the dispute to a procedure other than arbitration, namely the submission of the dispute to a chamber of the Court. In any event, the Parties were unable to agree on the organization of the arbitration during the requisite period. The second precondition stated in Article 24, paragraph 1, of the ICSFT must thus be regarded as fulfilled.

The Court therefore considers that the procedural preconditions set forth in Article 24, paragraph 1, of the ICSFT were met. The Court thus has jurisdiction to entertain the claims made pursuant to that provision.

IV. The International Convention on the Elimination of all Forms of Racial Discrimination (paras. 78–133)

The Court then examines the Russian Federation's preliminary objections to the Court's jurisdiction and the admissibility of Ukraine's claims under CERD. It recalls that the Russian Federation argues that the Court lacks jurisdiction *ratione materiae* under CERD, and that the procedural preconditions to the Court's jurisdiction set out in Article 22 of the Convention are not met; the Russian Federation also argues that Ukraine's Application with regard to claims under CERD is inadmissible because local remedies had not been exhausted before the dispute was referred to the Court. The Court deals with each objection in turn.

A. Jurisdiction ratione materiae *under CERD* (paras. 79–97)

The Court explains that, in order to determine whether it has jurisdiction *ratione materiae* under CERD, it needs only to ascertain whether the measures of which Ukraine complains fall within the provisions of the Convention. In this respect, the Court notes that both Parties agree that Crimean Tatars and ethnic Ukrainians in Crimea constitute ethnic groups protected under CERD. Moreover, Articles 2, 4, 5, 6 and 7 of the Convention set out specific obligations in relation to the treatment of individuals on the basis of "race, colour, descent, or national or ethnic origin". Article 2, paragraph 1, of CERD contains a general obligation to pursue by all appropriate means a policy of eliminating racial discrimination and an obligation to engage in no act or practice of racial discrimination against persons, groups of persons or institutions. Article 5 imposes an obligation to prohibit and eliminate racial discrimination and to guarantee the right of everyone to equality before the law, notably in the enjoyment of rights mentioned therein, including political, civil, economic, social and cultural rights.

The Court, taking into account the broadly formulated rights and obligations contained in the Convention, including the obligations under Article 2, paragraph 1, and the non-exhaustive list of rights in Article 5, considers that the measures of which Ukraine complains—restrictions allegedly imposed on Crimean Tatars and ethnic Ukrainians in Crimea—are capable of having an adverse effect on the enjoyment of certain rights protected under CERD. These measures thus fall within the provisions of the Convention.

Consequently, the Court concludes that the claims of Ukraine fall within the provisions of CERD.

B. Procedural preconditions under Article 22 of CERD (paras. 98–121)

The Court turns to the examination of the procedural preconditions under Article 22 of the Convention.

1. The alternative or cumulative character of the procedural preconditions (paras. 99–113)

Pursuant to Article 22 of CERD, the Court states that it has jurisdiction to decide a dispute brought under the Convention, provided that such a dispute is "not settled by negotiation or by the procedures expressly provided for in this Convention". As the Court has previously found, "in

their ordinary meaning, the terms of Article 22 of CERD … establish preconditions to be fulfilled before the seisin of the Court". In order to determine whether these preconditions are alternative or cumulative, the Court applies the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention.

Concerning the text of Article 22 of CERD, the Court notes that the Parties expressed divergent views on the meaning of the word "or" in the phrase "not settled by negotiation or by the procedures expressly provided for in this Convention". The Court notes that the conjunction "or" appearing between "negotiation" and the "procedures expressly provided for in this Convention" is part of a clause which is introduced by the word "not", and thus formulated in the negative. While the conjunction "or" should generally be interpreted disjunctively if it appears as part of an affirmative clause, the same view cannot necessarily be taken when the same conjunction is part of a negative clause. Article 22 is an example of the latter. It follows that, in the relevant part of Article 22 of CERD, the conjunction "or" may have either disjunctive or conjunctive meaning. The Court therefore is of the view that while the word "or" may be interpreted disjunctively and envisage alternative procedural preconditions, this is not the only possible interpretation based on the text of Article 22.

Turning to the context of Article 22 of CERD, the Court notes that "negotiation" and the "procedures expressly provided for in [the] Convention" are two means to achieve the same objective, namely to settle a dispute by agreement. Both of these conditions rest on the States parties' willingness to seek an agreed settlement of their dispute. It follows that, should negotiation and the CERD Committee procedure be considered cumulative, States would have to try to negotiate an agreed solution to their dispute and, after negotiation has not been successful, take the matter before the CERD Committee for further negotiation, again in order to reach an agreed solution. The Court considers that the context of Article 22 of CERD does not support this interpretation. In the view of the Court, the context of Article 22 rather indicates that it would not be reasonable to require States parties which have already failed to reach an agreed settlement through negotiations to engage in an additional set of negotiations.

The Court considers that Article 22 of CERD must also be interpreted in light of the object and purpose of the Convention. Article 2, paragraph 1, of CERD provides that States parties to CERD undertake to eliminate racial discrimination "without delay". Articles 4 and 7 provide that States parties undertake to eradicate incitement to racial discrimination and to combat prejudices leading to racial discrimination by adopting "immediate and positive measures" and "immediate and effective measures" respectively. The preamble to CERD further emphasizes the States' resolve to adopt all measures for eliminating racial discrimination "speedily". The Court considers that these provisions show the States parties' aim to eradicate all forms of racial discrimination effectively and promptly. In the Court's view, the achievement of such aims could be rendered more difficult if the procedural preconditions under Article 22 were cumulative.

The Court concludes that Article 22 of CERD imposes alternative preconditions to the Court's jurisdiction. Since the dispute between the Parties was not referred to the CERD Committee, the Court will only examine whether the Parties attempted to negotiate a settlement to their dispute.

2. Whether the Parties attempted to negotiate a settlement to their dispute under CERD (paras. 114–121)

The Court has already had the opportunity to examine the notion of "negotiation" under Article 22 of CERD. It has thus stated that

> "negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of 'negotiations' differs from the concept of 'dispute', and requires—at the very least—a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute."

The Court has also stated that "evidence of such an attempt to negotiate—or of the conduct of negotiations—does not require the reaching of an actual agreement between the disputing parties", and that "to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause". The Court has further held that "the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked".

The Court notes that Ukraine sent its first Note Verbale to the Russian Federation concerning alleged violations of CERD on 23 September 2014. In that Note, Ukraine listed a number of measures which, in its view, the Russian Federation was implementing in violation of the Convention, and the rights which such acts were allegedly violating, and went on to state that "the Ukrainian Side offers to the Russian Side to negotiate the use of [CERD], in particular, the implementation of international legal liability in accordance with international law". On 16 October 2014, the Russian Federation communicated to Ukraine its willingness to hold negotiations on the interpretation and application of CERD. On 29 October 2014, the Applicant sent a second Note Verbale to the Respondent, asking for face-to-face negotiations which it proposed to hold on 21 November 2014. The Russian Federation replied to this Note on 27 November 2014, after Ukraine's proposed date for the meeting had passed. Ukraine sent a third Note Verbale on 15 December 2014, proposing negotiations on 23 January 2015. The Russian Federation replied to this Note on 11 March 2015, after the date proposed by Ukraine for the negotiations had passed. Eventually, the Parties held three rounds of negotiation in Minsk between April 2015 and December 2016.

There are specific references to CERD in the Notes Verbales exchanged between the Parties, which also refer to the rights and obligations arising under that Convention. In those Notes, Ukraine set out its views concerning the alleged violations of the Convention, and the Russian Federation accordingly had a full opportunity to reply to such allegations. The Court is satisfied

that the subject-matter of such diplomatic exchanges related to the subject-matter of the dispute currently before the Court.

The Court observes that the negotiations between the Parties lasted for approximately two years and included both diplomatic correspondence and face-to-face meetings, which, in the Court's view, and despite the lack of success in reaching a negotiated solution, indicates that a genuine attempt at negotiation was made by Ukraine. Furthermore, the Court is of the opinion that, during their diplomatic exchanges, the Parties' respective positions remained substantially the same. The Court thus concludes that the negotiations between the Parties had become futile or deadlocked by the time Ukraine filed its Application under Article 22 of CERD.

Accordingly, the Court concludes that the procedural preconditions for it to have jurisdiction under Article 22 of CERD are satisfied in the circumstances of the present case. As a result, the Court has jurisdiction to consider the claims of Ukraine under CERD.

C. Admissibility (paras. 122–132)

Lastly, the Court turns to the objection raised by the Russian Federation to the admissibility of Ukraine's Application with regard to claims under CERD on the ground that Ukraine did not establish that local remedies had been exhausted before it seised the Court.

The Court recalls that local remedies must be previously exhausted as a matter of customary international law in cases in which a State brings a claim on behalf of one or more of its nationals.

The Court notes that, according to Ukraine, the Russian Federation has engaged in a sustained campaign of racial discrimination, carried out through acts repeated over an appreciable period of time starting in 2014, against the Crimean Tatar and Ukrainian communities in Crimea. The Court also notes that the individual instances to which Ukraine refers in its submissions emerge as illustrations of the acts by which the Russian Federation has allegedly engaged in a campaign of racial discrimination. It follows, in the view of the Court, that, in filing its Application under Article 22 of CERD, Ukraine does not adopt the cause of one or more of its nationals, but challenges, on the basis of CERD, the alleged pattern of conduct of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea. In view of the above, the Court concludes that the rule of exhaustion of local remedies does not apply in the circumstances of the present case. This conclusion by the Court is without prejudice to the question of whether the Russian Federation has actually engaged in the campaign of racial discrimination alleged by Ukraine, thus breaching its obligations under CERD. This is a question which the Court will address at the merits stage of the proceedings.

The Court finds that the Russian Federation's objection to the admissibility of Ukraine's Application with regard to CERD must be rejected.

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The Court considers that it follows from the findings made above that the Russian Federation's objections to the jurisdiction of the Court under Article 22 of CERD and to the admissibility of Ukraine's Application with regard to CERD must be rejected. Accordingly, the Court concludes that it has jurisdiction to entertain the claims made by Ukraine under CERD and that Ukraine's Application with regard to those claims is admissible.

V. Operative Clause (para. 134)

The Court,

(1) By thirteen votes to three,

Rejects the preliminary objection raised by the Russian Federation that the Court lacks jurisdiction on the basis of Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism;

In favour: President Yusuf; Judges Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; Judge *ad hoc* Pocar;

Against: Vice-President Xue; Judge Tomka; Judge *ad hoc* Skotnikov;

(2) By thirteen votes to three,

Finds that it has jurisdiction on the basis of Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism, to entertain the claims made by Ukraine under this Convention;

In favour: President Yusuf; Judges Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; Judge *ad hoc* Pocar;

Against: Vice-President Xue; Judge Tomka; Judge *ad hoc* Skotnikov;

(3) By fifteen votes to one,

Rejects the preliminary objection raised by the Russian Federation that the Court lacks jurisdiction on the basis of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; Judge *ad hoc* Pocar;

Against: Judge *ad hoc* Skotnikov;

(4) Unanimously,

Rejects the preliminary objection raised by the Russian Federation to the admissibility of the Application of Ukraine in relation to the claims under the International Convention on the Elimination of All Forms of Racial Discrimination;

(5) By fifteen votes to one,

Finds that it has jurisdiction, on the basis of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, to entertain the claims made by Ukraine under this Convention, and that the Application in relation to those claims is admissible.

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; Judge *ad hoc* Pocar;

Against: Judge *ad hoc* Skotnikov.

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Vice-President Xue appends a dissenting opinion to the Judgment of the Court; Judges Tomka and Cançado Trindade

append separate opinions to the Judgment of the Court; Judges Donoghue and Robinson append declarations to the Judgment of the Court; Judge *ad hoc* Pocar appends a separate opinion to the Judgment of the Court; Judge *ad hoc* Skotnikov appends a dissenting opinion to the Judgment of the Court.

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Dissenting opinion of Vice-President Xue

Vice-President Xue takes the view that the Court does not have jurisdiction under Article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism ("ICFST") in this case.

In her opinion, Ukraine's claim as presented in its Application and Memorial concerns more the alleged military and financial support provided by the Russian Federation to the armed groups in the course of armed conflict in eastern Ukraine, where violations of international humanitarian law may have occurred, than the Russian Federation's failure in preventing and suppressing the financing of terrorism. She considers that the materials submitted by Ukraine do not present a plausible case that falls within the scope of the ICFST.

Vice-President Xue observes that identification of the subject-matter of the dispute is essential for the Court to determine its jurisdiction *ratione materiae*. More often than not, a dispute arises from a complicated political context, where the legal question brought before the Court is mixed with various political aspects. In her view, that fact alone does not preclude the Court from founding its jurisdiction. Recalling the Court's pronouncement in the case concerning *United States Diplomatic and Consular Staff in Tehran*, she notes that what the Court had to take into account when determining the question of jurisdiction was whether there was connection, legal or factual, between the "overall problem" in the context and the particular events that gave rise to the dispute, which precluded the separate examination of the applicant's claims by the Court.

Vice-President Xue considers that when the dispute constitutes an inseparable part of the overall problem and any legal pronouncement by the Court on that particular dispute would necessarily step into the area beyond its jurisdiction, judicial prudence and self-restraint is required. She emphasizes that in the international judicial settlement of disputes between States, the question of jurisdiction is just as important as merits. This policy is designed and reflected in each and every aspect of the jurisdictional system of the Court.

Vice-President Xue observes that acts alleged by Ukraine all took place during the internal armed conflict in eastern Ukraine. To characterize military and financial support from Russia's side, by whomever possible, as terrorism financing, would inevitably bear the legal implication of defining the nature of the armed conflict in eastern Ukraine, which, in her view, extends well beyond the limit of the Court's jurisdiction under the ICSFT. In other words, Ukraine's allegations against the Russian Federation under the ICSFT bear an inseparable connection with the overall situation of the ongoing armed conflict in eastern Ukraine. Factually, documents before the Court do not demonstrate that the alleged terrorism financing can be discretely examined without passing a judgment on the overall situation of the armed conflict in the area; Ukraine's claim under the ICSFT forms an integral part of the whole issue in eastern Ukraine. Judicially, the Court is not in a position to resolve the dispute as presented by Ukraine.

Vice-President Xue is also of the view that, in considering the scope of the ICSFT, the meaning given by the Court to the term "any person" in Article 2, paragraph 1, of the ICSFT cannot be sustained by the rules of State responsibility. In its Application, Ukraine requests the Court to adjudge and declare that:

> "the Russian Federation, *through its State organs, State agents, and other persons and entities exercising governmental authority, and through other agents acting on its instructions or under its direction and control*, has violated its obligations under the Terrorism Financing Convention by:
>
> (*a*) supplying funds, including in-kind *contributions of weapons and training*, to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals, in violation of Article 18" (emphasis added).

Although Ukraine subsequently deleted this submission in the Memorial, instead accusing the Russian Federation of allowing and encouraging its own officials to finance terrorism, the substance of its claim under the ICSFT remains unchanged. In her opinion, this is apparently a case concerning the allegations of the financing by a State of terrorist acts, which, as the Court stated in the Judgment, is explicitly precluded from the scope of the ICSFT.

Vice-President Xue considers that, in the present case, the question whether or not the Russian Federation allowed or encouraged military and financial support to the armed groups in eastern Ukraine falls outside the scope of the Court's jurisdiction under the ICSFT. Should the case proceed to the merits phase, the Court may find itself in a position where it has to pronounce on the above question, which, in her view, may raise the issue of judicial propriety.

Vice-President Xue emphasizes that judicial policy requires the Court to avoid unnecessary prolongation of the legal process if the case does not present itself as plausible. Proper identification of the subject-matter of the dispute that falls within the scope of the jurisdiction ratione materiae of the Court is essential for the purposes of good administration of justice and judicial economy. To allow this case to proceed to the merits phase, in her view, would neither serve the object and purpose of the ICSFT, nor contribute to the peace process in the region.

Separate opinion of Judge Tomka

Judge Tomka does not agree with the Court's conclusion that it has jurisdiction over Ukraine's claims arising under the International Convention for the Suppression of the Financing of Terrorism ("ICSFT"). He recalls that the ICSFT is a criminal law convention, establishing obligations for States in respect of the prevention and punishment of the financing of terrorism. The financing by a State of alleged acts of "terrorism", as the Court confirms, lies outside the scope of the Convention. Ukraine's claims, however, relate to the provision of arms and weapons. He does not consider that the

Court has ascertained whether the acts alleged by Ukraine fall within the scope of the ICSFT, in accordance with the approach taken in the *Oil Platforms* case. For example, the Court does not evaluate whether the alleged supply of weapons falls within the scope of the word "funds" as used by the ICSFT. In Judge Tomka's view, it does not, and the Court therefore lacks jurisdiction over Ukraine's claims.

Similarly, Judge Tomka has doubts whether the Court has reasonably and sufficiently demonstrated that it has jurisdiction *ratione materiae* under the International Convention on the Elimination of All Forms of Racial Discrimination ("the CERD"), in view of the fact that the Court's discussion of the question comprises only three paragraphs of its Judgment. He considers that the Court should have expressly considered each of the preliminary objections of the Russian Federation, for example whether, under the CERD, there is an absolute right to education in one's native language. However, because certain of Ukraine's claims do fall within the scope of the CERD, Judge Tomka agrees that the Court does have jurisdiction *ratione materiae* over these claims.

Judge Tomka is not convinced by the Court's treatment of the question of the procedural preconditions for seising the Court contained in Article 22 of the CERD. He is of the view that the preconditions are cumulative. Judge Tomka considers that, read together, the terms "not" and "or" in the phrase "not settled by negotiation or by the procedures expressly provided for in this Convention" logically call for a cumulative reading. This is consistent with the context, which requires the conditions to be cumulative in order to preserve the effectiveness of the procedures foreseen in Articles 11 to 13 of the CERD. He considers this interpretation to be confirmed by the preparatory works of the CERD.

Finally, Judge Tomka considers that the Court has been needlessly imprecise in its description of breaches. He recalls that, consistently with the language of Article 36, paragraph 2 (*c*) of the Statute of the Court, the International Law Commission, in its work on State responsibility, determined that the language "breach of an international obligation" most accurately describes the subjective legal phenomenon which can give rise to a State's responsibility. Judge Tomka observes that the Court could have been more precise in this regard, rather than referring to breaches of a treaty or one of its provisions.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of seven parts, Judge Cançado Trindade begins by observing that he has concurred with his vote to the adoption of the present Judgment, dismissing all preliminary objections in the present case. He then explains that he has reached the same decision of the International Court of Justice (ICJ), but on the basis of a distinct reasoning in respect of the selected points, which, in his perception, require further attention on the part of the Court. He thus finds it necessary to present his own reasoning in the present separate opinion.

2. He focuses his reasoning on the following points: (*a*) basis of jurisdiction: its importance for the protection of the vulnerable under United Nations human rights conventions; (*b*) the *rationale* of the compromissory clause of the CERD Convention (Article 22); (*c*) the *rationale* of the local remedies rule in the international safeguard of human rights: protection and redress, rather than exhaustion; (*d*) the relevance of jurisdiction in face of the need to secure protection to those in situations of vulnerability; and (*e*) concluding considerations, followed by an epilogue containing a recapitulation of all the points that he sustains in the present separate opinion.

3. Judge Cançado Trindade starts by outlining the *rationale* of United Nations human rights conventions, like CERD, with attention to focus on the relevance of the basis of jurisdiction for the protection of the vulnerable under human rights conventions. He adds that human rights conventions, like CERD, go beyond the outdated inter-State outlook, ascribing a central position to the individual victims, rather than to their States. In doing so—he proceeds—human rights conventions, like CERD, are turned to securing the effective protection of the rights of the human person, in light of the principle *pro persona humana*, *pro victima* (paras. 4–7).

4. In his perception, had the inter-State dimension not been surmounted, not much development would have taken place in the present domain of protection. In Judge Cançado Trindade's understanding, the realization of justice, with the judicial recognition of the sufferings of the victims, is an imperative, and careful account is to be taken of the needs of protection of persons in situations of vulnerability or defencelessness. He adds that the compromissory clause of a victim-oriented human rights convention, like CERD (Article 22), is related to the justiciables' right of access to justice; this requires a necessary humanist outlook, and not at all a State-centric and voluntarist one (paras. 11–20).

5. Judge Cançado Trindade ponders that, in the consideration of utmost vulnerability or defencelessness of the human person, the principle of humanity comes to the fore, and assumes a clear incidence in the protection of human beings in situations of the kind. He adds that the principle of humanity, which has met with judicial recognition, permeates human rights conventions, like CERD, and the whole *corpus juris* of protection of human beings. Judge Cançado Trindade stresses that the principle of humanity is in line with the long-standing jusnaturalist thinking (*recta ratio*); general principles of law enshrine common and superior values, shared by the international community as a whole.

6. Reiterating the position that he sustained in his dissenting opinion in the earlier ICJ's case of *Application of the CERD Convention* (2011), opposing Georgia to the Russian Federation, Judge Cançado Trindade stresses, in the *cas d'espèce* opposing Ukraine to the Russian Federation, that Article 22 of the CERD Convention in his view does not establish "preconditions" to the Court's jurisdiction (para. 27). In the present case, he adds, the ICJ does not sustain any of the preliminary objections, and correctly dismisses them all (para. 28).

7. The next point he makes is that the incidence of the local remedies rule in human rights protection is certainly distinct from its application in the practice of diplomatic protection of nationals abroad, there being nothing to hinder the application of that rule with greater or lesser rigour in such different domains (para. 31). Judge Cançado Trindade points out that we

are here before a law of protection (*droit de protection*), where the local remedies rule has a *rationale* entirely distinct from the one in diplomatic protection: the former stresses *redress*, the latter outlines *exhaustion* (paras. 32–38). In his own words:

> "The *rationale* of the local remedies rule in human rights protection discloses the overriding importance of the element of *redress*, the provision of which being a matter of *ordre public*; what ultimately matters is the redress obtained for the wrongs complained of, and not the mechanical exhaustion of local remedies. (…)
>
> This *law of protection* of the rights of the human person, within the framework of which international and domestic law appear in constant *interaction*, is inspired by common superior values: this goes *pari passu* with an increasing emphasis on the State's duty to provide effective local remedies. (…)" (paras. 42–43).

8. Human beings protected by human rights conventions, like CERD—he proceeds—are their ultimate beneficiaries, even in an inter-State claim thereunder, as the present one. It is "necessary to keep in mind that the fundamental rights of human beings stand well above the States, which were historically created to secure those rights. After all, States exist for human beings, and not *vice-versa*" (para. 39). Judge Cançado Trindade then recalls that the prevalence of human beings over States marked presence in the writings of the "founding fathers" of the law of nations (in the sixteenth-seventeenth centuries), already attentive to the need of redress for the harm done to the human person (paras. 40–41 and 60–61).

9. The next part of his separate opinion turns attention to the relevance of jurisdiction in face of the need to secure protection to those in situations of vulnerability. He warns that human beings stand in need of protection against evil, they need protection ultimately against themselves. Furthermore, they stand in need of protection against arbitrariness, hence the importance of the imperative of access to justice *lato sensu*, the *right to the Law* (*le droit au Droit, el derecho al Derecho*), to secure the realization of justice also in situations of utmost human vulnerability (paras. 45–51).

10. Judge Cançado Trindade adds that fundamental principles of law conform the *substratum* of the *jus necessarium* (not a *jus voluntarium*) in the protection of human beings, expressing an idea of objective justice, in the line of jusnaturalist thinking. In his understanding, the basic foundations of the law of nations emanate ultimately from the universal juridical conscience (para. 54). Human beings are subjects of the law of nations, and attention is to remain turned to the victimized persons, rather than to inter-State susceptibilities.

11. In his own writing, "the basic posture is *principiste*, without making undue concessions to State voluntarism. The assertion of an *objective* law, beyond the 'will' of individual States, is, in my perception, a revival of jusnaturalist thinking" (para. 53). In Judge Cançado Trindade's understanding, overcoming the limitations of legal positivism, attention is to focus on the humane ends of States, emanating from *recta ratio*, as propounded by the jusnaturalist vision. Rights inherent to the human person are anterior and superior to the States.

12. Moreover, the concomitant expansion of international jurisdiction, responsibility, personality and capacity, rescues and enhances the position of the human person as subject of international law (paras. 68 and 78). The principle of humanity counts on judicial recognition in a *corpus juris gentium* oriented towards the victims, in the line of jusnaturalist thinking. The universal juridical conscience (*recta ratio*) necessarily prevails over the "will" of States, being the ultimate *material* source of the law of nations.

13. Judge Cançado Trindade concludes that the law of nations is thus endowed with universality. A judicial decision under human rights conventions, like CERD, calls for a reasoning going well beyond the strict inter-State dimension, with attention turned to victimized human beings, in pursuance of a humanist outlook. And the prevalence of the universal juridical conscience as the ultimate *material* source of the law of nations points to securing the realization of justice in any circumstances.

Declaration of Judge Donoghue

Judge Donoghue submits a declaration in which she sets out the reasons for her agreement with the Court's decision to reject the Respondent's preliminary objections to the Court's jurisdiction *ratione materiae*.

Declaration of Judge Robinson

1. In his declaration, Judge Robinson commences by stating that, although he has voted in favour of the operative paragraphs of the Judgment, he wishes to comment on two aspects. He addresses State responsibility and the references to acts of terrorism in the Judgment.

2. In respect of State responsibility, he examines and comments on paragraph 59 of the Judgment and observes that there is nothing in certain sentences of this paragraph to support the conclusion that State financing of terrorism is outside the scope of the International Convention for the Suppression of the Financing of Terrorism (the "Convention"). He argues that the result is that when the Judgment goes on in the seventh sentence of this paragraph to cite the preparatory work of the Convention as confirming its earlier conclusion, it is in reality seeking to confirm a finding that has no basis in an analysis of the text of the Convention.

3. Judge Robinson notes that preparatory work may be used to confirm the meaning of a term that results from the application of the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties (the "VCLT"). He observes that—since the relevant area of enquiry is the meaning of the term "any person" and the Court had not at this stage of its reasoning established the meaning of that term in accordance with the general rule of interpretation in Article 31 of the VCLT—there is no basis for recourse to the preparatory work to confirm the Court's conclusion that State financing of acts of terrorism is outside the scope of the Convention. He observes that in arriving at the finding that State financing of acts of terrorism is outside the scope of the Convention, the Court has not grappled with the real issue in the case, that is, the meaning of the term "any person" and the impact, if any, that the resolution of this question has

on the general rule of attribution to States of responsibility for the acts of their agents. One consequence of the Court's approach is that it renders questionable the finding in paragraph 61 that "the commission by a State official of an offence described in Article 2 does not in itself engage the responsibility of the State concerned under the Convention".

4. According to Judge Robinson, in adopting this line of reasoning, the Court appears to have put the proverbial cart before the horse, given that at this stage of its reasoning, it had not yet considered the meaning of the term "any person" in Article 2. He argues that when the Court does in fact analyse the meaning of that term, it correctly concludes that it covers both private individuals and State agents. Here the Court has interpreted the term "any person" in accordance with its ordinary meaning in its context and in light of the object and purpose of the Convention. But, by that time, it had already concluded that State financing was outside the scope of the Convention. By this approach the Court foreclosed itself from considering the impact that its conclusion that State agents are covered by the term "any person" has on its analysis of the question whether or not States are also covered by the Convention. According to Judge Robinson, in other words, the determination that State financing was outside the scope of the Convention should not have been made without the Court profiting from an analysis of the meaning of the term "any person". Further, he notes that in any event the preparatory work of the Convention is far from unequivocal in supporting the conclusion that State financing is outside the scope of the Convention.

5. Judge Robinson concludes that the Court has had recourse to the preparatory work of the Convention in circumstances not permitted by the customary rules of interpretation reflected in Articles 31 and 32 of the VCLT. Moreover, the Court has adopted a line of reasoning that does not establish that the financing by a State of acts constituting the offence under Article 2 is outside the scope of the Convention.

6. Turning to the references to acts of terrorism in the Judgment, Judge Robinson observes that the history of multilateral efforts to combat terrorism is marked by the failure to adopt any global treaty on the question (a failure principally explained by the difficulty in reaching agreement on a definition of terrorism). He expresses the view that the failure to adopt a multilateral treaty on international terrorism is mainly due to the difficulties that are encountered in defining that phenomenon. On the one hand, there are States whose approach is to concentrate only on the heinous nature of the acts which an international convention would proscribe. On the other hand, there are those countries which want to ensure that the underlying causes of terrorism would not be ignored in the adoption of any international instrument. According to Judge Robinson, in the view of these countries, a definition of terrorism should exclude from its ambit measures adopted by peoples in the struggle for national liberation, self-determination and independence. He notes that in light of the failure to adopt a multilateral treaty that defines international terrorism, States have concluded a large number of treaties at the global level, which take the simpler and less problematic approach of creating offences by identifying certain acts which are characterized as offences. He observes that all of these treaties carefully avoid using the term "terrorism" in defining the acts constituting the offences they create and that an examination of the nine treaties in the Annex referred to in Article 2 (1) (*a*) of the Convention shows that none of them describe the acts constituting the offence under the relevant treaty as terrorism. Rather, they, like the Convention, only prohibit specific acts. Significantly, even though the preamble of two of these conventions contain references to terrorism, there is absent from their articles—including the article creating the offence—any reference to terrorism. According to Judge Robinson, in that respect the Convention is similar to those conventions in that there is a reference to terrorism in the preamble but no such reference in the article creating the offence or in any other article. All the treaties in the Annex were concluded in the shadow cast by the failure of the international community to agree on a definition of international terrorism. As such, they isolate acts to be criminalized as offences. However, in view of the failure to reach agreement on the definition of international terrorism, they avoid characterizing these acts as terrorism. For example, the Convention for the Suppression of Unlawful Seizure of Aircraft (1970) criminalizes the act of seizing an aircraft (commonly called hijacking) but does not characterize the unlawful seizure as terrorism, even though in ordinary parlance it would be so described. In the same vein the (1979) Convention against the Taking of Hostages only criminalizes the act of taking hostages and does not characterize that act as terrorism, although in colloquial parlance it would be so described.

7. Judge Robinson argues that the legal history shows that it is no mere happenstance that the Convention does not describe the offence in Article 2 as terrorism, even though its title and preamble refer to the phenomenon of terrorism. If during the negotiations Article 2 had been formulated to read "any person commits the offence of terrorism within the meaning of this Convention … ", rather than "[a]ny person commits an offence within the meaning of this Convention", the draft Convention would more than likely have met with serious objections from several countries which would have wanted to carve out an exception in respect of peoples struggling for liberation, self-determination and independence. According to Judge Robinson, it is for this reason that the Court's finding in paragraph 63 is problematic. In that paragraph the Court finds that "[a]n element of an offence under Article 2, paragraph 1, of the ICSFT is that the person concerned has provided funds 'with the intention that they should be used or in the knowledge that they are to be used' to commit an act of terrorism". In his view, it is problematic because nowhere in any of the articles of the ICSFT and in particular, nowhere in Article 2 which creates the offence, is there any reference to "an act of terrorism". He observes that, of course it would be unobjectionable if the Judgment did not use terrorism as a term of art referring to the offence under Article 2. But here the reference to an "element of the offence", that is, "the intention" (the *mens rea*) that is required by Article 2, paragraph 1, to establish the offence makes it abundantly clear that by "an act of terrorism" what is meant is the offence established by the Convention. He notes that the Court should have followed the approach it took in the same paragraph when it referred to "an act fall[ing] within the meaning of Article 2, paragraph 1 (*a*) or (*b*)". He also observes

that this comment applies to other parts of the Judgment where "terrorism" is used as a term of art referring to the offence under Article 2. In any event, if the phrase "act of terrorism" were to be retained in paragraph 63, the more appropriate formulation would be an act of financing terrorism.

Separate opinion of Judge *ad hoc* Pocar

In agreement with the decision of the majority to reject the preliminary objections raised by the Russian Federation, Judge *ad hoc* Pocar clarifies his position regarding the jurisdiction *ratione materiae* of the Court on three points.

Firstly, Judge *ad hoc* Pocar agrees with the conclusion of the Court that the financing by a State of an offence set forth under Article 2 of the ICSFT "lies outside the scope of the Convention"; he adds that the obligation to criminalize this offence in their legislation inevitably presupposes that States accept not to engage themselves in such conduct. He also notes that even if the conduct of a given State lies outside the scope of the ICSFT, that State may nevertheless be responsible under customary international law.

Secondly, Judge *ad hoc* Pocar explains that, in his view, the Court's comprehensive interpretation of the term "any person" contained in Article 2, paragraph 1, of the ICSFT is obvious from the ordinary meaning of the terms, as established by the Court, but it is also strongly supported by the object and purpose of the ICSFT, as well as by international practice in the conclusion of similar treaties.

Thirdly, although Judge *ad hoc* Pocar agrees with the conclusion of the Court that the interpretation of the definition of "funds" is to be left to the stage of an examination of the merits, he does not agree with the inference of the Court that the interpretation of this term might have affected the *ratione materiae* jurisdiction of the Court. He highlights that contrary to what the Court states, the definition of "funds" of Article 1, paragraph 1, puts the accent on assets, not on financial instruments. He adds that the list of financial instruments being unlimited, these legal documents and financial instruments cannot play a role in circumscribing the scope of the Convention. Finally, he points out that the issue related to the provision of "assets of every kind" is not to establish what kind of assets are included in the definition, but to establish which assets were actually provided or collected with the intention or the knowledge that they were to be used for unlawful purposes as described in Article 2, paragraph 1 (*a*) and (*b*). The question is therefore more related to the factual circumstances of the case.

Dissenting opinion of Judge *ad hoc* Skotnikov

1. Judge *ad hoc* Skotnikov regrets that he cannot support the decision of the Court that it has jurisdiction to adjudicate the case before it.

2. He recalls that the existence of jurisdiction is a question of law to be resolved in light of the relevant facts. The alleged facts need to be ascertained to the extent which is appropriate in a given case. Considering the Court's conclusion at the provisional measures stage—that all of Ukraine's claims as to the rights it sought to protect under the ICSFT and most of its claims under CERD were not plausible—Judge *ad hoc* Skotnikov is of the view that particular caution is required at the present to stage to determine whether the acts alleged by Ukraine fall within the respective provisions of the treaties Ukraine invokes. The Court has not exercised such caution, either regarding whether Ukraine's allegations relate to the offence of financing of terrorism as defined in the ICSFT or whether alleged measures amount to racial discrimination under CERD.

3. With respect to issues of law, Judge *ad hoc* Skotnikov notes that the Court's task at the preliminary objections stage is to resolve issues relating to the scope of the treaties in question. Concerning the scope of the ICSFT, Judge *ad hoc* Skotnikov considers that the Court fails to satisfy itself whether it has jurisdiction when it states that the issue relating to the scope of the term "funds" need not be resolved at this stage. He also does not agree with the Court's finding that persons acting as State agents fall within the scope of the ICSFT, in view of the Court's correct conclusion that the financing by a State of acts of terrorism lies outside the scope of the Convention.

4. Judge *ad hoc* Skotnikov regrets that the Court has failed to consider questions relating to the scope of the CERD. In particular, he points out that the right of the Crimean Tatar community to maintain its distinctive representative institutions does not fall within the scope of the Convention's definition of "racial discrimination". He also considers that the Court has not analysed whether the right Ukraine alleges to education in one's native language falls within the scope of CERD in the circumstances of the present case.

5. Judge *ad hoc* Skotnikov is not convinced by the Court's reasoning as to whether the preconditions contained in Article 22 of CERD are met, in view of the context and the *travaux préparatoires* of CERD.

6. Judge *ad hoc* Skotnikov considers that the present Judgment comes very close to implying that it is enough for an applicant to argue the existence of a connection, no matter how remote or artificial, between its factual allegations and the treaty it invokes, in order for the Court to be satisfied that it has jurisdiction *ratione materiae* under that treaty to entertain the case. This departure from the Court's case law is not, in his view, a welcome development.

237. APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (THE GAMBIA *v.* MYANMAR) [PROVISIONAL MEASURES]

Order of 23 January 2020

On 23 January 2020, the International Court of Justice (ICJ), delivered its Order on the Request for the indication of provisional measures submitted by the Republic of The Gambia in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*. In its Order, the Court indicated various provisional measures.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judges *ad hoc* Pillay, Kress; Registrar Gautier.

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* *

The Court begins by recalling that, on 11 November 2019, The Gambia filed in the Registry of the Court an Application instituting proceedings against Myanmar concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter the "Genocide Convention" or the "Convention"). The Application contained a Request for the indication of provisional measures, submitted pursuant to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court with a view to preserving the rights The Gambia claims under the Convention, pending the Court's final decision in the case.

I. Prima facie *jurisdiction* (paras. 16–38)

1. General introduction (paras. 16–19)

The Court recalls that, when a request for the indication of provisional measures is submitted to it, it must examine whether the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. In the present case, The Gambia seeks to found the Court's jurisdiction on Article IX of the Genocide Convention[1]. The Court notes that The Gambia and Myanmar are parties to the Convention and that neither has made any reservation to Article IX.

2. Existence of a dispute relating to the interpretation, application or fulfilment of the Genocide Convention (paras. 20–31)

The Court notes that Article IX of the Genocide Convention makes its jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the said instrument, and that it must therefore determine *prima facie* the existence of such a dispute between the Parties. It observes that, in principle, the date for determining the existence of a dispute is the date on which the application is submitted.

First, Myanmar having argued that there was no dispute between the Parties in view of the fact that the proceedings before the Court were instituted by The Gambia not on its own behalf but rather as a "proxy" and "on behalf of" the Organisation of Islamic Cooperation ("OIC"), in circumvention of Article 34 of the Statute, the Court notes that the Applicant instituted proceedings in its own name, and that it maintains that it has a dispute with Myanmar regarding its own rights under the Convention. In the view of the Court, the fact that The Gambia may have sought and obtained the support of other States or international organizations in its endeavour to seise the Court does not preclude the existence between the Parties of a dispute relating to the Genocide Convention.

Turning to the question of whether there was a dispute between the Parties at the time of the filing of the Application, the Court notes that, on 8 August 2019, the Independent International Fact-Finding Mission on Myanmar established by the Human Rights Council of the United Nations (hereinafter the "Fact-Finding Mission") published a report which affirmed its previous conclusion "that Myanmar incurs State responsibility under the prohibition against genocide" and welcomed the efforts of The Gambia, Bangladesh and the OIC to pursue a case against Myanmar before the Court under the Genocide Convention. The Court further notes that, on 26 September 2019, The Gambia stated during the general debate of the seventy-fourth session of the General Assembly of the United Nations that it was ready to lead concerted efforts to take the Rohingya issue to the International Court of Justice, and that Myanmar delivered an address two days later, characterizing the Fact-Finding Mission reports as "biased and flawed, based not on facts but on narratives". In the Court's view, these statements suggested the existence of a divergence of views concerning the events which allegedly took place in Rakhine State in relation to the Rohingya. In addition, the Court takes into account The Gambia's Note Verbale of 11 October 2019, in which it stated that it understood Myanmar to be in ongoing breach of its obligations under the Genocide Convention and under customary international law and insisted that Myanmar take all necessary actions to comply with these obligations. In light of the gravity of the allegations made in this Note Verbale, the Court considers that the lack of response may be another indication of the existence of a dispute between the Parties.

Finally, as to whether the acts complained of by the Applicant are capable of falling within the provisions of the Genocide Convention, the Court observes that The Gambia contends, in particular, that Myanmar's military and security forces have been responsible, *inter alia*, for killings, rape and other forms of sexual violence, torture, beatings, cruel

[1] Article IX of the Genocide Convention reads:

"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

treatment, and for the destruction of or denial of access to food, shelter and other essentials of life, all with the intent to destroy the Rohingya group, in whole or in part. The Court notes that The Gambia considers Myanmar to be responsible for committing genocide and to have violated other obligations under the Genocide Convention, and that Myanmar, for its part, has denied committing any of the violations of the Genocide Convention alleged by The Gambia. The Court recalls that, at this stage of the proceedings, it is not required to ascertain whether any violations of Myanmar's obligations under the Genocide Convention have occurred, which it could do only at the stage of the examination of the merits of the case. In the Court's view, at least some of the acts alleged by The Gambia are capable of falling within the provisions of the Convention.

The Court finds that the above-mentioned elements are sufficient to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

3. The reservation of Myanmar to Article VIII of the Convention (paras. 32–36)

The Court then turns to Myanmar's argument that The Gambia cannot validly seise the Court as a result of Myanmar's reservation to Article VIII of the Genocide Convention. By this reservation, the Respondent declared that "the said article shall not apply to the Union [of Burma]".

Article VIII provides that

> "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III".

The Court considers that the terms used in this provision suggest that Article VIII does not apply to the Court. In particular, it notes that this provision only addresses in general terms the possibility for any Contracting Party to "call upon" the competent organs of the United Nations to take "action" which is "appropriate" for the prevention and suppression of acts of genocide. The Court observes that the matter of the submission of disputes between Contracting Parties to the Genocide Convention to the Court for adjudication is specifically addressed in Article IX of the Convention, to which Myanmar has not made any reservation. It considers that only this Article is relevant to the seisin of the Court in the present case. In view of the above, the Court concludes, Myanmar's reservation to Article VIII of the Genocide Convention does not appear to deprive The Gambia of the possibility to seise the Court of a dispute with Myanmar under Article IX of the Convention.

2. Conclusion as to prima facie *jurisdiction* (paras. 37–38)

In light of the foregoing, the Court concludes that, *prima facie*, it has jurisdiction pursuant to Article IX of the Genocide Convention to deal with the case. Given the above conclusion, the Court considers that it cannot accede to Myanmar's request that the case be removed from the General List for manifest lack of jurisdiction.

II. Question of the standing of The Gambia (paras. 39–42)

The Court next examines the Respondent's argument that The Gambia does not have standing to bring a case before the Court in relation to Myanmar's alleged breaches of the Genocide Convention without being specially affected by such alleged violations. The Court begins by observing that, in light of the high ideals which inspired the Convention, and in view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. It adds that this common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. As the Court observed in its Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, regarding similar provisions in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the relevant provisions of the Genocide Convention may be defined as obligations *erga omnes partes* in the sense that each State party has an interest in compliance with them in any given case. It follows, the Court adds, that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end. The Court concludes that The Gambia has *prima facie* standing to submit to it the dispute with Myanmar on the basis of alleged violations of obligations under the Genocide Convention.

III. The rights whose protection is sought and the link between such rights and the measures requested (paras. 43–63)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

The Court observes that, in accordance with Article I of the Convention, all States parties thereto have undertaken to prevent and to punish the crime of genocide. According to Article II of the Convention,

> "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (*a*) Killing members of the group;
>
> (*b*) Causing serious bodily or mental harm to members of the group;
>
> (*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (*d*) Imposing measures intended to prevent births within the group;

(*e*) Forcibly transferring children of the group to another group."

The Court notes that, pursuant to Article III of the Genocide Convention, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are also prohibited.

The Court observes that the provisions of the Convention are intended to protect the members of a national, ethnical, racial or religious group from acts of genocide or any other punishable acts enumerated in Article III. In the Court's view, the Rohingya in Myanmar appear to constitute a protected group within the meaning of Article II of the Genocide Convention.

In the present case, the Court notes that, at the hearings, Myanmar, referring to what it characterizes as "clearance operations" carried out in Rakhine State in 2017, stated that

> "it cannot be ruled out that disproportionate force was used by members of the Defence Services in some cases in disregard of international humanitarian law, or that they did not distinguish clearly enough between [Arakan Rohingya Salvation Army] fighters and civilians".

The Court notes, in particular, that the United Nations General Assembly, in its resolution 73/264 adopted on 22 December 2018, expressed

> "grave concern at the findings of the independent international fact-finding mission on Myanmar that there [was] sufficient information to warrant investigation and prosecution so that a competent court may determine liability for genocide in relation to the situation in Rakhine State",

and that, by that same resolution, the General Assembly condemned

> "all violations and abuses of human rights in Myanmar, as set out in the report of the fact-finding mission, including the widespread, systematic and gross human rights violations and abuses committed in Rakhine State".

In this connection, the Court recalls that, in its report of 12 September 2018, the Fact-Finding Mission stated that it had "reasonable grounds to conclude that serious crimes under international law ha[d] been committed that warrant[ed] criminal investigation and prosecution", including the crime of genocide, against the Rohingya in Myanmar. The Court also notes that, regarding the acts perpetrated against the Rohingya in Rakhine State, the Fact-Finding Mission concluded that "on reasonable grounds … the factors allowing the inference of genocidal intent [were] present". It further notes that the Fact-Finding Mission asserted that the extreme levels of violence perpetrated against the Rohingya in 2016 and 2017 resulted from the "systemic oppression and persecution of the Rohingya", including the denial of their legal status, identity and citizenship, and followed the instigation of hatred against the Rohingya on ethnic, racial or religious grounds. The Court also recalls that, following the events which occurred in Rakhine State in 2016 and 2017, hundreds of thousands of Rohingya have fled to Bangladesh.

The Court observes that, in view of the function of provisional measures, the exceptional gravity of the allegations is not a decisive factor warranting the determination, at the present stage of the proceedings, of the existence of a genocidal intent. In its view, all the facts and circumstances mentioned above are sufficient to conclude that the rights claimed by The Gambia and for which it is seeking protection—namely the right of the Rohingya group in Myanmar and of its members to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of The Gambia to seek compliance by Myanmar with its obligations not to commit, and to prevent and punish genocide in accordance with the Convention—are plausible.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested. The Court considers that, by their very nature, the first three provisional measures sought by The Gambia are aimed at preserving the rights it asserts on the basis of the Genocide Convention in the present case, namely the right of the Rohingya group in Myanmar and of its members to be protected from acts of genocide and other acts mentioned in Article III, and the right of The Gambia to have Myanmar comply with its obligations under the Convention to prevent and punish acts identified and prohibited under Articles II and III of the Convention, including by ensuring the preservation of evidence. Given the purpose of the fourth and fifth provisional measures requested by The Gambia, the Court considers that the question of their link with the rights for which The Gambia seeks protection does not arise. As to the sixth provisional measure requested by The Gambia, the Court does not consider that its indication is necessary in the circumstances of the case.

IV. Risk of irreparable prejudice and urgency (paras. 64–75)

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences, and that this power is exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision.

The Court further recalls, as it observed in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, that the Convention "was manifestly adopted for a purely humanitarian and civilizing purpose", since "its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality". In view of the fundamental values sought to be protected by the Genocide Convention, the Court considers that the rights in question in these proceedings, in particular the right of the Rohingya group in Myanmar and of its members to be protected from killings and other acts threatening their existence as a group, are of such a nature that prejudice to them is capable of causing irreparable harm.

The Court notes that the reports of the Fact-Finding Mission have indicated that, since October 2016, the Rohingya in Myanmar have been subjected to acts which are capable of affecting their right of existence as a protected group under the Genocide Convention, such as mass killings, widespread rape and other forms of sexual violence, as well as beatings, the destruction of villages and homes, denial of access to food, shelter

and other essentials of life. The Court is also of the opinion that the Rohingya in Myanmar remain extremely vulnerable. In this respect, the Court notes that, in its resolution 74/246 of 27 December 2019, the General Assembly reiterated

> "that, in spite of the fact that Rohingya Muslims lived in Myanmar for generations prior to the independence of Myanmar, they were made stateless by the enactment of the 1982 Citizenship Law and were eventually disenfranchised, in 2015, from the electoral process".

The Court also takes note of the detailed findings of the Fact-Finding Mission on Myanmar submitted to the Human Rights Council in September 2019, which refer to the risk of violations of the Genocide Convention, and in which it is "conclude[d] on reasonable grounds that the Rohingya people remain at serious risk of genocide under the terms of the Genocide Convention".

Moreover, the Court is of the view that the steps which the Respondent claimed to have taken to facilitate the return of Rohingya refugees present in Bangladesh, to promote ethnic reconciliation, peace and stability in Rakhine State, and to make its military accountable for violations of international humanitarian and human rights law, do not appear sufficient in themselves to remove the possibility that acts causing irreparable prejudice to the rights invoked by The Gambia for the protection of the Rohingya in Myanmar could occur. In particular, the Court notes that Myanmar has not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention. Moreover, the Court notes that, in its resolution 74/246 of 27 December 2019, the General Assembly expressed its regret that

> "the situation has not improved in Rakhine State to create the conditions necessary for refugees and other forcibly displaced persons to return to their places of origin voluntarily, safely and with dignity",

and reiterated

> "its deep distress at reports that unarmed individuals in Rakhine State have been and continue to be subjected to the excessive use of force and violations of human rights and international humanitarian law by the military and security and armed forces".

Finally, the Court observes that, irrespective of the situation that the Myanmar Government is facing in Rakhine State, including the fact that there may be an ongoing internal conflict between armed groups and the Myanmar military and that security measures are in place, Myanmar remains under the obligations incumbent upon it as a State party to the Genocide Convention. The Court recalls that, in accordance with the terms of Article I of the Convention, States parties expressly confirmed their willingness to consider genocide as a crime under international law which they must prevent and punish independently of the context "of peace" or "of war" in which it takes place. The context invoked by Myanmar does not stand in the way of the Court's assessment of the existence of a real and imminent risk of irreparable prejudice to the rights protected under the Convention.

The Court finds that there is a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia, as specified by the Court.

V. Conclusion and measures to be adopted (paras. 76–85)

The Court concludes that the conditions required by its Statute for it to indicate provisional measures are met, and that it is necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by The Gambia.

Bearing in mind Myanmar's duty to comply with its obligations under the Genocide Convention, the Court considers that, with regard to the situation described above, Myanmar must, in accordance with its obligations under the Convention, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of the Convention, in particular: (*a*) killing members of the group; (*b*) causing serious bodily or mental harm to the members of the group; (*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (*d*) imposing measures intended to prevent births within the group.

Myanmar must also, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit acts of genocide, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide.

Further, the Court is of the view that Myanmar must take effective measures to prevent the destruction and ensure the preservation of any evidence related to allegations of acts within the scope of Article II of the Genocide Convention.

Finally, the Court considers that Myanmar must submit a report to it on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court.

VI. Operative Clause (para. 86)

The Court

Indicates the following provisional measures:

(1) Unanimously,

The Republic of the Union of Myanmar shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:

(*a*) killing members of the group;

(*b*) causing serious bodily or mental harm to the members of the group;

(*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and

(*d*) imposing measures intended to prevent births within the group;

(2) Unanimously,

The Republic of the Union of Myanmar shall, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in point (1) above, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide;

(3) Unanimously,

The Republic of the Union of Myanmar shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide;

(4) Unanimously,

The Republic of the Union of Myanmar shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court."

*

Vice-President Xue appends a separate opinion to the Order of the Court; Judge Cançado Trindade appends a separate opinion to the Order of the Court; Judge *ad hoc* Kress appends a declaration to the Order of the Court.

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Separate opinion of Vice-President Xue

Vice-President Xue voted in favour of the operative paragraph of the Order. In explaining her vote, she expresses certain reservations to the reasoning in the Order.

First, she maintains serious reservations with regard to the plausibility of the present case under the Genocide Convention. She is of the view that, even if the Court does not have to make a determination of the existence of genocidal intent, at least, the alleged acts and the relevant circumstances should, *prima facie*, demonstrate that the nature and extent of the alleged acts have reached the level where a pattern of conduct might be considered as genocidal conduct. The evidence and documents submitted to the Court in the present case, while displaying an appalling situation of human rights violations, present a case of a protracted problem of ill-treatment of ethnic minorities in Myanmar rather than of genocide. The gravity of the matter does not change the nature of its subject, namely, the issue of national reconciliation and equality of ethnic minorities in Myanmar.

On the question of the standing of The Gambia, Vice-President Xue disagrees with the Court that by virtue of its Judgment in *Belgium* v. *Senegal*, The Gambia has standing in the present case. She emphasizes that the facts in the *The Gambia* v. *Myanmar* case are entirely different: in *Belgium* v. *Senegal,* Belgium instituted the case against Senegal in the Court not merely because it had an interest, as shared by all the States parties, in compliance with the Convention against Torture, but because it was specially affected by Senegal's alleged non-fulfilment of its obligation *aut dedere aut judicare* under Article 7 of the Convention, as its national courts were seised with lawsuits against Mr. Hissène Habré for allegations of torture. In other words, Belgium was supposedly an injured State under the rules of State responsibility.

In Vice-President Xue's view, it is one thing for each State party to the Convention against Torture to have an interest in compliance with the obligations *erga omnes partes* thereunder, and it is quite another to allow any State party to institute proceedings in the Court against another State party without any qualification on jurisdiction and admissibility. The same consideration equally applies to the Genocide Convention, or any of the other human rights treaties.

Moreover—Vice-President Xue emphasizes—lofty as it is, the *raison d'être* of the Genocide Convention, as illustrated by the Court in its Advisory Opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, does not, in and by itself, afford each State party a jurisdictional basis and legal standing before the Court. Otherwise, it cannot be explained why reservation to the jurisdiction of the Court under Article IX of the Convention is permitted under international law. Those States which have made a reservation to Article IX are equally committed to the *raison d'être* of the Genocide Convention. The fact that recourse to the Court cannot be used either by or against them in no way means that they do not share the common interest in the accomplishment of the high purposes of the Convention. The extent to which a State party may act on behalf of the States parties for the common interest by instituting proceedings in the Court bears on international relations, as well as on the structure of international law.

Vice-President Xue further notes that resort to the Court is not the only way to protect the common interest of the States parties in the accomplishment of the high purposes of the Convention. United Nations organs, including the General Assembly, the Human Rights Council and the Office of the United Nations High Commissioner for Human Rights, all stand ready, and indeed, are being involved in the current case to see to it that acts prohibited by the Genocide Convention be prevented and, should they have occurred, perpetrators be brought to justice. In this regard, the national legal system of criminal justice of the State concerned bears the primary responsibility.

Vice-President Xue takes the view that under the rules of State responsibility, it is the injured State, the one which is specially affected by the alleged violations, that has the standing to invoke the responsibility of another State in the Court. The position taken by the Court in this Order, albeit provisional, would put to a test Article 48 of the ILC's Articles

on Responsibility of States for Internationally Wrongful Acts. How far this unintended interpretation of the Convention can go in practice remains to be seen, as its repercussions on general international law and State practice would likely extend far beyond this particular case.

Notwithstanding her reservations, Vice-President Xue agrees with the indication of the provisional measures on a number of considerations. First, the two reports of the United Nations Fact-Finding Mission on Myanmar reveal, even *prima facie*, that there were serious violations of human rights and international humanitarian law against the Rohingya and other ethnic minorities in Rakhine State of Myanmar. Considering the gravity and scale of the alleged offences, measures to ensure that Myanmar, as a State party to the Genocide Convention, observe its international obligations under the Convention, especially the obligation to prevent genocide, should not be deemed unwarranted under the circumstances. Secondly, during the oral proceedings, Myanmar acknowledged that during their military operations, there may have been excessive use of force and violations of human rights and international humanitarian law in Rakhine State and there may also have been failures to prevent civilians from looting or destroying property after fighting or in abandoned villages. As internal armed conflicts in Rakhine State may erupt again, the provisional measures as indicated by the Court would, in Vice-President Xue's view, enhance the control of the situation. Lastly, it is apparent that the Rohingya as a group remain vulnerable under the present conditions. With more than 740,000 people displaced from their homeland, the situation demands preventive measures.

In light of the foregoing considerations, Vice-President Xue concurs with the indication of the provisional measures. She points out that the issues she has raised in this opinion should be further considered in due course.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of seven parts, Judge Cançado Trindade presents the foundations of his own personal position, pertaining to the Court's decision in the present case of *Application of the Convention against Genocide (The Gambia* v. *Myanmar)*. He begins with some introductory considerations in historical perspective (part I), pointing out that the present Order has just been adopted by the International Court of Justice (ICJ), significantly by unanimity: the provisional measures are intended to bring the necessary protection to human beings who have been suffering for a long time in a situation of extreme vulnerability.

2. From the start, in his support to the Order, he rejects a voluntarist outlook of the matter, given the prevalence of human conscience over the will of States (para. 5). He then proceeds to a review of provisional measures of protection in ICJ cases under the Convention against Genocide (part II). Bearing that in mind, he concentrates attention on the contents of international fact-finding in the *cas d'espèce*.

3. Judge Cançado Trindade presents a detailed examination (parts III and IV) of relevant passages, first, of United Nations Reports of the Independent International Fact-Finding Mission on Myanmar (of 12 September 2018, of 8 August 2019 and of 16 September 2019), and secondly, of Reports of the United Nations Special Rapporteur on Human Rights in Myanmar (of 30 August 2019, of 2 May 2019, and of 20 August 2018), disclosing the sufferings imposed upon the Rohingya in the situation in Myanmar (paras. 15–52).

4. Judge Cançado Trindade points out that those United Nations reports indeed give accounts of

> "great suffering on the part of the numerous victims of the tragedy in Myanmar; further to those who were killed or died, the surviving ones remain in a situation of extreme vulnerability. I ascribe considerable importance to human vulnerability, to which I have always been attentive, and I shall address this point further in the following paragraphs of the present part V of the Separate Opinion.
>
> The Provisional Measures of Protection just ordered by the ICJ in the *cas d'espèce* aim to safeguard the fundamental rights of the surviving victims. The suffering of victims has marked presence in the writings of thinkers along the centuries" (paras. 53–54).

5. In sequence, in part V of the separate opinion, Judge Cançado Trindade focuses on provisional measures of protection and the imperative of overcoming the extreme vulnerability of victims, encompassing the legacy of the Second World Conference on Human Rights (1993) in its attention to human vulnerability (paras. 55–65), and international case law and the need of properly addressing human vulnerability (paras. 66–74).

6. He stresses that "[i]nvocation of extreme human vulnerability is a key element to be taken into account in a decision concerning provisional measures of protection, in a case like the present one, on the *Application of the Convention against Genocide*. In effect, from time to time, the ICJ has been seized of cases disclosing human cruelty, always present in the history of humankind" (para. 72). In revising the recent case law of the ICJ, he points out "the great need of a people-centred approach, keeping in mind the fundamental right to life, with the *raison d'humanité* prevailing over the *raison d'Etat*" (para. 74).

7. Judge Cançado Trindade then outlines the utmost relevance of the safeguard of fundamental rights by provisional measures of protection, in the domain of *jus cogens*, under the Convention against Genocide and the corresponding customary international law (part VI). He points out that the rights protected by the present Order of provisional measures of protection are truly fundamental rights, starting with the right to life, right to personal integrity, right to health, among others (para. 75).

8. He adds that these rights are not simply "plausible", as the Court says; there is great need of serious reflection on this superficial use of "plausible"—a recent and unfortunate invention of the Court's majority—devoid of a meaning (para. 76). The major goal is to extend protection to human beings suffering a *continuing situation* of extreme vulnerability affecting their fundamental rights (para. 77). Given that we are here before fundamental human rights, there is need to keep in mind that the basic principle of equality and non-discrimination lies in the foundations of the rights safeguarded under the

Convention against Genocide, and human rights conventions, also by means of provisional measures of protection (para. 80).

9. In Judge Cançado Trindade's understanding, law and justice are indissociably together, in the Court's mission of contributing to a *humanized* law of nations, in the dehumanized world of our days (para. 80). To him, care is to be turned attentively to the victims, rather than to inter-State susceptibilities. In sum, "*jus cogens* is to be properly considered under the Convention against Genocide and the corresponding customary international law" (para. 87).

10. The way is then paved for the presentation of an epilogue recapitulating the main points sustained in the separate opinion (part VII), so as to secure the advances in the domain of the autonomous legal régime of provisional measures of protection (para. 88). In a case like the present one, Judge Cançado Trindade sustains that the provisions of the Convention against Genocide conform a *law of protection* (a *droit de protection*), oriented towards the safeguard of the fundamental rights of those victimized in a continuing situation of extreme human vulnerability, so as also to secure the prevalence of the rule of law (*la prééminence du droit*) (para. 89).

11. Provisional measures of protection, like the ones indicated in the present Order, are intended to put an end to a continuing situation of extreme vulnerability of the victimized persons (para. 91). He adds that as such provisional measures have recently been protecting growing numbers of persons in situations of extreme vulnerability, they appear transformed into a true jurisdictional *guarantee* of preventive character (para. 92).

12. Judge Cançado Trindade observes that the legacy of the Second World Conference on Human Rights (Vienna, 1993) has been much contributing precisely to the protection of human beings in situations of great vulnerability. Furthermore, international case law, as the *cas d'espèce* shows, can serve the need of properly addressing extreme human vulnerability (para. 93). The present case shows—he concludes—that

> "the determination and ordering of provisional measures of protection under the Convention against Genocide, and under human rights Conventions, can only be properly undertaken from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarist outlook" (para. 94).

Declaration of Judge *ad hoc* Kress

In his declaration, Judge *ad hoc* Kress observes that the Order must be read keeping in mind the distinctive protective function of the indication of provisional measures. He notes, in particular, that, at this initial stage of the proceedings, the Court has not proceeded to anything close to a detailed examination of the question of genocidal intent. Against this background and in view of the exceptional gravity of the violations alleged, Judge *ad hoc* Kress believes it is worth emphasizing that the Court's Order in no way whatsoever prejudges the merits.

238. APPEAL RELATING TO THE JURISDICTION OF THE ICAO COUNCIL UNDER ARTICLE 84 OF THE CONVENTION ON INTERNATIONAL CIVIL AVIATION (BAHRAIN, EGYPT, SAUDI ARABIA AND UNITED ARAB EMIRATES *v.* QATAR)

Judgment of 14 July 2020

On 14 July 2020, the International Court of Justice delivered its Judgment on the *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates* v. *Qatar)*.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; Judges *ad hoc* Berman, Daudet; Registrar Gautier.

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The Court begins by recalling that, by a joint Application filed in the Registry of the Court on 4 July 2018, Bahrain, Egypt, Saudi Arabia and the United Arab Emirates instituted an appeal against a Decision rendered by the Council of the International Civil Aviation Organization (ICAO) on 29 June 2018 in proceedings brought by Qatar against these States on 30 October 2017, pursuant to Article 84 of the Convention on International Civil Aviation (the "Chicago Convention"). In this Decision, the ICAO Council rejected the preliminary objections raised by the applicant States that it lacked jurisdiction "to resolve the claims raised" by Qatar in its application and that these claims were inadmissible.

In their Application, the applicant States seek to found the jurisdiction of the Court on Article 84 of the Chicago Convention, in conjunction with Article 36, paragraph 1, and Article 37 of the Statute of the Court.

For the purposes of this Judgment, the applicant States are collectively referred to as the "Appellants". In describing proceedings before the ICAO Council, these States are referred to as respondents before that body.

I. Introduction (paras. 21–36)

A. Factual background (paras. 21–26)

The Court explains that, on 5 June 2017, the Governments of Bahrain, Egypt, Saudi Arabia and the United Arab Emirates severed diplomatic relations with Qatar and adopted a series of restrictive measures relating to terrestrial, maritime and aerial lines of communication with Qatar, which included certain aviation restrictions. Pursuant to these restrictions, all Qatar-registered aircraft were barred by the Appellants from landing at or departing from their airports and were denied the right to overfly their respective territories, including the territorial seas within the relevant flight information regions. Certain restrictions also applied to non-Qatar-registered aircraft flying to and from Qatar, which were required to obtain prior approval from the civil aviation authorities of the Appellants. According to the latter, these restrictive measures were taken in response to the alleged breach by Qatar of its obligations under certain international agreements to which the Appellants and Qatar are parties, namely the Riyadh Agreement of 23 and 24 November 2013, the Mechanism Implementing the Riyadh Agreement of 17 April 2014 and the Supplementary Riyadh Agreement of 16 November 2014, and of other obligations under international law.

On 30 October 2017, pursuant to Article 84 of the Chicago Convention, Qatar filed an application and memorial with the ICAO Council, in which it claimed that the aviation restrictions adopted by Bahrain, Egypt, Saudi Arabia and the United Arab Emirates violated their obligations under the Chicago Convention. On 19 March 2018, Bahrain, Egypt, Saudi Arabia and the United Arab Emirates, as respondents before the ICAO Council, raised two preliminary objections. In the first, they argued that the ICAO Council lacked jurisdiction under the Chicago Convention since the real issue in dispute between the Parties involved matters extending beyond the scope of that instrument, including whether the aviation restrictions could be characterized as lawful countermeasures under international law. In the second, they argued that Qatar had failed to meet the precondition of negotiation set forth in Article 84 of the Chicago Convention, also reflected in Article 2, subparagraph (*g*), of the ICAO Rules for the Settlement of Differences and, consequently, that the Council lacked jurisdiction to resolve the claims raised by Qatar, or alternatively that the application was inadmissible. By a decision dated 29 June 2018, the ICAO Council rejected, by 23 votes to 4, with 6 abstentions, the preliminary objections, treating them as a single objection.

On 4 July 2018, the Appellants submitted a joint Application to the Court instituting an appeal against the Decision of the Council dated 29 June 2018.

B. The Court's appellate function and the scope of the right of appeal to the Court (paras. 27–36)

The Court observes that Article 84 of the Chicago Convention provides for the jurisdiction of the ICAO Council to decide "any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes" if it "cannot be settled by negotiation". A decision of the Council may be appealed either to an *ad hoc* arbitral tribunal agreed upon between the parties to a dispute or to "the Permanent Court of International Justice". Under Article 37 of the Statute of the International Court of Justice, "[w]henever a treaty or convention in force provides for reference of a matter … to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice". Accordingly, under Article 84, the Court is competent to hear an appeal against a decision of the ICAO Council.

The Court notes that Article 84 appears under the title "Settlement of disputes", whereas the text of the Article

opens with the expression "any disagreement". In this context, it recalls that its predecessor, the Permanent Court of International Justice, defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". The Court notes that the Appellants are appealing against a decision of the ICAO Council on the preliminary objections which they raised in the proceedings before it. The text of Article 84 does not specify whether only final decisions of the ICAO Council on the merits of disputes before it are subject to appeal. The Court nonetheless settled this issue in 1972, in the first appeal submitted to it against a decision of the ICAO Council, finding that "an appeal against a decision of the Council as to its own jurisdiction must therefore be receivable since, from the standpoint of the supervision by the Court of the validity of the Council's acts, there is no ground for distinguishing between supervision as to jurisdiction, and supervision as to merits" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 26). The Court is thus satisfied that it has jurisdiction to entertain the present appeal.

With regard to the scope of the right of appeal, the Court recalls that its role in supervising the Council in the exercise of the latter's dispute settlement functions under Article 84 of the Chicago Convention is to determine whether the impugned decision is correct. In the present case, its task is to decide whether the Council has erred in rejecting the preliminary objections of the Appellants to the jurisdiction of the ICAO Council and the admissibility of Qatar's application.

II. Grounds of appeal (paras. 37–125)

The Court observes that it is not bound to follow the order in which the Appellants invoke their three grounds of appeal. The Court first examines the grounds based on the alleged errors of the ICAO Council in rejecting the Appellants' objections (second and third grounds of appeal). Thereafter, the Court considers the ground based on the alleged manifest lack of due process in the procedure before the Council (first ground of appeal).

A. The second ground of appeal: rejection by the ICAO Council of the first preliminary objection (paras. 41–63)

The Court notes that, in their second ground of appeal, the Appellants assert that the ICAO Council "erred in fact and in law in rejecting the first preliminary objection … in respect of the competence of the ICAO Council". According to the Appellants, to pronounce on the dispute would require the Council to rule on questions that fall outside its jurisdiction, specifically on the lawfulness of the countermeasures, including "certain airspace restrictions", adopted by the Appellants. In the alternative, and for the same reasons, they argue that the claims of Qatar are inadmissible.

1. Whether the dispute between the Parties relates to the interpretation or application of the Chicago Convention (paras. 41–50)

The Court has first to determine whether the dispute brought by Qatar before the ICAO Council is a disagreement between the Appellants and Qatar relating to the interpretation or application of the Chicago Convention and its Annexes. The Council's jurisdiction *ratione materiae* is circumscribed by the terms of Article 84 of the Chicago Convention to this type of disagreement.

The Court observes that, in its application and memorial submitted to the ICAO Council on 30 October 2017, Qatar requested the Council to "determine that the Respondents violated by their actions against the State of Qatar their obligations under the Chicago Convention, its Annexes and other rules of international law". It further requested the Council to "deplore the violations by the Respondents of the fundamental principles of the Chicago Convention and its Annexes". Consequently, Qatar asked the Council to urge the respondents "to withdraw, without delay, all restrictions imposed on the Qatar-registered aircraft and to comply with their obligations under the Chicago Convention and its Annexes" and "to negotiate in good faith the future harmonious cooperation in the region to safeguard the safety, security[,] regularity and economy of international civil aviation". In its memorial, Qatar identified a number of provisions of the Chicago Convention with which, in its view, the measures taken by the respondents are not in conformity, in particular Articles 2, 3*bis*, 4, 5, 6, 9, 37 and 89.

The Court considers that the disagreement between the Parties brought before the ICAO Council does concern the interpretation and application of the Chicago Convention and its Annexes and therefore falls within the scope of Article 84 of the Convention. The mere fact that this disagreement has arisen in a broader context does not deprive the ICAO Council of its jurisdiction under the said article.

The Court also cannot accept the argument that, because the Appellants characterize their aviation restrictions imposed on Qatar-registered aircraft as lawful countermeasures, the Council has no jurisdiction to hear the claims of Qatar. Countermeasures are among the circumstances capable of precluding the wrongfulness of an otherwise unlawful act in international law and are sometimes invoked as defences. The prospect that a respondent would raise a defence based on countermeasures in a proceeding on the merits before the ICAO Council does not, in and of itself, have any effect on the Council's jurisdiction within the limits laid down in Article 84 of the Chicago Convention.

The Court therefore concludes that the Council did not err when it rejected the first preliminary objection by the Appellants relating to its jurisdiction.

2. Whether Qatar's claims are inadmissible on grounds of "judicial propriety" (paras. 51–62)

The question for the Court is, in its view, whether the decision of the ICAO Council rejecting the first preliminary objection as it relates to the admissibility of Qatar's claims was a correct one. In other words, the Court has to ascertain whether the claims brought before the Council are admissible.

The Court observes that it is difficult to apply the concept of "judicial propriety" to the ICAO Council. The Council is a permanent organ responsible to the ICAO Assembly, composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity as is characteristic of

a judicial body. In addition to its executive and administrative functions specified in Articles 54 and 55 of the Chicago Convention, the Council was given in Article 84 the function of settling disagreements between two or more contracting States relating to the interpretation or application of the Convention and its Annexes. This, however, does not transform the ICAO Council into a judicial institution in the proper sense of that term. The Court considers that, in any event, the integrity of the ICAO Council's dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction under Article 84 of the Chicago Convention. Therefore, a possible need for the ICAO Council to consider issues falling outside the scope of the Chicago Convention solely in order to settle a disagreement relating to the interpretation or application of the Chicago Convention would not render the application submitting that disagreement to it inadmissible.

The Court therefore concludes that the Council did not err when it rejected the first preliminary objection in so far as the respondents asserted that Qatar's claims were inadmissible.

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In view of the above, the Court is of the opinion that the second ground of appeal cannot be upheld.

B. The third ground of appeal: rejection by the ICAO Council of the second preliminary objection (paras. 64–107)

The Court notes that, as their third ground of appeal, the Appellants assert that the ICAO Council erred when it rejected the second preliminary objection which they raised as respondents before the Council, whereby they claimed that the ICAO Council lacked jurisdiction because Qatar had failed to meet the negotiation precondition found in Article 84 of the Chicago Convention and that Qatar's application to the ICAO Council was inadmissible because it did not comply with Article 2, subparagraph (*g*), of the ICAO Rules for the Settlement of Differences.

1. The alleged failure to meet a negotiation precondition prior to the filing of Qatar's application with the ICAO Council (paras. 65–98)

The Court observes that Article 84 of the Chicago Convention is part of Chapter XVIII of the Convention, entitled "Disputes and Default". This chapter provides a dispute settlement procedure that is available in the event of disagreements concerning the interpretation or application of the Convention and its Annexes. Article 84 specifies that the disagreements that are to be settled by the Council are only those that "cannot be settled by negotiation". The Court also notes that Article 14 of the ICAO Rules for the Settlement of Differences contemplates that the Council may invite the parties to a dispute to engage in direct negotiations. It further notes that the reference in Article 84 of the Chicago Convention to a disagreement that "cannot be settled by negotiation" is similar to the wording of the compromissory clauses of a number of other treaties. The Court has, in the past, found several such compromissory clauses to contain negotiation preconditions that must be satisfied in order to establish the Court's jurisdiction. It considers that this jurisprudence is also relevant to the interpretation of Article 84 and to its application in determining the jurisdiction of the ICAO Council. Thus, prior to filing an application under Article 84, a contracting State must make a genuine attempt to negotiate with the other concerned State or States. If the negotiations or attempted negotiations reach a point of futility or deadlock, the disagreement "cannot be settled by negotiation" and the precondition to the jurisdiction of the ICAO Council is satisfied. In the view of the Court, a genuine attempt to negotiate can be made outside of bilateral diplomacy. Exchanges that take place in an international organization are also recognized as "established modes of international negotiation".

The Court notes that, in responding to the preliminary objection presented to the ICAO Council, Qatar cited a series of communications in June and July 2017 in which it urged the Council to take action with respect to the aviation restrictions. These communications referred both to the aviation restrictions and to provisions of the Chicago Convention that, according to Qatar, are implicated by those restrictions. According to the Court, the competence of ICAO unquestionably extends to questions of overflight of the territory of contracting States, a matter that is addressed in the Chicago Convention. The overtures that Qatar made within the framework of ICAO related directly to the subject-matter of the disagreement that later was the subject of its application to the ICAO Council under Article 84 of the Chicago Convention. The Court concludes that Qatar made a genuine attempt within ICAO to settle by negotiation its disagreement with the Appellants regarding the interpretation and application of the Chicago Convention.

As to the question whether negotiations within ICAO had reached the point of futility or deadlock before Qatar filed its application to the ICAO Council, the Court has previously stated that a requirement that a dispute cannot be settled through negotiations "could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that … 'no reasonable probability exists that further negotiations would lead to a settlement'." In past cases, the Court has found that a negotiation precondition was satisfied when the parties' "basic positions have not subsequently evolved" after several exchanges of diplomatic correspondence and/or meetings. In the view of the Court, its inquiry into the sufficiency of negotiations is a question of fact.

The Court observes that, in advance of the ICAO Council's Extraordinary Session of 31 July 2017, which was to be held in response to Qatar's request, the Appellants submitted a working paper that urged the Council to limit any discussion under Article 54 (*n*) of the Chicago Convention to issues related to the safety of international aviation. During the Extraordinary Session, the Council focused on matters other than the aviation restrictions that later formed the subject-matter of Qatar's application to the ICAO Council, with particular attention to contingency arrangements to facilitate air traffic over the high seas. The Court considers that, as of the close of the Extraordinary Session, settlement of the disagreement by negotiation within ICAO was not a realistic possibility. The Court also takes into account developments outside of ICAO. Diplomatic relations between Qatar and the Appellants had been severed on 5 June 2017, concurrently with the imposition of the aviation restrictions. Under these circumstances,

the Court considers that, as of the filing of Qatar's application before the ICAO Council, there was no reasonable probability of a negotiated settlement of the disagreement between the Parties regarding the interpretation and application of the Chicago Convention, whether before the ICAO Council or in another setting. The Court also recalls that Qatar maintains that it faced a situation in which the futility of negotiation was so clear that the negotiation precondition of Article 84 could be met without requiring Qatar to make a genuine attempt at negotiations. Because the Court has found that Qatar did make a genuine attempt to negotiate, which failed to settle the dispute, it has no need to examine this argument.

For the reasons set forth above, the Court considers that the ICAO Council did not err in rejecting the contention advanced by the respondents before the Council that Qatar had failed to fulfil the negotiation precondition of Article 84 of the Chicago Convention prior to filing its application before the ICAO Council.

2. Whether the ICAO Council erred by not declaring Qatar's application inadmissible on the basis of Article 2, subparagraph (g), of the ICAO Rules for the Settlement of Differences (paras. 99–105)

The Court notes that Article 2 of the ICAO Rules for the Settlement of Differences sets out the basic information that is to be contained in a memorial attached to an application filed pursuant to Article 84 of the Chicago Convention, in order to facilitate the ICAO Council's consideration of such applications. By requiring a statement regarding negotiations, subparagraph (*g*) of Article 2 takes cognizance of the negotiation precondition contained in Article 84 of the Chicago Convention.

Qatar's application and memorial before the ICAO Council contain a section entitled "A statement of attempted negotiations", in which Qatar states that the respondents before the ICAO Council "did not permit any opportunity to negotiate" regarding the aviation restrictions. The Secretary General confirmed that she had verified that Qatar's application "compl[ied] in form with the requirements of Article 2 of the … Rules [for the Settlement of Differences]" when forwarding the document to the respondents before the ICAO Council. The question of substance, *i.e.* whether Qatar had met the negotiation precondition, was addressed by the Council in the proceedings on preliminary objections, pursuant to Article 5 of the ICAO Rules for the Settlement of Differences.

The Court sees no reason to conclude that the ICAO Council erred by not declaring Qatar's application before the ICAO Council to be inadmissible by reason of a failure to comply with Article 2, subparagraph (*g*), of the ICAO Rules for the Settlement of Differences.

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For the reasons set forth above, the Court cannot uphold the third ground of appeal.

C. The first ground of appeal: alleged manifest lack of due process in the procedure before the ICAO Council (paras. 108–124)

The Court recalls that, in their first ground of appeal, the Appellants submit that the Decision of the Council "should be set aside on the grounds that the procedure adopted by the ICAO Council was manifestly flawed and in violation of fundamental principles of due process and the right to be heard".

The Court observes that, in its Judgment in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, it concluded that, in the proceedings at issue, the ICAO Council had reached the correct decision as to its jurisdiction, which is an objective question of law. The Court also observed that the procedural irregularities alleged by the Appellant did not prejudice in any fundamental way the requirements of a just procedure. The Court had no need to examine whether a decision of the ICAO Council that was legally correct should nonetheless be annulled because of procedural irregularities.

In the present case, the Court has rejected the Appellants' second and third grounds of appeal against the Decision of the ICAO Council. The Court considers that the issues posed by the preliminary objections that were presented to the Council in this case are objective questions of law. It also considers that the procedures followed by the Council did not prejudice in any fundamental way the requirements of a just procedure.

For the reasons set forth above, the first ground of appeal cannot be upheld.

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Recalling the Court's previous observation, in its Judgment in the case concerning the Appeal *Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, that Article 84 of the Chicago Convention gives the Court "a certain measure of supervision" over decisions rendered by the ICAO Council, the Court emphasizes that it will be best positioned to act on any future appeal if the decision of the ICAO Council contains the reasons of law and fact that led to the ICAO Council's conclusions.

III. Operative clause (para. 126)

The Court,

(1) Unanimously,

Rejects the appeal brought by the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates on 4 July 2018 from the Decision of the Council of the International Civil Aviation Organization, dated 29 June 2018;

(2) By fifteen votes to one,

Holds that the Council of the International Civil Aviation Organization has jurisdiction to entertain the application submitted to it by the Government of the State of Qatar on 30 October 2017 and that the said application is admissible.

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judge *ad hoc* Daudet;

Against: Judge *ad hoc* Berman.

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Judge Cançado Trindade appends a separate opinion to the Judgment of the Court; Judge Gevorgian appends a

declaration to the Judgment of the Court; Judge *ad hoc* Berman appends a separate opinion to the Judgment of the Court.

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Separate opinion of Judge Cançado Trindade

1. In the case of *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (*ICAOA*), Judge Cançado Trindade presents his separate opinion, composed of nine parts, wherein he begins by pointing out that, although he arrives at the conclusions of the *dispositif* of ICJ's Judgment (*ICAOA*, para. 126), he does so on the basis of a distinct reasoning, in particular in his own rejection of so-called "countermeasures" (para. 2). He selects this point, raised by the appellant States, so as to examine in his separate opinion their lack of legal grounds and their negative effects on the law of nations and on State responsibility, and to leave on the records the foundations of his own personal position thereon.

2. Judge Cançado Trindade begins by addressing "countermeasures"—unduly invoked by the appellant States—in breach of the foundations of the law of nations, and of State responsibility. In recalling that "the international legal order is based upon justice rather than force" (para. 10), he warns that

> "[c]ountermeasures are reminiscent of the old practice of retaliation, and,—whether one wishes to admit it or not,—they rely upon force rather than conscience. Recourse to them discloses the insufficient degree of development of the treatment of State responsibility" (para. 9).

3. Judge Cançado Trindade further warns that attention is to focus not on "coercive means", but rather "on conscience and the prevalence of *opinio juris communis*", keeping in mind "the very foundations of the international responsibility of States"; attention is thus "correctly focused on Law rather than force, on conscience rather than 'will', to the greater effectiveness of public international law itself" (para. 12). He much regrets that "countermeasures" have been raised by the appellant States in the present case of *ICAOA*, paying a disservice to international law (para. 13).

4. In sequence, Judge Cançado Trindade examines in detail the lengthy and strong criticisms of "countermeasures" presented in the corresponding debates of both the UN International Law Commission, as well as of the Sixth Committee of the UN General Assembly (parts III and IV, respectively), in the process of preparation (1992–2001) of the International Law Commission's Articles on State Responsibility (2001). He demonstrates how in those prolonged debates strong criticisms were made to the inclusion of "countermeasures" in that document, from jurists from distinct continents.

5. Yet, despite those heavy criticisms throughout the whole preparatory work of the corresponding provisions of that document,—he adds,—it is "surprising and regrettable" that there were supporters for the inclusion therein of "countermeasures", "without any juridical grounds"; furthermore, Judge Cançado Trindade adds,

> "it is likewise surprising and regrettable that the ICJ itself referred to 'countermeasures' in its Judgment of 25.09.1997 in the case of *Gabčíkovo-Nagymaros Project* (Hungary *versus* Slovakia, paras. 82–85), and again referred to it in the present Judgments of the ICJ of today in the two cases of *ICAOA* and *ICAOB* (para. 49 of both Judgments)" (para. 38).

6. Following that, he focuses on the prevalence of the imperative of judicial settlement over the State's "will", turning to further criticisms to the initiative of consideration of so-called "countermeasures" (paras. 40–41), and recalling the earlier lessons of true jurists, in previous decades, on the importance of the realization of justice (paras. 42–44). Judge Cançado Trindade then adds that, regrettably, "[o]nce again, in the present case, the ICJ reiterates its view that jurisdiction is based on State consent, which I have always opposed within the Court: in my perception, human conscience stands above *voluntas*" (para. 39).

7. He further recalls that this is the position he has been sustaining within the ICJ, as illustrated, *e.g.* by his long reasoning in his dissenting opinion in the case of *Application of the CERD Convention* (Georgia *versus* Russian Federation, Judgment of 01.04.2011) (paras. 45–52). In his understanding, there is need to secure "the reconstruction and evolution of the *jus gentium* in our times, in conformity with the *recta ratio*, as a new and truly *universal law of humankind*. It is thus more sensitive to the identification and realization of superior common values and goals, concerning humankind as a whole" (para. 52).

8. Judge Cançado Trindade then moves to another part (VI) of his separate opinion, wherein he presents his own reflections on international legal thinking and the prevalence of human conscience (*recta ratio*) over the "will". He begins with the identification and flourishment of *recta ratio* in the historical humanization of the law of nations as from the writings of its "founding fathers" at the XVIth and XVIIth centuries (paras. 54–63), focusing the emerging new *jus gentium* in the realm of natural law, developing until our times. The conception of *recta ratio* and justice, conceiving human beings as endowed with intrinsic dignity, came to be seen as "indispensable to the prevalence of the law of nations itself" (para. 54).

9. In sequence, he strongly criticizes the personification of the powerful State with its unfortunate a most regrettable influence upon international law by the end of the XIXth century and in the first decades of the XXth century; "voluntarist positivism", grounded on the consent or "will" of States, became the predominant criterion, denying *jus standi* to human beings, and envisaging "a strictly inter-State law, no longer *above* but *between* sovereign States", leading to "the irresponsibility and the alleged omnipotence of the State, not impeding the successive atrocities committed by it against human beings", with "disastrous consequences of such distortion" (para. 64–65). Yet,—Judge Cançado Trindade adds,—the confidence in the *droit des gens* has fortunately survived, as

> "from the 'founding fathers' of the law of nations grounded on the *recta ratio* until our times, the jusnaturalist thinking in international law has never faded away; it overcame all crises, in its perennial reaction of human conscience against successive atrocities committed against human beings, which regrettably counted on the subservience and cowardice of legal positivism" (para. 66).

10. He adds that the "continuing revival" of natural law strengthens the safeguard of the universality of the rights inherent to all human beings—overcoming self-contained positive norms, deprived of universality for varying from one social *milieu* to another,—and acknowledges the importance of fundamental principles of international law (para. 68). To sustain nowadays this legacy of the evolving *jus gentium*,—he proceeds,—amounts to keep on "safeguarding the universalist conception of international law", giving "expression to universal values, and advancing a wide conception of international legal personality (including human beings, and humankind as a whole); this can render viable to address more adequately the problems facing the *jus gentium* of our times, the international law for humankind" (cf. A. A. Cançado Trindade, *International Law for Humankind—Towards a New Jus Gentium*, 3rd. rev. ed., The Hague, Nijhoff/The Hague Academy of International Law, 2020, pp. 1–655) (para. 69).

11. Judge Cançado Trindade further recalls that contemporary international law counts on "the mechanisms of protection of human beings in situations of adversity (International Law of Human Rights, International Humanitarian Law, International Law of Refugees) as well as the operation of the Law of International Organizations" (para. 70). Awareness of, and respect for, "the fundamental principles of international law are essential for the prevalence of rights" (para. 71). In his perception, the basic mistake of legal positivists has been "their minimization of the *principles*, which lie on the foundations of any legal system (national and international), and which inform and conform the new legal order in the search for the realization of justice" (para. 73).

12. This leads Judge Cançado Trindade to his next line of reflections, on the universal juridical conscience in the rejection of voluntarism and "countermeasures". He ponders that, for those who dedicate themselves to the law of nations, it has become evident that one can only properly approach its foundations and validity as from *universal juridical conscience*, in conformity with the *recta ratio*, which prevails over the "will". By contrast, legal positivism statically focuses rather on the "will" of States. In rejecting this view, he criticizes that

> "[h]umankind as subject of international law cannot at all be restrictively visualized from the optics of States only; definitively, what imposes itself is to recognize the limits of States as from the optics of humankind, this latter likewise being a subject of contemporary international law.
>
> It is clear that human conscience stands well above the 'will'. The emergence, formation, development and expansion of the law of nations (*droit des gens*) are grounded on *recta ratio*, and are guided by general principles of law and human values. Law and justice are interrelated, they evolve together. It is regrettable that the great majority of practitioners in international law overvalue the 'will' of the contending parties, without realizing the importance of fundamental principles and superior human values.
>
> Voluntarism and positivism have by themselves rendered a disservice to international law. So-called 'countermeasures' are an example of deconstruction ensuing therefrom, which should not appeal in legal practice" (paras. 75–78).

13. In sequence, attention is thus focused by Judge Cançado Trindade on law and justice interrelated, with general principles of law in the foundations of the new *jus gentium*. He identifies, as the remaining points to be here at last examined, the following ones: first, basic considerations of humanity in the *corpus juris gentium* (paras. 79–81); secondly, human suffering and the need of protection to victims; and thirdly, the interrelationship between law and justice orienting jurisprudential construction. As to the first point, he observes that nowadays the evolving universalization and humanization of the law of nations, is "faithful to the thinking of the 'founding fathers' of the discipline", and attentive to "the needs and aspirations of the international community, and of humankind as a whole" (para. 82).

14. As to the second point, he stresses the need to devote attention to the consequences of human cruelty, and the need to extend protection to those victimized by injustice and human suffering (paras. 83–85). He recalls that, in the historical year of 1948, the law of nations itself expressed concern for humankind, as exemplified by the successive adoptions, in that same year, *e.g.* of the OAS American Declaration of the Rights and Duties of Man (adopted on 02.05.1948), of the UN Convention against Genocide (adopted on 09.12.1948), and of the UN Universal Declaration of Human Rights (adopted on 10.12.1948); the "International Law of Human Rights was at last seeing the light of the day, enhancing the position of human beings and their inherent rights in the *corpus juris gentium* from that historical moments onwards" (para. 86).

15. And as to the third point, Judge Cançado Trindade points out that acknowledgment of the interrelationship between law and justice has come to orient jurisprudential construction, so as "to avoid the undue and regrettable divorce between *law* and *justice*, which legal positivists had incurred into" (para. 87). It is clear that

> "*law and justice* are not at all put apart, they are interrelated and advance together. After all, it is in jusnaturalist thinking that the notion of *justice* has always occupied a central position, orienting *law* as a whole. In my own perception and conception, *justice* is found, in sum, at the beginning of all *law*, being, moreover, its ultimate end (A. A. Cançado Trindade, "Reflexiones sobre la Presencia de la Persona Humana en el Contencioso Interestatal ante la Corte Internacional de Justicia: Desarrollos Recientes", *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián*—Universidad del País Vasco (2017), Vol. 17, pp. 223–271)" (para. 89).

16. Furthermore, he stresses that the law of nations "can only be properly considered together with its foundations, and its basic principles which permeate its whole *corpus juris*, in the line of natural law thinking" (para. 90). Judge Cançado Trindade then recalls (paras. 91–92 and 94) that he has been making this point along the years in the case-law of the ICJ, *e.g.*: his separate opinion in the ICJ's Advisory Opinion (of 22.07.2010) on the *Declaration of Independence of Kosovo*; his separate opinion in the ICJ's Advisory Opinion (of 25.02.2019) on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*; his dissenting opinion in the ICJ's Judgment (of 01.04.2011) in the case concerning the *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation).

17. Moreover, in his separate opinion in the case of *Application of the Convention for the Suppression of the Financing of Terrorism and of the Convention on the Elimination of All Forms of Racial Discrimination* (preliminary objections, Judgment of 08.11.2019, Ukraine *versus* Russian Federation), he draws attention to the relevance of the right of redress (para. 95). And, in the lecture he delivered at the Hague Academy of International Law in 2017, Judge Cançado Trindade warns that "la position fondamentale d'un tribunal international ne peut être que principiste, sans faire de concessions injustifiées au volontarisme des États"; in the "*jus gentium* en évolution, les considérations fondamentales de l'humanité jouent un rôle de la plus haute importance (A. A. Cançado Trindade, "Les tribunaux internationaux et leur mission commune de réalisation de la justice: développements, état actuel et perspectives", *Recueil des Cours de l'Académie de Droit International de La Haye* (2017), Vol. 391, pp. 59 and 61–62)" (para. 93).

18. An international tribunal, besides settling disputes,—he continues,—is entitled to state what the law is (*juris dictio*), keeping in mind that contemporary *droit des gens* applies directly to States, international organizations, peoples and individuals, as well as humankind. Advances achieved so far are due to the awareness that human conscience stands above the "will"; after all, the foundations of international law emanate clearly from human conscience, the universal juridical conscience, and not from the so-called "will" of individual States (paras. 96–99).

19. Such advances should, however, have been more sufficiently examined, as, in his perception, the ICJ, instead of concentrating on general principles of law, "has unduly given much importance to State 'consent'", an attitude that he has constantly criticized. In Judge Cançado Trindade's understanding, general principles of law are in the foundations themselves of international law, being essential for the realization of justice, and they are to be kept in mind within the larger framework comprising the expansion of international jurisdiction, and the concomitant expansion of the international legal personality and capacity, as well the international responsibility,—and the corresponding mechanisms of implementation (para. 99).

20. Such expansion (of international jurisdiction, legal personality and capacity, and responsibility), characteristic of our times,—he adds,—comes on its part "to foster the encouraging historical process in course of the *humanization* of international law". There have been cases with true advances with the necessary overcoming of persisting difficulties[1], discarding the dogmas of the past; the rights of the human person,—he stresses,—have been "effectively marking presence" also in the framework of the ICJ's traditional inter-State *contentieux* (para. 100).

[1] In some decisions along the last decade, the ICJ has known to go beyond the inter-State dimension, in rendering justice, for example: case of *A. S. Diallo* (Guinea *versus* D. R. Congo, Judgments on merits, of 30.11.2010; and on reparations, of 19.06.2012; both with his corresponding separate opinions); and case of *Frontier Dispute* (Burkina Faso *versus* Niger, Judgment on the merits, of 16.04.2013; also with his corresponding separate opinion); among others.

21. At last, in an epilogue, Judge Cançado Trindade proceeds to the presentation of his final considerations on the points dealt with in his separate opinion. He emphasizes that the present cases (*ICAOA* and *ICAOB*) before the ICJ once again show that "international adjudication can only be properly undertaken from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarist outlook" (para. 105). To him,

> "*[r]ecta ratio* and the jusnaturalist thinking in international law have never faded away until our times, as a perennial reaction of human conscience against the subservience and cowardice of legal positivism and the breaches of the rights of human beings. (…) The foundations and validity of the law of nations can only be properly approached as from the *universal juridical conscience*, in conformity with the *recta ratio*" (para. 106).

22. The traditional inter-State outlook of international law "has surely been overcome", with the expansion of international legal personality encompassing nowadays, besides States, international organizations, individuals and peoples, as well as humankind (para. 112). It is clearly sustained, along the present separate opinion, that the foundations of the law of nations emanate clearly from human conscience,—the universal juridical conscience,—and not from the so-called "will" of individual States (para. 111).

23. Judge Cançado Trindade sustains that "general principles of law are a manifestation of the universal juridical conscience", recalling permanent attention for the preservation of the ineluctable interrelationship between law and justice; the international community cannot prescind from "universal principles and values of the law of nations", which are essential for the realization of justice. The present case of *ICAOA* leaves it clear that so-called "countermeasures" are groundless, providing no legal ground whatsoever for any legal action (paras. 109–110); furthermore, it reveals "the importance of the awareness of the historical formation of the law of nations, as well as of the needed faithfulness of the ICJ to the realization of justice, which clearly prevails over the 'will' of States" (para. 114).

Declaration of Judge Gevorgian

In his declaration, Judge Gevorgian explains his disagreement with certain aspects of the Court's reasoning regarding the Applicants' second ground of appeal, particularly as contained within paragraphs 48 and 61 of the Judgment.

In his view, the Court is not justified in relying upon jurisprudence relating to its own competence—specifically its Judgment in *United States Diplomatic and Consular Staff in Tehran*—when assessing the competence of the ICAO Council. Significant differences between the two bodies—including the facts that the Council is composed not of independent judges but of Members representing contracting States, that those Members act on the instructions of their Governments, and that the Council primarily exercises functions of a technical and administrative nature—are reasons to consider that jurisdictional principles which apply to the Court do not apply equally to the ICAO Council.

Moreover, the Court goes too far in making the broad statement that the integrity of the ICAO Council's dispute settlement function "would not be affected" if the Council examined matters outside of civil aviation for the purpose of resolving a dispute over which it has jurisdiction. The basic principle remains that States are only subject to the jurisdiction of the Council to the extent they have consented to it, and States have not consented to the Council's adjudication of disputes unrelated to civil aviation. The need to adhere to the principle of consent is all the more important in the context of the ICAO Council, which has a narrow dispute settlement mandate.

Separate opinion of Judge *ad hoc* Berman

1. In his separate opinion, Judge *ad hoc* Berman agrees that the applicant States have failed to make out any of their three grounds of appeal and that therefore the appeal must be rejected. However the Court's further finding that the Council "has jurisdiction to entertain" the application submitted to it by Qatar has little relationship to the submissions actually put to the Court by the Parties on either side and, if left unqualified or unexplained, is all too likely to lead to misunderstanding or confusion in the future, in the application of Article 84 of the Chicago Convention. Judge *ad hoc* Berman therefore voted against subparagraph (2) of paragraph 126 of the Judgment and explains the reasons why, in the hope that this may be of real assistance to the ICAO Council in the future.

2. In Judge *ad hoc* Berman's view, it is far from clear, on the terms of Article 84, exactly what authority it sought to confer on the ICAO Council over and above that which arises from the other provisions of the Chicago Convention taken as a whole, notably the "mandatory" functions of the Council laid down in Article 54; what Article 84 adds to that must therefore be something to do with the nature or legal status of the Council's decision on an application made to it under Article 84, not about its competence to entertain the application in the first place. By using in the *dispositif* the term "jurisdiction" for the Council's functions under Article 84, with all of the connotations that term usually carries of judicial power and process, the Court has, regrettably, contributed to prolonging this confusion rather than setting out to dispel it.

3. Judge *ad hoc* Berman draws attention to the wording of Article 84, which is drafted to deal with "disagreements" between contracting States "relating to" the interpretation or application of the Convention. Although the heading uses the term "disputes" and there are two references to "dispute" in the body text, it remains the fact that what the Article opens the path for, and what the Council must then "decide", are "disagreement[s] between two or more contracting States" which, if not settled between them, may then be referred to the Council by any State "concerned in" the disagreement. The Court's consistent practice, in regard to "jurisdictional" clauses, had been to give their text close and minute attention, following Vienna Convention principles of treaty interpretation. The Court's failure to enter into any consideration of the use of these different terms in Article 84 is therefore disappointing, as it is not at all difficult to give each of the two different terms, as used here, a full meaning of its own, and one which would thus illuminate the role and function cast on the Council by Article 84.

4. While therefore Article 84, taken as a whole, can certainly find a place of some kind within the framework of "dispute settlement"—in the broad ecumenical sense of Article 33 of the United Nations Charter—the language used, in Judge *ad hoc* Berman's view, is clearly not that of judicial settlement. And it is judicial settlement that carries with it the notion of "jurisdiction" (*jus dicere*) and therefore of the legally binding outcome that results from its exercise.

5. To the reasons given by the Court in paragraph 60 of the Judgment why the Council should not be regarded as a judicial organ in any ordinary sense, Judge *ad hoc* Berman adds the fact that the Members of the Council are accepted as acting on instructions from their governments, including in the exercise of their functions under Article 84. He further finds it perhaps even more significant that, in framing its own rules for the implementation of Article 84, the Council has itself provided for various actions—such as encouraging negotiation between the parties with its own assistance and appointing conciliators—that are naturally and typically associated with the highest executive organ of a significant technical agency, or with an *amiable compositeur*, but not with any kind of tribunal. The Judgment fails to extract from this the conclusions that should have been drawn.

6. Judge *ad hoc* Berman therefore questions whether the contracting States to the Chicago Convention, or in its turn the Council itself in seeking to give effect to their wishes, can have been thinking of Article 84 as endowing the Council with any kind of judicial power to decide, with binding legal effect, upon disputes between member State A and member State B. Taking into account the suggestive further fact that Article 84, on its literal terms, opens the right of appeal to *any contracting State*, whether or not party to a dispute or disagreement, he finds persuasive another reading of Article 84 that would see the Council as carrying, not "jurisdiction", but rather the high administrative function, drawing on its unique knowledge and expertise in the field of civil aviation, of giving authoritative rulings of general application as to what the Convention means and requires, whether or not part of specific disputes between member States over their mutual rights and duties. Under such a reading of Article 84, the Council's decisions would constitute authoritative determinations of general application having equal force for all the contracting States to the Chicago Convention, to the enormous benefit of the vital régime of international civil aviation. That would at the same time demarcate a clearer and more manageable role for the Court itself in its appellate function, without drawing it into questions of aviation policy. As, however, none of these issues were, disappointingly, gone into by the Parties in their argument, the question remains open, to be decided by the Court at some later stage when the opportunity and the need arise.

7. Judge *ad hoc* Berman adds two points of a more specific character, directed at particular aspects of the Judgment.

8. The first relates to paragraph 49 of the Judgment, where the Court inexplicably fails to draw the corollary from its central finding that the ICAO Council cannot be disseised

of its competences under Article 84 by the fact that one side in a disagreement has defended its actions on a basis lying outside the Chicago Convention; it must necessarily follow, by the same token, that the invocation of a wider legal defence cannot have the effect of extending or expanding the Council's competence under Article 84 either. This is implicit in what it has said, but the Court missed a valuable opportunity to clarify it expressly.

9. The second relates to the questions of due process disposed of by the Court somewhat brusquely in paragraphs 122–123 of the Judgment, which fail to subject to more nuanced attention, as contemporary conditions require, the cavalier approach to this question adopted in the only precedent case from 1972. Circumstances could readily be imagined, even if unlikely to occur, in which serious procedural irregularity might render a Council decision a nullity, or not legally correct. There should be no room for any impression, through overbroad language, that procedural irregularity was a matter of indifference to the Court. It was therefore welcome that the Court had at least reminded the ICAO Council, in paragraph 125 of the Judgment, that the very structure of Article 84 imposes certain obligatory requirements on the Council itself in order to make an effective reality out of the right of appeal laid down in that Article, notably the requirement to give reasons. It was disappointing that the Council adopted the decisions presently under appeal without so much as a hint at its reasoning, contrary to its own directly applicable rules; and it would have been better had the Court been prepared to say that doing so was not legally acceptable, for the Council's future guidance.

239. APPEAL RELATING TO THE JURISDICTION OF THE ICAO COUNCIL UNDER ARTICLE II, SECTION 2, OF THE 1944 INTERNATIONAL AIR SERVICES TRANSIT AGREEMENT (BAHRAIN, EGYPT AND UNITED ARAB EMIRATES V. QATAR)

Judgment of 14 July 2020

On 14 July 2020, the International Court of Justice delivered its Judgment on the *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates* v. *Qatar)*.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; Judges *ad hoc* Berman, Daudet; Registrar Gautier.

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The Court begins by recalling that, by a joint Application filed in the Registry of the Court on 4 July 2018, Bahrain, Egypt and the United Arab Emirates instituted an appeal against a Decision rendered by the Council of the International Civil Aviation Organization (ICAO) on 29 June 2018 in proceedings brought by Qatar against these States on 30 October 2017, pursuant to Article II, Section 2, of the International Air Services Transit Agreement, adopted at Chicago on 7 December 1944 (the "IASTA"). In this Decision, the ICAO Council rejected the preliminary objections raised by the applicant States that it lacked jurisdiction "to resolve the claims raised" by Qatar in its application and that these claims were inadmissible.

In their Application, the applicant States seek to found the jurisdiction of the Court on Article II, Section 2, of the IASTA, and by reference on Article 84 of the Chicago Convention, in conjunction with Articles 36, paragraph 1, and 37 of the Statute of the Court.

For the purposes of this Judgment, the applicant States are collectively referred to as the "Appellants". In describing proceedings before the ICAO Council, these States are referred to as respondents before the ICAO Council.

I. Introduction (paras. 21–36)

A. Factual background (paras. 21–26)

The Court explains that, on 5 June 2017, the Governments of Bahrain, Egypt and the United Arab Emirates, as well as Saudi Arabia, severed diplomatic relations with Qatar and adopted a series of restrictive measures relating to terrestrial, maritime and aerial lines of communication with Qatar, which included certain aviation restrictions. Pursuant to these restrictions, all Qatar-registered aircraft were barred by the Appellants from landing at or departing from their airports and were denied the right to overfly their respective territories, including the territorial seas within the relevant flight information regions. Certain restrictions also applied to non-Qatar-registered aircraft flying to and from Qatar, which were required to obtain prior approval from the civil aviation authorities of the Appellants. According to the latter, these restrictive measures were taken in response to the alleged breach by Qatar of its obligations under certain international agreements to which the Appellants and Qatar are parties, namely the Riyadh Agreement of 23 and 24 November 2013, the Mechanism Implementing the Riyadh Agreement of 17 April 2014 and the Supplementary Riyadh Agreement of 16 November 2014, and of other obligations under international law.

On 30 October 2017, pursuant to Article II, Section 2, of the IASTA, Qatar filed an application and memorial with the ICAO Council, in which it claimed that the aviation restrictions adopted by Bahrain, Egypt and the United Arab Emirates violated their obligations under the IASTA. On 19 March 2018, Bahrain, Egypt and the United Arab Emirates, as respondents before the ICAO Council, raised two preliminary objections. In the first, they argued that the ICAO Council lacked jurisdiction under the IASTA since the real issue in dispute between the Parties involved matters extending beyond the scope of that instrument, including whether the aviation restrictions could be characterized as lawful countermeasures under international law. In the second, they argued that Qatar had failed to meet the precondition of negotiation set forth in Article II, Section 2, of the IASTA, also reflected in Article 2, subparagraph (*g*), of the ICAO Rules for the Settlement of Differences, and consequently that the Council lacked jurisdiction to resolve the claims raised by Qatar, or alternatively that the application was inadmissible. By a decision dated 29 June 2018, the ICAO Council rejected, by 18 votes to 2, with 5 abstentions, the preliminary objections, treating them as a single objection.

On 4 July 2018, the Appellants submitted a joint Application to the Court instituting an appeal against the Decision of the Council dated 29 June 2018.

B. The Court's appellate function and the scope of the right of appeal to the Court (paras. 27–36)

The Court observes that Article II, Section 2, of the IASTA provides for the jurisdiction of the ICAO Council to decide "any disagreement between two or more contracting States relating to the interpretation or application of this Agreement" if it "cannot be settled by negotiation". Under the Chicago Convention, to which the IASTA refers, a decision of the Council may be appealed either to an *ad hoc* arbitral tribunal agreed upon between the parties to a dispute or to "the Permanent Court of International Justice". Under Article 37 of the Statute of the International Court of Justice, "[w]henever a treaty or convention in force provides for reference of a matter … to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice". Accordingly, under Article II, Section 2, of the IASTA and Article 84 of the Chicago Convention, the Court is competent to hear an appeal against a decision of the ICAO Council.

The Court notes that Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA) appears under the title "Settlement of disputes", whereas the text of the Article opens with the expression "any disagreement". In this context, it recalls that its predecessor, the Permanent Court of International Justice, defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". The Court notes that the Appellants are appealing against a decision of the ICAO Council on the preliminary objections which they raised in the proceedings before it. The text of Article 84 does not specify whether only final decisions of the ICAO Council on the merits of disputes before it are subject to appeal. The Court nonetheless settled this issue in 1972, in the first appeal submitted to it against a decision of the ICAO Council, finding that "an appeal against a decision of the Council as to its own jurisdiction must therefore be receivable since, from the standpoint of the supervision by the Court of the validity of the Council's acts, there is no ground for distinguishing between supervision as to jurisdiction, and supervision as to merits" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 26). The Court is thus satisfied that it has jurisdiction to entertain the present appeal.

With regard to the scope of the right of appeal, the Court recalls that its role in supervising the Council in the exercise of the latter's dispute settlement functions under Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA) is to determine whether the impugned decision is correct. In the present case, its task is to decide whether the Council has erred in rejecting the preliminary objections of the Appellants to the jurisdiction of the ICAO Council and the admissibility of Qatar's application.

II. Grounds of appeal (paras. 37–126)

The Court observes that it is not bound to follow the order in which the Appellants invoke their three grounds of appeal. The Court first examines the grounds based on the alleged errors of the ICAO Council in rejecting the Appellants' objections (second and third grounds of appeal). Thereafter, the Court considers the ground based on the alleged manifest lack of due process in the procedure before the Council (first ground of appeal).

A. The second ground of appeal: rejection by the ICAO Council of the first preliminary objection (paras. 41–63)

The Court notes that, in their second ground of appeal, the Appellants assert that the ICAO Council "erred in fact and in law in rejecting the first preliminary objection … in respect of the competence of the ICAO Council". According to the Appellants, to pronounce on the dispute would require the Council to rule on questions that fall outside its jurisdiction, specifically on the lawfulness of the countermeasures, including "certain airspace restrictions", adopted by the Appellants. In the alternative, and for the same reasons, they argue that the claims of Qatar are inadmissible.

1. Whether the dispute between the Parties relates to the interpretation or application of the IASTA (paras. 41–50)

The Court has first to determine whether the dispute brought by Qatar before the ICAO Council is a disagreement between the Appellants and Qatar relating to the interpretation or application of the IASTA. The Council's jurisdiction *ratione materiae* is circumscribed by the terms of Article II, Section 2, of the IASTA to this type of disagreement.

The Court observes that, in its application and memorial submitted to the ICAO Council on 30 October 2017, Qatar requested the Council to "determine that the Respondents violated by their actions against the State of Qatar their obligations under the International Air Services Transit Agreement and other rules of international law". It further requested the Council to "deplore the violations by the Respondents of the fundamental principles of the International Air Services Transit Agreement". Consequently, Qatar asked the Council to urge the respondents "to withdraw, without delay, all restrictions imposed on the Qatar-registered aircraft and to comply with their obligations under the IASTA" and "to negotiate in good faith the future harmonious cooperation in the region to safeguard the safety, security[,] regularity and economy of international civil aviation". In its memorial, Qatar stated that parties to the IASTA "grant each other in scheduled international air services [t]he privilege to fly across its territory without landing, and [t]he privilege to land for non-traffic purposes". It further stated that "[b]y their actions starting on 5 June 2017 and lasting to the present time the Respondents violated the letter and spirit of the [IASTA]" and that "[t]hey are in blatant default of their obligations under the IASTA".

The Court considers that the disagreement between the Parties brought before the ICAO Council does concern the interpretation and application of the IASTA and therefore falls within the scope of Article II, Section 2, of the IASTA. The mere fact that this disagreement has arisen in a broader context does not deprive the ICAO Council of its jurisdiction under Article II, Section 2, of the IASTA.

The Court also cannot accept the argument that, because the Appellants characterize their aviation restrictions imposed on Qatar-registered aircraft as lawful countermeasures, the Council has no jurisdiction to hear the claims of Qatar. Countermeasures are among the circumstances capable of precluding the wrongfulness of an otherwise unlawful act in international law and are sometimes invoked as defences. The prospect that a respondent would raise a defence based on countermeasures in a proceeding on the merits before the ICAO Council does not, in and of itself, have any effect on the Council's jurisdiction within the limits laid down in Article II, Section 2, of the IASTA.

The Court therefore concludes that the Council did not err when it rejected the first preliminary objection by the Appellants relating to its jurisdiction.

2. Whether Qatar's claims are inadmissible on grounds of "judicial propriety" (paras. 51–62)

The question for the Court is, in its view, whether the decision of the ICAO Council rejecting the first preliminary

objection as it relates to the admissibility of Qatar's claims was a correct one. In other words, the Court has to ascertain whether the claims brought before the Council are admissible.

The Court observes that it is difficult to apply the concept of "judicial propriety" to the ICAO Council. The Council is a permanent organ responsible to the ICAO Assembly, composed of designated representatives of the contracting States elected by the Assembly, rather than of individuals acting independently in their personal capacity as is characteristic of a judicial body. In addition to its executive and administrative functions specified in Articles 54 and 55 of the Chicago Convention, the Council was given in Article 84 the function of settling disagreements between two or more contracting States relating to the interpretation or application of the Convention and its Annexes. This, however, does not transform the ICAO Council into a judicial institution in the proper sense of that term. The Court considers that, in any event, the integrity of the ICAO Council's dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction under Article II, Section 2, of the IASTA. Therefore, a possible need for the ICAO Council to consider issues falling outside the scope of the IASTA solely in order to settle a disagreement relating to the interpretation or application of the IASTA would not render the application submitting that disagreement to it inadmissible.

The Court therefore concludes that the Council did not err when it rejected the first preliminary objection in so far as the respondents asserted that Qatar's claims were inadmissible.

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In view of the above, the Court is of the opinion that the second ground of appeal cannot be upheld.

B. The third ground of appeal: rejection by the ICAO Council of the second preliminary objection (paras. 64–108)

The Court notes that, as their third ground of appeal, the Appellants assert that the ICAO Council erred when it rejected the second preliminary objection which they raised as respondents before the Council, whereby they claimed that the ICAO Council lacked jurisdiction because Qatar had failed to meet the negotiation precondition found in Article II, Section 2, of the IASTA and that Qatar's application to the ICAO Council was inadmissible because it did not comply with Article 2, subparagraph (*g*), of the ICAO Rules for the Settlement of Differences.

1. The alleged failure to meet a negotiation precondition prior to the filing of Qatar's application with the ICAO Council (paras. 65–99)

The Court observes that Article II, Section 2, of the IASTA refers to Chapter XVIII of the Chicago Convention, entitled "Disputes and Default". This chapter provides a dispute settlement procedure that is available in the event of disagreements concerning the interpretation or application of the Convention and its Annexes. It follows that disagreements relating to the interpretation or application of the IASTA are to be resolved through the procedure provided in Chapter XVIII of the Chicago Convention. Article II, Section 2, of the IASTA further specifies that the disagreements that are to be settled through this procedure, which involves resort to the ICAO Council, are only those that "cannot be settled by negotiation". The Court also notes that Article 14 of the ICAO Rules for the Settlement of Differences contemplates that the Council may invite the parties to a dispute to engage in direct negotiations. It further notes that the reference, in Article II, Section 2, of the IASTA, to a disagreement that "cannot be settled by negotiation" is similar to the wording of the compromissory clauses of a number of other treaties. The Court has in the past found several such compromissory clauses to contain negotiation preconditions that must be satisfied in order to establish the Court's jurisdiction. It considers that this jurisprudence is also relevant to the interpretation of Article II, Section 2, of the IASTA and to its application in determining the jurisdiction of the ICAO Council. Thus, prior to filing an application under Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA), a contracting State must make a genuine attempt to negotiate with the other concerned State or States. If the negotiations or attempted negotiations reach a point of futility or deadlock, the disagreement "cannot be settled by negotiation" and the precondition to the jurisdiction of the ICAO Council is satisfied. In the view of the Court, a genuine attempt to negotiate can be made outside of bilateral diplomacy. Exchanges that take place in an international organization are also recognized as "established modes of international negotiation".

The Court notes that, in responding to the preliminary objection presented to the ICAO Council, Qatar cited a series of communications in June and July 2017 in which it urged the Council to take action with respect to the aviation restrictions. These communications referred both to the aviation restrictions and to provisions of the IASTA that, according to Qatar, are implicated by those restrictions. The Court further notes that many of the interactions relevant to the question whether the negotiation precondition has been met with regard to Article II, Section 2, of the IASTA took place in the context of Qatar's request pursuant to Article 54 (*n*) of the Chicago Convention. Moreover, some of these interactions involved Saudi Arabia, which is not a party to the present case. The Court recalls, however, that Article II, Section 2, of the IASTA provides that Chapter XVIII of the Chicago Convention shall be applicable to settlement of disagreements under the IASTA in the same manner as it applies to settlement of disagreements under the Chicago Convention. In considering whether the precondition of negotiation was fulfilled in this case, the Court finds it appropriate to take into account interactions that took place as a consequence of Qatar's invocation of Article 54 (*n*) of the Chicago Convention. Those interactions relate to aviation restrictions which were jointly adopted by four States, including the three Appellants, and which, according to Qatar, are inconsistent with the Appellants' obligations under the IASTA. The Court further observes that the competence of ICAO unquestionably extends to questions of overflight of the territory of contracting States, a matter that is addressed in both the Chicago Convention and the IASTA. The overtures that Qatar made within the framework of ICAO related directly to the subject-matter of the disagreement that later was the subject of its application to the ICAO Council under Article II,

Section 2, of the IASTA. The Court concludes that Qatar made a genuine attempt within ICAO to settle by negotiation its disagreement with the Appellants regarding the interpretation and application of the IASTA.

As to the question whether negotiations within ICAO had reached the point of futility or deadlock before Qatar filed its application to the ICAO Council, the Court has previously stated that a requirement that a dispute cannot be settled through negotiations "could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that … 'no reasonable probability exists that further negotiations would lead to a settlement'." In past cases, the Court has found that a negotiation precondition was satisfied when the parties' "basic positions have not subsequently evolved" after several exchanges of diplomatic correspondence and/or meetings. In the view of the Court, its inquiry into the sufficiency of negotiations is a question of fact.

The Court observes that, in advance of the ICAO Council's Extraordinary Session of 31 July 2017, which was to be held in response to Qatar's request, the Appellants submitted a working paper that urged the Council to limit any discussion under Article 54 (*n*) of the Chicago Convention to issues related to the safety of international aviation. During the Extraordinary Session, the Council focused on matters other than the aviation restrictions that later formed the subject-matter of Qatar's application to the ICAO Council, with particular attention to contingency arrangements to facilitate air traffic over the high seas. The Court considers that, as of the close of the Extraordinary Session, settlement of the disagreement by negotiation within ICAO was not a realistic possibility. The Court also takes into account developments outside of ICAO. Diplomatic relations between Qatar and the Appellants had been severed on 5 June 2017, concurrently with the imposition of the aviation restrictions. Under these circumstances, the Court considers that, as of the filing of Qatar's application before the ICAO Council, there was no reasonable probability of a negotiated settlement of the disagreement between the Parties regarding the interpretation and application of the IASTA, whether before the ICAO Council or in another setting. The Court also recalls that Qatar maintains that it faced a situation in which the futility of negotiation was so clear that the negotiation precondition of Article II, Section 2, of the IASTA could be met without requiring Qatar to make a genuine attempt at negotiations. Because the Court has found that Qatar did make a genuine attempt to negotiate, which failed to settle the dispute, it has no need to examine this argument.

For the reasons set forth above, the Court considers that the ICAO Council did not err in rejecting the contention advanced by the respondents before the Council that Qatar had failed to fulfil the negotiation precondition of Article II, Section 2, of the IASTA prior to filing its application before the ICAO Council.

2. Whether the ICAO Council erred by not declaring Qatar's application inadmissible on the basis of Article 2, subparagraph (g), of the ICAO Rules for the Settlement of Differences (paras. 100–106)

The Court notes that Article 2 of the ICAO Rules for the Settlement of Differences sets out the basic information that is to be contained in a memorial attached to an application filed pursuant to Article 84 of the Chicago Convention (incorporated by reference in Article II, Section 2, of the IASTA), in order to facilitate the ICAO Council's consideration of such applications. By requiring a statement regarding negotiations, subparagraph (*g*) of Article 2 takes cognizance of the negotiation precondition contained in Article II, Section 2, of the IASTA.

Qatar's application and memorial before the ICAO Council contain a section entitled "A statement of attempted negotiations", in which Qatar states that the respondents before the ICAO Council "did not permit any opportunity to negotiate" regarding the aviation restrictions. The Secretary General confirmed that she had verified that Qatar's application "compl[ied] in form with the requirements of Article 2 of the … Rules [for the Settlement of Differences]" when forwarding the document to the respondents before the ICAO Council. The question of substance, *i.e.* whether Qatar had met the negotiation precondition, was addressed by the Council in the proceedings on preliminary objections, pursuant to Article 5 of the ICAO Rules for the Settlement of Differences.

The Court sees no reason to conclude that the ICAO Council erred by not declaring Qatar's application before the ICAO Council to be inadmissible by reason of a failure to comply with Article 2, subparagraph (*g*), of the ICAO Rules for the Settlement of Differences.

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For the reasons set forth above, the Court cannot uphold the third ground of appeal.

C. The first ground of appeal: alleged manifest lack of due process in the procedure before the ICAO Council (paras. 109–125)

The Court recalls that, in their first ground of appeal, the Appellants submit that the Decision of the Council "should be set aside on the grounds that the procedure adopted by the ICAO Council was manifestly flawed and in violation of fundamental principles of due process and the right to be heard".

The Court observes that, in its Judgment in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, it concluded that, in the proceedings at issue, the ICAO Council had reached the correct decision as to its jurisdiction, which is an objective question of law. The Court also observed that the procedural irregularities alleged by the Appellant did not prejudice in any fundamental way the requirements of a just procedure. The Court had no need to examine whether a decision of the ICAO Council that was legally correct should nonetheless be annulled because of procedural irregularities.

In the present case, the Court has rejected the Appellants' second and third grounds of appeal against the Decision of the ICAO Council. The Court considers that the issues posed by the preliminary objections that were presented to the Council in this case are objective questions of law. It also considers that the procedures followed by the Council did not prejudice in any fundamental way the requirements of a just procedure.

For the reasons set forth above, the first ground of appeal cannot be upheld.

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Recalling the Court's previous observation, in its Judgment in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, that the Chicago Convention and the IASTA give the Court "a certain measure of supervision" over decisions of the ICAO Council, the Court emphasizes that it will be best positioned to act on any future appeal if the decision of the ICAO Council contains the reasons of law and fact that led to the ICAO Council's conclusions.

III. Operative clause (para. 127)

The Court,

(1) Unanimously,

Rejects the appeal brought by the Kingdom of Bahrain, the Arab Republic of Egypt and the United Arab Emirates on 4 July 2018 from the Decision of the Council of the International Civil Aviation Organization, dated 29 June 2018;

(2) By fifteen votes to one,

Holds that the Council of the International Civil Aviation Organization has jurisdiction to entertain the application submitted to it by the Government of the State of Qatar on 30 October 2017 and that the said application is admissible.

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judge *ad hoc* Daudet;

Against: Judge *ad hoc* Berman.

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Judge Cançado Trindade appends a separate opinion to the Judgment of the Court; Judge Gevorgian appends a declaration to the Judgment of the Court; Judge *ad hoc* Berman appends a separate opinion to the Judgment of the Court.

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Separate opinion of Judge Cançado Trindade

1. In the case of *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 IASTA* (ICAOB), Judge Cançado Trindade presents his separate opinion, composed of nine parts, wherein he begins by pointing out that, although he arrives at the conclusions of the *dispositif* of ICJ's Judgment (*ICAOB*, para. 127), he does so on the basis of a distinct reasoning, in particular in his own rejection of so-called "countermeasures" (para. 2). He selects this point, raised by the appellant States, so as to examine in his separate opinion their lack of legal grounds and their negative effects on the law of nations and on State responsibility, and to leave on the records the foundations of his own personal position thereon.

2. Judge Cançado Trindade begins by addressing "countermeasures"—unduly invoked by the appellant States—in breach of the foundations of the law of nations, and of State responsibility. In recalling that "the international legal order is based upon justice rather than force" (para. 10), he warns that

> "[c]ountermeasures are reminiscent of the old practice of retaliation, and,—whether one wishes to admit it or not,—they rely upon force rather than conscience. Recourse to them discloses the insufficient degree of development of the treatment of State responsibility" (para. 9).

3. Judge Cançado Trindade further warns that attention is to focus not on "coercive means", but rather "on conscience and the prevalence of *opinio juris communis*", keeping in mind "the very foundations of the international responsibility of States"; attention is thus "correctly focused on Law rather than force, on conscience rather than 'will', to the greater effectiveness of public international law itself" (para. 12). He much regrets that "countermeasures" have been raised by the appellant States in the present case of *ICAOB*, paying a disservice to international law (para. 13).

4. In sequence, Judge Cançado Trindade examines in detail the lengthy and strong criticisms of "countermeasures" presented in the corresponding debates of both the UN International Law Commission, as well as of the Sixth Committee of the UN General Assembly (parts III and IV, respectively), in the process of preparation (1992–2001) of the International Law Commission's Articles on State Responsibility (2001). He demonstrates how in those prolonged debates strong criticisms were made to the inclusion of "countermeasures" in that document, from jurists from distinct continents.

5. Yet, despite those heavy criticisms throughout the whole preparatory work of the corresponding provisions of that document,—he adds,—it is "surprising and regrettable" that there were supporters for the inclusion therein of "countermeasures", "without any juridical grounds"; furthermore, Judge Cançado Trindade adds,

> "it is likewise surprising and regrettable that the ICJ itself referred to 'countermeasures' in its Judgment of 25.09.1997 in the case of *Gabčíkovo-Nagymaros Project* (Hungary *versus* Slovakia, paras. 82–85), and again referred to it in the present Judgments of the ICJ of today in the two cases of *ICAOB* and *ICAOA* (para. 49 of both Judgments)" (para. 38).

6. Following that, he focuses on the prevalence of the imperative of judicial settlement over the State's "will", turning to further criticisms to the initiative of consideration of so-called "countermeasures" (paras. 40–41), and recalling the earlier lessons of true jurists, in previous decades, on the importance of the realization of justice (paras. 42–44). Judge Cançado Trindade then adds that, regrettably, "[o]nce again, in the present case, the ICJ reiterates its view that jurisdiction is based on State consent, which I have always opposed within the Court: in my perception, human conscience stands above *voluntas*" (para. 39).

7. He further recalls that this is the position he has been sustaining within the ICJ, as illustrated, *e.g.* by his long reasoning in his dissenting opinion in the case of *Application of the CERD Convention* (Georgia *versus* Russian Federation, Judgment of 01.04.2011) (paras. 45–52). In his understanding, there is need to secure "the reconstruction and evolution of the *jus gentium* in our times, in conformity with the *recta ratio*, as a new and truly *universal law of humankind*. It is thus more sensitive to the identification and realization of superior common values and goals, concerning humankind as a whole" (para. 52).

8. Judge Cançado Trindade then moves to another part (VI) of his separate opinion, wherein he presents his own reflections on international legal thinking and the prevalence of human conscience (*recta ratio*) over the "will". He begins with the identification and flourishment of *recta ratio* in the historical humanization of the law of nations as from the writings of its "founding fathers" at the XVIth and XVIIth centuries (paras. 54–63), focusing the emerging new *jus gentium* in the realm of natural law, developing until our times. The conception of *recta ratio* and justice, conceiving human beings as endowed with intrinsic dignity, came to be seen as "indispensable to the prevalence of the law of nations itself" (para. 54).

9. In sequence, he strongly criticizes the personification of the powerful State with its unfortunate a most regrettable influence upon international law by the end of the XIXth century and in the first decades of the XXth century; "voluntarist positivism", grounded on the consent or "will" of States, became the predominant criterion, denying *jus standi* to human beings, and envisaging "a strictly inter-State law, no longer *above* but *between* sovereign States", leading to "the irresponsibility and the alleged omnipotence of the State, not impeding the successive atrocities committed by it against human beings", with "disastrous consequences of such distortion" (para. 64–65). Yet,—Judge Cançado Trindade adds,—the confidence in the *droit des gens* has fortunately survived, as

> "from the 'founding fathers' of the law of nations grounded on the *recta ratio* until our times, the jusnaturalist thinking in international law has never faded away; it overcame all crises, in its perennial reaction of human conscience against successive atrocities committed against human beings, which regrettably counted on the subservience and cowardice of legal positivism" (para. 66).

10. He adds that the "continuing revival" of natural law strengthens the safeguard of the universality of the rights inherent to all human beings,—overcoming self-contained positive norms, deprived of universality for varying from one social *milieu* to another,—and acknowledges the importance of fundamental principles of international law (para. 68). To sustain nowadays this legacy of the evolving *jus gentium*,—he proceeds,—amounts to keep on "safeguarding the universalist conception of international law", giving "expression to universal values, and advancing a wide conception of international legal personality (including human beings, and humankind as a whole); this can render viable to address more adequately the problems facing the *jus gentium* of our times, the international law for humankind" (cf. A. A. Cançado Trindade, *International Law for Humankind—Towards a New Jus Gentium*, 3rd. rev. ed., The Hague, Nijhoff/The Hague Academy of International Law, 2020, pp. 1–655) (para. 69).

11. Judge Cançado Trindade further recalls that contemporary international law counts on "the mechanisms of protection of human beings in situations of adversity (International Law of Human Rights, International Humanitarian Law, International Law of Refugees) as well as the operation of the Law of International Organizations" (para. 70). Awareness of, and respect for, "the fundamental principles of international law are essential for the prevalence of rights" (para. 71). In his perception, the basic mistake of legal positivists has been "their minimization of the *principles*, which lie on the foundations of any legal system (national and international), and which inform and conform the new legal order in the search for the realization of justice" (para. 73).

12. This leads Judge Cançado Trindade to his next line of reflections, on the universal juridical conscience in the rejection of voluntarism and "countermeasures". He ponders that, for those who dedicate themselves to the law of nations, it has become evident that one can only properly approach its foundations and validity as from *universal juridical conscience*, in conformity with the *recta ratio*, which prevails over the "will". By contrast, legal positivism statically focuses rather on the "will" of States. In rejecting this view, he criticizes that

> "[h]umankind as subject of international law cannot at all be restrictively visualized from the optics of States only; definitively, what imposes itself is to recognize the limits of States as from the optics of humankind, this latter likewise being a subject of contemporary international law.
>
> It is clear that human conscience stands well above the 'will'. The emergence, formation, development and expansion of the law of nations (*droit des gens*) are grounded on *recta ratio*, and are guided by general principles of law and human values. Law and justice are interrelated, they evolve together. It is regrettable that the great majority of practitioners in international law overvalue the 'will' of the contending parties, without realizing the importance of fundamental principles and superior human values.
>
> Voluntarism and positivism have by themselves rendered a disservice to international law. So-called 'countermeasures' are an example of deconstruction ensuing therefrom, which should not appeal in legal practice" (paras. 75–78).

13. In sequence, attention is thus focused by Judge Cançado Trindade on law and justice interrelated, with general principles of law in the foundations of the new *jus gentium*. He identifies, as the remaining points to be here at last examined, the following ones: first, basic considerations of humanity in the *corpus juris gentium* (paras. 79–81); secondly, human suffering and the need of protection to victims; and thirdly, the interrelationship between law and justice orienting jurisprudential construction. As to the first point, he observes that nowadays the evolving universalization and humanization of the law of nations, is "faithful to the thinking of the 'founding fathers' of the discipline", and attentive to "the needs and aspirations of the international community, and of humankind as a whole" (para. 82).

14. As to the second point, he stresses the need to devote attention to the consequences of human cruelty, and the need to extend protection to those victimized by injustice and human suffering (paras. 83–85). He recalls that, in the historical year of 1948, the law of nations itself expressed concern for humankind, as exemplified by the successive adoptions, in that same year, *e.g.* of the OAS American Declaration of the Rights and Duties of Man (adopted on 02.05.1948), of the UN Convention against Genocide (adopted on 09.12.1948), and of the UN Universal Declaration of Human Rights (adopted on 10.12.1948); the "International Law of Human Rights was at last seeing the light of the day, enhancing the position of human beings and their inherent rights in the *corpus juris gentium* from that historical moments onwards" (para. 86).

15. And as to the third point, Judge Cançado Trindade points out that acknowledgment of the interrelationship between law and justice has come to orient jurisprudential construction, so as "to avoid the undue and regrettable divorce between *law* and *justice*, which legal positivists had incurred into" (para. 87). It is clear that

> "*law and justice* are not at all put apart, they are interrelated and advance together. After all, it is in jusnaturalist thinking that the notion of *justice* has always occupied a central position, orienting *law* as a whole. In my own perception and conception, *justice* is found, in sum, at the beginning of all *law*, being, moreover, its ultimate end (A. A. Cançado Trindade, "Reflexiones sobre la Presencia de la Persona Humana en el Contencioso Interestatal ante la Corte Internacional de Justicia: Desarrollos Recientes", *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián*—Universidad del País Vasco (2017), Vol. 17, pp. 223–271)" (para. 89).

16. Furthermore, he stresses that the law of nations "can only be properly considered together with its foundations, and its basic principles which permeate its whole *corpus juris*, in the line of natural law thinking" (para. 90). Judge Cançado Trindade then recalls (paras. 91–92 and 94) that he has been making this point along the years in the case-law of the ICJ, *e.g.*: his separate opinion in the ICJ's Advisory Opinion (of 22.07.2010) on the *Declaration of Independence of Kosovo*; his separate opinion in the ICJ's Advisory Opinion (of 25.02.2019) on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*; his dissenting opinion in the ICJ's Judgment (of 01.04.2011) in the case concerning the *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation).

17. Moreover, in his separate opinion in the case of Application of the Convention for the Suppression of the Financing of Terrorism and of the Convention on the Elimination of All Forms of Racial Discrimination (preliminary objections, Judgment of 08.11.2019, Ukraine versus Russian Federation), he draws attention to the relevance of the right of redress (para. 95). And, in the lecture he delivered at the Hague Academy of International Law in 2017, Judge Cançado Trindade warns that "la position fondamentale d'un tribunal international ne peut être que principiste, sans faire de concessions injustifiées au volontarisme des États"; in the "jus gentium en évolution, les considérations fondamentales de l'humanité jouent un rôle de la plus haute importance (A. A. Cançado Trindade, "Les tribunaux internationaux et leur mission commune de réalisation de la justice: développements, état actuel et perspectives", Recueil des Cours de l'Académie de Droit International de La Haye (2017), Vol. 391, pp. 59 and 61–62)" (para. 93).

18. An international tribunal, besides settling disputes,—he continues,—is entitled to state what the law is (*juris dictio*), keeping in mind that contemporary *droit des gens* applies directly to States, international organizations, peoples and individuals, as well as humankind. Advances achieved so far are due to the awareness that human conscience stands above the "will"; after all, the foundations of international law emanate clearly from human conscience, the universal juridical conscience, and not from the so-called "will" of individual States (paras. 96–99).

19. Such advances should, however, have been more sufficiently examined, as, in his perception, the ICJ, instead of concentrating on general principles of law, "has unduly given much importance to State 'consent'", an attitude that he has constantly criticized. In Judge Cançado Trindade's understanding, general principles of law are in the foundations themselves of international law, being essential for the realization of justice, and they are to be kept in mind within the larger framework comprising the expansion of international jurisdiction, and the concomitant expansion of the international legal personality and capacity, as well the international responsibility,—and the corresponding mechanisms of implementation (para. 99).

20. Such expansion (of international jurisdiction, legal personality and capacity, and responsibility), characteristic of our times,—he adds,—comes on its part "to foster the encouraging historical process in course of the *humanization* of international law". There have been cases with true advances with the necessary overcoming of persisting difficulties[1], discarding the dogmas of the past; the rights of the human person,—he stresses,—have been "effectively marking presence" also in the framework of the ICJ's traditional inter-State *contentieux* (para. 100).

21. At last, in an epilogue, Judge Cançado Trindade proceeds to the presentation of his final considerations on the points dealt with in his separate opinion. He emphasizes that the present cases (*ICAOB* and *ICAOA*) before the ICJ once again show that "international adjudication can only be properly undertaken from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarist outlook" (para. 105). To him,

> "*[r]ecta ratio* and the jusnaturalist thinking in international law have never faded away until our times, as a perennial reaction of human conscience against the subservience and cowardice of legal positivism and the breaches of the rights of human beings. (…) The foundations and validity of the law of nations can only be properly approached as from the *universal juridical conscience*, in conformity with the *recta ratio*" (para. 106).

22. The traditional inter-State outlook of international law "has surely been overcome", with the expansion of international legal personality encompassing nowadays, besides States, international organizations, individuals and peoples, as well as humankind (para. 112). It is clearly sustained, along the present separate opinion, that the foundations of the law of nations emanate clearly from human conscience,—the universal juridical conscience,—and not from the so-called "will" of individual States (para. 111).

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[1] In some decisions along the last decade, the ICJ has known to go beyond the inter-State dimension, in rendering justice, for example: case of *A. S. Diallo* (Guinea *versus* D. R. Congo, Judgments on merits, of 30.11.2010; and on reparations, of 19.06.2012; both with his corresponding separate opinions); and case of *Frontier Dispute* (Burkina Faso *versus* Niger, Judgment on the merits, of 16.04.2013; also with his corresponding separate opinion); among others.

23. Judge Cançado Trindade sustains that "general principles of law are a manifestation of the universal juridical conscience", recalling permanent attention for the preservation of the ineluctable interrelationship between law and justice; the international community cannot prescind from "universal principles and values of the law of nations", which are essential for the realization of justice. The present case of *ICAOB* leaves it clear that so-called "countermeasures" are groundless, providing no legal ground whatsoever for any legal action (paras. 109–110); furthermore, it reveals "the importance of the awareness of the historical formation of the law of nations, as well as of the needed faithfulness of the ICJ to the realization of justice, which clearly prevails over the 'will' of States" (para. 114).

Declaration of Judge Gevorgian

In his declaration, Judge Gevorgian explains his disagreement with certain aspects of the Court's reasoning regarding the Applicants' second ground of appeal, particularly as contained within paragraphs 48 and 61 of the Judgment.

In his view, the Court is not justified in relying upon jurisprudence relating to its own competence—specifically its Judgment in *United States Diplomatic and Consular Staff in Tehran*—when assessing the competence of the ICAO Council. Significant differences between the two bodies—including the facts that the Council is composed not of independent judges but of Members representing contracting States, that those Members act on the instructions of their Governments, and that the Council primarily exercises functions of a technical and administrative nature—are reasons to consider that jurisdictional principles which apply to the Court do not apply equally to the ICAO Council.

Moreover, the Court goes too far in making the broad statement that the integrity of the ICAO Council's dispute settlement function "would not be affected" if the Council examined matters outside of civil aviation for the purpose of resolving a dispute over which it has jurisdiction. The basic principle remains that States are only subject to the jurisdiction of the Council to the extent they have consented to it, and States have not consented to the Council's adjudication of disputes unrelated to civil aviation. The need to adhere to the principle of consent is all the more important in the context of the ICAO Council, which has a narrow dispute settlement mandate.

Separate opinion of Judge *ad hoc* Berman

1. In his separate opinion, Judge *ad hoc* Berman agrees that the applicant States have failed to make out any of their three grounds of appeal and that therefore the appeal must be rejected. However the Court's further finding that the Council "has jurisdiction to entertain" the application submitted to it by Qatar has little relationship to the submissions actually put to the Court by the Parties on either side and, if left unqualified or unexplained, is all too likely to lead to misunderstanding or confusion in the future, in the application of Article 84 of the Chicago Convention. Judge *ad hoc* Berman therefore voted against subparagraph (2) of paragraph 127 of the Judgment and explains the reasons why, in the hope that this may be of real assistance to the ICAO Council in the future.

2. In Judge *ad hoc* Berman's view, it is far from clear, on the terms of Article 84, exactly what authority it sought to confer on the ICAO Council over and above that which arises from the other provisions of the Chicago Convention taken as a whole, notably the "mandatory" functions of the Council laid down in Article 54; what Article 84 adds to that must therefore be something to do with the nature or legal status of the Council's decision on an application made to it under Article 84, not about its competence to entertain the application in the first place. By using in the *dispositif* the term "jurisdiction" for the Council's functions under Article 84, with all of the connotations that term usually carries of judicial power and process, the Court has, regrettably, contributed to prolonging this confusion rather than setting out to dispel it.

3. Judge *ad hoc* Berman draws attention to the wording of Article 84, which is drafted to deal with "disagreements" between contracting States "relating to" the interpretation or application of the Convention. Although the heading uses the term "disputes" and there are two references to "dispute" in the body text, it remains the fact that what the Article opens the path for, and what the Council must then "decide", are "disagreement[s] between two or more contracting States" which, if not settled between them, may then be referred to the Council by any State "concerned in" the disagreement. The Court's consistent practice, in regard to "jurisdictional" clauses, had been to give their text close and minute attention, following Vienna Convention principles of treaty interpretation. The Court's failure to enter into any consideration of the use of these different terms in Article 84 is therefore disappointing, as it is not at all difficult to give each of the two different terms, as used here, a full meaning of its own, and one which would thus illuminate the role and function cast on the Council by Article 84.

4. While therefore Article 84, taken as a whole, can certainly find a place of some kind within the framework of "dispute settlement"—in the broad ecumenical sense of Article 33 of the United Nations Charter—the language used, in Judge *ad hoc* Berman's view, is clearly not that of judicial settlement. And it is judicial settlement that carries with it the notion of "jurisdiction" (*jus dicere*) and therefore of the legally binding outcome that results from its exercise.

5. To the reasons given by the Court in paragraph 60 of the Judgment why the Council should not be regarded as a judicial organ in any ordinary sense, Judge *ad hoc* Berman adds the fact that the Members of the Council are accepted as acting on instructions from their governments, including in the exercise of their functions under Article 84. He further finds it perhaps even more significant that, in framing its own rules for the implementation of Article 84, the Council has itself provided for various actions—such as encouraging negotiation between the parties with its own assistance and appointing conciliators—that are naturally and typically associated with the highest executive organ of a significant technical agency, or with an *amiable compositeur*, but not with any kind of tribunal. The Judgment fails to extract from this the conclusions that should have been drawn.

6. Judge *ad hoc* Berman therefore questions whether the contracting States to the Chicago Convention, or in its turn the Council itself in seeking to give effect to their wishes, can have been thinking of Article 84 as endowing the Council with any kind of judicial power to decide, with binding legal effect, upon disputes between member State A and member State B. Taking into account the suggestive further fact that Article 84, on its literal terms, opens the right of appeal to *any contracting State*, whether or not party to a dispute or disagreement, he finds persuasive another reading of Article 84 that would see the Council as carrying, not "jurisdiction", but rather the high administrative function, drawing on its unique knowledge and expertise in the field of civil aviation, of giving authoritative rulings of general application as to what the Convention means and requires, whether or not part of specific disputes between member States over their mutual rights and duties. Under such a reading of Article 84, the Council's decisions would constitute authoritative determinations of general application having equal force for all the contracting States to the Chicago Convention, to the enormous benefit of the vital régime of international civil aviation. That would at the same time demarcate a clearer and more manageable role for the Court itself in its appellate function, without drawing it into questions of aviation policy. As, however, none of these issues were, disappointingly, gone into by the Parties in their argument, the question remains open, to be decided by the Court at some later stage when the opportunity and the need arise.

7. Judge *ad hoc* Berman adds two points of a more specific character, directed at particular aspects of the Judgment.

8. The first relates to paragraph 49 of the Judgment, where the Court inexplicably fails to draw the corollary from its central finding that the ICAO Council cannot be disseised of its competences under Article 84 by the fact that one side in a disagreement has defended its actions on a basis lying outside the Chicago Convention; it must necessarily follow, by the same token, that the invocation of a wider legal defence cannot have the effect of extending or expanding the Council's competence under Article 84 either. This is implicit in what it has said, but the Court missed a valuable opportunity to clarify it expressly.

9. The second relates to the questions of due process disposed of by the Court somewhat brusquely in paragraphs 123–124 of the Judgment, which fail to subject to more nuanced attention, as contemporary conditions require, the cavalier approach to this question adopted in the only precedent case from 1972. Circumstances could readily be imagined, even if unlikely to occur, in which serious procedural irregularity might render a Council decision a nullity, or not legally correct. There should be no room for any impression, through overbroad language, that procedural irregularity was a matter of indifference to the Court. It was therefore welcome that the Court had at least reminded the ICAO Council, in paragraph 126 of the Judgment, that the very structure of Article 84 imposes certain obligatory requirements on the Council itself in order to make an effective reality out of the right of appeal laid down in that Article, notably the requirement to give reasons. It was disappointing that the Council adopted the decisions presently under appeal without so much as a hint at its reasoning, contrary to its own directly applicable rules; and it would have been better had the Court been prepared to say that doing so was not legally acceptable, for the Council's future guidance.

240. IMMUNITIES AND CRIMINAL PROCEEDINGS (EQUATORIAL GUINEA *v.* FRANCE)

Judgment of 11 December 2020

On 11 December 2020, the International Court of Justice delivered its Judgment in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France).*

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judge *ad hoc* Kateka; Registrar Gautier.

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History of the proceedings (paras. 1–24)

The Court begins by recalling that, on 13 June 2016, Equatorial Guinea filed an Application instituting proceedings against France with regard to a dispute concerning

> "the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security [Mr. Teodoro Nguema Obiang Mangue], and the legal status of the building which houses the Embassy of Equatorial Guinea in France, both as premises of the diplomatic mission and as State property".

In its Application, Equatorial Guinea sought to found the Court's jurisdiction, first, on Article 35 of the United Nations Convention against Transnational Organized Crime of 15 November 2000 (hereinafter the "Palermo Convention"), and, second, on Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, of 18 April 1961.

Following the filing of a Request for the indication of provisional measures by Equatorial Guinea on 29 September 2016, the Court instructed France, in an Order dated 7 December 2016, "pending a final decision in the case", to

> "take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations[1], in order to ensure their inviolability".

On 31 March 2017, France raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. By its Judgment of 6 June 2018, the Court upheld the first preliminary objection that the Court lacks jurisdiction on the basis of Article 35 of the Palermo Convention. However, it rejected the second and third preliminary objections and declared that it has jurisdiction, on the basis of the Optional Protocol to the Vienna Convention on Diplomatic Relations, to entertain the Application filed by Equatorial Guinea, in so far as it concerns the status of the building located at 42 avenue Foch in Paris as premises of the mission, and that this part of the Application is admissible.

I. Factual background (paras. 25–38)

The Court explains that, on 2 December 2008, the association Transparency International France filed a complaint with the Paris Public Prosecutor against certain African Heads of State and members of their families in respect of allegations of misappropriation of public funds in their country of origin, the proceeds of which had allegedly been invested in France. This complaint was declared admissible by the French courts, and a judicial investigation was opened in 2010. The investigation focused, in particular, on the methods used to finance the acquisition of movable and immovable assets in France by Mr. Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, who was at the time Minister of State for Agriculture and Forestry of Equatorial Guinea and who became Second Vice-President of Equatorial Guinea in charge of Defence and State Security on 21 May 2012.

The investigation more specifically concerned the way in which Mr. Teodoro Nguema Obiang Mangue acquired various objects of considerable value and a building located at 42 avenue Foch in Paris. On 28 September and 3 October 2011, investigators conducted searches at that address and seized luxury vehicles which belonged to Mr. Teodoro Nguema Obiang Mangue. On 4 October 2011, Equatorial Guinea addressed a Note Verbale to France, stating that it had for a number of years had at its disposal a building located at 42 avenue Foch in Paris, which it used for the performance of the functions of its diplomatic mission. By a Note Verbale of 11 October 2011, France replied that the building in question did not form part of the premises of Equatorial Guinea's diplomatic mission, that it fell within the private domain and was, accordingly, subject to ordinary law. By a Note Verbale dated 17 October 2011, Equatorial Guinea informed France that the official residence of its Permanent Delegate to UNESCO was on the premises of the diplomatic mission located at 42 avenue Foch in Paris. By a Note Verbale to Equatorial Guinea dated 31 October 2011, France reiterated that the building in question was not part of the mission's premises, had never been recognized as such, and accordingly was subject to ordinary law.

From 14 to 23 February 2012, further searches of the building at 42 avenue Foch in Paris were conducted, during which additional items were seized and removed. By Notes Verbales dated 14 and 15 February 2012, which described the building as the official residence of Equatorial Guinea's Permanent Delegate to UNESCO and asserted that the searches violated

[1] Art. 22 reads as follows:

> "1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
>
> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

the Vienna Convention, Equatorial Guinea invoked the protection afforded by the said Convention for such a residence.

On 19 July 2012, having found, *inter alia*, that the building at 42 avenue Foch in Paris had been wholly or partly paid for out of the proceeds of the alleged offences under investigation and that its real owner was Mr. Teodoro Nguema Obiang Mangue, one of the investigating judges of the Paris *Tribunal de grande instance* ordered the "attachment of the building" (*saisie pénale immobilière*). This decision was upheld on 13 June 2013 by the *Chambre de l'instruction* of the Paris *Cour d'appel*, before which Mr. Teodoro Nguema Obiang Mangue had lodged an appeal.

By a Note Verbale of 27 July 2012, Equatorial Guinea informed France that, as from that date, the Embassy's offices were located at 42 avenue Foch in Paris. By a Note Verbale of 6 August 2012, France drew Equatorial Guinea's attention to the fact that the building in question was the subject of an attachment order under the Code of Criminal Procedure, dated 19 July 2012, and that it was thus unable officially to recognize the building as being the seat of the chancellery as from 27 July 2012.

On 23 May 2016, the Financial Prosecutor filed final submissions (*réquisitoire définitif*) seeking in particular that Mr. Teodoro Nguema Obiang Mangue be tried for money laundering offences. On 5 September 2016, the investigating judges of the Paris *Tribunal de grande instance* ordered the referral of Mr. Teodoro Nguema Obiang Mangue—who, by a presidential decree of 21 June 2016, had been appointed as the Vice-President of Equatorial Guinea in charge of National Defence and State Security—for trial before the Paris *Tribunal correctionnel* for alleged offences committed in France between 1997 and October 2011.

The *Tribunal correctionnel* delivered its judgment on 27 October 2017, in which it found Mr. Teodoro Nguema Obiang Mangue guilty of money laundering offences. The tribunal ordered, *inter alia*, the confiscation of all the movable assets seized during the judicial investigation and of the attached building at 42 avenue Foch in Paris. Regarding the confiscation of this building, the tribunal, referring to the Court's Order of 7 December 2016 indicating provisional measures, stated that "the … proceedings [pending before the International Court of Justice] make the execution of any measure of confiscation by the French State impossible, but not the imposition of that penalty". Following the delivery of the judgment, Mr. Teodoro Nguema Obiang Mangue lodged an appeal against his conviction with the Paris *Cour d'appel*. This appeal having a suspensive effect, no steps were taken to enforce the sentences handed down to Mr. Teodoro Nguema Obiang Mangue. The Paris *Cour d'appel* rendered its judgment on 10 February 2020. It upheld, *inter alia*, the confiscation of the "property located in the municipality of Paris, 16th arrondissement, 40–42 avenue Foch, attached by order of 19 July 2012". Mr. Teodoro Nguema Obiang Mangue lodged a further appeal (*pourvoi en cassation*) against this judgment. This appeal having a suspensive effect, no steps have been taken to enforce the sentences handed down to Mr. Teodoro Nguema Obiang Mangue.

II. Circumstances in which a property acquires the status of "premises of the mission" under the Vienna Convention (paras. 39–75)

The Court notes that the Parties disagree on whether the building at 42 avenue Foch in Paris constitutes part of the premises of Equatorial Guinea's diplomatic mission in France and is thus entitled to the treatment afforded to such premises under Article 22 of the Vienna Convention on Diplomatic Relations (hereinafter the "Vienna Convention"). The Parties also disagree on whether France, by the actions of its authorities in relation to the building, is in breach of its obligations under Article 22.

The Court begins by examining the circumstances in which a property acquires the status of "premises of the mission" within the meaning of Article 1 (*i*) of the Vienna Convention. That Article provides that the "premises of the mission" are "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission". To this end, the Court looks to the Vienna Convention, stating that it will interpret it according to customary rules of treaty interpretation which are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

The Court considers that the provisions of the Vienna Convention, in their ordinary meaning, are of little assistance in determining the circumstances in which a property acquires the status of "premises of the mission". Although Article 1 (*i*) of the Convention describes the "premises of the mission" as buildings "used for the purposes of the mission", this provision, taken alone, is unhelpful in determining how a building may come to be used for the purposes of a diplomatic mission, whether there are any prerequisites to such use and how such use, if any, is to be ascertained. Moreover, it is silent as to the respective roles of the sending and receiving States in the designation of mission premises. Article 22 of the Vienna Convention provides no further guidance on this point. The Court therefore turns to the context of these provisions as well as the Vienna Convention's object and purpose.

Turning first to context, Article 2 of the Vienna Convention provides that "[t]he establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent". In the Court's view, it is difficult to reconcile such a provision with an interpretation of the Convention that a building may acquire the status of the premises of the mission on the basis of the unilateral designation by the sending State despite the express objection of the receiving State.

Moreover, the provisions of the Convention dealing with the appointment and immunities of diplomatic personnel and staff of the mission illustrate the balance that the Convention attempts to strike between the interests of the sending and receiving States. Article 4 provides that the sending State's choice of head of mission is subject to the *agrément* of the receiving State. It further provides that the receiving State does not need to provide reasons for any refusal. On the other hand, the receiving State's prior approval is not generally required for the appointment of members of the mission's staff under Article 7. Pursuant to Article 39, those individuals who

enjoy privileges and immunities enjoy them from the moment they arrive on the territory of the receiving State, or if they are already on the territory of the receiving State, from the moment their appointment is notified to the receiving State. However, these broad immunities are counterbalanced by the power of the receiving State, under Article 9, to declare members of a diplomatic mission *personae non gratae*. In contrast, the Vienna Convention establishes no equivalent mechanism for mission premises. If it were possible for a sending State unilaterally to designate the premises of its mission, despite objection by the receiving State, the latter would effectively be faced with the choice of either according protection to the property in question against its will, or taking the radical step of breaking off diplomatic relations with the sending State. Even in the latter situation, Article 45 of the Vienna Convention requires the receiving State to continue to respect and protect the premises of the mission together with its property and archives, prolonging the effects of the sending State's unilateral choice. In the Court's view, this situation would place the receiving State in a position of imbalance, to its detriment, and would go far beyond what is required to achieve the Vienna Convention's goal of ensuring the efficient performance of the functions of diplomatic missions.

As to the Vienna Convention's object and purpose, the preamble specifies the Convention's aim to "contribute to the development of friendly relations among nations". This is to be achieved by according sending States and their representatives significant privileges and immunities. The preamble indicates that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States". It thus reflects the fact that diplomatic privileges and immunities impose upon receiving States weighty obligations, which however find their *raison d'être* in the objective of fostering friendly relations among nations.

In light of the foregoing, the Court considers that the Vienna Convention cannot be interpreted so as to allow a sending State unilaterally to impose its choice of mission premises upon the receiving State where the latter has objected to this choice. In such an event, the receiving State would, against its will, be required to take on the "special duty" referred to in Article 22, paragraph 2, of the Convention to protect the chosen premises. A unilateral imposition of a sending State's choice of premises would thus clearly not be consistent with the object of developing friendly relations among nations. Moreover, it would leave the receiving State vulnerable to a potential misuse of diplomatic privileges and immunities, which the drafters of the Vienna Convention intended to avoid by specifying, in the preamble, that the purpose of such privileges and immunities is not "to benefit individuals". The practice of several States, which clearly requires the prior approval of the receiving State before a building can acquire the status of "premises of the mission"—and the lack of any objection to such practice—are factors which weigh against finding a right belonging to the sending State under the Vienna Convention unilaterally to designate the premises of its diplomatic mission.

The Court considers that if the receiving State may object to the sending State's choice of premises, it follows that it may choose the modality of such objection. To hold otherwise would be to impose a restriction on the sovereignty of receiving States that finds no basis in the Vienna Convention or in general international law. Some receiving States may, through legislation or official guidelines, set out in advance the modalities pursuant to which their approval may be granted, while others may choose to respond on a case-by-case basis. This choice itself has no bearing on the power of the receiving State to object.

The Court emphasizes, however, that the receiving State's power to object to a sending State's designation of the premises of its diplomatic mission is not unlimited. In light of the above-mentioned requirements, and the Vienna Convention's object and purpose of enabling the development of friendly relations among nations, the Court considers that an objection of a receiving State must be timely and not be arbitrary. Further, in accordance with Article 47 of the Vienna Convention, this objection must not be discriminatory in character. In any event, the receiving State remains obliged under Article 21 of the Vienna Convention to facilitate the acquisition on its territory, in accordance with its laws, by the sending State of the premises necessary for its diplomatic mission, or otherwise assist the latter in obtaining accommodation in some other way.

Given the above considerations, the Court concludes that—where the receiving State objects to the designation by the sending State of certain property as forming part of the premises of its diplomatic mission, and this objection is communicated in a timely manner and is neither arbitrary nor discriminatory in character—that property does not acquire the status of "premises of the mission" within the meaning of Article 1 (*i*) of the Vienna Convention, and therefore does not benefit from protection under Article 22 of the Convention. Whether or not the aforementioned criteria have been met is a matter to be assessed in the circumstances of each case.

In view of these conclusions, the Court proceeds to examine whether, on the facts before the Court, France objected to the designation of the building at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission and whether any such objection was communicated in a timely manner, and was neither arbitrary nor discriminatory in character.

III. Status of the building at 42 avenue Foch in Paris (paras. 76–118)

1. Whether France objected through diplomatic exchanges between the Parties from 4 October 2011 to 6 August 2012 (paras. 76–89)

The Court begins by examining the diplomatic exchanges of the Parties in the period between 4 October 2011, when Equatorial Guinea first notified France that the property "form[ed] part of the premises of the diplomatic mission", and 6 August 2012, shortly after the "attachment of the building" (*saisie pénale immobilière*) on 19 July 2012.

The Court recalls that the initial searches at the property by the French investigative authorities took place on 28 September 2011 and 3 October 2011, during the course of which luxury vehicles belonging to Mr. Teodoro Nguema Obiang Mangue were seized. On 4 October 2011, Equatorial

Guinea addressed a Note Verbale to France, in which it stated that it "has for a number of years had at its disposal" a building located at 42 avenue Foch in Paris, which it "uses for the performance of the functions of its diplomatic mission". On the same date, paper signs were put up at the building marked "République de Guinée équatoriale—locaux de l'ambassade" (Republic of Equatorial Guinea—Embassy premises). On 11 October 2011, France addressed a Note Verbale to Equatorial Guinea, which stated that "the … building [in question] does not form part of the premises of Equatorial Guinea's diplomatic mission. It falls within the private domain and is, accordingly, subject to ordinary law."

On 17 October 2011, Equatorial Guinea addressed a Note Verbale to France, informing it that its diplomatic mission would be headed (as Chargée d'affaires *ad interim*) by its Permanent Delegate to UNESCO. The Note stated that the latter's "official residence" was "on the premises of [Equatorial Guinea's] diplomatic mission located at 40–42 avenue Foch [in] Paris". In a Note Verbale addressed to Equatorial Guinea on 31 October 2011, France reiterated that the building in question "is not a part of the mission's premises, has never been recognized as such, and accordingly is subject to ordinary law".

Between 14 and 23 February 2012, the French authorities conducted further searches of the building at 42 avenue Foch in Paris, in the course of which various items were seized and removed. During this period, presenting the building as the residence of its Chargée d'affaires and Permanent Representative to UNESCO, and asserting that the searches and seizures violated the Vienna Convention, Equatorial Guinea invoked the protection afforded by that Convention for such a residence. France, for its part, reiterated that it did not recognize the building as the official residence of the representative in question. On 9 and 12 March 2012, Equatorial Guinea addressed two Notes Verbales to France, in which it reiterated that the building formed part of the premises of its diplomatic mission in France. In its reply of 28 March 2012, France, for its part, again asserted that the building "cannot be considered as part of the premises of the diplomatic mission, since it has not been recognized as such by the French authorities, given that it has not been assigned for the purposes of the mission or as the residence of the head of the mission in accordance with … Article 1, paragraph (*i*), of the Vienna Convention".

By Notes Verbales of 25 April and 2 May 2012, Equatorial Guinea and France reiterated their positions.

On 19 July 2012, an investigating judge of the Paris *Tribunal de grande instance* ordered the "attachment of the building" (*saisie pénale immobilière*). On 27 July and 2 August 2012, Equatorial Guinea addressed two Notes Verbales to France, informing it that, as from that date, the offices of its Embassy were located at 42 avenue Foch in Paris, a building which it was henceforth using for the performance of the functions of its diplomatic mission. In a Note Verbale of 6 August 2012, France replied that since the building in question was the subject of an attachment order (*ordonnance de saisie pénale immobilière*) of 19 July 2012, it was unable officially to recognize it as being the seat of the chancellery as from 27 July 2012, and that the latter thus remained at 29 boulevard de Courcelles in Paris, the only address recognized as such.

The Court considers that the facts recounted demonstrate that, between 11 October 2011 and 6 August 2012, France consistently expressed its objection to the designation of the building at 42 avenue Foch in Paris as part of the premises of Equatorial Guinea's diplomatic mission.

2. Whether the objection of France was timely (paras. 90–92)

The Court then turns to the examination of whether France's objection was made in a timely manner. On 11 October 2011, France notified Equatorial Guinea in clear and unambiguous terms that it did not accept this designation. France communicated its objection promptly, exactly one week after Equatorial Guinea first asserted the building's status as premises of its diplomatic mission in its Note Verbale of 4 October 2011. In its Note Verbale of 17 October 2011, Equatorial Guinea again asserted that the building formed part of the premises of its diplomatic mission, and also that it housed the residence of Equatorial Guinea's Permanent Delegate to UNESCO, who it indicated would henceforth also serve as Chargée d'affaires *ad interim* of its diplomatic mission to France. In its Note Verbale of 31 October 2011, France reiterated its objection to accept Equatorial Guinea's designation of the building as part of the premises of its diplomatic mission in France.

When the new searches commenced at the building at 42 avenue Foch in Paris on 14 February 2012, Equatorial Guinea sent a number of diplomatic communications to France complaining against the actions of the French authorities. In its replies, France refused again to recognize the status of the building and indicated the procedure to be followed in order for a property to acquire the status of premises of a diplomatic mission. On 9 March and 12 March 2012, two Notes Verbales were addressed to France by Equatorial Guinea, in which it again asserted that the building formed part of the premises of its diplomatic mission in France. France again clearly rejected this claim on 28 March 2012. On 25 April 2012, Equatorial Guinea reiterated its claim; on 2 May 2012, France reiterated its objection. Following the "attachment of the building" (*saisie pénale immobilière*) on 19 July 2012, Equatorial Guinea sent two further Notes Verbales to France, on 27 July 2012 and 2 August 2012, asserting the status of the building as premises of its diplomatic mission; France responded on 6 August 2012, again expressly refusing to recognize that the building formed part of the premises of Equatorial Guinea's diplomatic mission.

Assessing this record overall, the Court notes that France promptly communicated its objection to the designation of the building at 42 avenue Foch in Paris as premises of Equatorial Guinea's diplomatic mission following the notification of 4 October 2011. France then consistently objected to each assertion, on the part of Equatorial Guinea, that the building constituted the premises of the diplomatic mission, and maintained its objection to the designation of the building as premises of Equatorial Guinea's diplomatic mission. The Court considers that, in the circumstances of the present case, France objected to the designation by Equatorial Guinea of the building as premises of its diplomatic mission in a timely manner.

3. Whether the objection of France was non-arbitrary and non-discriminatory (paras. 93–117)

The Court next turns to the question whether France's objection to the designation by Equatorial Guinea of the building at 42 avenue Foch in Paris as premises of its diplomatic mission was non-arbitrary and non-discriminatory in character.

The Court considers that, at the time it received Equatorial Guinea's notification on 4 October 2011, France possessed sufficient information to provide a reasonable basis for its conclusion with respect to the status of the building at 42 avenue Foch in Paris. As well as being in a position to conclude that the building was not being used, or being prepared for use, for diplomatic purposes at the time of Equatorial Guinea's notification, France had an obvious additional ground justifying its objection to the designation of the building as premises of the diplomatic mission as of 4 October 2011. The building had been searched only a few days earlier, in the context of criminal proceedings which were still ongoing. Therefore, it was reasonable for France to assume that further searches in the building, or other measures of constraint, might be necessary before the criminal proceedings were terminated. If France had acceded to Equatorial Guinea's assignment of the building to its diplomatic mission, thereby assuming obligations to ensure the inviolability and immunity of the building under the Convention, it might have hindered the proper functioning of its criminal justice system. In this connection, the Court notes that Equatorial Guinea was aware of the ongoing criminal proceedings. Accordingly, Equatorial Guinea was aware, or could not have been unaware, on 4 October 2011 that the building had been searched in the context of the ongoing criminal proceedings. The Court observes that this ground justifying France's objection on 11 October 2011 has persisted long after that date. Whether or not it was being prepared for use, or was being used, for the purposes of Equatorial Guinea's diplomatic mission at some point after 27 July 2012, the building at 42 avenue Foch in Paris was still a target in ongoing criminal proceedings which are pending to this date. When it reiterated its objection in its Note Verbale of 6 August 2012, France explicitly referred to the attachment ordered in the course of the ongoing criminal proceedings.

In these circumstances, the Court concludes that there existed reasonable grounds for France's objection to Equatorial Guinea's designation of the building as premises of Equatorial Guinea's diplomatic mission. These grounds were known, or should have been known, to Equatorial Guinea. In light of these grounds, the Court does not consider that the objection by France was arbitrary in character. Furthermore, the Court is of the view that France was not required to co-ordinate with Equatorial Guinea before communicating its decision not to recognize the status of the building as premises of the mission on 11 October 2011. Indeed, the Vienna Convention establishes no obligation to co-ordinate with a sending State before a receiving State may object to the designation of a building as premises of a diplomatic mission.

The Court turns to the question whether France's position with respect to the status of the building has been inconsistent. It notes that in all of the diplomatic correspondence invoked by Equatorial Guinea, France consistently asserted that acquiring the status of premises of the mission was contingent on two conditions: absence of objection of the receiving State and actual assignment of the premises for diplomatic use.

The Court observes that France has maintained its explicit objection to the designation of the building as premises of Equatorial Guinea's diplomatic mission, long after the Note Verbale of 6 August 2012. It refers, in particular, to a Note Verbale of 2 March 2017 in which France stated that "[i]n keeping with its consistent position, France does not consider the building located at 42 avenue Foch in Paris (16th arr.) to form part of the premises of the diplomatic mission of the Republic of Equatorial Guinea in France".

The instances adduced by Equatorial Guinea, for example the acquisition of visas at 42 avenue Foch in Paris or the protection provided on the occasion of events that may foreseeably cause harm to persons or property within a State's territory, such as demonstrations or presidential elections, do not demonstrate that France tacitly recognized the building as "premises of the mission" under the Convention.

Additionally, the evidence does not establish that France has failed to object to the designation of a building by another sending State as premises of its diplomatic mission in circumstances comparable to those in the present case. In the circumstances, Equatorial Guinea has not demonstrated that France, in objecting to the designation of the building at 42 avenue Foch in Paris as the premises of Equatorial Guinea's diplomatic mission, has acted in a discriminatory manner.

Finally, the Court notes that the conduct by France did not deprive Equatorial Guinea of its diplomatic premises in France: Equatorial Guinea already had diplomatic premises in Paris (at 29 boulevard de Courcelles), which France still recognizes officially as the premises of Equatorial Guinea's diplomatic mission. Therefore, France's objection to the Embassy's move to 42 avenue Foch in Paris did not prevent Equatorial Guinea from maintaining a diplomatic mission in France, nor from retaining the diplomatic premises it already had elsewhere in Paris. This constitutes a further factor which tells against a finding of arbitrariness or discrimination.

On the basis of all of the above considerations, the Court considers that France objected to Equatorial Guinea's designation of the building as premises of its diplomatic mission in a timely manner, and that this objection was neither arbitrary nor discriminatory in character.

For all these reasons, the Court concludes that the building at 42 avenue Foch in Paris has never acquired the status of "premises of the mission" within the meaning of Article 1 (*i*) of the Convention.

IV. Consideration of Equatorial Guinea's final submissions (paras. 119–125)

As the Court concluded that the building at 42 avenue Foch in Paris has never acquired the status of "premises of the mission" under the Vienna Convention, the acts complained of by Equatorial Guinea cannot constitute a breach by France of its obligations under that Convention. Consequently, the Court cannot uphold Equatorial Guinea's submission that the Court declare that France has an obligation to make reparation for the harm suffered by Equatorial Guinea.

The Court recalls that an objection by a receiving State to the designation of property as forming part of the premises of a foreign diplomatic mission prevents that property from acquiring the status of the "premises of the mission", within the meaning of Article 1 (*i*) of the Vienna Convention, provided that this objection is communicated in a timely manner and is neither arbitrary nor discriminatory in character. The Court has found that the objection by France in the present case meets these conditions. In the light of the above conclusions, the Court cannot uphold the submission of Equatorial Guinea that it declare that France must recognize the status of the said building as premises of the diplomatic mission of Equatorial Guinea.

V. Operative clause (para. 126)

The Court,

(1) By nine votes to seven,

Finds that the building at 42 avenue Foch in Paris has never acquired the status of "premises of the mission" of the Republic of Equatorial Guinea in the French Republic within the meaning of Article 1 (*i*) of the Vienna Convention on Diplomatic Relations;

In favour: Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Crawford, Gevorgian, Salam, Iwasawa;

Against: President Yusuf; Vice-President Xue; Judges Gaja, Sebutinde, Bhandari, Robinson; Judge *ad hoc* Kateka;

(2) By twelve votes to four,

Declares that the French Republic has not breached its obligations under the Vienna Convention on Diplomatic Relations;

In favour: President Yusuf; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Crawford, Gevorgian, Salam, Iwasawa;

Against: Vice-President Xue; Judges Bhandari, Robinson; Judge *ad hoc* Kateka;

(3) By twelve votes to four,

Rejects all other submissions of the Republic of Equatorial Guinea.

In favour: President Yusuf; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Crawford, Gevorgian, Salam, Iwasawa;

Against: Vice-President Xue; Judges Bhandari, Robinson; Judge *ad hoc* Kateka.

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President Yusuf appends a separate opinion to the Judgment of the Court; Vice-President Xue appends a dissenting opinion to the Judgment of the Court; Judge Gaja appends a declaration to the Judgment of the Court; Judge Sebutinde appends a separate opinion to the Judgment of the Court; Judges Bhandari and Robinson append dissenting opinions to the Judgment of the Court; Judge *ad hoc* Kateka appends a dissenting opinion to the Judgment of the Court.

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Separate opinion of President Yusuf

Whilst agreeing with the second and third operative clauses of the Judgment, President Yusuf voted against the first operative clause, which finds that the building at 42 avenue Foch in Paris has never acquired the status of "'premises of the mission' … within the meaning of Article 1 (*i*) of the Vienna Convention" on Diplomatic Relations (hereinafter the "VCDR" or the "Vienna Convention"). In his view, this conclusion is erroneous. It is not based on a proper interpretation and application of Article 1 (*i*) nor of any other provision of the VCDR. It does not even derive from the legal reasoning of the Judgment. The provisions of the VCDR are described in the Judgment as being "of little assistance" in appraising the circumstances in which a property acquires the status of "premises of the mission", while Article 1 (*i*) is considered "unhelpful" in determining how a building may come to be used for the purposes of a diplomatic mission. He therefore raises the question: if Article 1 (*i*) is unhelpful in making such determination, how can it serve as the basis of the conclusion in the *dispositif* that the building has never acquired the status of "premises of the mission"?

According to him, the Judgment offers no meaningful interpretation of the terms "buildings … used for the purposes of the mission" in Article 1 (*i*), nor does it make the slightest attempt to apply such interpretation to the particular circumstances of this case. For President Yusuf, the Court should have interpreted, in accordance with the customary rules of treaty interpretation, the definitional provision in Article 1 (*i*) in its context and in the light of its object and purpose in order to determine, as a threshold matter, whether the building at 42 avenue Foch in Paris was "used for the purposes of the mission". This approach is supported by the previous practice of domestic and international courts and tribunals which have addressed the status of diplomatic premises in the past. Instead, the Judgment pivots to a hitherto unknown requirement of "prior approval" or "power to object" of the receiving State, which has no basis in the text of the Convention. These newly minted conditions are not supported by the subsequent practice of the parties to the Vienna Convention nor by customary law or any other source of international law. They are also likely to generate in the future unnecessary misunderstandings and tensions in the application to diplomatic premises of the centuries-old law on diplomatic relations. Furthermore, the criteria propounded by the Court for the exercise of such "power to object" are unclear and unqualified.

In President Yusuf's view, a proper assessment of the facts should have led to the conclusion that the building at 42 avenue Foch in Paris acquired the status of "premises of the mission" as of 27 July 2012, after the various entries and searches of the premises by French officials had taken place. Therefore, these measures could not amount to a violation of Article 22, paragraph 1, of the Convention. Nor could the subsequent measures of attachment and confiscation be in violation of Article 22, paragraph 3, of the Convention, in so far as they would only affect the ownership of the building, which, according to Article 1 (*i*), is not relevant to the status of "premises of the mission".

Dissenting opinion of Vice-President Xue

1. Vice-President Xue disagrees with the decision rendered by the Court primarily on the basis of her position on the question of jurisdiction. In her view, the status of the building at 42 avenue Foch in Paris is one, and an inseparable, part of the dispute between Equatorial Guinea and France in relation to the immunities of the high-ranking official of Equatorial Guinea and its State property from the jurisdiction of the French courts. She regrets that, by narrowing down its jurisdictional basis in the present case, the Court eschewed some crucial aspects of the dispute between the Parties. She is of the view that whether or not the building at 42 avenue Foch in Paris became the State property of Equatorial Guinea through the transfer of ownership is not a purely legal issue under the French law in the present case; it ultimately boils down to the issue of the rights and obligations of a State under international law in handling criminal cases concerning a foreign State and its property.

2. In this regard, Vice-President Xue considers two issues to be relevant: the transaction of the building between Mr. Teodoro Nguema Obiang Mangue and the Republic of Equatorial Guinea, and Equatorial Guinea's right to designate it as the premises of its diplomatic mission. On the first issue, she observes that evidence adduced by Equatorial Guinea shows that the transaction was legally carried out under the French law. It is evident from the facts that France's persistent objection to Equatorial Guinea's request to designate the building at 42 avenue Foch in Paris has little to do with the circumstances and conditions under which a property may acquire diplomatic status, but is related to the controversy between the Parties over the ongoing criminal investigation against Mr. Teodoro Nguema Obiang Mangue.

3. In respect of the second issue, she observes that the public acts of the French authorities on the registration of the transfer of shareholder rights in relation to the building and the collection of a capital gains tax gave rise to a reasonable belief by Equatorial Guinea that it has acquired the ownership of the building. If France wished to maintain the assets within the private domain, it should have stopped these deeds at the outset of the transaction so as to leave no doubt to Equatorial Guinea on the status of the building. In addition to these public acts of its authorities, France does not claim at any time during the proceedings that the transfer of the building between Mr. Teodoro Nguema Obiang Mangue and Equatorial Guinea was not genuine. In her opinion, the dispute between the Parties over the status of the building hinges on the ownership of the building. First, the reason given by France for its objection to Equatorial Guinea's request directly relates to the ownership of the building, as it explicitly mentioned that the building "falls within the private domain". Secondly, the question of ownership has consequential effects on the conduct of France in handling the building. Although the ownership is irrelevant to the status of the premises of a diplomatic mission, if owned by the sending State, however, the premises would enjoy the protection of the Vienna Convention on Diplomatic Relations (hereinafter the "Vienna Convention" or the "Convention") as well as of customary rules on jurisdictional immunities of a State and its property. In the present case, such rules may come into play in the examination of the lawfulness of the measures of constraint imposed on the building by the French courts, if the issue of the ownership of the building were duly considered.

4. As regards the interpretation of the Vienna Convention, Vice-President Xue agrees with the majority that the provisions of the Convention do not lay down at which point of time and under what conditions a property acquires the status of "premises of the mission" as defined in Article 1 (*i*) of the Convention and starts to enjoy the privileges and immunities as provided for therein. In light of the object and purpose of the Convention, the sending State cannot unilaterally impose its choice of premises on the receiving State. She disagrees, however, with the reasoning of the Court which implies that the receiving State, by its persistent objection to the sending State's designation, would unilaterally dictate the outcome of the matter.

5. She emphasizes that the fundamental principle of international law contained in the preamble of the Convention, *i.e.* the principle of sovereign equality, is the legal basis of international diplomacy law. Diplomatic privileges and immunities, "significant" or "weighty" as they may be, are mutually granted and mutually beneficial. The establishment of permanent diplomatic missions—if it is to serve the purposes of maintaining peace and security and fostering friendly relations among nations—must be based on mutual respect for sovereignty and equal treatment of States. While the designation of the premises of diplomatic missions is left largely to the practice of States in light of the specific circumstances of each country, by virtue of the principle of sovereign equality, co-operation and consultation are the only way that can produce a mutually acceptable solution.

6. Vice-President Xue observes that, in the present case, France did not produce convincing evidence to show that, in its practice, prior consent is consistently required for a building to acquire diplomatic status. Moreover, its repeated refusal of Equatorial Guinea's assignment is related more to the disputed criminal proceedings than to the procedure itself.

7. In her opinion, as the status of the building in question is the very subject of the dispute relating to the immunities of State property between the Parties, a general examination of the circumstances under which a property acquires diplomatic status does not address the real issue in the present case. The key question in the present context is not whether France as the receiving State enjoys the sovereign right to object to Equatorial Guinea's choice of its diplomatic premises, but whether it has wrongfully exercised jurisdiction by imposing measures of constraint on the State property of Equatorial Guinea.

8. Vice-President Xue notes that the Court recognizes three criteria for the manner in which the receiving State raises its objection to a sending State's designation of its diplomatic premises, *i.e.* timely, non-arbitrary and non-discriminatory. On the first criterion of timely objection, she has no doubt that each time when Equatorial Guinea notified the Protocol Department of the French Ministry of Foreign Affairs of its designation or use of the building as the premises of its diplomatic mission, the latter objected without delay.

9. However, she points out that, in assessing whether France's objection was arbitrary, the Court's reasoning is predicated on a wrongful assumption that the criminal proceedings against Mr. Teodoro Nguema Obiang Mangue and measures of constraint on the building were not in dispute between the Parties. In her view, this line of reasoning is totally one-sided. It reveals that the issue of France's objection to Equatorial Guinea's designation of the building as the premises of its diplomatic mission cannot be separated from the question of immunities of State property in the criminal proceedings. At the time when Equatorial Guinea first requested to assign the building for its diplomatic mission, the very reason for France's objection was to maintain the building under measures of constraint for the purpose of the criminal proceedings. She also considers that it is contrary to the object and purpose of the Convention for the Court to state that France was under no obligation under the Convention to consult with Equatorial Guinea, when it decided to refuse the latter's designation of the building as its diplomatic premises.

10. Vice-President Xue considers that, in assessing whether France's conduct was discriminatory, one does not have to rely on any comparable case in France's practice, but just to inquire whether, under the same circumstances, France would have treated any other State, or whether any other State would have accepted to be treated, in the same way. In this regard, she notes that, for almost four years, *i.e.* from 27 July 2012, the date when Equatorial Guinea actually moved its mission into the building, until it instituted proceedings against France before this Court on 13 June 2016, the Embassy of Equatorial Guinea used the building for the performance of the official functions of its diplomatic mission, but without proper status and protection. Meanwhile, measures of constraint such as attachment and confiscation were imposed on the building. In her opinion, this kind of situation cannot be deemed normal in diplomatic relations; nor does it resemble the relationship between two sovereign equals. These facts *per se* demonstrate that undue emphasis on the power of the receiving State to object would upset the delicate balance established by the Vienna Convention between the sending State and the receiving State.

Declaration of Judge Gaja

Judge Gaja considers that, notwithstanding France's objection, the building at 42 avenue Foch in Paris acquired the status of premises of Equatorial Guinea's diplomatic mission. For that purpose, consent—express or implied—of the receiving State is not required by the Vienna Convention on Diplomatic Relations. There is no reference to such consent in the definition of premises of the mission given in Article 1 (*i*) of the Convention. Article 12 requires the "prior express consent" of the receiving State when the building is located outside the State's capital city. This reinforces the interpretation that consent is not necessary in the much more frequent case of buildings situated in the capital city.

While the sending State needs to comply with the laws and regulations of the receiving State, no issue of town planning or zoning for security reasons was raised in the present case. France is not among the States which have adopted legislation or sent circular notes to diplomatic missions asserting a receiving State's right to refuse its consent to a sending State's future choice of a building as premises of its diplomatic mission.

Thus France was bound to respect the obligations under Article 22 of the Convention once the building was used for Equatorial Guinea's diplomatic mission. However, Equatorial Guinea failed to substantiate any claim that these obligations have been violated by France.

Separate opinion of Judge Sebutinde

Judge Sebutinde has voted against paragraph 126 (1) of the Judgment. In her opinion, the building located at 42 avenue Foch in Paris acquired the status of "premises of the mission" of Equatorial Guinea within the meaning of Article 1 (*i*) of the Vienna Convention on Diplomatic Relations (hereinafter the "VCDR") on 27 July 2012, when Equatorial Guinea effectively moved its mission into that building. With effect from that date, France had an obligation to extend to Equatorial Guinea's mission at the disputed building, the protection guaranteed under Article 22 of the VCDR.

Under the VCDR, ownership of a building is immaterial in determining whether it is capable of forming part of the premises of a mission. Judge Sebutinde is of the view that France's refusal to recognize the disputed building as premises of Equatorial Guinea's mission after 27 July 2012 was based on factors to do with the ownership or transfer of ownership of the disputed building rather than its use by the Applicant for purposes other than its mission. The evidence regarding the prerequisite for consent of a receiving State, before a building can be recognized as premises of a mission, points to France's practice of non-objection, whereby the receiving State will not unreasonably object on grounds other than that the building is not being used for the purposes of the mission stipulated in Article 3 of the VCDR.

Since the building only attained the status of "premises of the mission" on 27 July 2012, Judge Sebutinde opines that the actions of French authorities in relation to that building before that date, including searches, seizures and order of attachment (*saisie pénale immobilière*), cannot be considered as being in violation of Article 22 of the VCDR. The order of confiscation of the disputed building issued on 27 October 2017 and confirmed on 10 February 2020, does not violate Article 22 of the VCDR since it concerns the transfer of ownership of the building and does not necessarily implicate its use as premises of Equatorial Guinea's mission. In this regard, Judge Sebutinde has voted with the majority in favour of paragraph 126 (2) of the Judgment.

Lastly, the Judgment says little on the issue of Equatorial Guinea's alleged abuse of rights in the present case, simply alluding in paragraph 66 to the fact that the purpose of the diplomatic privileges and immunities under the VCDR are not meant to benefit individuals, without explaining how this statement relates to Equatorial Guinea's claims or conduct. Judge Sebutinde is of the considered opinion that there being no exceptional and compelling circumstances pointing to abuse of rights by Equatorial Guinea, the Court should have expressly said so in the Judgment.

Dissenting opinion of Judge Bhandari

1. In his dissenting opinion, Judge Bhandari submits that he is unable to concur with the conclusion reached by the majority in paragraph 126 of the Judgment. His hesitations are based on the insufficiency of the test that an objection by the receiving State, which is timely and neither arbitrary nor discriminatory, could prevent certain property from acquiring the status of mission premises. Such a test inexorably leads to the conclusion that a property may never acquire diplomatic status without the consent of the receiving State. Notably, neither the Vienna Convention on Diplomatic Relations, 1961 (hereinafter the "Vienna Convention") nor customary law provides for such a requirement. Judge Bhandari takes this position on the basis of the following four areas of consideration.

2. First, he examines the concept of mutual consent and reciprocal privileges in diplomatic intercourse and privileges, as signified by early practices and instruments prior to the codification of the Vienna Convention. He then examines the work of the International Law Commission (hereinafter the "ILC") in 1957 in the codification of the topic of diplomatic intercourse and immunities, and the theory of functional necessity in the work of the ILC as a basis of the diplomatic function. He also notes the work of the United Nations Conference on Diplomatic Intercourse and Immunities in 1961 in this context. The preamble of the Vienna Convention was based on a proposal which had the merit of stating that the purpose of diplomatic privileges and immunities was "to ensure the efficient performance of the functions of diplomatic missions", thereby placing functional necessity at the forefront of the purpose of the régime of privileges and immunities under the Vienna Convention. According to him, this historical backdrop emphasizes that no previously established rule of customary international law required or appears to permit an objection to designation of mission premises by the receiving State. His analysis will be guided by the purpose of ensuring the efficient performance of the functions of diplomatic missions.

3. Second, he examines the object and purpose of the Vienna Convention. In doing so, he specifically addresses the principles of the sovereign equality of States, the promotion of friendly relations among nations, and the maintenance of international peace and security. The principle of sovereign equality emphasizes the right of all States to equality in law, to the exclusion of the notion of the legal superiority of one State over the other. He further examines the commitment to promote friendly relations, as reinforced by the adoption of General Assembly resolution 2625 (XXV), which itself is reflective of customary international law. He further states that in interpreting the object and purpose of the Vienna Convention, he is obliged to give special consideration to the prevention of conflict and the peaceful settlement of disputes. He emphasizes that the test in paragraph 74 of the Judgment would disrupt the fine balancing of interests that the object and purpose establishes, and may further the notion of the legal superiority of one State over the other by placing discretionary power in the hands of one.

4. Third, he highlights the provision for mutual consent in the establishment of diplomatic relations between States under Article 2 of the Vienna Convention, and notes that there is nothing in the Vienna Convention which requires the consent of the receiving State for the establishment of premises of the mission. Consequently, the test in paragraph 74 would not evince mutual consent. The inevitable consequence of permitting an objection to designation is that the consent of the receiving State would begin to play an important role in the establishment of "premises of the mission" which is not reflective of the view that the right of legation cannot be exercised without the agreement of both parties.

5. Fourth, by applying the customary rules on treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, he concludes that, in the circumstances of the case, and on the basis of the facts advanced, Article 1 (*i*) read in conjunction with Article 22 of the Vienna Convention may be helpful in determining "how and when" certain property acquires diplomatic status within the meaning of the Vienna Convention. He relies on distinctions to be found in the provisions relating to the accreditation of heads of missions in Article 4, paragraphs 1 and 2, Article 5, paragraph 1, and Article 6 of the Vienna Convention which expressly provide for *agrément* and objection by the receiving State. He therefore concludes that the two cumulative conditions of notification by the sending State followed by actual use as such may be an appropriate standard to determine how and when property acquires diplomatic status. Consequently, from 27 July 2012, the building at 42 avenue Foch in Paris acquired the status of premises of Equatorial Guinea's diplomatic mission.

6. Finally, he concludes that an objection by the receiving State to the choice of mission premises, regardless of whether it is adjudged against parameters of timeliness and non-arbitrariness, does not reflect the balancing of interests required by the Vienna Convention. It is also not reflective of good faith, as an objection to the acknowledgment of the existence of the premises of a mission would result in bad faith, and an impingement upon the sovereignty of a member of the Vienna Convention. In interpreting relations between equal sovereign States, it appears an erroneous proposition that the sending State would have no option but to accede to the desires of the receiving State. A unilateral objection by the receiving State which has the effect of instantaneously denuding the acquisition of diplomatic status may result in an imbalance to the detriment of the sending State. It follows that the logical consequence of the majority view is that the building at 42 avenue Foch in Paris would never acquire the status of premises of Equatorial Guinea's diplomatic mission. On the basis of the considerations examined in this opinion, this could not have been a consequence envisaged by the régime for immunities and privileges for the establishment of "premises of the mission", and the promotion of friendly relations among all nations under the Vienna Convention.

Dissenting opinion of Judge Robinson

In his dissenting opinion, Judge Robinson states his disagreement with all the findings in operative paragraph 126 of the Judgment. In his view, the evidence before the Court establishes that the building at 42 avenue Foch acquired the status of "premises of the mission" within the meaning of Article 1 (*i*) of the Vienna Convention on Diplomatic

Relations (hereinafter "the VCDR or the Convention"). Consequently, he argues that the actions taken by France—of entering, searching, attaching, and ordering the confiscation of the building—breached its inviolability under Article 22 of the VCDR as "premises of the mission".

Judge Robinson addresses the majority's interpretation of the VCDR as allowing a receiving State unilaterally to object to, and negate, the designation by Equatorial Guinea of the building at 42 avenue Foch as "premises of the mission". He also describes how, in his view, the Convention should be interpreted and the alleged violations of the Convention as well as remedies for the violations.

According to Judge Robinson, the decisive issue in this case is whether the building at 42 avenue Foch acquired the status of "premises of the mission" within the meaning of Article 1 (*i*) of the VCDR. He argues that the reasoning of the majority is as follows: (i) the VCDR empowers the receiving State to object to a designation by the sending State of a building as "premises of the mission"; (ii) since, in this case, there is evidence that France objected on several occasions to that designation by Equatorial Guinea, the building did not acquire the status of "premises of the mission". However, he disagrees, because it would seem to follow from that reasoning that—even if there is unambiguous evidence of diplomatic activities at 42 avenue Foch, thereby indicating its use for the purposes of the mission—it cannot acquire the status of premises of the mission if France, as the receiving State, objects to Equatorial Guinea's designation of the building as its diplomatic mission. In his view, that proposition runs counter to the ordinary meaning of the term "used for the purposes of the mission". He asserts that a building that is "used for the purposes of the mission" within the meaning of Article 1 (*i*) of the VCDR should not be denied the status of "premises of the mission", and thus inviolability, on account of the objection of the receiving State. For him, to interpret the Convention in that way is to misunderstand it. He argues that the definition of "premises of the mission" is not subject to a "no-objection" clause, that is, there is nothing in the definition that makes its application dependent on the lack of an objection from the receiving State.

He asserts that France is correct in what it calls the "essentially consensual letter and spirit of the Vienna Convention" and that what is called for is a "bond of trust" between the sending and the receiving States. According to him, these are critically important elements for the proper interpretation and application of the Convention, since mutuality and balance go to the core of the Convention. However, in his view, the majority's conflation of the requirement of the receiving State's consent for the designation by the sending State of a building as premises of the mission, with the power of the receiving State to object to that designation, robs its conclusion in paragraph 67 of the Judgment of any legal effect. He opines that the conclusion is irrational and, therefore, invalid because the reasoning of the majority does not reveal any discrimination between the two distinct concepts of the requirement of the receiving State's consent for the designation of mission premises and the power of the receiving State to object to this designation. According to him, while the conclusion is framed in terms of the power of the receiving State to object to the designation by the sending State of a building as premises of the mission, France's case includes references to the concept of consent and the separate concept of objection, and the Applicant's case is built on a response to the argument that the consent of France as the receiving State is required for this designation. He comments that, also, notably the Judgment itself cites State practice that shows the requirement of the receiving State's consent for this designation, and not practice evidencing the power of the receiving State to object to such designation. In his view, in this melee of mixed reasoning, the majority's conclusion is without any legal effect.

According to Judge Robinson—although his dissenting opinion takes the position that the majority has not established that the VCDR empowers the receiving State to object to the sending State's designation of a building as premises of the mission and that, consequently, there is no need to examine whether the discretionary power has been exercised reasonably—this case pinpoints an example of unreasonable exercise of that power. At certain times, France alludes to its power to object to Equatorial Guinea's designation of a building as premises of the mission, while at other times it argues that such a designation is subject to its consent. This inconsistency amounts to an unreasonable and arbitrary exercise by France of its discretionary power, thereby depriving the objection of any legal effect. Therefore, the objections by France on which the majority relies for its conclusion in paragraph 67 were invalid, and thus, the conclusion itself is robbed of any validity.

He also argues that there is a strong case to be made that France recognized the diplomatic status of the building at 42 avenue Foch when French officials, including the State Secretary for Development and Francophone Affairs, attended at the building at 42 avenue Foch in order to acquire visas for visits to Equatorial Guinea. This conduct qualifies as tacit recognition. Although Article 5 of the Vienna Convention on Consular Relations lists the issuance of visas as a consular function, Article 3 (2) of the VCDR, provides that "nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission". Thus, even though the non-exhaustive list of the functions of a diplomatic mission set out in Article 3 (1) of the VCDR does not include the issuance of visas, the Convention allows a diplomatic mission to issue visas. Judge Robinson is of the view that the majority's approach to this question is to proceed by way of assertion as it simply states in paragraph 114 of the Judgment "the Court does not consider that the acquisition of visas at 42 avenue Foch in Paris leads to the conclusion that the premises were recognized as constituting the premises of a diplomatic mission". However, in Judge Robinson's view, in the circumstances of this case that conclusion is wrong because far from objecting to Equatorial Guinea's designation of the building as premises of the mission, France's conduct shows that it tacitly recognized that designation.

Judge Robinson also argues that the majority has substantially relied on the preamble as the foundation for its very consequential conclusion in paragraph 67 of the Judgment. However, in his view, the preamble does not support such a conclusion, and he adds that it is indeed unusual for the principal finding in a Judgment of the Court to be based substantially on the Court's interpretation of the preamble of a treaty. Further, also relevant in his view is that, State practice

indicates that a building acquires the status of premises of the mission when its intended use for the purposes of the mission is followed by actual use for those purposes. According to him, based on that practice, the building at 42 avenue Foch acquired the status of premises of the mission on 4 October 2011 because its intended use for the purposes of the mission from that date was followed by actual use for the same purpose at the latest by 27 July 2012.

Judge Robinson asserts that in light of the balance that the VCDR seeks to strike between the interests of the sending and the receiving States, and having regard to its aim of promoting friendly relations among nations on the basis of respect for the principle of sovereign equality of States, and the purpose of the maintenance of international peace and security, the VCDR should not be interpreted as empowering either the sending or the receiving State to impose its will on the other State in determining whether a building has acquired the status of "premises of the mission".

In Judge Robinson's view, the VCDR establishes an objective criterion for determining the status of a building as "premises of the mission". This criterion is that the building must be "used for the purposes of the mission", which is a pragmatic yardstick that does not include as one of its elements the power of the receiving State to object to the sending State's designation of a building as premises of the mission. He argues that the determination whether the criterion has been met is to be made free from the subjective views of either the sending State or the receiving State as to whether a building constitutes premises of the mission. In his view, in light of this objective criterion, it is therefore not surprising that the VCDR remains silent on the roles of sending and receiving States in the designation of mission premises.

Judge Robinson poses the following question: "How then is a controversy to be resolved when there is disagreement, as there is in this case, between the parties on this important question?" He responds that in light of the VCDR's relationship with the three fundamental purposes and principles of the United Nations Charter that are set out in its preamble, if there is disagreement, it is to be resolved, by consultation between the parties carried out in good faith, and if there is no resolution, then on the basis of third-party settlement. He notes that in this case Equatorial Guinea has sought judicial settlement on the basis of the compromissory clause in the Optional Protocol to the Convention concerning the Compulsory Settlement of Disputes. In his view, the Court is to resolve the dispute on the basis of the objective criterion set out in Article 1 (*i*) of the VCDR, and it is to arrive at its decision on the basis of that objective criterion, but having regard to the three fundamental principles and purposes set out in the preamble. He asserts that in the circumstances of this case, the Court had sufficient evidence to conclude that the building at 42 avenue Foch was at the relevant time used for the purposes of the mission of Equatorial Guinea. Consequently, he is unable to agree with the conclusion of the majority that the building at 42 avenue Foch has never acquired the status of "premises of the mission".

Finally, he concludes that the evidence before the Court establishes that the building at 42 avenue Foch acquired the status of "premises of the mission" within the meaning of Article 1 (*i*) of the VCDR on 4 October 2011 and that therefore, the action taken by France of entering, searching, attaching, and ordering the confiscation of the building breached its inviolability under Article 22 of the VCDR as "premises of the mission".

Judge Robinson ends by stressing that his opinion reflects his views on the merits of this case, which has been brought by Equatorial Guinea against France and is not to be seen as in any way reflecting his views on the merits of the case instituted by the French authorities in the French courts against Mr. Teodoro Nguema Obiang Mangue.

Dissenting opinion of Judge *ad hoc* Kateka

In his dissenting opinion, Judge *ad hoc* Kateka indicates his disagreement with the Court's finding that the building at 42 avenue Foch has never acquired the status of "premises of the mission" of the Republic of Equatorial Guinea in the French Republic within the meaning of Article 1 (*i*) of the Vienna Convention on Diplomatic Relations (hereinafter "VCDR" or "the Convention"). He also disagrees with the Court's declaration that France has not breached its obligations under the VCDR. Consequently, he has voted against the operative paragraph 126 of the Judgment, including the subparagraph where the majority rejects all other submissions of the Republic of Equatorial Guinea. Judge *ad hoc* Kateka is of the view that the building at 42 avenue Foch acquired the status of the diplomatic mission of Equatorial Guinea and that France breached its obligations under the VCDR by its measures of constraint against the building.

Judge *ad hoc* Kateka disagrees with the majority's reasoning on procedural and substantive grounds. He does not share the majority's reading into the VCDR of the consent requirement on which the Convention is silent and what he refers to as their putting aside of the "use" requirement which is mentioned in Article 1 (*i*) of the VCDR. In this connection, he argues that the Court has placed over-reliance on the preamble under the guise of interpreting the object and purpose of the VCDR. Substantively, he examines the circumstances for a property to acquire the status of "premises of the mission" within the meaning of Article 1 (*i*) of the VCDR. In that regard, he argues that the Judgment ignores the "use" condition which is found in Article 1 (*i*) of the VCDR and prefers the consent or non-objection condition, which he argues does not have a basis in the VCDR in relation to the condition for property to acquire the status of "premises of the mission". He discusses the test of timeliness, non-arbitrariness and non-discriminatory character advanced by the majority. In his view, the building meets the use requirement in Article 1 (*i*) of the VCDR and acquired the status of premises of the mission of Equatorial Guinea on 4 October 2011, but in any event, surely by 27 July 2012. Finally, he comments on the fate of the diplomatic premises of Equatorial Guinea once the Court has issued its Judgment on the merits.

More particularly, firstly, according to Judge *ad hoc* Kateka, it is regrettable that the majority placed so much emphasis on the preamble given that, while preambles have normative influence on the understanding of a treaty's meaning,

this influence is limited. He argues that use of preambles on their own in treaty interpretation, which are not supported by specific, operative provisions of a treaty, do not create substantive obligations for the parties to a treaty. He therefore concludes that, while preambles are of assistance in treaty interpretation, they should not be elevated to play a role that would change the meaning of a treaty to the detriment of what the drafters intended. Secondly, he examines the requirements under the VCDR for a property to acquire the status of "premises of the mission". He disagrees with the majority when it states that the consent or non-objection of the receiving State is required for the designation of a building as diplomatic mission, for two main reasons. First, the Convention is silent as to this requirement. It does not make the granting of diplomatic status subject to the consent or non-objection of the receiving State. Second, where the consent of the receiving State is required, it is so stated in the Convention. There are numerous provisions such as Articles 5 (1), 6, 7, 8 (2), 12, 19 (2), 27 (1) and 46 of the VCDR, which spell out the requirement of the consent or non-objection of the receiving State. Further, according to Judge *ad hoc* Kateka, the majority avoids the "use" condition which is provided for in the Convention. This "use" condition is referred to in paragraphs 107, 108 and 109 of the Judgment as actual assignment. According to Judge *ad hoc* Kateka, these are passing references in the context of justifying the majority's consent or non-objection argument and the criminal proceedings in France against Mr. Teodoro Nguema Obiang Mangue. Consequently, he regrets the selective invocation of a non-existing criterion of consent or non-objection, including its coupling to the test or standard of "timely, non-arbitrary and non-discriminatory character". Judge *ad hoc* Kateka also disagrees with the view of the majority that diplomatic privileges and immunities impose weighty obligations on the receiving State. In his view, reciprocity permeates diplomatic practice. Consequently, for Judge *ad hoc* Kateka, it is misleading for the majority to state that the receiving States have weighty or onerous obligations given that every State is both a sending and a receiving State. In his view, benefits for diplomatic missions are counterbalanced by the sanctions provided for in the VCDR.

Judge *ad hoc* Kateka also comments that the majority's use of the analogy between the *persona non grata* provision in Article 9 of the VCDR and lack of an equivalent mechanism for mission premises is misplaced. He argues that the Convention is a self-contained régime that concerns persons, premises and property, which must not be read in isolation. It must be read as an integrated régime. Thus, the sanctions available to a receiving State in respect of persons can also be used for solving disputes concerning premises or property. A receiving State can break off diplomatic relations with a sending State that disregards the rules in the VCDR. It can also use the *persona non grata* provision to expel diplomats of a State that offends against the VCDR régime.

Turning to the condition of "use" of the premises, he states that the majority does not consider it necessary to rule on the alleged "actual assignment" requirement for a building to benefit from the protections provided for in Article 22. According to him, in the majority's view, the dispute between the Parties can be resolved through an analysis of whether France's objection to the designation of the building at 42 avenue Foch as premises of Equatorial Guinea's diplomatic mission was "communicated in a timely manner, and was neither arbitrary nor discriminatory in character". He disagrees with this approach which ignores the condition of "use" mentioned in the VCDR, and with the adoption by the majority of the consent or non-objection condition on which the Convention is silent. He observes that the majority adopts the non-arbitrary, non-discriminatory test to rationalize the invocation of the "consent" condition which is not provided for in the VCDR.

Judge *ad hoc* Kateka points out that the majority does not interpret Article 1 (*i*) of the VCDR in detail. For Judge *ad hoc* Kateka, the definition in Article 1 (*i*) of the VCDR is more than descriptive. The term "used" in that provision indicates one of the conditions for establishing premises of the mission. He agrees with Equatorial Guinea that the term encompasses premises assigned for diplomatic purposes, that is, intended use. For him, given that planning for mission premises and their refurbishment can take time, he rejects the view that "actual" or "effective" assignment occurs only when a diplomatic mission has completely moved into the premises in question. He is of the view that a building is entitled to immunity on the basis of the intended use as diplomatic premises, when that use is followed by the actual use of the building as diplomatic premises. He asserts that the condition of use which is mentioned in Article 1 (*i*) of the Vienna Convention can be interpreted to include the intended use of a diplomatic mission in which the actions of Equatorial Guinea fall for the period from 4 October 2011 to 27 July 2012.

With respect to the status of the building at 42 avenue Foch in Paris, Judge *ad hoc* Kateka discusses exchanges between the Parties between 4 October 2011 and 27 July 2012. He considers that these two dates are crucial in determining the status of the building at 42 avenue Foch. He argues that, since the Court ruled against jurisdiction of the building at 42 avenue Foch as property of a foreign State under the Palermo Convention, the claims of Equatorial Guinea prior to 4 October 2011 fall outside the Court's jurisdiction and that the events of the period prior to 4 October 2011 are irrelevant and should not have been invoked by the majority.

He then examines the actions of France to determine whether the objection of France was timely, non-arbitrary and non-discriminatory. He opines that this is a standard that is difficult to justify. He further notes that the question whether the actions of France were timely is debatable. In relation to reasonableness, he concludes that the circumstances of the present case point to Equatorial Guinea being a victim of unjust treatment. He further observes that accusations of abuse of rights were made, although they have not been commented upon by the majority. Additionally, he notes that France cannot be absolved from accusations of arbitrariness and discrimination. For example, French authorities accepted a capital gains tax for the property at 42 avenue Foch when they had no intention to pass on title to the building to Equatorial Guinea.

Further, he opines that the commencement date of the designation of the building at 42 avenue Foch as diplomatic premises of Equatorial Guinea of 4 October 2011 should be

accepted. The period between this date and 27 July 2012 was used for planning the transfer of the premises from 29 boulevard de Courcelles to 42 avenue Foch in Paris. He observes that the French authorities, by their actions, have repeatedly recognized the building at 42 avenue Foch as the diplomatic mission of Equatorial Guinea. Several actions are cited by him in that regard. He argues that, in any event, even if the date of 4 October 2011 proves problematic, 27 July 2012 cannot be in doubt as the commencement date of the diplomatic status of Equatorial Guinea's mission at 42 avenue Foch. France concedes that its non-recognition of the building and the seizures of assets were done before 27 July 2012. It further states that, since that date, Equatorial Guinea has never reported any incidents that could have affected the peace of the building. In his view, this is tacit consent and recognition of the diplomatic status of the premises. In light of the above, he concludes that the building at 42 avenue Foch acquired the status of premises of the mission of Equatorial Guinea in France as of 4 October 2011 and that France is in breach of its obligations under the VCDR.

Finally, in considering the fate of the premises of the mission of Equatorial Guinea at 42 avenue Foch, Judge *ad hoc* Kateka observes that the premises at 42 avenue Foch have been recognized by the Court under the Order for provisional measures of December 2016 and that recognition/protection will end with the present Judgment on the merits. For him, the fate of these premises will be more uncertain when the appeal against the judgment of the *Cour d'appel* of 10 February 2020 comes to an end. Consequently, he opines that it is regrettable that the Court has left this matter unresolved.

241. ARBITRAL AWARD OF 3 OCTOBER 1899 (GUYANA V. VENEZUELA) [JURISDICTION OF THE COURT]

Judgment of 18 December 2020

On 18 December 2020, the International Court of Justice delivered its Judgment on the question of its jurisdiction in the case concerning the *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela).* The Court found that it had jurisdiction to entertain the Application filed by Guyana in so far as it concerns the validity of the Arbitral Award of 3 October 1899 and the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judge *ad hoc* Charlesworth; Registrar Gautier.

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History of the proceedings (paras. 1–22)

The Court recalls that, on 29 March 2018, the Government of the Co-operative Republic of Guyana (hereinafter "Guyana") filed in the Registry of the Court an Application instituting proceedings against the Bolivarian Republic of Venezuela (hereinafter "Venezuela") with regard to a dispute concerning "the legal validity and binding effect of the Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, of 3 October 1899" (hereinafter the "1899 Award" or the "Award"). In its Application, Guyana seeks to found the jurisdiction of the Court, under Article 36, paragraph 1, of the Statute of the Court, on Article IV, paragraph 2, of the "Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana" signed at Geneva on 17 February 1966 (hereinafter the "Geneva Agreement"). It explains that, pursuant to this latter provision, Guyana and Venezuela "mutually conferred upon the Secretary-General of the United Nations the authority to choose the means of settlement of the controversy and, on 30 January 2018, the Secretary-General exercised his authority by choosing judicial settlement by the Court".

On 18 June 2018, Venezuela stated that it considered that the Court lacked jurisdiction to hear the case and that Venezuela would not participate in the proceedings. The Court was of the view that in the circumstances of the case, it was necessary first of all to resolve the question of its jurisdiction, and that this question should accordingly be separately determined before any proceedings on the merits.

I. Introduction (paras. 23–28)

As a preliminary, the Court expresses its regret at the decision taken by Venezuela not to participate in the proceedings before it. The non-appearance of a party obviously has a negative impact on the sound administration of justice. In particular, the non-appearing party forfeits the opportunity to submit evidence and arguments in support of its own case and to counter the allegations of its opponent. For this reason, the Court does not have the assistance it might have derived from this information, yet it must nevertheless proceed and make any necessary findings in the case.

The Court emphasizes that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment, whilst recalling that, should the examination of the present case extend beyond the current phase, Venezuela, which remains a Party to the proceedings, will be able, if it so wishes, to appear before the Court to present its arguments.

The Court further explains that, though formally absent from the proceedings, non-appearing parties sometimes submit to the Court letters and documents in ways and by means not contemplated by its Rules. It notes that, in this instance, Venezuela sent the Court a Memorandum, which the Court takes into account to the extent that it finds it appropriate in discharging its duty, under Article 53 of the Statute, to satisfy itself as to its jurisdiction to entertain the Application.

II. Historical and factual background (paras. 29–60)

The Court then turns to the historical and factual background of the case. In this regard, it observes that, located in the north-east of South America, Guyana is bordered by Venezuela to the west. At the time the present dispute arose, Guyana was still a British colony, known as British Guiana. It gained independence from the United Kingdom on 26 May 1966. The Court next explains that the dispute between Guyana and Venezuela dates back to a series of events that took place during the second half of the nineteenth century, each of which it describes in turn.

A. The Washington Treaty and the 1899 Award (paras. 31–34)

The Court recalls that in the nineteenth century, the United Kingdom and Venezuela both claimed the territory comprising the area between the mouth of the Essequibo River in the east and the Orinoco River in the west.

In the 1890s, the United States of America encouraged both parties to submit their territorial claims to binding arbitration. The exchanges between the United Kingdom and Venezuela eventually led to the signing in Washington of a treaty of arbitration entitled the "Treaty between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary between the Colony of British Guiana and the United States of Venezuela" (hereinafter the "Washington Treaty") on 2 February 1897.

The arbitral tribunal established under this Treaty rendered its Award on 3 October 1899. This decision granted the entire mouth of the Orinoco River and the land on either side to Venezuela; it granted to the United Kingdom the land to the east extending to the Essequibo River. The following year, a joint Anglo-Venezuelan commission was charged with demarcating

the boundary established by the 1899 Award. The commission carried out that task between November 1900 and June 1904. On 10 January 1905, after the boundary had been demarcated, the British and Venezuelan commissioners produced an official boundary map and signed an agreement accepting, *inter alia*, that the co-ordinates of the points listed were correct.

B. Venezuela's repudiation of the 1899 Award and the search for a settlement of the dispute (paras. 35–39)

The Court notes that on 14 February 1962, Venezuela informed the Secretary-General of the United Nations that it considered there to be a dispute between itself and the United Kingdom "concerning the demarcation of the frontier between Venezuela and British Guiana", that the 1899 Award had been "the result of a political transaction carried out behind Venezuela's back and sacrificing its legitimate rights", and that it therefore could not recognize the Award.

The Government of the United Kingdom, for its part, asserted that "the Western boundary of British Guiana with Venezuela [had been] finally settled by the award which the arbitral tribunal announced on 3 October 1899", and that it could not "agree that there [could] be any dispute over the question settled by the award". The United Kingdom nonetheless stated that it was open to discussions through diplomatic channels.

On 16 November 1962, with the authorization of the representatives of the United Kingdom and Venezuela, the Chairman of the Fourth Committee of the United Nations General Assembly declared that the Governments of the two States (the Government of the United Kingdom acting with the full concurrence of the Government of British Guiana) would examine the "documentary material" relating to the 1899 Award (hereinafter the "Tripartite Examination"). This Examination took place from 1963 to 1965. It was completed on 3 August 1965 with the exchange of the experts' reports. While Venezuela's experts continued to consider the Award to be null and void, the experts of the United Kingdom were of the view that there was no evidence to support that position. On meeting in London in December 1965 to discuss a settlement of the dispute, each party maintained its position on the matter.

C. The signing of the 1966 Geneva Agreement (paras. 40–44)

The Court next recalls that, following the failure of the talks in London, the three delegations met again in Geneva in February 1966 and that, on 17 February 1966, they signed the Geneva Agreement, the English and Spanish texts of which are authoritative. On 26 May 1966, Guyana, having attained independence, became a party to the Geneva Agreement, alongside the Governments of the United Kingdom and Venezuela.

The Geneva Agreement provides, first, for the establishment of a Mixed Commission to seek a settlement of the controversy between the parties (Articles I and II). Article IV, paragraph 1, further states that, should this Commission fail in its task, the Governments of Guyana and Venezuela shall choose one of the means of peaceful settlement provided for in Article 33 of the United Nations Charter. Finally, in accordance with Article IV, paragraph 2, should those Governments fail to reach agreement, the decision as to the means of settlement shall be made by an appropriate international organ upon which they both agree, or, failing that, by the Secretary-General of the United Nations.

D. The implementation of the Geneva Agreement (paras. 45–60)

1. The Mixed Commission (1966–1970) (paras. 45–47)

The Mixed Commission was established in 1966, pursuant to Articles I and II of the Geneva Agreement. During the Commission's mandate, representatives from Guyana and Venezuela met on several occasions. However, the Mixed Commission reached the end of its mandate in 1970 without having arrived at a solution.

2. The 1970 Protocol of Port of Spain and the moratorium put in place (paras. 48–53)

Since no solution was identified through the Mixed Commission, it fell to Venezuela and Guyana, under Article IV of the Geneva Agreement, to choose one of the means of peaceful settlement provided for in Article 33 of the United Nations Charter. However, in view of the disagreements between the Parties, a moratorium on the dispute settlement process was adopted in a protocol to the Geneva Agreement (the "Protocol of Port of Spain"), signed on 18 June 1970, the same day that the Mixed Commission delivered its final report. Article III of the Protocol provided for the operation of Article IV of the Geneva Agreement to be suspended so long as the Protocol remained in force. The Protocol was, pursuant to its Article V, to remain in force for an initial period of twelve years, which could be renewed thereafter.

In December 1981, Venezuela announced its intention to terminate the Protocol of Port of Spain. Consequently, the application of Article IV of the Geneva Agreement was resumed from 18 June 1982.

Pursuant to Article IV, paragraph 1, of the Geneva Agreement, the Parties attempted to reach an agreement on the choice of one of the means of peaceful settlement provided for in Article 33 of the Charter. However, they failed to do so within the three-month time-limit set out in Article IV, paragraph 2. They also failed to agree on the choice of an appropriate international organ to decide on the means of settlement, as provided for in Article IV, paragraph 2, of the Geneva Agreement.

The Parties therefore proceeded to the next step, referring the decision on the means of settlement to the Secretary-General of the United Nations.

After the matter was referred to him by the Parties, the Secretary-General, Mr. Javier Pérez de Cuéllar, agreed by a letter of 31 March 1983 to undertake the responsibility conferred upon him under Article IV, paragraph 2, of the Geneva Agreement.

After one of his representatives had held meetings and discussions with the Parties, in early 1990 the Secretary-General chose the good offices process as the appropriate means of settlement.

3. From the good offices process (1990–2014 and 2017) to the seisin of the Court (paras. 54–60)

Between 1990 and 2014, the good offices process was led by three Personal Representatives appointed by successive

Secretaries-General. Regular meetings were held during this period between the representatives of both States and the Secretary-General.

In September 2015, the Secretary-General held a meeting with the Heads of State of Guyana and Venezuela, before issuing, on 12 November 2015, a document in which he informed the Parties that "[i]f a practical solution to the controversy [were] not found before the end of his tenure, [he] intend[ed] to initiate the process to obtain a final and binding decision from the International Court of Justice".

In December 2016, the Secretary-General announced that he had decided to continue the good offices process for a further year.

After taking office on 1 January 2017, the new Secretary-General, Mr. António Guterres, continued the good offices process for a final year, in conformity with his predecessor's decision. In letters to both Parties dated 30 January 2018, the Secretary-General stated that he had "carefully analyzed the developments in the good offices process during the course of 2017" and announced that, "significant progress not having been made toward arriving at a full agreement for the solution of the controversy", he had "chosen the International Court of Justice as the means that is now to be used for its solution".

On 29 March 2018, Guyana filed its Application in the Registry of the Court.

III. Interpretation of the Geneva Agreement (paras. 61–101)

The Court recalls the three-stage process established by the Geneva Agreement and notes that the Parties failed to reach agreement on the choice of one of the means of peaceful settlement set out in Article 33 of the Charter, as provided for by Article IV, paragraph 1, of the Geneva Agreement. They then proceeded to the next step and referred this decision to the Secretary-General of the United Nations, pursuant to Article IV, paragraph 2, of the Agreement. The Court must thus interpret this provision in order to determine whether, in entrusting the decision as to the choice of one of the means of settlement provided for in Article 33 of the Charter to the Secretary-General, the Parties consented to settle their controversy by, *inter alia*, judicial means. If it finds that they did, the Court will have to determine whether this consent is subject to any conditions. As part of the interpretation of Article IV, paragraph 2, of the Geneva Agreement, the Court first examines the use of the term "controversy" in this provision.

A. The "controversy" under the Geneva Agreement (paras. 64–66)

For the purpose of identifying the "controversy" for the resolution of which the Geneva Agreement was concluded, the Court examines the use of this term in this instrument.

The Court notes, in particular, that in the conclusion and implementation of the Geneva Agreement, the parties have expressed divergent views as to the validity of the 1899 Award and the implications of this question for their frontier. Thus, Article I of the Geneva Agreement defines the mandate of the Mixed Commission as seeking satisfactory solutions for the practical settlement of "the controversy between Venezuela and the United Kingdom which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void". That contention by Venezuela was consistently opposed by the United Kingdom in the period from 1962 until the adoption of the Geneva Agreement on 17 February 1966, and subsequently by Guyana after it became a party to the Geneva Agreement upon its independence, in accordance with Article VIII thereof.

It follows, in the view of the Court, that the object of the Geneva Agreement was to seek a solution to the frontier dispute between the parties that originated from their opposing views as to the validity of the 1899 Award. This is also indicated in the title of the Geneva Agreement, which is the "Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana", and from the wording of the last paragraph of its preamble. The same idea is implicit in Article V, paragraph 1, of the Geneva Agreement, which refers to the preservation of the parties' respective rights and claims to such territorial sovereignty.

Following its analysis, the Court concludes that the "controversy" that the parties agreed to settle through the mechanism established under the Geneva Agreement concerns the question of the validity of the 1899 Award, as well as its legal implications for the boundary line between Guyana and Venezuela.

B. Whether the Parties gave their consent to the judicial settlement of the controversy under article IV, paragraph 2, of the Geneva Agreement (paras. 67–88)

The Court notes that, unlike other provisions in treaties which refer directly to judicial settlement by the Court, Article IV, paragraph 2, of the Geneva Agreement refers to a decision by a third party with regard to the choice of the means of settlement. The Court therefore begins by ascertaining whether the Parties conferred on that third party, in this instance the Secretary-General, the authority to choose, by a decision which is binding on them, the means of settlement of their controversy.

1. Whether the decision of the Secretary-General has a binding character (paras. 68–78)

To interpret the Geneva Agreement, the Court applies the rules on treaty interpretation to be found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Although that convention is not in force between the Parties and is not, in any event, applicable to instruments concluded before it entered into force, such as the Geneva Agreement, the Court recalls that it is well established that these articles reflect rules of customary international law.

The first sentence of Article IV, paragraph 2, of the Geneva Agreement provides that the Parties "shall refer the decision … to the Secretary-General". The Court considers that this wording indicates that the Parties made a legal commitment to comply with the decision of the third party on whom they conferred such authority, in this instance the Secretary-General of the United Nations. It then notes that the object and purpose of the Geneva Agreement is to ensure a definitive resolution of the controversy between the Parties.

In view of the foregoing, the Court considers that the Parties conferred on the Secretary-General the authority to choose, by a decision which is binding on them, the means to be used for the settlement of their controversy. This conclusion is also supported by the position of Venezuela set out in its Exposition of Motives for the Draft Law Ratifying the Protocol of Port of Spain of 22 June 1970, which recognizes the possibility that "the determination of the means of dispute settlement, would have left the hands of the two directly interested Parties, to be decided by an international institution chosen by them, or failing that, by the Secretary-General of the United Nations". It is further supported by the circumstances in which the Geneva Agreement was concluded. In this regard, the Court observes that, in his statement of 17 March 1966 before the National Congress on the occasion of the ratification of the Geneva Agreement, the Venezuelan Minister for Foreign Affairs, in describing the discussions that had taken place at the Geneva Conference, asserted that "[t]he only role entrusted to the Secretary-General of the United Nations [was] to indicate to the parties the means of peaceful settlement of disputes … provided in Article 33". He went on to state that, having rejected the British proposal to entrust that role to the General Assembly of the United Nations, "Venezuela [had] then suggested giving this role to the Secretary-General".

2. Whether the Parties consented to the choice by the Secretary-General of judicial settlement (paras. 79–88)

The Court then turns to the interpretation of the last sentence of Article IV, paragraph 2, of the Geneva Agreement, which provides that the Secretary-General "shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted".

Given that Article IV, paragraph 2, of the Geneva Agreement refers to Article 33 of the Charter of the United Nations, which includes judicial settlement as a means of dispute resolution, the Court considers that the Parties accepted the possibility of the controversy being settled by that means. It is of the opinion that if they had wished to exclude such a possibility, the Parties could have done so during their negotiations. Equally, instead of referring to Article 33 of the Charter, they could have set out the means of settlement envisaged while omitting judicial settlement, which they did not do either.

The Court notes that, according to the wording of Article IV, paragraph 2, of the Geneva Agreement, the Parties conferred on the Secretary-General the authority to choose among the means of dispute settlement provided for in Article 33 of the Charter "until the controversy has been resolved". It observes that Article 33 of the Charter includes, on the one hand, political and diplomatic means, and, on the other, adjudicatory means such as arbitration or judicial settlement. The willingness of the Parties to resolve their controversy definitively is indicated by the fact that the means listed include arbitration and judicial settlement, which are by nature binding. The phrase "and so on until the controversy has been resolved" also suggests that the Parties conferred on the Secretary-General the authority to choose the most appropriate means for a definitive resolution of the controversy. The Court considers that the Secretary-General's choice of a means that leads to the resolution of the controversy fulfils his responsibility under Article IV, paragraph 2, of the Geneva Agreement, in accordance with the object and purpose of that instrument.

In light of the above analysis, the Court concludes that the means of dispute settlement at the disposal of the Secretary-General, to which the Parties consented under Article IV, paragraph 2, of the Geneva Agreement, include judicial settlement.

The Court then notes that this conclusion is not called into question by the phrase "or until all the means of peaceful settlement there contemplated have been exhausted" at paragraph 2 of that Article, which might suggest that the Parties had contemplated the possibility that the choice, by the Secretary-General, of the means provided for in Article 33 of the Charter, which include judicial settlement, would not lead to a resolution of the controversy. There are various reasons why a judicial decision, which has the force of *res judicata* and clarifies the rights and obligations of the parties, might not in fact lead to the final settlement of a dispute. It suffices for the Court to observe that, in this case, a judicial decision declaring the 1899 Award to be null and void without delimiting the boundary between the Parties might not lead to the definitive resolution of the controversy, which would be contrary to the object and purpose of the Geneva Agreement.

In light of the above, the Court concludes that the Parties consented to the judicial settlement of their controversy.

C. Whether the consent given by the Parties to the judicial settlement of their controversy under Article IV, paragraph 2, of the Geneva Agreement is subject to any conditions (paras. 89–100)

The Court observes that, in treaties by which parties consent to the judicial settlement of a dispute, it is not unusual for them to subject such consent to conditions which must be regarded as constituting the limits thereon. It must therefore ascertain whether the Parties' consent to the means of judicial settlement, as expressed in Article IV, paragraph 2, of the Geneva Agreement, is subject to certain conditions.

Noting that the Parties do not dispute that the Secretary-General is required to establish that the means previously chosen have not "le[d] to a solution of the controversy" before "choos[ing] another of the means stipulated in Article 33 of the Charter of the United Nations", the Court interprets only the terms of the second sentence of this provision, which provides that, if the means chosen do not lead to a resolution of the controversy, "the Secretary-General … shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, *and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted*" (emphasis added).

The Court must determine whether, under Article IV, paragraph 2, of the Geneva Agreement, the Parties' consent to the settlement of their controversy by judicial means is subject to the condition that the Secretary-General follow the order

in which the means of settlement are listed in Article 33 of the United Nations Charter.

The Court considers that the ordinary meaning of this provision indicates that the Secretary-General is called upon to choose any of the means listed in Article 33 of the Charter but is not required to follow a particular order in doing so.

In the view of the Court, an interpretation of Article IV, paragraph 2, of the Geneva Agreement whereby the means of settlement should be applied successively, in the order in which they are listed in Article 33 of the Charter, could prove contradictory to the object and purpose of the Geneva Agreement for a number of reasons. First, the exhaustion of some means would render recourse to other means pointless. Moreover, such an interpretation would delay resolution of the controversy, since some means may be more effective than others in light of the circumstances surrounding the controversy between the Parties. In contrast, the flexibility and latitude afforded to the Secretary-General in the exercise of the decision-making authority conferred on him contribute to the aim of finding a practical, effective and definitive resolution of the controversy.

The Court also recalls that the Charter of the United Nations does not require the exhaustion of diplomatic negotiations as a precondition for the decision to resort to judicial settlement.

The Court finally notes that it emerges from the Parties' subsequent practice that they acknowledged that the Secretary-General was not required to follow the order in which the means of settlement are listed in Article 33 of the Charter but instead had the authority to give preference to one means over another.

Regarding the question of consultation, the Court is of the view that nothing in Article IV, paragraph 2, of the Geneva Agreement requires the Secretary-General to consult with the Parties before choosing a means of settlement. It also observes that, although the successive Secretaries-General consulted with the Parties, it is clear from the various communications of the Secretaries-General that the sole aim of such consultation was to gather information from the Parties in order to choose the most appropriate means of settlement.

The Court concludes that, having failed to reach an agreement, the Parties entrusted to the Secretary-General, pursuant to Article IV, paragraph 2, of the Geneva Agreement, the role of choosing any of the means of settlement set out in Article 33 of the Charter. In choosing the means of settlement, the Secretary-General is not required, under Article IV, paragraph 2, to follow a particular order or to consult with the Parties on that choice. Finally, the Parties also agreed to give effect to the decision of the Secretary-General.

IV. Jurisdiction of the Court (paras. 102–115)

As the Court has established, the Parties, by virtue of Article IV, paragraph 2, of the Geneva Agreement, accepted the possibility of the controversy being resolved by means of judicial settlement. The Court therefore examines whether, by choosing the International Court of Justice as the means of judicial settlement for the controversy between Guyana and Venezuela, the Secretary-General acted in accordance with that provision. If it finds that he did, the Court will have to determine the legal effect of the decision of the Secretary-General of 30 January 2018 on the jurisdiction of the Court under Article 36, paragraph 1, of its Statute.

A. The conformity of the decision of the Secretary-General of 30 January 2018 with Article IV, paragraph 2, of the Geneva Agreement (paras. 103–109)

Having recalled the content of the letters that the Secretary-General addressed on 30 January 2018 to the Presidents of Guyana and Venezuela in relation to the settlement of the controversy, the Court first notes that, in announcing that he had chosen the International Court of Justice as the next means of settlement to be used for the resolution of the controversy, the Secretary-General expressly relied upon Article IV, paragraph 2, of the Geneva Agreement. The Court further notes that, if the means of settlement previously chosen does not lead to a solution of the controversy, this provision calls upon the Secretary-General to choose another of the means of settlement provided for in Article 33 of the Charter of the United Nations, without requiring him to follow any particular sequence.

The Court is of the view that the means previously chosen by the Secretary-General "d[id] not lead to a solution of the controversy" within the terms of Article IV, paragraph 2. By 2014, the Parties had already been engaged in the good offices process within the framework of the Geneva Agreement for over twenty years, under the supervision of three Personal Representatives appointed by successive Secretaries-General, in order to find a solution to the controversy. As a result, in his decision of 30 January 2018, the Secretary-General stated that, no significant progress having been made towards arriving at a full agreement for the solution of the controversy in the good offices process, he had "chosen the International Court of Justice as the means that is now to be used for its solution", thereby fulfilling his responsibility to choose another means of settlement among those set out in Article 33 of the Charter of the United Nations.

Neither Article IV, paragraph 2, of the Geneva Agreement nor Article 33 of the Charter of the United Nations expressly mentions the International Court of Justice. However, the Court, being the "principal judicial organ of the United Nations" (Article 92 of the Charter), constitutes a means of "judicial settlement" within the meaning of Article 33 of the Charter. The Secretary-General could therefore choose the Court, on the basis of Article IV, paragraph 2, of the Geneva Agreement, as the judicial means of settlement of the controversy between the Parties.

The Court notes that, moreover, the circumstances surrounding the conclusion of the Geneva Agreement, which include ministerial statements and parliamentary debates, indicate that recourse to the International Court of Justice was contemplated by the parties during their negotiations.

In light of the foregoing, the Court is of the view that, by concluding the Geneva Agreement, both Parties accepted the possibility that, under Article IV, paragraph 2, of that instrument, the Secretary-General could choose judicial settlement by the International Court of Justice as one of the means listed in Article 33 of the Charter of the United Nations for the resolution of the controversy. The decision of the Secretary-General

of 30 January 2018 was therefore taken in conformity with the terms of Article IV, paragraph 2, of the Geneva Agreement.

The Court observes that the fact that the Secretary-General invited Guyana and Venezuela, if they so wished, "to attempt to resolve the controversy through direct negotiations, in parallel to a judicial process", and his offer of good offices to that end, do not affect the conformity of the decision with Article IV, paragraph 2, of the Geneva Agreement. The Court has already explained in the past that parallel attempts at settlement of a dispute by diplomatic means do not prevent it from being dealt with by the Court. In the present case, the Secretary-General simply reminded the Parties that negotiations were a means of settlement that remained available to them while the dispute was pending before the Court.

B. The legal effect of the decision of the Secretary-General of 30 January 2018 (paras. 110–115)

The Court then turns to the legal effect of the decision of the Secretary-General on its jurisdiction under Article 36, paragraph 1, of its Statute, which provides that "[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force".

The Court recalls that "its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them".

Both this Court and its predecessor have previously observed in a number of cases that the parties are not bound to express their consent to the Court's jurisdiction in any particular form. Consequently, there is nothing in the Court's Statute to prevent the Parties from expressing their consent through the mechanism established under Article IV, paragraph 2, of the Geneva Agreement.

The Court recalls that it must however satisfy itself that there is an unequivocal indication of the desire of the parties to a dispute to accept the jurisdiction of the Court in a voluntary and indisputable manner.

The Court explains that Venezuela has argued that the Geneva Agreement is not sufficient in itself to found the jurisdiction of the Court and that the subsequent consent of the Parties is required even after the decision of the Secretary-General to choose the International Court of Justice as the means of judicial settlement. However, the decision taken by the Secretary-General in accordance with the authority conferred upon him under Article IV, paragraph 2, of the Geneva Agreement would not be effective if it were subject to the further consent of the Parties for its implementation. Moreover, an interpretation of Article IV, paragraph 2, that would subject the implementation of the decision of the Secretary-General to further consent by the Parties would be contrary to this provision and to the object and purpose of the Geneva Agreement, which is to ensure a definitive resolution of the controversy, since it would give either Party the power to delay indefinitely the resolution of the controversy by withholding such consent.

For all these reasons, the Court concludes that, by conferring on the Secretary-General the authority to choose the appropriate means of settlement of their controversy, including the possibility of recourse to judicial settlement by the International Court of Justice, Guyana and Venezuela consented to its jurisdiction. The text, the object and purpose of the Geneva Agreement, as well as the circumstances surrounding its conclusion, support this finding. It follows that the consent of the Parties to the jurisdiction of the Court is established in the circumstances of this case.

V. Seisin of the Court (paras. 116–121)

The Court next turns to the question whether it has been validly seised by Guyana.

In this regard, it recalls that its seisin is "a procedural step independent of the basis of jurisdiction invoked and, as such, is governed by the Statute and the Rules of Court". Thus, for the Court to be able to entertain a case, the relevant basis of jurisdiction needs to be supplemented by the necessary act of seisin.

In the present case, the Court is of the view that an agreement of the Parties to seise the Court jointly would only be necessary if they had not already consented to its jurisdiction. However, having concluded above that the consent of the Parties to the jurisdiction of the Court is established in the circumstances of this case, either Party could institute proceedings by way of a unilateral application under Article 40 of the Statute of the Court.

In light of the foregoing, the Court concludes that it has been validly seised of the dispute between the Parties by way of the Application of Guyana.

VI. Scope of the jurisdiction of the Court (paras. 122–137)

Having concluded that it has jurisdiction to entertain Guyana's Application and that it is validly seised of this case, the Court ascertains whether all the claims advanced by Guyana fall within the scope of its jurisdiction.

The Court notes that, in its Application, Guyana has made certain claims concerning the validity of the 1899 Award and other claims arising from events that occurred after the conclusion of the Geneva Agreement. Consequently, the Court first ascertains whether Guyana's claims in relation to the validity of the 1899 Award about the frontier between British Guiana and Venezuela fall within the subject-matter of the controversy that the Parties agreed to settle through the mechanism set out in Articles I to IV of the Geneva Agreement, and whether, as a consequence, the Court has jurisdiction *ratione materiae* to entertain them. Secondly, it will have to determine whether Guyana's claims arising from events that occurred after the conclusion of the Geneva Agreement fall within the scope of the Court's jurisdiction *ratione temporis*.

With regard to its jurisdiction *ratione materiae*, the Court recalls that Article I of the Geneva Agreement refers to the controversy that has arisen between the parties to the Geneva Agreement as a result of Venezuela's contention that the 1899 Award about the frontier between British Guiana and Venezuela is null and void. As stated above, the subject-matter of the controversy which the parties agreed to settle under the Geneva Agreement relates to the validity of the 1899 Award and its implications for the land boundary between Guyana and Venezuela. The opposing views held by the parties to the Geneva Agreement on the validity of the 1899 Award is

demonstrated by the use of the words "Venezuelan contention" in Article I of the Geneva Agreement. The word "contention", in accordance with the ordinary meaning to be given to it in the context of this provision, indicates that the alleged nullity of the 1899 Award was a point of disagreement between the parties to the Geneva Agreement for which solutions were to be sought. This in no way implies that the United Kingdom or Guyana accepted that contention before or after the conclusion of the Geneva Agreement. The Court therefore considers that, contrary to Venezuela's argument, the use of the word "contention" points to the opposing views between the parties to the Geneva Agreement regarding the validity of the 1899 Award.

This interpretation is consistent with the object and purpose of the Geneva Agreement, which was to ensure a definitive resolution of the dispute between Venezuela and the United Kingdom over the frontier between Venezuela and British Guiana, as indicated by its title and preamble. Indeed, it would not be possible to resolve definitively the boundary dispute between the Parties without first deciding on the validity of the 1899 Award about the frontier between British Guiana and Venezuela.

The Court considers that this interpretation is also confirmed by the circumstances surrounding the conclusion of the Geneva Agreement, and by the statement of the Minister for Foreign Affairs of Venezuela before the Venezuelan National Congress shortly after the conclusion of that Agreement. He stated in particular that "[i]f the nullity of the Award of 1899, be it through agreement between the concerned Parties or through a decision by any competent international authority as per Agreement, is declared then the question will go back to its original state".

The Court therefore concludes that Guyana's claims concerning the validity of the 1899 Award about the frontier between British Guiana and Venezuela and the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela fall within the subject-matter of the controversy that the Parties agreed to settle through the mechanism set out in Articles I to IV of the Geneva Agreement, in particular Article IV, paragraph 2, thereof, and that, as a consequence, the Court has jurisdiction *ratione materiae* to entertain these claims.

With respect to its jurisdiction *ratione temporis*, the Court notes that the scope of the dispute that the Parties agreed to settle through the mechanism set out in Articles I to IV of the Geneva Agreement is circumscribed by Article I thereof, which refers to "the controversy … which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 … is null and void". The use of the present perfect tense in Article I indicates that the parties understood the controversy to mean the dispute which had crystallized between them at the time of the conclusion of the Geneva Agreement. This interpretation is not contradicted by the equally authoritative Spanish text. It is reinforced by the use of the definite article in the title of the Agreement ("Agreement to resolve *the* controversy"; in Spanish, "Acuerdo para resolver *la* controversia"), the reference in the preamble to the resolution of "any *outstanding* controversy" (in Spanish, "cualquiera controversia *pendiente*"), as well as the reference to the Agreement being reached "to resolve the *present* controversy" (in Spanish, "para resolver la *presente* controversia") (emphases added). The Court's jurisdiction is therefore limited *ratione temporis* to the claims of either Party that existed on the date the Geneva Agreement was signed, on 17 February 1966. Consequently, Guyana's claims arising from events that occurred after the signature of the Geneva Agreement do not fall within the scope of the jurisdiction of the Court *ratione temporis*.

In light of the foregoing, the Court concludes that it has jurisdiction to entertain Guyana's claims concerning the validity of the 1899 Award about the frontier between British Guiana and Venezuela and the related question of the definitive settlement of the land boundary dispute between the territories of the Parties.

VII. Operative clause (para. 138)

The Court,

(1) By twelve votes to four,

Finds that it has jurisdiction to entertain the Application filed by the Co-operative Republic of Guyana on 29 March 2018 in so far as it concerns the validity of the Arbitral Award of 3 October 1899 and the related question of the definitive settlement of the land boundary dispute between the Co-operative Republic of Guyana and the Bolivarian Republic of Venezuela;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Cançado Trindade, Donoghue, Sebutinde, Bhandari, Robinson, Crawford, Salam, Iwasawa; Judge *ad hoc* Charlesworth;

Against: Judges Abraham, Bennouna, Gaja, Gevorgian;

(2) Unanimously,

Finds that it does not have jurisdiction to entertain the claims of the Co-operative Republic of Guyana arising from events that occurred after the signature of the Geneva Agreement.

*

Judge Tomka appends a declaration to the Judgment of the Court; Judges Abraham and Bennouna append dissenting opinions to the Judgment of the Court; Judges Gaja and Robinson append declarations to the Judgment of the Court; Judge Gevorgian appends a dissenting opinion to the Judgment of the Court.

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Declaration of Judge Tomka

Having voted in favour of the conclusions reached by the Court, Judge Tomka wishes to offer some remarks on this case which is rather unusual. Although the 1966 Geneva Agreement, and in particular Article IV, paragraph 2, thereof, do not fit the usual moulds of special agreements or compromissory clauses providing for dispute resolution by the Court, the fact remains that the Geneva Agreement provides for a set of procedures and mechanisms aiming at the resolution of the dispute opposing Guyana and Venezuela.

In the opinion of Judge Tomka, the Parties consented to the jurisdiction of the International Court of Justice by concluding the Geneva Agreement, should the Secretary-General choose it as a means of settlement. The Court's jurisdiction *ratione materiae*, being based on that Agreement, encompasses the controversy over the frontier, including the issue of the validity of the 1899 Arbitral Award.

By upholding its jurisdiction, the Court provides an opportunity for the Respondent to substantiate its contention that the 1899 Arbitral Award is null and void. The issue of the validity of the 1899 Arbitral Award is a legal question *par excellence* and no organ other than a judicial one is more appropriate to determine it. In the view of Judge Tomka, the Secretary-General of the United Nations made a sound decision when he chose the Court as a means of settlement of the dispute opposing Guyana and Venezuela.

It is important for the Parties to understand that, should the 1899 Arbitral Award be declared null and void by the Court, it will be in need of further submissions about the course of the land boundary, in the form of evidence and arguments, in order for it to fully resolve the dispute opposing them.

Dissenting opinion of Judge Abraham

Judge Abraham considers that there is no title of jurisdiction allowing the Court to entertain the dispute between Venezuela and Guyana upon the unilateral application of the latter. In his view, the majority is correct in holding that the Secretary-General had the authority to choose the International Court of Justice as the next means of settlement within the meaning of Article IV, paragraph 2, of the Geneva Agreement, and indeed that he was not obliged to follow any particular order in his choice of successive means. Nor is there any doubt, according to Judge Abraham, that the Secretary-General's choice is not a mere recommendation without binding effect, but that it creates certain obligations for the parties to the Agreement.

Judge Abraham believes, however, that these elements do not permit the finding that there is, in this instance, "an unequivocal indication of the desire of the parties to a dispute to accept the jurisdiction of the Court in a voluntary and indisputable manner". He disagrees in particular with the majority's understanding of the object and purpose of the Agreement. To his mind, Article IV, paragraph 2, does indeed express the parties' acceptance of the idea that their dispute may ultimately be resolved by means of judicial settlement; but it does not establish a binding mechanism aimed at ensuring that such a resolution will be obtained, by negotiation if possible, or by judicial means if necessary. On the contrary, it is clear from several provisions of the Agreement that the parties accepted the possibility that its implementation would not necessarily result in the settlement of their dispute. That is true of Article IV, paragraph 2, according to which the Secretary-General must choose means of settlement one after another, "and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted". In concluding the Agreement, the parties therefore did not intend to give their consent in advance to judicial settlement. In the absence of such consent, the Court should have declined jurisdiction.

Dissenting opinion of Judge Bennouna

In the case brought by Guyana against Venezuela concerning a dispute on the validity of the Arbitral Award of 3 October 1899, the Court declared itself competent to entertain Guyana's Application on the basis of Article IV, paragraph 2, of the Geneva Agreement of 17 February 1966. According to Judge Bennouna, this provision cannot establish the jurisdiction of the Court, since the Parties have not clearly and unequivocally consented to the settlement of their dispute by the Court. Rather, it is a provision on the choice of means. Under this provision, the Parties vested in the Secretary-General the power to choose one of the means for the settlement of their dispute, from among those provided for in Article 33 of the Charter of the United Nations, "until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted". Judge Bennouna is of the opinion that the Court's interpretation favoured the object and purpose of the Agreement, namely that of reaching a final settlement of the dispute, over the ordinary meaning of the second alternative of this provision, depriving the latter of its *effet utile*. In so doing, the Court concluded that the Secretary-General could consent in lieu of the Parties to the jurisdiction of the Court. This is a delegation without precedent in international practice and one that would not be subject to any temporal limitation. The Secretary-General himself was not persuaded by the authority conferred on him by the Parties, as is clear from his letter to them of 30 January 2018, in which he identified the Court as the next means of settlement, while offering his good offices as a complementary procedure which "could contribute to the use of the selected means of peaceful settlement". Also in the context of its teleological interpretation of the Geneva Agreement, the Court concluded that it had jurisdiction not only over the dispute concerning the validity of the Arbitral Award of 3 October 1899, but also over another quite distinct dispute, namely that concerning the delimitation of the land boundary between the two States. Judge Bennouna does not share this conclusion which, in his view, ignores the ordinary meaning of the terms contained in the Geneva Agreement, in so far as the only dispute envisaged by that instrument concerns the validity of the Arbitral Award of 3 October 1899.

Declaration of Judge Gaja

Judge Gaja concurs with the view of the majority that the Parties are bound to submit their dispute to the Court in pursuance of Article IV, paragraph 2, of the 1966 Geneva Agreement and of the Secretary-General's choice of judicial settlement as the means to be used. However, according to Judge Gaja, the Secretary-General's decision is not sufficient to confer jurisdiction on the Court. Article IV, paragraph 2, empowers the Secretary-General to select any of the means of settlement referred to in Article 33 of the United Nations Charter, but leaves the implementation of this decision to the Parties. The inclusion of judicial settlement among the means of settling the dispute

under the Geneva Agreement cannot be construed as implying the Parties' consent to the Court's jurisdiction.

Declaration of Judge Robinson

1. In his declaration, Judge Robinson states that he is in agreement with the finding in the *dispositif* of the Judgment but wished to make some brief comments on the case.

2. According to Judge Robinson, in the Geneva Agreement, sequence and stages are everything. He states that the sequence follows a path along the stages of various means of settlement and that, in this process, the failure of a particular means of settlement to resolve the controversy sets the stage for the employment of another means of settlement for the same purpose. For Judge Robinson, in the circumstances of this case, this approach leads to two results. First, in the final stage, the means of settlement selected is such that it will resolve the controversy. Second, by the time the final stage of Article IV (2) has been reached, the Parties have consented to accept the means of settlement selected by the Secretary-General, that is, the International Court of Justice, thereby consenting to the jurisdiction of the Court over the controversy.

3. According to Judge Robinson, this result has a special significance since the Geneva Agreement does not have the usual compromissory clause in a treaty empowering a party to submit to the Court, a dispute concerning its interpretation or application. He states that a compromissory clause reflects the consent of the parties to a treaty to the jurisdiction of the Court. However, Judge Robinson notes that it is settled that consent to the jurisdiction of the Court does not have to be expressed in a particular form. Consequently, he concludes that, in the instant case, the Court has to satisfy itself that on the basis of the Geneva Agreement and any other relevant material that the Parties have consented to its jurisdiction. Judge Robinson states that Article I of the Geneva Agreement provides for the establishment of a Mixed Commission to find a solution for the practical settlement of the controversy between the two countries arising from Venezuela's argument that the Award of 1899 was null and void. He also refers to Article II which sets out the procedure for the establishment of the Mixed Commission and Article III which provides that the Commission was to submit reports at six-month intervals over a period of four years.

4. Judge Robinson cites Article IV (I) which provides that, if within a period of four years the Mixed Commission had not arrived at "a full agreement for the solution of the controversy", it was to refer any outstanding questions to the two countries, which were obliged to choose one of the means of settlement in Article 33 of the Charter of the United Nations.

5. According to Judge Robinson, the important paragraph 2 may be divided into two stages. In accordance with the first stage, failing agreement between the Parties within three months of receiving the final report on the choice of one of the means of settlement in Article 33, the Parties were obliged to "refer the decision as to the means of settlement to an appropriate international organ upon which they both agree or, failing agreement on this point, the means to the Secretary-General of the United Nations". He observes that significantly, in the circumstances of this case, what has been referred to the Secretary-General is not simply the decision as to the means of settlement but rather, the decision as to the choice of the means of settlement. He states that since the Parties failed to agree on referring the decision as to the means of settlement to an appropriate international organ, that decision was referred to the Secretary-General. He notes that, in the ordinary meaning of the word "decide", to decide a matter is to bring that matter to a definitive resolution and that consequently, the effect of the referral of the decision as to the means of settlement to the Secretary-General is to confer on him the power to bring to a definitive resolution the question of the means of settlement. For Judge Robinson, implicit in the word "decision" is the notion of an outcome that is binding, and not merely recommendatory.

6. Judge Robinson comments that in the second stage of the process, paragraph 2 stipulates that, in the event that the means chosen by the Secretary-General does not lead to a solution of the controversy, he was obliged to "choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted". He notes that the means of good offices was employed by four Secretaries-General over a period of 27 years, without producing a solution to the controversy. Consequent on that failure, the Secretary-General, acting on the authority vested in him by the Parties, stated on 30 January 2018 that in light of the lack of progress in resolving the controversy, he had "chosen the International Court of Justice as the means to be used for the solution of the controversy". Judge Robinson makes four points in this regard.

7. The first point is that, Articles I, II, III and IV establish a sequence in the use of various means for the settlement of the controversy. Following the failure of the various means of settlement in Articles I, II, III and the first stage of Article IV (2), Judge Robinson observes that we are left, in the second stage of Article IV (2), with a Secretary-General on whom the Parties have conferred the power to make a binding decision as to the means of settlement.

8. The second point is that, by agreeing in the first stage of Article IV (2) to refer the decision as to the means of settlement to the Secretary-General, the Parties not only empower and require the Secretary-General to make a decision on the choice of the means of the settlement, but also express their agreement with the choice made by the Secretary-General, and thereby confer, on the particular means selected by him: the International Court of Justice, jurisdiction over the controversy. Consequently, Judge Robinson concludes that the Court's jurisdiction is therefore established pursuant to Article 36 (1) of the Statute which provides for its jurisdiction on the basis of "treaties", the Geneva Agreement being the relevant treaty. Thus, according to Judge Robinson, the Court has satisfied the requirement under Article 53 (2) of the Statute of ensuring that it has jurisdiction in a case where a party does not appear.

9. The third point made by Judge Robinson is that a proper reading of Article IV (2), and indeed Article IV as a whole, does not yield the conclusion that the agreement of both

Parties is needed for the institution of proceedings before the Court. He states that this is so because, when in the first stage of Article IV (2) the Parties refer the decision as to the means of settlement to the Secretary-General, they are agreeing that the decision of the Secretary-General is binding on both of them; consequently, it is a decision on the basis of which either of them can unilaterally institute proceedings before the Court. Judge Robinson observes that reading Article IV (2) as requiring the other Party to agree to the institution of proceedings would run counter to the object and purpose of the Agreement to find a solution for the controversy, since it is very likely that the other Party would not agree to such a course.

10. Judge Robinson therefore concludes that, once the Secretary-General had identified the International Court of Justice as the means of settlement, it was perfectly proper for either Guyana or Venezuela to file an application before the Court in accordance with Article 40 (1) of the Statute. In this case it was Guyana that filed an application.

11. The fourth point made by Judge Robinson is that there is nothing in the second stage of Article IV (2) that obliges the Secretary-General to exhaust some or all of the non-judicial means of settlement in Article 33 before he is entitled to choose judicial settlement by the Court for the resolution of the controversy. Judge Robinson observes that consequent on the failure of good offices to provide a solution, the Secretary-General was entitled and required to choose any other of the means in Article 33 in his search for a solution to the controversy. He notes that it is logical and understandable that, following the failure of good offices, used over a period of 27 years, the Secretary-General would choose a means of settlement that would produce a result that was binding on the Parties. He comments that, in choosing the International Court of Justice, the Secretary-General settled on a means of settlement, the result of which would be binding on the Parties. This choice is consistent with the intention of the Parties in adopting the Geneva Agreement to provide for a dispute settlement procedure that would lead to a final and complete resolution of the controversy.

12. According to Judge Robinson, the real issue for the Court is whether, in choosing the International Court of Justice as a form of judicial settlement under Article 33 of the Charter, the Secretary-General acted within the scope of his powers under Article IV (2) of the Geneva Agreement. For example, was he obliged to choose a means of settlement other than judicial settlement, or was he obliged to choose a means of settlement in a particular order, and it was not the turn of judicial settlement to be chosen? According to Judge Robinson, the answer is no. The Secretary-General was empowered to "choose another of the means" of settlement in Article 33 of the Charter. He was left with the choice of any other means of settlement from the suite of means set out in Article 33. The second stage of Article IV (2) obliges the Secretary-General to "choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted". Judge Robinson observes that it has been argued that the Secretary-General may have recourse to all the means of settlement set out in Article 33 without the dispute being resolved. That argument is fallacious because the means of settlement included two that were capable of definitively resolving the dispute, namely arbitration and judicial settlement. Therefore, once the Secretary-General chose the International Court of Justice, there was no need for him to have recourse to any of the other means set out in Article 33, because the International Court of Justice as a judicial body would settle the dispute by arriving at a decision that would be binding on the Parties. Judge Robinson concludes that, intriguing though the questions raised by that argument might be, the phrase "or until all the means of peaceful settlement there contemplated have been exhausted", having been rendered inoperative, has no practical consequences in the circumstances of this case.

13. In light of the foregoing, Judge Robinson respectfully disagrees with the inclusion of paragraph 86 in the Judgment. In his view, the cautionary note sounded by the paragraph is not warranted in the circumstances of this case.

Dissenting opinion of Judge Gevorgian

Judge Gevorgian disagrees with the Court's conclusion that it has jurisdiction to entertain Guyana's claims.

In his view, the Court's Judgment undermines the fundamental principle of consent of the parties to the Court's jurisdiction. The Court has made the unprecedented decision to exercise jurisdiction on the basis of a treaty that does not even mention the Court and contains no clause referring disputes to it. This is especially problematic as one of the Parties has consistently refused to submit the present dispute to the Court, and the dispute concerns national interests of the highest order, such as territorial sovereignty.

In particular, Judge Gevorgian considers that Article IV (2) of the Geneva Agreement does not empower the Secretary-General of the United Nations to issue a legally binding decision as to the means of settlement to be employed by the Parties. The contrary conclusion reached by the Court is not supported by the text of the Geneva Agreement or by the Agreement's object and purpose.

In Judge Gevorgian's view, the object and purpose of the Geneva Agreement is to help the Parties reach an agreed settlement to their dispute. As such, the Secretary-General has a non-binding role similar to that of a conciliator or mediator, entrusted with facilitating the Parties' attempts to reach an agreed solution, but not empowered to impose a means of settlement on them.

Finally, Judge Gevorgian considers that the Court gives inadequate attention to Venezuela's current and historical position regarding third-party dispute settlement, including the fact that Venezuela had, on several occasions prior to 1966, manifested its unwillingness to have issues related to its territory decided by third parties without its clear consent.

242. ALLEGED VIOLATIONS OF THE 1955 TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS (ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA) [PRELIMINARY OBJECTIONS]

Judgment of 3 February 2021

On 3 February 2021, the International Court of Justice delivered its Judgment on the preliminary objections raised by the United States of America in the case concerning *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America).* The Court found that it had jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955, to entertain the Application filed by the Islamic Republic of Iran on 16 July 2018, and that the said Application was admissible.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judges *ad hoc* Brower, Momtaz; Registrar Gautier.

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History of the proceedings (paras. 1–23)

The Court begins by recalling that, on 16 July 2018, the Islamic Republic of Iran (hereinafter "Iran") filed an Application instituting proceedings against the United States of America (hereinafter the "United States") with regard to a dispute concerning alleged violations of the Treaty of Amity Economic Relations, and Consular Rights, which was signed by the two States in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter the "Treaty of Amity" or the "1955 Treaty").

In its Application, Iran sought to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article XXI, paragraph 2, of the 1955 Treaty. On the same day, Iran filed a Request for the indication of provisional measures.

By an Order of 3 October 2018, the Court indicated the following provisional measures:

> "(1) The United States of America, in accordance with its obligations under the 1955 Treaty of Amity, Economic Relations, and Consular Rights, shall remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of
>
> (i) medicines and medical devices;
>
> (ii) foodstuffs and agricultural commodities; and
>
> (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and inspections) necessary for the safety of civil aviation;
>
> (2) The United States of America shall ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to in point (1);
>
> (3) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

On 23 August 2019, the United States raised certain preliminary objections.

I. Factual background (paras. 24–38)

In the present proceedings, Iran alleges violations by the United States of the Treaty of Amity, which was signed by the Parties on 15 August 1955 and entered into force on 16 June 1957. It is not disputed by the Parties that on the date of the filing of the Application, namely, on 16 July 2018, the Treaty of Amity was in force. In accordance with Article XXIII, paragraph 3, of the Treaty of Amity, "[e]ither High Contracting Party may, by giving one year's written notice to the other High Contracting Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter". By a diplomatic Note dated 3 October 2018 addressed by the United States Department of State to the Ministry of Foreign Affairs of Iran, the United States, in accordance with Article XXIII, paragraph 3, of the Treaty of Amity, gave "notice of the termination of the Treaty".

As regards the events forming the factual background of the case, the Court recalls that Iran is a party to the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968. According to Article III of this Treaty, each non-nuclear-weapon State party undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency (hereinafter the "IAEA" or "Agency"), for the exclusive purpose of verification of the fulfilment of its obligations assumed under the Treaty "with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices". The Agreement between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons has been in force since 15 May 1974.

In a report dated 6 June 2003, the IAEA Director General stated that Iran had failed to meet its obligations under the Safeguards Agreement. In 2006, the Agency's Board of Governors requested the Director General to report the matter to the Security Council of the United Nations. On 31 July 2006, the Security Council, acting under Article 40 of Chapter VII of the Charter of the United Nations, adopted resolution 1696 (2006), in which it noted, with serious concern, Iran's decision to resume enrichment-related activities and demanded the suspension of all of its enrichment-related and reprocessing activities, to be verified by the IAEA.

On 23 December 2006, the Security Council, acting under Article 41 of Chapter VII of the Charter of the United Nations, adopted resolution 1737 (2006), in which it noted, with serious concern, *inter alia*, that Iran had not established "full and sustained suspension of all enrichment-related and reprocessing

activities as set out in resolution 1696 (2006)". In resolution 1737 (2006), the Security Council decided that Iran must suspend all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA. It further decided that all States must take the necessary measures to prevent the supply, sale or transfer of all items, materials, equipment, goods and technology which could contribute to Iran's nuclear-related activities. Subsequently, the Security Council adopted further resolutions on the Iranian nuclear issue, in 2007, 2008, 2010 and 2015.

On 26 July 2010, the Council of the European Union adopted Decision 2010/413/CFSP and, on 23 March 2012, Regulation No. 267/2012 concerning nuclear-related "restrictive measures against Iran", banning arms exports, restricting financial transactions, imposing the freezing of assets and restricting travel for certain individuals.

The United States, by Executive Orders 13574 of 23 May 2011, 13590 of 21 November 2011, 13622 of 30 July 2012, 13628 of 9 October 2012 (Sections 5 to 7, and 15) and 13645 of 3 June 2013, imposed a number of nuclear-related "additional sanctions" with regard to various sectors of Iran's economy.

On 14 July 2015, China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy, and Iran concluded the Joint Comprehensive Plan of Action (hereinafter the "JCPOA") concerning the nuclear programme of Iran. The declared purpose of that instrument was to ensure the exclusively peaceful nature of Iran's nuclear programme and to produce "the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear programme". On 20 July 2015, the Security Council adopted resolution 2231 (2015), whereby it endorsed the JCPOA and urged its "full implementation on the timetable established [therein]".

The JCPOA describes, in particular, the steps to be taken by Iran within a set time frame, regarding agreed limitations on all uranium enrichment and uranium enrichment-related activities and addresses the co-operation of Iran with the IAEA. It provides for the termination of all sanctions adopted by the Security Council and the European Union, respectively, as well as the cessation of the implementation of certain United States sanctions.

On 16 January 2016, the President of the United States issued Executive Order 13716 revoking or amending a certain number of earlier Executive Orders on "nuclear-related sanctions" imposed on Iran or Iranian nationals.

On 8 May 2018, the President of the United States issued a National Security Presidential Memorandum announcing the end of the participation of the United States in the JCPOA and directing the reimposition of "sanctions lifted or waived in connection with the JCPOA". In the Memorandum, the President of the United States indicated that Iranian or Iran-backed forces were engaging in military activities in the surrounding region and that Iran remained a State sponsor of terrorism.

On 6 August 2018, the President of the United States issued Executive Order 13846 reimposing "certain sanctions" on Iran, its nationals and companies. Earlier Executive Orders implementing the commitments of the United States under the JCPOA were revoked.

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The Court recalls that the United States raised five preliminary objections. The first two relate to the jurisdiction of the Court *ratione materiae* to entertain the case on the basis of Article XXI, paragraph 2, of the Treaty of Amity. The third contests the admissibility of Iran's Application by reason of an alleged abuse of process and on grounds of judicial propriety. The last two are based on subparagraphs (*b*) and (*d*) of Article XX, paragraph 1, of the Treaty of Amity. Although, according to the Respondent, they relate neither to the jurisdiction of the Court nor to the admissibility of the Application, the Respondent requests a decision upon them before any further proceedings on the merits.

The Court begins by considering issues related to its jurisdiction.

II. Jurisdiction of the Court ratione materiae under Article XXI of the Treaty of Amity (paras. 39–84)

The Court notes that the United States contests the Court's jurisdiction to entertain the Application of Iran. It submits that the dispute before the Court falls outside the scope *ratione materiae* of Article XXI, paragraph 2, of the Treaty of Amity, the basis of jurisdiction invoked by Iran, which provides that:

> "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

The Court observes that, according to the Respondent, the dispute which Iran seeks to bring before the Court falls outside the scope of the compromissory clause for two reasons which, in its view, are alternative in nature.

First, the United States contends that "the true subject matter of this case is a dispute as to the application of the JCPOA, an instrument entirely distinct from the Treaty of Amity, with no relationship thereto". Therefore, in the Respondent's view, the subject-matter of the dispute which Iran seeks to have settled by the Court is not "the interpretation or application of the … Treaty" within the meaning of the second paragraph of Article XXI, as cited above.

Secondly, the United States argues that the vast majority of the measures challenged by Iran fall outside the scope *ratione materiae* of the Treaty of Amity, because they principally concern trade and transactions between Iran and third countries, or their companies and nationals, and not between Iran and the United States, or their companies and nationals.

The Court begins by examining the first of these two objections, which, if well founded, would cause all of Iran's claims to be excluded from the Court's jurisdiction; then, if necessary, it will consider the second objection, which concerns only the majority, and not the entirety, of the claims at issue.

1. First preliminary objection to jurisdiction: the subject-matter of the dispute (paras. 42–60)

The Court notes that the Parties do not contest that there is a dispute between them, but they disagree as to whether this dispute concerns the interpretation and application of the Treaty of Amity, as Iran claims, or exclusively the JCPOA, as the United States contends. In the latter case, the dispute would fall outside the scope *ratione materiae* of the compromissory clause of the Treaty of Amity.

As the Court has consistently recalled, while it is true that, in accordance with Article 40, paragraph 1, of the Statute, the applicant must indicate to the Court what it considers to be the "subject of the dispute", it is for the Court to determine, taking account of the parties' submissions, the subject-matter of the dispute of which it is seised.

The Court's determination of the subject-matter of the dispute is made "on an objective basis", "while giving particular attention to the formulation of the dispute chosen by the Applicant". To identify the subject-matter of the dispute, the Court bases itself on the application, as well as on the written and oral pleadings of the parties. In particular, it takes account of the facts that the applicant identifies as the basis for its claim.

The Court notes that, in the present case, according to the submissions presented in its Application and its Memorial, Iran essentially seeks to have the Court declare that the measures reimposed pursuant to the United States' decision expressed in the Presidential Memorandum of 8 May 2018 are in breach of various obligations of the United States under the Treaty of Amity, and consequently to have the situation prior to that decision restored. The United States contests that the impugned measures constitute violations of the Treaty of Amity. Hence there exists an opposition of views which amounts to a dispute relating to the Treaty of Amity.

According to the Court, it is true that this dispute arose in a particular political context, that of the United States' decision to withdraw from the JCPOA. However, the Court recalls that, as it has had occasion to observe:

> "[L]egal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them." (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 20, para. 37.)

The fact that the dispute between the Parties has arisen in connection with and in the context of the decision of the United States to withdraw from the JCPOA does not in itself preclude the dispute from relating to the interpretation or application of the Treaty of Amity. Certain acts may fall within the ambit of more than one instrument and a dispute relating to those acts may relate to the "interpretation or application" of more than one treaty or other instrument. To the extent that the measures adopted by the United States following its decision to withdraw from the JCPOA might constitute breaches of certain obligations under the Treaty of Amity, those measures relate to the interpretation or application of that Treaty.

The Court considers that, even if it were true, as the Respondent contends, that a judgment of the Court upholding Iran's claims under the Treaty of Amity would result in the restoration of the situation which existed when the United States was still participating in the JCPOA, it nonetheless would not follow that the dispute brought before the Court by Iran concerns the JCPOA and not the Treaty of Amity.

The Court notes that the United States has made clear that it does not assert that the existence of a connection between the dispute and its decision to withdraw from the JCPOA suffices in itself to preclude the Court from finding that it has jurisdiction over Iran's claims under the Treaty of Amity, or that jurisdiction under the Treaty is precluded solely because the dispute is part of a broader context that includes the JCPOA. The Respondent's argument is that the very subject-matter of Iran's claims in this case relates exclusively to the JCPOA, and not to the Treaty of Amity. The Court does not see how it could support such an analysis without misrepresenting Iran's claims as formulated by the Applicant. The Court's "duty to isolate the real issue in the case and to identify the object of the claim" does not permit it to modify the object of the submissions, especially when they have been clearly and precisely formulated. In particular, the Court cannot infer the subject-matter of a dispute from the political context in which the proceedings have been instituted, rather than basing itself on what the applicant has requested of it.

For the reasons set out above, the Court cannot uphold the first preliminary objection to jurisdiction raised by the United States.

2. Second preliminary objection to jurisdiction: "third country measures" (paras. 61–83)

The Court notes that, according to the United States, the Court lacks jurisdiction to entertain the vast majority of Iran's claims, as those claims relate to measures which principally concern trade or transactions between Iran and third countries, or between their nationals and companies, which the United States characterizes as "third country measures", while the Treaty of Amity is applicable only to trade and transactions between the Parties. In that regard, the Court recalls, that, according to its well-established jurisprudence, in order to determine its jurisdiction *ratione materiae* under a compromissory clause concerning disputes relating to the interpretation or application of a treaty, it cannot limit itself to noting that one of the parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the acts of which the applicant complains fall within the provisions of the treaty containing the compromissory clause. This may require the interpretation of the provisions that define the scope of the treaty.

The Court observes that the "third country measures" objection does not concern all of Iran's claims, but only the majority of them. Indeed, the Respondent stated that one of the four categories into which it divides the measures put in place or reimposed pursuant to the Presidential Memorandum of 8 May 2018 cannot be characterized as "third country

measures" and is therefore not included in the second preliminary objection to jurisdiction. This fourth category consists of the revocation of certain licensing actions which had made it possible to engage in certain commercial or financial transactions with Iran during the period of implementation of the JCPOA. According to the Respondent, the licences in question, which were revoked pursuant to the Memorandum of 8 May 2018, benefited "U.S. persons" and their withdrawal is not included in the objection now under consideration.

It follows that even if the Court were to uphold the second objection to jurisdiction—and assuming that it does not accept any of the other preliminary objections, each of which concerns all of Iran's claims—the proceedings would not be terminated. They would in any event have to continue to the merits in respect of the category of measures challenged by Iran which, according to the United States, are not "third country measures". The Court notes, however, that, as regards this category, the United States has declared that it "reserves the right to argue that some or all of Iran's claims based on the revocation of particular licensing actions are outside the scope of the Treaty" at a later stage in the proceedings, should they continue.

The Court observes that the Parties are in disagreement about the relevance of the concept of "third country measures" and about the effects that should follow from the application of such a concept in this case. While, according to the United States, the Court should find that it lacks jurisdiction to entertain most of Iran's claims, since the vast majority of the measures complained of by the Applicant are directed against "non-U.S." persons, companies or entities, Iran, on the other hand, contends that the concept of "third country measures" is irrelevant. It is only necessary, according to the Applicant, to examine each category of measures at issue in order to determine whether they fall within the scope of the various provisions of the Treaty of Amity which it claims to have been violated.

Moreover, the Court notes that the Parties disagree on the interpretation of the provisions of the Treaty which Iran claims to have been breached by the United States, as regards their territorial scope and their ambit. According to Iran, the provisions that do not contain an express territorial limitation must be interpreted generally as being applicable to activities exercised in all places, whereas, according to the United States, it follows from the object and purpose of the Treaty of Amity that it is concerned only with the protection of commercial and investment activities of one Party, or of its nationals or companies, on the territory of the other or in the context of trade between them. Furthermore, Iran maintains that the Treaty prohibits the United States from impairing the rights guaranteed to Iran and Iranian nationals and companies, not only through measures applied directly to those nationals or companies, or to "U.S. persons" in their relations with Iran, but also through measures directed in the first instance against a third party, whose real aim is however to prevent Iran, its nationals and its companies from enjoying their rights under the Treaty. The United States contests this view.

The Court observes that all the measures of which Iran complains—those put in place or reinstated as a result of the Presidential Memorandum of 8 May 2018—are intended to weaken Iran's economy. Indeed, on the basis of the official statements of the United States' authorities themselves, Iran, its nationals and its companies are the target of what the Respondent describes as "third country measures", as well as of the measures aimed directly against Iranian entities and of those against "U.S. persons" which are intended to prohibit them from engaging in transactions with Iran, its nationals or its companies.

However, it cannot be inferred from the above that all the measures at issue are capable of constituting breaches of the United States' obligations under the Treaty of Amity. What is decisive in this regard is whether each of the measures—or category of measures—under consideration is of such a nature as to impair the rights of Iran under the various provisions of the Treaty of Amity which the Applicant claims to have been violated.

Conversely, the fact that some of the measures challenged—whether or not they are "the vast majority", as the United States maintains—directly target third States or the nationals or companies of third States does not suffice for them to be automatically excluded from the ambit of the Treaty of Amity. Only through a detailed examination of each of the measures in question, of their reach and actual effects, can the Court determine whether they affect the performance of the United States' obligations arising out of the provisions of the Treaty of Amity invoked by Iran, taking account of the meaning and scope of those various provisions.

In sum, the Court considers that the second preliminary objection of the United States relates to the scope of certain obligations relied upon by the Applicant in the present case and raises legal and factual questions which are properly a matter for the merits. If the case were to proceed to the merits, such matters would be decided by the Court at that stage, on the basis of the arguments advanced by the Parties.

In light of the above, the Court finds that the second preliminary objection to jurisdiction raised by the United States cannot be upheld.

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For all the reasons set out above, the Court finds that it has jurisdiction *ratione materiae* to entertain the Application of Iran on the basis of Article XXI, paragraph 2, of the 1955 Treaty of Amity.

III. Admissibility of Iran's Application (paras. 85–96)

The objection to admissibility raised by the United States is based on the contention that "Iran's claims amount to an abuse of process and would work an injustice that would raise serious questions of judicial propriety". This is because "Iran has invoked the Treaty [of Amity] in a case involving a dispute that solely concerns the application of the JCPOA". The Court notes that the United States did not address its objection to the admissibility of Iran's Application during the oral hearings, but expressly maintained that objection.

As the Court has observed in the past, "[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process". The Court has specified that there has to be "clear evidence" that the Applicant's conduct amounts to an abuse of process.

In the present case, the Court notes that it has already ascertained that the dispute submitted by the Applicant

concerns alleged breaches of obligations under the Treaty of Amity and not the application of the JCPOA. The Court has also found that the compromissory clause included in the Treaty of Amity provides a valid basis for its jurisdiction with regard to the Applicant's claims. If the Court eventually found on the merits that certain obligations under the Treaty of Amity have indeed been breached, this would not imply giving Iran any "illegitimate advantage" with regard to its nuclear programme, as contended by the United States. Such a finding would rest on an examination by the Court of the treaty provisions that are encompassed within its jurisdiction.

In the view of the Court, there are no exceptional circumstances that would justify considering Iran's Application inadmissible on the ground of abuse of process. In particular, the fact that Iran only challenged the consistency with the Treaty of Amity of the measures that had been lifted in conjunction with the JCPOA and then reinstated in May 2018, without discussing other measures affecting Iran and its nationals or companies, may reflect a policy decision. However, the Court's judgment "cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement". In any event, the fact that most of Iran's claims concern measures that had been lifted in conjunction with the JCPOA and were later reinstated does not indicate that the submission of these claims constitutes an abuse of process.

In light of the foregoing, the Court finds that the objection to the admissibility of the Application raised by the United States must be rejected.

IV. Objections on the basis of Article XX, paragraph 1 (b) and (d), of the Treaty of Amity (paras. 97–113)

The Court then turns to the objections based on Article XX, paragraph 1, of the Treaty of Amity which reads as follows:

> "1. The present Treaty shall not preclude the application of measures:
>
> …
>
> (*b*) relating to fissionable materials, the radio-active by-products thereof, or the sources thereof;
>
> …
>
> (*d*) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

The Court recalls that in the *Oil Platforms* case, it found that "Article XX, paragraph 1 (*d*), [of the Treaty of Amity] does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits". A similar view was expressed in the case concerning *Certain Iranian Assets*, where the Court noted that the interpretation given to Article XX, paragraph 1, with regard to subparagraph (*d*) also applies to subparagraph (*c*), which concerns measures "regulating the production of or traffic in arms, ammunition and implements of war". The Court observed that in this respect "there are no relevant grounds on which to distinguish [subparagraph (*c*)] from Article XX, paragraph 1, subparagraph (*d*)". The Court finds that there are equally no relevant grounds for a distinction with regard to subparagraph (*b*), which may only afford a possible defence on the merits.

The Court observes that the Parties do not dispute that arguments based on Article XX of the Treaty of Amity do not affect either the Court's jurisdiction or the admissibility of the application. However, the Respondent argues that objections formulated on the basis of Article XX, paragraph 1 (*b*) and (*d*), may be presented as preliminary according to Article 79 of the Rules of Court as "other objection[s] the decision upon which is requested before any further proceedings on the merits". For the following reasons, the two objections raised by the United States on the basis of Article XX, paragraph 1 (*b*) and (*d*), cannot be considered as preliminary. A decision concerning these matters requires an analysis of issues of law and fact that should be left to the stage of the examination of the merits.

The Applicant contends that subparagraph (*b*), which refers to measures "relating to fissionable materials, the radio-active by-products thereof, or the sources thereof", should be interpreted as addressing only measures such as those specifically concerning the exportation or importation of fissionable materials. It was however argued by the Respondent that subparagraph (*b*) applies to all measures of whatever content addressing Iran's nuclear programme, because they may all be said to relate to the use of fissionable materials. The question of the meaning to be given to subparagraph (*b*) and that of its implications for the present case do not have a preliminary character and will have to be examined as part of the merits.

The same applies to measures taken by the United States allegedly because they are deemed "necessary to protect its essential security interests" and are therefore argued to be comprised in the category of measures that are outlined in subparagraph (*d*). The analysis of this objection would raise the question of the existence of such essential security interests and may require an assessment of the reasonableness and necessity of the measures in so far as they affect the obligations under the Treaty of Amity. Such an assessment can be conducted only at the stage of the examination of the merits.

For the foregoing reasons, the arguments raised by the Respondent with regard to Article XX, paragraph 1 (*b*) and (*d*), of the Treaty of Amity cannot provide a basis for preliminary objections, but may be presented at the merits stage. Therefore, the preliminary objections raised by the United States based on these provisions must be rejected.

Operative clause (para. 114)

The Court,

(1) Unanimously,

Rejects the preliminary objection to its jurisdiction raised by the United States of America according to which the subject-matter of the dispute does not relate to the interpretation or application of the Treaty of Amity, Economic Relations, and Consular Rights of 1955;

(2) Unanimously,

Rejects the preliminary objection to its jurisdiction raised by the United States of America relating to the measures concerning trade or transactions between the Islamic

Republic of Iran (or Iranian nationals and companies) and third countries (or their nationals and companies);

(3) By fifteen votes to one,

Rejects the preliminary objection to the admissibility of the Application raised by the United States of America;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judge *ad hoc* Momtaz;

Against: Judge *ad hoc* Brower;

(4) By fifteen votes to one,

Rejects the preliminary objection raised by the United States of America on the basis of Article XX, paragraph 1 (*b*), of the Treaty of Amity, Economic Relations, and Consular Rights of 1955;

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judge ad hoc Momtaz;

Against: Judge *ad hoc* Brower;

(5) Unanimously,

Rejects the preliminary objection raised by the United States of America on the basis of Article XX, paragraph 1 (*d*), of the Treaty of Amity, Economic Relations, and Consular Rights of 1955;

(6) By fifteen votes to one,

Finds, consequently, that it has jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955, to entertain the Application filed by the Islamic Republic of Iran on 16 July 2018, and that the said Application is admissible.

In favour: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judge *ad hoc* Momtaz;

Against: Judge *ad hoc* Brower.

*

Judge Tomka appends a declaration to the Judgment of the Court; Judge *ad hoc* Brower appends a separate, partly concurring and partly dissenting, opinion to the Judgment of the Court.

*

* *

Declaration of Judge Tomka

Having voted in favour of the conclusions reached by the Court, Judge Tomka wishes to offer some observations on the way the Court has treated the second preliminary objection raised by the United States. According to this objection, the Court would lack jurisdiction to entertain the vast majority of Iran's claims, as those claims relate to measures which principally concern trade or transactions between Iran and third countries, or between their nationals and companies, whereas the 1955 Treaty of Amity would only be applicable to trade between the two States parties, or their companies and nationals.

Although the Parties devoted much attention, both in their written pleadings and during the hearings, to the analysis of the provisions invoked by Iran, the Court stops short from analysing and interpreting them. It simply rejects the second preliminary objection raised by the United States, while at the same time leaving open the possibility for the Parties to argue "legal and factual questions" raised by the preliminary objection at the merits stage.

In the view of Judge Tomka, the approach taken by the Court in the present case is unsatisfactory as it is inconsistent with the approach followed by it in its previous case law on the same Treaty. The legal question which the Court should have determined at this stage of the proceedings is whether the 1955 Treaty of Amity provides Iran (and its nationals or companies) with a right not to have its trade, commercial or financial relations with third States (and their nationals or companies) interfered with by the United States' measures.

Separate, partly concurring and partly dissenting, opinion of Judge *ad hoc* Brower

Judge *ad hoc* Brower joins the Court's unanimous rejection of the Respondent's two preliminary objections to jurisdiction, as well as the objection based on Article XX, paragraph 1, subparagraph (*d*) of the Treaty of Amity. However, he disagrees with the Court's finding that Iran's Application is admissible, as well as with its rejection of the United States' objection under Article XX, paragraph 1, subparagraph (*b*).

Judge *ad hoc* Brower considers that Iran's Application should have been declared inadmissible as an abuse of process, as it seeks from the Court a legally binding Judgment compelling the United States to carry out its undertakings under the non-legally binding JCPOA, while Iran would remain free not to comply with that instrument (as it has already admitted to doing). This would confer upon Iran an illegitimate advantage.

Judge *ad hoc* Brower notes that the Court has devoted little attention to abuse of process in its Judgment. In particular, in quickly dismissing the relevance of Iran's choice to challenge only those sanctions that had been lifted in accordance with the JCPOA (and not the many other sanctions applicable in relations between the United States and Iran) by characterizing it as a mere "political decision", the Court has avoided actually analysing the import of Iran's strategy.

The Court's approach in this case continues a longstanding practice whereby the Court has failed to provide any definition of the concept of abuse of process or of the standards for its application. In the 95 years since the related concept of abuse of rights was first discussed by the Court's predecessor, the Court has repeatedly declined to contribute to the substantive development of this principle or of that of abuse of process, despite having had many opportunities to do so. More recently, the Court has adopted and often invoked "exceptional circumstances" and "clear evidence" tests but has left the meaning of these terms opaque. In Judge *ad hoc* Brower's view, the Court would do well to clarify the principle of abuse of process and the evidentiary condition for its acceptance.

Judge *ad hoc* Brower considers that the failure of the Court in this case to declare Iran's Application inadmissible,

added to its and its predecessor's 95-years of treating the concept of abuse of process with acute neglect, will disincentivize States from seeking peacefully to resolve disputes through legally non-binding means, which sometimes, as in the case of the JCPOA, are the only means available.

With regard to the United States' objection under Article XX, paragraph 1, subparagraph (*b*) of the Treaty of Amity, Judge *ad hoc* Brower considers that this should have been dealt with as a legitimate preliminary objection, and should have led to the dismissal of Iran's claims.

Judge *ad hoc* Brower has agreed with the majority, both in the present case and in *Certain Iranian Assets*, that United States' objections under subparagraph (*d*) must be heard at the merits phase of the case. However, Judge *ad hoc* Brower considers that the language of subparagraph (*b*), which applies to measures "relating to fissionable materials", is much broader than the language in other subparagraphs of Article XX, paragraph 1. In his view, given dictionary definitions of the terms "to relate" and "fissionable", it is clear that measures concerning nuclear weapons and nuclear proliferation are measures "relating to fissionable materials". Moreover, official statements by high officials of both Parties, including in the context of the JCPOA and in these very proceedings, confirm that the sanctions at issue in this case are "nuclear-related".

Judge *ad hoc* Brower notes that the Court has not analysed subparagraph (*b*) in accordance with Article 31 of the Vienna Convention on the Law of Treaties, but rather has simply applied its past treatment of other subparagraphs of Article XX, paragraph 1, to subparagraph (*b*). In his view, the application of Articles 31 and 32 of the Vienna Convention to subparagraph (*b*) would have been warranted and would yield the conclusion that the United States' objection under that provision should have been upheld and Iran's claims dismissed.

243. APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (QATAR *v.* UNITED ARAB EMIRATES) [PRELIMINARY OBJECTIONS]

Judgment of 4 February 2021

On 4 February 2021, the International Court of Justice delivered its Judgment on the preliminary objections raised by the United Arab Emirates in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates).* The Court upheld the first preliminary objection raised by the United Arab Emirates and found that it has no jurisdiction to entertain the Application filed by Qatar on 11 June 2018.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judges *ad hoc* Cot, Daudet; Registrar Gautier.

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* *

History of the proceedings (paras. 1–25)

The Court begins by recalling that, on 11 June 2018, the State of Qatar (hereinafter "Qatar") filed in the Registry of the Court an Application instituting proceedings against the United Arab Emirates (hereinafter the "UAE") with regard to alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention"). It notes that, in its Application, Qatar seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.

The Court then states that, following Qatar's submission of a Request for the indication of provisional measures on 11 June 2018, the Court, by an Order of 23 July 2018, indicated the following provisional measures:

> "(1) The United Arab Emirates must ensure that
>
> (i) families that include a Qatari, separated by the measures adopted by the United Arab Emirates on 5 June 2017, are reunited;
>
> (ii) Qatari students affected by the measures adopted by the United Arab Emirates on 5 June 2017 are given the opportunity to complete their education in the United Arab Emirates or to obtain their educational records if they wish to continue their studies elsewhere; and
>
> (iii) Qataris affected by the measures adopted by the United Arab Emirates on 5 June 2017 are allowed access to tribunals and other judicial organs of the United Arab Emirates;
>
> (2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

The Court also recalls that, on 22 March 2019, the UAE submitted a Request for the indication of provisional measures, which was rejected by the Court in its Order of 14 June 2019.

Finally, the Court states that, on 30 April 2019, the UAE presented preliminary objections to the jurisdiction of the Court and the admissibility of the Application.

I. Introduction (paras. 26–40)

A. Factual background (paras. 26–34)

The Court recalls that, on 5 June 2017, the UAE issued a statement which provided, in relevant part, that it had been decided to:

> "[p]reven[t] Qatari nationals from entering the UAE or crossing its point of entry, giving Qatari residents and visitors in the UAE 14 days to leave the country for precautionary security reasons. The UAE nationals are likewise banned from traveling to or staying in Qatar or transiting through its territories."

The Court further recalls that the UAE took certain additional measures relating to Qatari media and speech in support of Qatar. In this regard, it notes in particular that, on 6 June 2017, the Attorney General of the UAE issued a statement indicating that expressions of sympathy for the State of Qatar or objections to the measures taken by the UAE against the Qatari Government were considered crimes punishable by imprisonment and a fine. The UAE blocked several websites operated by Qatari companies, including those run by Al Jazeera Media Network. On 6 July 2017, the Abu Dhabi Department of Economic Development issued a circular prohibiting the broadcasting of certain television channels operated by Qatari companies.

The Court also notes that, on 8 March 2018, Qatar deposited a communication with the Committee on the Elimination of Racial Discrimination (hereinafter the "CERD Committee") under Article 11 of the Convention, requesting that the UAE take all necessary steps to end the measures enacted and implemented since 5 June 2017.

In its decision on jurisdiction with regard to Qatar's inter-State communication, dated 27 August 2019, the CERD Committee concluded that "it ha[d] jurisdiction to examine the exceptions of inadmissibility raised by the Respondent State" (Decision on the jurisdiction of the Committee over the inter-State communication submitted by Qatar against the UAE dated 27 August 2019, United Nations, doc. CERD/C/99/3, para. 60). The Committee

> "request[ed] its Chairperson to appoint, in accordance with article 12 (1) of the Convention, the members of an *ad hoc* Conciliation Commission, which shall make its good offices available to the States concerned with a view to an amicable solution of the matter on the basis of the States parties' compliance with the Convention".

The *ad hoc* Conciliation Commission was appointed by the Chair of the Committee and has been effective since 1 March 2020.

B. The jurisdictional basis invoked and the preliminary objections raised (paras. 35–40)

The Court recalls that Qatar asserts that the Court has jurisdiction over its Application pursuant to Article 22 of CERD, which provides that:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

Qatar contends that there is a dispute between the Parties with respect to the interpretation and application of CERD and that the Parties have been unable to settle this dispute despite Qatar's attempts to negotiate with the UAE.

The Court notes that at the present stage of the proceedings, the UAE is asking it to adjudge and declare that the Court lacks jurisdiction to address the claims brought by Qatar on the basis of two preliminary objections. In its first preliminary objection, the UAE maintains that the Court lacks jurisdiction *ratione materiae* over the dispute between the Parties because the alleged acts do not fall within the scope of CERD. In its second preliminary objection, the UAE asserts that Qatar failed to satisfy the procedural preconditions of Article 22 of CERD.

The Court further notes that, in its written pleadings, the UAE also included an objection to admissibility on the ground that Qatar's claims constitute an abuse of process. However, during the oral proceedings, counsel for the UAE stated that it was not pursuing an allegation of abuse of process at this stage of the proceedings.

II. Subject-matter of the dispute (paras. 41–70)

As a preliminary, the Court recalls that, pursuant to Article 40, paragraph 1, of its Statute and Article 38, paragraph 1, of its Rules, an applicant is required to indicate the subject of a dispute in its application.

It notes that it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the applicant's claims. The Court recalls that, in doing so, it examines the application, as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant. It takes account of the facts that the applicant presents as the basis for its claims. The matter is one of substance, not of form.

In the present case, after setting out the arguments of the Parties, the Court observes that, as can be seen from Qatar's characterization of the subject-matter of the dispute, Qatar makes three claims of racial discrimination. The first is its claim arising out of the "travel bans" and "expulsion order", which make express reference to Qatari nationals. The second is its claim arising from the restrictions on Qatari media corporations. Qatar's third claim is that the measures taken by the UAE, including the measures on which Qatar bases its first and second claims, result in "indirect discrimination" on the basis of Qatari national origin.

As to Qatar's first claim, taking into account Qatar's characterization of these measures and the facts on which it relies in support of its claim that the measures that it describes as the "expulsion order" and the "travel bans" discriminate against Qataris on the basis of their current nationality, in violation of the UAE's obligations under CERD, as well as the characterization by the Respondent, the Court considers that the Parties hold opposing views over this claim.

With regard to Qatar's second claim, the Court has noted that the UAE does not deny that it imposed measures to restrict broadcasting and internet programming by certain Qatari media corporations. The Parties disagree, however, on whether those measures directly targeted these media corporations in a racially discriminatory manner, in violation of the UAE's obligations under CERD.

As to its third claim, as noted above, Qatar maintains that the subject-matter of the dispute encompasses Qatar's assertion that the "expulsion order" and the "travel bans" give rise to "indirect discrimination" against persons of Qatari national origin, independent of the claim of racial discrimination on the basis of current nationality. The UAE, however, maintains that this claim of "indirect discrimination" is not part of the case presented in Qatar's Application.

The Court observes that the subject-matter of a dispute is not limited by the precise wording that an applicant State uses in its application. The Rules of Court provide an applicant State with some latitude to develop the allegations in its application, so long as it does not "transform the dispute brought before the Court by the application into another dispute which is different in character" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 318–319, paras. 98 and 99).

The Court turns next to Qatar's other allegations of "indirect discrimination" against persons of Qatari national origin. In this regard, it recalls that Qatar brings these allegations on the basis of the restrictions on Qatari media corporations and other measures that, in its view, attack freedom of expression, incite anti-Qatari sentiment and criminalize speech deemed to be in favour of Qatar or critical of the UAE's policies towards Qatar, as well as statements by the UAE or its officials that express or condone anti-Qatari hate speech and propaganda.

The Court notes that Qatar made specific references in its Application to the 6 June 2017 statement by the Attorney General of the UAE, the restrictions on Qatari media corporations, the UAE's "media defamation" campaign against Qatar and alleged statements by UAE officials fostering anti-Qatari sentiment. It further notes that the Parties address these contentions in their written and oral pleadings. In this regard, the UAE again argues that by invoking the restrictions on Qatari media corporations in support of its claim of "indirect discrimination", Qatar has presented a new argument that does not form part of the case pleaded in its Application.

As the Court previously noted, the Rules of Court do not preclude Qatar from refining the legal arguments presented in its Application or from advancing new arguments. Taking into account the Application and the written and oral pleadings, as well as the facts asserted by Qatar, the Court

considers that the Parties hold opposing views over Qatar's claim that the UAE has engaged in "indirect discrimination" against persons of Qatari national origin, in violation of its obligations under CERD.

In view of its analysis, the Court concludes that the Parties disagree in respect of Qatar's three claims that the UAE has violated its obligations under CERD: first, the claim that the measures that Qatar describes as the "expulsion order" and the "travel bans", by their express references to Qatari nationals, discriminate against Qataris on the basis of their current nationality; secondly, the claim that the UAE imposed racially discriminatory measures on certain Qatari media corporations; and thirdly, the claim that the UAE has engaged in "indirect discrimination" against persons of Qatari national origin by taking these measures and others. The Parties' disagreements in respect of these claims form the subject-matter of the dispute.

III. First preliminary objection: jurisdiction ratione materiae (paras. 71–114)

The Court then considers whether it has jurisdiction *ratione materiae* over the dispute under Article 22 of CERD.

In order to determine whether the dispute is one with respect to the interpretation or application of CERD, under its Article 22, the Court examines whether each of the above claims falls within the scope of that instrument. The Court addresses Qatar's claims in the order in which they are mentioned in the above characterization of the subject-matter of the dispute.

The Court observes that, as far as the first claim of Qatar is concerned, the Parties disagree on whether the term "national origin" in Article 1, paragraph 1, of the Convention encompasses current nationality. In respect of the second claim of Qatar, the Parties disagree on whether the scope of the Convention extends to Qatari media corporations. Finally, in respect of the third claim, the Parties disagree on whether the measures of which Qatar complains give rise to "indirect discrimination" against Qataris on the basis of their national origin. The Court examines each of these questions with a view to ascertaining whether it has jurisdiction *ratione materiae* in the present case.

A. The question whether the term "national origin" encompasses current nationality (paras. 74–105)

Qatar is of the view that the term "national origin", in the definition of racial discrimination in Article 1, paragraph 1, of the Convention, encompasses current nationality and that the measures of which Qatar complains thus fall within the scope of CERD. The UAE argues that the term "national origin" does not include current nationality and that the Convention does not prohibit differentiation based on the current nationality of Qatari citizens, as complained of by Qatar in this case. Thus, the Parties hold opposing views on the meaning and scope of the term "national origin" in Article 1, paragraph 1, of the Convention, which reads:

> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

In order to determine its jurisdiction *ratione materiae* in this case, the Court interprets CERD and specifically the term "national origin" in Article 1, paragraph 1, thereof by applying the rules on treaty interpretation enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"). Although that Convention is not in force between the Parties and is not, in any event, applicable to treaties concluded before it entered into force, such as CERD, it is well established that Articles 31 and 32 of the Vienna Convention reflect rules of customary international law.

1. The term "national origin" in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of CERD (paras. 78–88)

The Court recalls that Article 31, paragraph 1, of the Vienna Convention provides that "[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". The Court's interpretation must take account of all these elements considered as a whole.

As the Court has recalled on many occasions, "[i]nterpretation must be based above all upon the text of the treaty" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 22, para. 41). The Court observes that the definition of racial discrimination in the Convention includes "national or ethnic origin". These references to "origin" denote, respectively, a person's bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person's lifetime. The Court notes that the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of the Convention, namely race, colour and descent, are also characteristics that are inherent at birth.

The Court next turns to the context in which the term "national origin" is used in the Convention, in particular paragraphs 2 and 3 of Article 1. It considers that these provisions support the interpretation of the ordinary meaning of the term "national origin" as not encompassing current nationality. While according to paragraph 3, the Convention in no way affects legislation concerning nationality, citizenship or naturalization, on the condition that such legislation does not discriminate against any particular nationality, paragraph 2 provides that any "distinctions, exclusions, restrictions or preferences" between citizens and non-citizens do not fall within the scope of the Convention.

The Court then examines the object and purpose of the Convention. Recalling that it has frequently referred to the preamble of a convention to determine its object and purpose, the Court notes in the present case that CERD was drafted against the backdrop of the 1960s decolonization movement, for which the adoption of resolution 1514 (XV) of 14 December 1960 was a defining moment. By underlining that "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially

unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere", the Preamble to the Convention clearly sets out its object and purpose, which is to bring to an end all practices that seek to establish a hierarchy among social groups as defined by their inherent characteristics or to impose a system of racial discrimination or segregation. The aim of the Convention is thus to eliminate all forms and manifestations of racial discrimination against human beings on the basis of real or perceived characteristics as of their origin, namely at birth.

CERD, whose universal character is confirmed by the fact that 182 States are parties to it, thus condemns any attempt to legitimize racial discrimination by invoking the superiority of one social group over another. Therefore, it was clearly not intended to cover every instance of differentiation between persons based on their nationality. Differentiation on the basis of nationality is common and is reflected in the legislation of most States parties.

Consequently, the term "national origin" in Article 1, paragraph 1, of CERD, in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of the Convention, does not encompass current nationality.

2. The term "national origin" in the light of the travaux préparatoires *as a supplementary means of interpretation* (paras. 89–97)

In light of the conclusion above, the Court considers that it need not resort to supplementary means of interpretation. However, it notes that both Parties have carried out a detailed analysis of the *travaux préparatoires* of the Convention in support of their respective positions on the meaning and scope of the term "national origin" in Article 1, paragraph 1, of the Convention. Considering this fact and the Court's practice of confirming, when it deems it appropriate, its interpretation of the relevant texts by reference to the *travaux préparatoires*, the Court examines the *travaux préparatoires* of CERD in the present case.

The Court recalls that the Convention was drafted in three stages: first, as part of the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, then within the Commission on Human Rights and, finally, within the Third Committee of the United Nations General Assembly. In the view of the Court, the definition of racial discrimination contained in the various drafts demonstrates that the drafters did in fact have in mind the differences between national origin and nationality.

The Court concludes that the *travaux préparatoires* as a whole confirm that the term "national origin" in Article 1, paragraph 1, of the Convention does not include current nationality.

3. The practice of the CERD Committee (paras. 98–101)

The Court next turns to the practice of the CERD Committee. It notes that, in its General Recommendation XXX, the CERD Committee considered that "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim".

The Court recalls that, in its Judgment on the merits in the *Diallo* case, it indicated that it should "ascribe great weight" to the interpretation of the International Covenant on Civil and Political Rights—which it was called upon to apply in that case—adopted by the Human Rights Committee (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66). In this regard, it also affirmed, however, that it was "in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee". In the present case concerning the interpretation of CERD, the Court has carefully considered the position taken by the CERD Committee on the issue of discrimination based on nationality. By applying, as it is required to do, the relevant customary rules on treaty interpretation, it came to the conclusion, on the basis of the reasons set out above, that the term "national origin" in Article 1, paragraph 1, of CERD, in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of the Convention, does not encompass current nationality.

4. The jurisprudence of regional human rights courts (paras. 102–104)

Lastly, the Court notes that both Parties referred in their written and oral pleadings to the jurisprudence of regional human rights courts in their arguments on the meaning and scope of the term "national origin".

It recalls that it is for the Court, in the present case, to determine the scope of CERD, which exclusively concerns the prohibition of racial discrimination on the basis of race, colour, descent, or national or ethnic origin. The Court notes that the regional human rights instruments on which the jurisprudence of the regional courts is based concern respect for human rights without distinction of any kind among their beneficiaries. The relevant provisions of these conventions are modelled on Article 2 of the Universal Declaration of Human Rights of 10 December 1948.

While these legal instruments all refer to "national origin", their purpose is to ensure a wide scope of protection of human rights and fundamental freedoms. The jurisprudence of regional human rights courts based on those legal instruments is therefore of little help for the interpretation of the term "national origin" in CERD.

5. Conclusion on the interpretation of the term "national origin" (para. 105)

In light of the above, the Court finds that the term "national origin" in Article 1, paragraph 1, of the Convention does not encompass current nationality. Consequently, the measures complained of by Qatar in the present case as part of its first claim, which are based on the current nationality of its citizens, do not fall within the scope of CERD.

B. The question whether the measures imposed by the UAE on certain Qatari media corporations come within the scope of the Convention (paras. 106–108)

The Court recalls that, in its second claim, Qatar complains that the measures imposed on certain media

corporations in the UAE have infringed the right to freedom of opinion and expression of Qataris.

For the present purposes, the Court examines only whether the measures concerning certain Qatari media corporations, which according to Qatar have been imposed in a racially discriminatory manner, fall within the scope of the Convention.

The Court notes that the Convention concerns only individuals or groups of individuals. In its view, this is clear from the various substantive provisions of CERD (in particular Article 1, paragraph 4, Article 4 (*a*) and Article 14, paragraph 1), as well as its Preamble. It considers that, read in its context and in the light of the object and purpose of the Convention, the term "institutions" refers to collective bodies or associations, which represent individuals or groups of individuals. Thus, the Court concludes that Qatar's second claim relating to Qatari media corporations does not fall within the scope of the Convention.

C. The question whether the measures that Qatar characterizes as "indirect discrimination" against persons of Qatari national origin fall within the scope of the Convention (paras. 109–113)

The Court recalls that Qatar submits that the "expulsion order" and "travel bans", as well as other measures taken by the UAE, have had the purpose and effect of discriminating "indirectly" against persons of Qatari national origin in the historical-cultural sense, namely persons of Qatari birth and heritage, including their spouses, their children and persons otherwise linked to Qatar.

The Court further recalls that it has already found that the "expulsion order" and "travel bans" of which Qatar complains as part of its first claim do not fall within the scope of CERD, since these measures are based on the current nationality of Qatari citizens, and that such differentiation is not covered by the term "national origin" in Article 1, paragraph 1, of the Convention. The Court then turns to the question whether these and any other measures as alleged by Qatar are capable of falling within the scope of the Convention, if, by their purpose or effect, they result in racial discrimination against certain persons on the basis of their Qatari national origin.

The Court first observes that, according to the definition of racial discrimination in Article 1, paragraph 1, of CERD, a restriction may constitute racial discrimination if it "has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". Thus, the Convention prohibits all forms and manifestations of racial discrimination, whether arising from the purpose of a given restriction or from its effect. In the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention. In the Court's view, the various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin. The Court further observes that declarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD. Thus, the Court concludes that, even if the measures of which Qatar complains in support of its "indirect discrimination" claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention.

It follows from the above that the Court does not have jurisdiction *ratione materiae* to entertain Qatar's third claim, since the measures complained of therein by that State do not entail, either by their purpose or by their effect, racial discrimination within the meaning of Article 1, paragraph 1, of the Convention.

D. General conclusion (para. 114)

In light of the above, the Court concludes that the first preliminary objection raised by the UAE must be upheld. Having found that it does not have jurisdiction *ratione materiae* in the present case under Article 22 of the Convention, the Court does not consider it necessary to examine the second preliminary objection raised by the UAE. In accordance with its jurisprudence, when its jurisdiction is challenged on diverse grounds, the Court is "free to base its decision on the ground which in its judgment is more direct and conclusive".

Operative clause (para. 115)

The Court,

(1) By eleven votes to six,

Upholds the first preliminary objection raised by the United Arab Emirates;

In favour: Vice-President Xue; Judges Tomka, Abraham, Bennouna, Donoghue, Gaja, Crawford, Gevorgian, Salam; Judges *ad hoc* Cot, Daudet;

Against: President Yusuf; Judges Cançado Trindade, Sebutinde, Bhandari, Robinson, Iwasawa;

(2) By eleven votes to six,

Finds that it has no jurisdiction to entertain the Application filed by the State of Qatar on 11 June 2018.

In favour: Vice-President Xue; Judges Tomka, Abraham, Bennouna, Donoghue, Gaja, Crawford, Gevorgian, Salam; Judges *ad hoc* Cot, Daudet;

Against: President Yusuf; Judges Cançado Trindade, Sebutinde, Bhandari, Robinson, Iwasawa.

*

President Yusuf appends a declaration to the Judgment of the Court; Judges Sebutinde, Bhandari and Robinson append dissenting opinions to the Judgment of the Court; Judge Iwasawa appends a separate opinion to the Judgment of the Court; Judge *ad hoc* Daudet appends a declaration to the Judgment of the Court.

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Declaration of President Yusuf

President Yusuf disagrees with the conclusions of the Court and the reasoning of the majority on two interrelated issues: the

determination of the subject-matter of the dispute and the jurisdiction *ratione materiae* of the Court with regard to what is referred to in the Judgment as a claim of "indirect discrimination".

In President Yusuf's view, the majority has framed the subject-matter of the dispute in a manner totally disconnected from the Applicant's written and oral pleadings. While Qatar has consistently claimed that the measures adopted by the UAE amount to racial discrimination on the basis of "national origin" both in purpose and in effect, the entire reasoning of the Judgment turns on the concept of "nationality" and proceeds to make an artificial classification of Qatar's claims in three categories that ignore the actual formulation of the dispute chosen by the Applicant. In his view, the majority departs from the long-standing jurisprudence of the Court that, when determining the subject-matter of the dispute, the Court must give particular attention to the actual formulation of the dispute chosen by the applicant. Had the majority applied this jurisprudence to this case, it would have come to the conclusion that Qatar's claims of racial discrimination on grounds of "national origin" fall squarely within the scope of Article 1, paragraph 1, of CERD.

Furthermore, President Yusuf disagrees with the approach of the majority with regard to the Applicant's claim of so-called "indirect discrimination". In his view, the examination of Qatar's claims of racial discrimination against individuals of Qatari national origin raises questions of fact regarding the actual effect of the impugned measures on such individuals and is therefore properly a matter for the merits. What matters at this stage is whether the impugned measures were capable of having an adverse effect on rights protected under CERD. In President Yusuf's view, the measures complained of by Qatar were capable of having such an effect on persons of Qatari national origin, and the Court should have left their examination for the merits stage.

Dissenting opinion of Judge Sebutinde

In her dissenting opinion Judge Sebutinde opines that the first preliminary objection of the UAE does not, in the circumstances of the present case, have an exclusively preliminary character and should be joined to the merits, pursuant to the provisions of Article 79*ter*, paragraph 4, of the Rules of Court. In particular, the question of whether or not the measures taken by the UAE against Qatar and Qataris on 5 June 2017 had "the purpose or effect of racial discrimination" within the meaning of Article 1, paragraph 1, of the CERD, is a delicate and complex one that can only be determined after a detailed examination of the evidence and arguments of the Parties during the merits stage.

Secondly, Judge Sebutinde further opines that the preconditions referred to in Article 22 of the CERD are in the alternative and are not cumulative. The wording of Article 22 of the CERD does not expressly require a party to exhaust the CERD procedures before that party can unilaterally seise the Court. Both Parties acknowledge that the CERD Committee and the proceedings before the Court have related but fundamentally distinct roles relating to resolving disputes between States parties to the CERD. The Committee's role is conciliatory and recommendatory, while that of the Court is legal and binding. There is nothing incompatible about Qatar pursuing the two procedures in parallel and, accordingly, the second preliminary objection of the UAE should be rejected.

Thirdly, according to the Court's well-established jurisprudence, a claim based upon a valid title of jurisdiction cannot be challenged on grounds of "abuse of process" unless the high threshold of "exceptional circumstances" has been met. The UAE has not met that threshold. Qatar's claims are admissible and the third preliminary objection should also be rejected, and the Court should find Qatar's Application admissible.

Dissenting opinion of Judge Bhandari

In his dissenting opinion, Judge Bhandari states his disagreement with the finding of the Judgment upholding the first preliminary objection raised by the UAE and the finding that the Court has no jurisdiction to entertain the Application filed by Qatar. The dispute between Qatar and the UAE concerns the series of discriminatory measures allegedly promulgated by the UAE against Qatar, Qatari nationals and individuals of Qatari "national origin", on 5 June 2017 and the days that followed. In order to invoke the jurisdictional basis under Article 22 of CERD, the alleged discriminatory measures must fall within one of the prohibited categories of "racial discrimination", as defined under Article 1, paragraph 1, of CERD. At this preliminary stage, the Court is called upon to interpret whether the term "national origin" in Article 1, paragraph 1, of CERD encompasses current nationality.

Judge Bhandari first addresses the majority's interpretation of the ordinary meaning of the term "national origin". In interpreting the term's ordinary meaning, the majority highlights the immutable nature of its meaning in opposition to the transient nature of the meaning of "nationality". In Judge Bhandari's view, by alluding that the two words are fundamentally disparate, the Judgment reaches no real consensus in its attempt to delineate the ordinary meaning for two reasons. First, the term "national origin" presents an amalgamation of the words "national" and "origin". When the definitions of these words are analysed, "national origin" refers to a person's belonging to a country or nation. Belonging in this sense may be long standing or historical, and defined by ancestry or descent, or it may be confirmed by the legal status of nationality or national affiliation. Thus, current nationality, even if considered in a purely legal sense to be within the discretion of the State and subject to change over a person's lifetime, is in any event encompassed within the broader term "national origin". Since there is no doubt that these terms coincide, it is difficult to simply distinguish one from the other solely on the basis of immutability. Secondly, where nationality follows a *jus sanguinis* model, nationality coincides with "national origin". Under the *jus sanguinis* model, in Qatar, since nationality is conferred by parentage, the vast majority of Qatari nationals, including those affected by the measures, were born Qatari nationals and are Qatari in the sense of heritage. Nationality in this context is as immutable as "national origin". When the UAE adopted measures targeting "Qatari residents and visitors" and "Qatari nationals", they inevitably

also affected persons of Qatari "national origin" since Qatari nationals are primarily persons of Qatari heritage.

In relation to the majority's interpretation of the term "national origin" in its context, in light of the object and purpose of CERD, Judge Bhandari disagrees with the exclusion of the prohibition of discrimination "against any particular nationality" contained in Article 1, paragraph 3, of CERD in the Judgment's reasoning. In his view, the provisions which form the context of Article 1, paragraph 1, of CERD do not envisage broad and unqualified distinctions to be drawn between citizens and non-citizens. Article 1, paragraph 1, of CERD provides a broad definition of racial discrimination which includes discrimination based on "national origin". Article 1, paragraph 2, in functional terms, establishes an exception to the broader principle contained in Article 1, paragraph 1, of CERD by permitting a distinction to be drawn between citizens and non-citizens. However, this exception is limited by the object and purpose of the Convention, to eliminate racial discrimination in all its forms and manifestations. This object and purpose cannot be furthered if States are permitted to draw broad and unqualified distinctions, as have been drawn by the UAE through its measures *vis-à-vis* Qataris, Qatari nationals, residents and visitors. Article 1, paragraph 3, establishes a further exception to Article 1, paragraph 1; while implicating the treatment of non-citizens, it clarifies that "such provisions [should] not discriminate against any particular nationality".

According to Judge Bhandari, the *travaux préparatoires* further confirm that the term "national origin" should have a wider application than that envisaged by the majority. He points out that the Judgment does not touch upon the fact that the joint amendment suggested by the delegates of France and the United States of America, which specifically excluded nationality from the purview of "national origin", was withdrawn in favour of a compromise which was considered "entirely acceptable". The nine-power compromise proposal was the result of the exclusion of certain proposed amendments which had the effect of excluding nationality from the purview of "national origin". Arguments made during the debates of the Commission on Human Rights further highlight the compromise that the meaning of "national origin" represents. The delegate of Lebanon, for instance, argued that "[t]he convention should apply to nationals, non-nationals, and all ethnic groups, but it should not bind the parties to afford the same political rights to non-nationals as they normally granted to nationals". The drafter's rejection of the approach that excluded nationality-based discrimination in Article 1, paragraph 1, indicates that CERD's inclusion of "national origin" protects against discrimination on the basis of current nationality.

In Judge Bhandari's view, the ordinary meaning of the term "national origin" therefore encompasses one's nationality, including current nationality. The ordinary meaning in its context, in light of CERD's object and purpose to eliminate "all forms" of racial discrimination, converges to confirm that the term "national origin" encompasses current nationality. An interpretation that categorically excludes current nationality would undermine this object and purpose. Considering the fundamental ambiguity resulting from the approach adopted by the majority to determine the ordinary meaning, the *travaux préparatoires* reinforce the conclusion that CERD's definition of racial discrimination should have a wide application. The *travaux préparatoires* thus confirm the ordinary meaning of "national origin" as encompassing current nationality.

Judge Bhandari further opines that the majority has insufficiently addressed the relevance of the CERD Committee and its General Recommendation XXX, paragraph 4, to the present dispute. The CERD Committee being "the guardian of the Convention", the Judgment provides no compelling reason as to why it has chosen to depart from the observation in *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66, that it "should ascribe great weight" to interpretations by the independent body established for the purpose of supervising the application of the treaty concerned. Moreover, considering the functions it carries out and the manner in which it does this—as well as its composition and its members—the CERD Committee, which has sought to act judicially since its very first meeting in 1970, undoubtedly offers consistent interpretations of CERD by the most highly qualified publicists in this field. Judge Bhandari asserts that his reasoning on this contention is reinforced in light of the Court's willingness to take into account the work of United Nations supervisory bodies of human rights treaties in its judgments in the past, even though reference to external precedents is not a common feature of the Court's case law. Moreover, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 179–180, paras. 109–112, while quoting from Human Rights Committee General Comment 27, paragraph 14, the Court stated that the restrictions to the freedom of movement in Article 12, paragraph 3, of the International Covenant on Civil and Political Rights "must conform to the principle of proportionality" and "must be the least intrusive instrument amongst those which might achieve the desired result". The Court thereby acknowledged that the derogatory measure in question had to be proportionate to the achievement of a legitimate aim. General Recommendation XXX, paragraph 4, reflects this widely accepted principle of proportionality, thus there appears to be no reason to disregard its application to the present case.

General Recommendation XXX, paragraph 4, provides that differential treatment will "constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim". In this regard, Judge Bhandari states that the UAE announced a series of measures with specific application to Qataris on the basis of their nationality and with the specific purpose of using such measures to "induc[e] Qatar to comply with its obligations under international law". Accordingly, if nationality is determined to be a prohibited basis of discrimination under Article 1, paragraph 1, of CERD, distinctions on this basis are capable of falling within the provisions of CERD when they do not fulfil "a legitimate aim, and are not proportional to the achievement of this aim". The stated purpose of using such measures to induce compliance with unrelated treaty obligations appears neither legitimate nor proportionate, given the fundamental human rights claimed to have been affected. The alleged acts by the UAE

thus disproportionately affect Qatari nationals and satisfy the conditions for exercise of the Court's jurisdiction *ratione materiae* under Article 22 of CERD.

In relation to the three heads of claims which form the subject-matter of the dispute, Judge Bhandari concludes that CERD encompasses discrimination against a particular group of non-nationals on the basis of their current nationality. As such, the measures adopted by the UAE which disproportionately affected individuals of Qatari nationality—which form the first claim of Qatar—are capable of falling within the scope of CERD. Furthermore, in Judge Bhandari's view, the majority fails to identify that the word "residents" in the 5 June 2017 measures, which are addressed at "all Qatari residents and visitors", is broad enough to include not only Qatari nationals but also people of Qatari "national origin". If the measures were to only affect Qatari nationals, the measures would have been couched in different terminology. Furthermore, since the majority of Qatari nationals are defined by their Qatari heritage, ancestry or descent, Qatar's third claim of indirect discrimination, which is based on the discriminatory effect of the measures, is capable of falling within the provisions of CERD. In particular, the effect of the adverse media coverage and the anti-Qatari propaganda against Qatari nationals inevitably impairs the enjoyment of rights by individuals of Qatari national origin. The attempt to limit these measures to nationality alone is untenable.

While a full assessment of these claims would appear more appropriate at the merits stage of the proceedings, at the jurisdictional stage, there is a sufficient basis to reject the first preliminary objection of the UAE. Thus, the majority ought to have rejected the first preliminary objection of the UAE.

Dissenting opinion of Judge Robinson

1. Judge Robinson disagrees with the Court upholding the first preliminary objection of the UAE and the finding that the Court has no jurisdiction to entertain the Application filed by Qatar. Judge Robinson argues that the majority has wrongly concluded that the claims arising from the first and third measures do not fall within the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD" or the "Convention").

2. In relation to the first claim, Judge Robinson maintains that the dispute between the Parties concerns the question whether the term "national origin" in the definition of racial discrimination in Article 1 (1) of CERD excludes or encompasses differences of treatment based on nationality. He concludes that Qatar is correct in its argument that the term "national origin" encompasses differences of treatment based on nationality. In his view, there is nothing in the ordinary meaning of the term "national origin" that would render it inapplicable to a person's current nationality. According to Judge Robinson, the majority has argued as a general proposition that, while nationality is changeable, national origin is a characteristic acquired at birth and for that reason, immutable. However, in Judge Robinson's view, as a general proposition, the validity of this statement is questionable because it is too stark in its presentation of the difference between nationality and national origin and does not reflect the nuances distinguishing one from the other.

3. Judge Robinson observes that the majority has relied on the Court's judgment in *Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, p. 20, to support its reasoning that nationality is subject to the discretion of the State. However, in his view, that case, decided in 1955, reflects a substantially State-centred approach to international law that has been affected by subsequent developments in human rights law. For example, it is now generally accepted that a State is not entirely free to deprive a person of its nationality where this act would render the person stateless.

4. Judge Robinson examines the context and the Convention's object and purpose in relation to nationality. He also examines the *travaux préparatoires* in relation to the meaning of the term "national origin" and concludes that the *travaux* confirm the interpretation resulting from the ordinary meaning of the term "national origin". Turning to the work of the CERD Committee and General Recommendation XXX, he argues that it is regrettable that, in this case, the Court did not follow the CERD Committee's recommendation. He noted that the majority did not offer any explanation for not following it.

5. For Judge Robinson, paragraph 4 of General Recommendation XXX seeks to strike a balance between measures taken by a State in the exercise of its sovereign powers and the extent to which those measures may properly derogate from a fundamental human right. He notes that the principle of proportionality is applied in the implementation of all the major global and regional human rights instruments and by the multitude of States, which have, in their national constitutions and laws, provisions relating to the protection of fundamental rights and freedoms that have been influenced by the Universal Declaration of Human Rights and the European Convention on Human Rights. The principle of proportionality is applied by all regional human rights courts. Judge Robinson states that his own view is that the principle may very well reflect a rule of customary international law.

6. According to Judge Robinson, if the Convention is interpreted as not requiring the application of the principle of proportionality set out in paragraph 4 of General Recommendation XXX, it would be an outlier among the number of human rights treaties that have been adopted since World War II. Moreover, the Commission's recommendation is wholly consistent with the purpose of the Convention to eliminate all forms of racial discrimination, since it confirms that States are not free to adopt measures that disproportionately discriminate against persons on the basis of their nationality.

7. Judge Robinson expresses the view that, in the circumstances of this case and in the context of Article 1 (2) and (3) of the Convention, it was open to the UAE to adopt measures distinguishing between the United Arab Emirates' citizens and the citizens of other States, including those of Qatar. However, in adopting those measures, the UAE was obliged to ensure that the measures served a legitimate aim and were proportionate to the achievement of that aim. In any event, Judge Robinson argues that although Article 1 (3) allows a State to adopt measures providing for distinctions on

the basis of nationality, it specifically provides that such measures must not discriminate against a particular nationality. Judge Robinson concludes that, in the particular context of this case, Qatar's claim that the measures disproportionately affected Qataris on the basis of their nationality, which is encompassed by the term "national origin", falls within the provisions of the Convention.

8. In relation to the third claim, Judge Robinson argues that according to the Convention, the term "racial discrimination" refers to a restrictive measure that is based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of impairing the enjoyment, on an equal footing, of fundamental human rights. He notes that, as Judge Crawford stated in his declaration in *Ukraine* v. *Russian Federation*, "the definition of 'racial discrimination' in Article 1 of CERD does not require that the restriction in question be based expressly on racial or other grounds enumerated in the definition; it is enough that it directly implicates such a group on one or more of these grounds"[1]. He points out that Qatar relies on this analysis by Judge Crawford in order to distinguish between a restrictive measure that is based expressly on one of the protected grounds (direct discrimination) and one that, although not based expressly on one of those grounds, nonetheless directly implicates a group on one of the protected grounds. For him, translated to the circumstances of this case, Qatar's submission is that, although the UAE's measures do not on their face refer to persons of Qatari national origin, as a matter of fact by their effect they directly implicate persons of Qatari national origin. Qatar describes this as indirect discrimination. He expresses the view that, although Qatar has framed this part of its case as one of indirect discrimination—since labels such as "indirect discrimination" are very often misleading—it is better to concentrate on the essence of Qatar's claim.

9. Judge Robinson comments first that the label "indirect discrimination" may be misleading because, for the so-called indirect discrimination to occur, the measures in question must by their effect directly implicate persons in the protected group. In this case, the measures directly implicate persons of Qatari national origin. In his view, there is nothing that is indirect in the way the measures by their effect implicate persons of Qatari national origin. Second, the kind of treatment described by Qatar as indirect discrimination occurs frequently in the practice of States. Third, another drawback with the label "indirect discrimination" is that it would seem to suggest or imply that indirect discrimination is inferior to what is called direct discrimination and, for that reason, there may be a tendency to undervalue indirect discrimination. He points out that, in paragraph 112 of the Judgment, the majority speaks of "collateral or secondary effects" of the measures. Fourth, the kind of restriction that gives rise to indirect discrimination is frequently disguised discrimination; the discrimination may be difficult to detect because, on its face, the restrictive measure is not based expressly on racial or other grounds.

10. For Judge Robinson, it is regrettable that the majority did not address Qatar's third claim in a satisfactory manner.

11. According to Judge Robinson, the substance of Qatar's third claim is that while the travel ban, the expulsion order and the restrictions on media corporations do not on their face purport to discriminate against Qataris on the basis of their national origin—that is, are not based expressly on national origin—by their effect, they constitute discrimination on that basis. He emphasizes that Qatar's third claim operates independently of its claim that the measures discriminated against Qataris by reason of their nationality; Qatar argues that by reason of their effect the measures also discriminate against Qataris because of their cultural links with Qatar and, therefore, by reason of their Qatari national origin. In his view, the examples given by Qatar of how Qataris have been impacted by the measures are a classical illustration of discrimination based on national origin; they show precisely how Qataris were impacted by the measures by reason of their cultural ties with Qatar as a nation. In his view, it follows, therefore, that Qatar's third claim—based as it is on the effect of the measures on Qataris as persons of Qataris national origin—is not affected by the majority's finding in paragraph 105 that "the measures complained of by Qatar in the present case as part of its first claim, which are based on the current nationality of its citizens, do not fall within the scope of CERD". Qatar's third claim is that the measures that are based on national origin, a protected ground in the Convention, fall within the provisions of the Convention.

12. Finally, Judge Robinson concludes that the first preliminary objection should have been rejected as the dispute between the Parties concerns the interpretation or application of the Convention, and the Court should have found that it has jurisdiction *ratione materiae* under Article 22 of CERD in respect of the Qatar's first and third claims in its first preliminary objection.

Separate opinion of Judge Iwasawa

1. Judge Iwasawa agrees with the Court that the term "national origin" in Article 1, paragraph 1, of CERD does not encompass current nationality. However, he disagrees with the Court's analysis and conclusion regarding Qatar's claim of indirect discrimination. The UAE's first preliminary objection, inasmuch as it relates to Qatar's claim of indirect discrimination, raises issues that require a detailed examination by the Court at the merits stage. He is therefore of the view that the Court should have declared that the UAE's first preliminary objection does not possess an exclusively preliminary character.

2. Judge Iwasawa begins his separate opinion by reviewing the position of non-citizens under international law. The 1948 Universal Declaration on Human Rights provides for the prohibition of discrimination in Article 2. It contains a list of prohibited grounds of discrimination, which is illustrative, and not exhaustive. Thus, even though nationality is not expressly mentioned, it may be concluded that discrimination based on nationality is prohibited by the Declaration and that

[1] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine* v. *Russian Federation*), *Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 215, para. 7, declaration of Judge Crawford.

non-citizens are entitled to the human rights enshrined therein. Similarly, non-citizens are entitled to the human rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and regional conventions such as the European Convention on Human Rights and the American Convention on Human Rights. This has been confirmed by the international human rights bodies and courts established by these treaties to monitor their implementation by States. Nonetheless, since the Court's jurisdiction in the present case is limited to disputes with respect to the interpretation or application of CERD, Judge Iwasawa points out that the Court has no jurisdiction to make determinations as to whether the measures taken by the UAE comply with other rules of international law.

3. Judge Iwasawa then turns to the question whether the Court has jurisdiction over Qatar's claims. For Qatar's claims to fall within the scope of CERD, the measures taken by the UAE must be capable of constituting "racial discrimination" within the meaning of CERD. According to the definition of "racial discrimination" in Article 1, paragraph 1, of CERD, the measures must be based on "race, colour, descent, or national or ethnic origin". While the UAE maintains that the Court lacks jurisdiction because its alleged acts differentiate on the basis of nationality, Qatar argues that the term "national origin", as used in Article 1, paragraph 1, of CERD, encompasses nationality. Judge Iwasawa agrees with the Court's conclusion that "national origin" does not encompass current nationality and provides additional reasons in support of that conclusion.

4. Judge Iwasawa is of the view that the different levels of scrutiny required in reviewing the lawfulness of differential treatment on the ground of "national origin" and "nationality" support a distinction being made between the two terms. While differential treatment based on "race, colour, descent, or national or ethnic origin" must meet the most rigorous scrutiny, the scrutiny required for distinctions based on "nationality" is not as rigorous. In addition, he emphasizes that the Court's conclusion is consistent with the interpretation of similar language in other human rights conventions by the bodies established under those conventions. The Human Rights Committee has taken the position that nationality falls within the term "other status", rather than "national origin", both of which are listed as prohibited grounds of discrimination in Article 26 of the ICCPR. The Committee on Economic, Social and Cultural Rights has equally taken the view that nationality falls within "other status" under Article 2, paragraph 2, of the ICESCR.

5. With regard to Qatar's claim of indirect discrimination, the Court considers, in paragraph 112 of the Judgment, that "even if the measures of which Qatar complains in support of its 'indirect discrimination' claim were to be proven on the facts, they are not capable of constituting racial discrimination". Judge Iwasawa disagrees and considers that, if the measures were proven to have an unjustifiable disproportionate prejudicial impact on an identifiable group distinguished by national origin, they would constitute racial discrimination in accordance with the notion of indirect discrimination.

6. Judge Iwasawa points out that international human rights courts and bodies, including the CERD Committee, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the European Court of Human Rights and the Inter-American Court of Human Rights, have embraced and developed the notion of indirect discrimination. If a rule, measure or policy that is apparently neutral has an unjustifiable disproportionate prejudicial impact on a certain protected group, it constitutes discrimination, notwithstanding that it is not specifically aimed at that group. The analysis of disproportionate impact requires a comparison between different groups. The context and circumstances in which the differentiation was introduced must be taken into account in determining whether the measure amounts to discrimination.

7. Judge Iwasawa further observes that the CERD Committee has applied the notion of indirect discrimination in the context of the treatment of non-citizens. For instance, after considering reports submitted by States parties, the Committee regularly adopts concluding observations that include recommendations on the treatment of non-citizens. In his view, paragraph 4 of the Committee's General Recommendation XXX on *discrimination against non-citizens* can be explained by the notion of indirect discrimination.

8. In the final part of his separate opinion, Judge Iwasawa addresses Qatar's claim of indirect discrimination in the present case. The Court's task is to determine whether the measures taken by the UAE on the basis of current nationality have an unjustifiable disproportionate prejudicial effect on an identifiable group distinguished by national origin. In order to make this determination, it is first necessary to identify a group that is distinguished by "national origin". It must then be assessed whether the measures have an unjustifiable disproportionate prejudicial impact on that protected group compared to other groups. With regard to the first issue, Judge Iwasawa believes that the Court does not possess the facts necessary to establish whether a CERD-protected group can be distinguished by national origin. The examination of the second issue similarly requires extensive factual analysis. Moreover, Judge Iwasawa considers that both issues constitute the very subject-matter of the dispute on the merits and should therefore be determined at the merits stage.

9. For these reasons, Judge Iwasawa concludes that the Court should have declared that the first preliminary objection of the UAE does not have an exclusively preliminary character. He notes that this conclusion should not be interpreted as prejudging in any way the potential findings of the Court on the merits.

Declaration of Judge *ad hoc* Daudet

1. Judge *ad hoc* Daudet voted in favour of all the paragraphs of the operative part of the present Judgment. Indeed, he agrees with the view expressed by the Court regarding the interpretation of Article 1, paragraph 1, of CERD, namely that "national origin" is distinct from "nationality". In Judge *ad hoc* Daudet's opinion, this consideration does not require an examination of any question on the merits. The objection raised to jurisdiction thus possesses an exclusively preliminary character.

2. He points out, however, that this finding does not justify the actions taken by the UAE against Qatar, which he considers to be human rights violations under several international conventions.

3. Judge *ad hoc* Daudet also recalls that the Court's 2018 Order indicating provisional measures is binding on the Parties. In his view, this has enabled Qatar to recover part of its rights, subject to the proper implementation of the Order by the UAE.

4. Lastly, after contemplating the possibility of a peaceful resolution of the dispute through a conciliation process under CERD, Judge *ad hoc* Daudet welcomes the reconciliation process initiated between the Gulf countries at the time of delivery of the Court's Judgment.

244. MARITIME DELIMITATION IN THE INDIAN OCEAN (SOMALIA *v.* KENYA)

Judgment of 12 October 2021

On 12 October 2021, the International Court of Justice delivered its Judgment in the case concerning *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya).*

The Court was composed as follows: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; Judge *ad hoc* Guillaume; Registrar Gautier.

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History of the proceedings (paras. 1–28)

The Court begins by recalling that, on 28 August 2014, the Federal Republic of Somalia (hereinafter "Somalia") filed in the Registry of the Court an Application instituting proceedings against the Republic of Kenya (hereinafter "Kenya") concerning a dispute in relation to "the establishment of the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone … and continental shelf, including the continental shelf beyond 200 nautical miles". In its Application, Somalia sought to found the jurisdiction of the Court on the declarations made, pursuant to Article 36, paragraph 2, of the Statute of the Court, by Somalia on 11 April 1963 and by Kenya on 19 April 1965. On 7 October 2015, Kenya raised preliminary objections to the jurisdiction of the Court and to the admissibility of the Application. By its Judgment of 2 February 2017 (hereinafter the "2017 Judgment"), the Court rejected the preliminary objections raised by Kenya, and found that it had jurisdiction to entertain the Application filed by Somalia and that the Application was admissible. Following the filing of the Parties' written pleadings, public hearings on the merits were held from 15 to 18 March 2021. Kenya did not participate in those hearings.

I. Geographical and historical background (paras. 31–34)

The Court first recalls the Parties' geographical situation, before noting the following facts. On 15 July 1924, Italy and the United Kingdom concluded a treaty regulating certain questions concerning the boundaries of their respective territories in East Africa, including what Somalia describes as "the Italian colony of Jubaland", located in present-day Somalia, and the British colony of Kenya. By an Exchange of Notes dated 16 and 26 June 1925, the boundary between the Italian and British colonial territories was redefined in its southernmost section. Between 1925 and 1927, a joint British-Italian commission surveyed and demarcated the boundary. Following the completion of this exercise, the commission recorded its decisions in an Agreement signed on 17 December 1927 (hereinafter the "1927 Agreement"), which was subsequently formally confirmed by an Exchange of Notes of 22 November 1933 between the British and Italian Governments (the 1927 Agreement and this Exchange of Notes hereinafter collectively being referred to as the "1927/1933 treaty arrangement"). Somalia and Kenya gained their independence in 1960 and 1963, respectively. Both Parties signed the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention") on 10 December 1982. They ratified it on 2 March 1989 and 24 July 1989, respectively, and the Convention entered into force for them on 16 November 1994. Both Somalia and Kenya have filed submissions with the Commission on the Limits of the Continental Shelf (hereinafter the "CLCS" or the "Commission") in order to obtain its recommendations on the establishment of the outer limits of their continental shelves beyond 200 nautical miles, in accordance with Article 76, paragraph 8, of UNCLOS. While they previously objected to the consideration by the Commission of each other's submissions, these objections were subsequently withdrawn. As of the date of the Judgment, the Commission has yet to issue its recommendations in respect of the Parties' submissions.

II. Overview of the positions of the Parties (para. 35)

The Court notes that the Parties have adopted fundamentally different approaches to the delimitation of the maritime areas. Somalia argues that no maritime boundary exists between the two States and asks the Court to plot a boundary line using the equidistance/special circumstances method (for the delimitation of the territorial sea) and the equidistance/relevant circumstances method (for the maritime areas beyond the territorial sea). In its view, an unadjusted equidistance line throughout all maritime areas achieves the equitable result required by international law. Kenya, for its part, contends that there is already an agreed maritime boundary between the Parties, because Somalia has acquiesced to a boundary that follows the parallel of latitude at 1° 39' 43.2" S (hereinafter "the parallel of latitude"). Kenya further contends that the Parties have considered this to be an equitable delimitation, in light of both the geographical context and regional practice. Kenya submits that, even if the Court were to conclude that there is no maritime boundary in place, it should delimit the maritime areas following the parallel of latitude, and that, even if the Court were to employ the delimitation methodology suggested by Somalia, the outcome, following adjustment to reach an equitable result, would be a delimitation that follows the parallel of latitude.

III. Whether Somalia has acquiesced to a maritime boundary following the parallel of latitude (paras. 36–89)

The Court first ascertains whether there is an agreed maritime boundary between the Parties on the basis of acquiescence by Somalia.

It recalls that both Kenya and Somalia are parties to UNCLOS. For the delimitation of the territorial sea, Article 15 of the Convention provides for the use of a median line "failing agreement between [the two States] to the contrary", unless "it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in

a [different] way". The delimitation of the exclusive economic zone and the continental shelf is governed by Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention, respectively. They establish that delimitation "shall be effected by agreement on the basis of international law".

The Court reiterates that maritime delimitation between States with opposite or adjacent coasts must be effected by means of an agreement between them, and that, where such an agreement has not been achieved, delimitation should be effected by recourse to a third party possessing the necessary competence. Maritime delimitation cannot be effected unilaterally by either of the States concerned.

An agreement establishing a maritime boundary is usually expressed in written form. The Court considers, however, that the "agreement" referred to in Article 15, Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention may take other forms as well. The essential question is whether there is a shared understanding between the States concerned regarding their maritime boundaries.

The jurisprudence relating to acquiescence and tacit agreement may be of assistance when examining whether there exists an agreement that is not in written form regarding the maritime boundary between two States. In this regard, the Court recalls that acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent. If the circumstances are such that the conduct of the other State calls for a response, within a reasonable period, the absence of a reaction may amount to acquiescence. This is based on the principle *qui tacet consentire videtur si loqui debuisset ac potuisset*. In determining whether a State's conduct calls for a response from another State, it is important to consider whether the State has consistently maintained that conduct. In evaluating the absence of a reaction, duration may be a significant factor.

The Court observes that it has set a high threshold for proof that a maritime boundary has been established by acquiescence or tacit agreement. It has thus emphasized that since the establishment of a permanent maritime boundary is a matter of grave importance, evidence of a tacit legal agreement must be compelling. Acquiescence presupposes clear and consistent acceptance of another State's position. To date, the Court has recognized the existence of a tacit agreement delimiting a maritime boundary in only one case, in which the parties had acknowledged in a binding international agreement that a maritime boundary already existed. In the present case, the Court uses the criteria it has identified in earlier cases and examines whether there is compelling evidence that Kenya's claim to a maritime boundary at the parallel of latitude was maintained consistently and, consequently, called for a response from Somalia. It then considers whether there is compelling evidence that Somalia clearly and consistently accepted the boundary claimed by Kenya.

In this respect, the Court notes that Somalia and Kenya present arguments regarding the Proclamations by the President of the Republic of Kenya dated 28 February 1979 and 9 June 2005 (hereinafter the "1979 Proclamation" and the "2005 Proclamation"), Kenya's 2009 Submission to the CLCS and their respective domestic laws. They also refer to other conduct of the Parties in the period between 1979 and 2014. The Court examines these arguments in turn.

The Court observes that the 1979 and 2005 Proclamations both claim a boundary at the parallel of latitude, but Kenya's legislation refers to a boundary along a median or equidistance line. Moreover, in Notes Verbales of 26 September 2007 and 4 July 2008, Kenya requested Somalia to confirm its agreement to a boundary along the parallel of latitude, but it has not been shown that Somalia provided such confirmation. Furthermore, Kenya's 2009 Submission to the CLCS and a Memorandum of Understanding (hereinafter the "MOU") signed by the two States that same year recognize the existence of a maritime boundary dispute between the Parties. Finally, the negotiations held between the Parties in 2014 and Notes Verbales of Kenya in 2014 and 2015 also indicate a lack of agreement between the Parties on their maritime boundaries. In light of the foregoing, the Court considers that Kenya has not consistently maintained its claim that the parallel of latitude constitutes the single maritime boundary with Somalia. It thus concludes that there is no compelling evidence that Kenya's claim and related conduct were consistently maintained and, consequently, called for a response from Somalia.

The Court also considers that Somalia's conduct between 1979 and 2014 in relation to its maritime boundary with Kenya, in particular its alleged absence of protest against Kenya's claim, does not establish Somalia's clear and consistent acceptance of a maritime boundary at the parallel of latitude. In this regard, the Court is of the view that, contrary to what is claimed by Kenya, it cannot be inferred from the Parties' positions during the Third United Nations Conference on the Law of the Sea that Somalia rejected equidistance as a possible method of achieving an equitable solution. Moreover, there is no indication that Somalia accepted the boundary claimed by Kenya during the bilateral negotiations held in 1980 and 1981. Furthermore, although Somalia's Maritime Law of 1988 refers to a boundary for the territorial sea which follows "a straight line toward the sea from the land as indicated on the enclosed charts", this phrase is unclear and, without the charts mentioned, its meaning cannot be determined. The Court also notes that the 2009 MOU, Somalia's 2009 submission of preliminary information to the CLCS, a letter from Somalia dated 19 August 2009 and addressed to the Secretary-General of the United Nations, and Somalia's 2014 objection to the consideration by the CLCS of Kenya's submission all mention the existence of a maritime boundary dispute between the Parties. Finally, the Court adds that the context of the civil war that afflicted Somalia, depriving it of a fully operational government and administration between 1991 and 2005, must be taken into account in evaluating the extent to which it was in a position to react to Kenya's claim during this period.

In addition, the Court examines other conduct of the Parties between 1979 and 2014 concerning naval patrols, fisheries, marine scientific research and oil concessions, and considers that it does not confirm that Somalia has clearly and consistently accepted a boundary at the parallel of latitude.

In conclusion on this question, the Court finds that there is no compelling evidence that Somalia has acquiesced to the maritime boundary claimed by Kenya and that, consequently, there

is no agreed maritime boundary between the Parties at the parallel of latitude. It therefore rejects Kenya's claim in this respect.

IV. Maritime delimitation (paras. 90–197)

In view of this conclusion, the Court turns to the delimitation of the maritime areas appertaining to Somalia and Kenya.

A. Applicable law (para. 92)

The Court first recalls that both Somalia and Kenya are parties to UNCLOS, and the provisions of the Convention must therefore be applied in determining the course of the maritime boundary between the two States.

B. Starting-point of the maritime boundary (paras. 93–98)

The Court notes that although the Parties initially proffered divergent views on the appropriate approach to defining the starting-point of the maritime boundary, those views evolved in the course of the proceedings and are now by and large concordant. Taking into account the views of the Parties, the Court considers that the starting-point of the maritime boundary is to be determined by connecting the final permanent boundary beacon, known as Primary Beacon No. 29, or "PB 29", to a point on the low-water line by a straight line that runs in a south-easterly direction and that is perpendicular to "the general trend of the coastline at Dar Es Salam" in accordance with the terms of the 1927/1933 treaty arrangement.

C. Delimitation of the territorial sea (paras. 99–118)

The Court then turns to the delimitation of the territorial sea. It notes that Somalia submits that this delimitation is to be effected pursuant to Article 15 of the Convention, whereas Kenya maintains that the maritime boundary in the territorial sea already exists at the parallel of latitude. The Court recalls that it has already concluded that no such boundary was agreed between the Parties. It also observes that Kenya, in its Counter-Memorial, referred to the 1927/1933 treaty arrangement and stated that it "provided for the establishment of [a] boundary of the territorial sea". The Court notes, however, that neither Party asks it to confirm the existence of any segment of a maritime boundary or to delimit the boundary in the territorial sea on the basis of the 1927/1933 treaty arrangement. It recalls that in their legislation concerning the territorial sea neither Party has referred to the terms of the 1927/1933 treaty arrangement to indicate the extent of the territorial sea in relation to its adjacent neighbour. The Court further notes that the agenda of the meeting between Somalia and Kenya, held on 26 and 27 March 2014, to discuss the maritime boundary between the two countries, covered all maritime zones, including the territorial sea, and that, in a presentation attached to the report on that meeting, Kenya referred to Articles 15, 74 and 83 of the Convention as relevant to maritime delimitation, emphasizing that Article 15 provides for delimitation through a "[m]edian line for [the] territorial sea unless there is an agreement to the contrary based on [a] claim by historical title and or special circumstances". In light of the above, the Court considers it unnecessary to decide whether the 1927/1933 treaty arrangement had as an objective the delimitation of the boundary in the territorial sea.

The Court recalls that the delimitation methodology is based on the geography of the coasts of the two States concerned, and that a median or equidistance line is constructed using base points appropriate to that geography. It explains that, although in the identification of base points the Court will have regard to the proposals of the parties, it need not select a particular base point, even if the parties are in agreement in that respect, if it does not consider that base point to be appropriate. It may select a base point that neither party has proposed. The Court further recalls that it has sometimes been led to eliminate the disproportionate effect of small islands by not selecting a base point on such small maritime features. As the Court has stated in the past, there may be situations in which the equitableness of an equidistance line depends on the precaution taken to eliminate the disproportionate effect of certain islets, rocks and minor coastal projections.

In the circumstances of the present case, the Court considers it appropriate to place base points for the construction of the median line solely on solid land on the mainland coasts of the Parties. It does not consider it appropriate to place base points on the tiny arid Diua Damasciaca islets, which would have a disproportionate impact on the course of the median line in comparison to the size of these features. For similar reasons, nor does the Court consider it appropriate to select a base point on a low-tide elevation off the southern tip of Ras Kaambooni, which is a minor protuberance in Somalia's otherwise relatively straight coastline in the vicinity of the land boundary terminus, which constitutes the starting-point for the maritime delimitation.

The Court then gives the geographic co-ordinates of the base points that it places on the Parties' coasts for the construction of the median line. The resulting line starts from the land boundary terminus and continues out to the point (Point A) at a distance of 12 nautical miles from the coast. That median line is depicted on sketch-map No. 5 (reproduced in the Annex to this Summary).

The Court observes that the course of the median line corresponds closely to that of a line "at right angles to the general trend of the coastline", assuming that the 1927/1933 treaty arrangement, in using this phrase, had as an objective to draw a line that continues into the territorial sea, a question that the Court need not decide.

D. Delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles (paras. 119–177)

1. Delimitation methodology (paras. 119–131)

The Court then proceeds to the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles from the coasts of the Parties, noting that the relevant provisions of the Convention for this exercise are contained in Article 74 of UNCLOS for the delimitation of the exclusive economic zone and Article 83 for the delimitation of the continental shelf. It observes that those provisions are of a very general nature and do not provide much by way of guidance for those involved in the maritime delimitation exercise. The goal of that exercise is to achieve an equitable solution. If two States have freely agreed on a maritime boundary, they are deemed to have achieved such an equitable solution.

However, if they fail to reach an agreement on their maritime boundary and the matter is submitted to the Court, it is the task of the Court to find an equitable solution in the maritime delimitation it has been requested to effect.

The Court recalls that, since the adoption of the Convention, it has gradually developed a maritime delimitation methodology to assist it in carrying out its task. In determining the maritime delimitation line, the Court proceeds in three stages, which it described in the case concerning *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*. In the first stage, the Court will establish the provisional equidistance line from the most appropriate base points on the parties' coasts. In the second, the Court will consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. In the third and final stage, the Court will subject the envisaged delimitation line, either the equidistance line or the adjusted line, to the disproportionality test. The purpose of this test is to assure the Court that there is no marked disproportion between the ratio of the lengths of the parties' relevant coasts and the ratio of the parties' respective shares in the relevant area to be delimited by the envisaged line, and thus to confirm that the delimitation achieves an equitable solution as required by the Convention.

The Court observes that the three-stage methodology is not prescribed by UNCLOS and therefore is not mandatory. It has been developed by the Court in its jurisprudence on maritime delimitation as part of its effort to arrive at an equitable solution, as required by Articles 74 and 83 of the Convention. The methodology is based on objective, geographical criteria, while at the same time taking into account any relevant circumstances bearing on the equitableness of the maritime boundary. It has brought predictability to the process of maritime delimitation and has been applied by the Court in a number of past cases. The three-stage methodology for maritime delimitation has also been used by international tribunals. The Court will nonetheless abstain from using the three-stage methodology if there are factors which make the application of the equidistance method inappropriate, for instance if the construction of an equidistance line from the coasts is not feasible. This is not the case in the present circumstances, however, where such a line can be constructed.

Moreover, the Court does not consider that the use of the parallel of latitude is the appropriate methodology to achieve an equitable solution, as suggested by Kenya. A boundary along the parallel of latitude would produce a severe cut-off effect on the maritime projections of the southernmost coast of Somalia.

The Court therefore sees no reason in the present case to depart from its usual practice of using the three-stage methodology to establish the maritime boundary between Somalia and Kenya in the exclusive economic zone and on the continental shelf.

2. Relevant coasts and relevant area (paras. 132–141)

(*a*) *Relevant coasts* (paras. 132–137)

The Court begins by identifying the relevant coasts of the Parties, namely those coasts whose projections overlap. It states that, using radial projections which overlap within 200 nautical miles, it has identified that the relevant coast of Somalia extends for approximately 733 km and that of Kenya for approximately 511 km.

(*b*) *Relevant area* (paras. 138–141)

The Court notes that the Parties disagree as to the identification of the relevant area. It recalls that it has explained on a number of occasions that the relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap. The Court also recalls its observation that the relevant area cannot extend beyond the area in which the entitlements of both parties overlap. In the present case, the Court is of the view that, in the north, the relevant area extends as far as the overlap of the maritime projections of the coast of Kenya and the coast of Somalia. The Court considers it appropriate to use the overlap of the 200-nautical-mile radial projections from the land boundary terminus. As far as the southern limit of the relevant area is concerned, the Court notes that the Parties agree that the maritime space south of the boundary between Kenya and Tanzania is not part of the relevant area. The relevant area, as identified by the Court for the purpose of delimiting the exclusive economic zone and the continental shelf up to 200 nautical miles from the coasts, measures approximately 212,844 sq km.

3. Provisional equidistance line (paras. 142–146)

The Court next constructs the provisional equidistance line. It identifies the appropriate base points for the construction of this line within 200 nautical miles of the coasts. The provisional equidistance line constructed on the basis of these base points begins from the endpoint of the maritime boundary in the territorial sea (Point A) and continues until it reaches 200 nautical miles from the starting-point of the maritime boundary, at a point (Point 10') the co-ordinates of which are given in the Judgment. The line thus obtained is depicted on sketch-map No. 9 (reproduced in the Annex to this Summary).

4. Whether there is a need to adjust the provisional equidistance line (paras. 147–174)

The Court considers whether there are factors requiring the adjustment or shifting of the provisional equidistance line in order to achieve an equitable solution. It recalls that Kenya perceives the provisional equidistance line as inequitable while Somalia sees no plausible reason for adjusting the line and believes that it would constitute an equitable boundary.

The Court notes that Kenya, by invoking various factors which it considers relevant circumstances in the context of this case, has consistently sought a maritime boundary that would follow the parallel of latitude. The Court has already concluded that no maritime boundary between Somalia and Kenya following the parallel of latitude was established in the past. Nor has the Court accepted the methodology based on the parallel of latitude for establishing the maritime boundary between the Parties as advocated by Kenya. Kenya would now like to achieve the same result by a major shifting of the provisional equidistance line, changing its south-easterly direction to an exclusively easterly direction. The Court considers that such a shifting of the provisional equidistance line, as argued for by Kenya, would represent a radical adjustment while clearly not achieving an equitable solution. It would severely

curtail Somalia's entitlements to the continental shelf and the exclusive economic zone generated by its coast adjacent to that of Kenya. A line thus adjusted would not allow the Parties' coasts to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way.

The Court begins by considering those factors, relied on by Kenya, which are non-geographical in nature. First, as far as Kenya's security interests are concerned, the Court observes that boundaries between States, including maritime boundaries, are aimed at providing permanency and stability. This being so, the Court believes that the current security situation in Somalia and in the maritime spaces adjacent to its coast is not of a permanent nature. The Court is therefore of the view that the current security situation does not justify the adjustment of the provisional equidistance line. Moreover, the Court recalls its statement in a previous case that legitimate security considerations may be a relevant circumstance if a maritime delimitation was effected particularly near to the coast of a State. This is not the case here, as the provisional equidistance line does not pass near the coast of Kenya. The Court also recalls that control over the exclusive economic zone and the continental shelf is not normally associated with security considerations and does not affect rights of navigation.

Access for Kenya's fisherfolk to natural resources is another factor which Kenya brought to the attention of the Court when arguing for the adjustment of the line. The Court explains that such a factor can be taken into account as a relevant circumstance in exceptional cases, in particular if the line would likely entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned. On the basis of the evidence before it, the Court is not convinced that the provisional equidistance line would entail such harsh consequences for the population of Kenya in the present case. Moreover, the Court has to consider the well-being of the populations on both sides of the delimitation line. In light of the foregoing, the Court cannot accept Kenya's argument that the provisional equidistance line would deny Kenya equitable access to fisheries resources that are vital to its population.

The Court then turns to another argument put forward by Kenya. It contends that the evidence of the Parties' long-standing and consistent conduct in relation to oil concessions, naval patrols, fishing and other activities reflects the existence of "a *de facto* maritime boundary" along the parallel of latitude which calls for the adjustment of the provisional equidistance line. However, the Court recalls that it has already concluded that no maritime boundary along the parallel of latitude has been agreed by the Parties. There is no *de facto* maritime boundary between Somalia and Kenya. The Court therefore cannot accept Kenya's argument that, on the basis of the conduct of the Parties, the provisional equidistance line has to be adjusted so that it coincides with the alleged *de facto* maritime boundary.

Finally, the Court considers the two remaining arguments which, according to Kenya, call for the adjustment of the provisional equidistance line. Kenya submits that the application of an equidistance line would produce a significant cut-off effect with respect to its maritime areas, and that the regional context and practice require the provisional equidistance line to be adjusted.

The Court recalls that both the ICJ itself and international tribunals have acknowledged that the use of an equidistance line can produce a cut-off effect, particularly where the coastline is characterized by concavity, and that an adjustment of that line might be necessary in order to reach an equitable solution. Nevertheless, it considers that any cut-off effect as a result of the Kenya-Tanzania maritime boundary is not a relevant circumstance. The agreements between Kenya and Tanzania are *res inter alios acta* and cannot *per se* affect the maritime boundary between Kenya and Somalia. However, the issue to be considered in the present case is whether the use of an equidistance line produces a cut-off effect for Kenya, not as a result of the agreed boundary between Kenya and Tanzania, but as a result of the configuration of the coastline.

The Court observes that if the examination of the coastline is limited only to the coasts of Kenya and Somalia, any concavity is not conspicuous. However, examining only the coastlines of the two States concerned to assess the extent of any cut-off effect resulting from the geographical configuration of the coastline may be an overly narrow approach. Examining the concavity of the coastline in a broader geographical configuration is consistent with the approach taken by this Court and international tribunals. In this regard, the Court refers, in particular, to the two *North Sea Continental Shelf* cases and the *Bangladesh/Myanmar* and *Bangladesh* v. *India* cases, before stating that, in the present case, the potential cut-off of Kenya's maritime entitlements should be assessed in a broader geographical configuration. In the Court's view, the potential cut-off of Kenya's maritime entitlements cannot be properly observed by examining the coasts of Kenya and Somalia in isolation. When the mainland coasts of Somalia, Kenya and Tanzania are observed together, as a whole, the coastline is undoubtedly concave. Kenya faces a cut-off of its maritime entitlements as the middle State located between Somalia and Tanzania. The presence of Pemba Island, a large and populated island that appertains to Tanzania, accentuates this cut-off effect because of its influence on the course of a hypothetical equidistance line between Kenya and Tanzania. The provisional equidistance line between Somalia and Kenya progressively narrows the coastal projection of Kenya, substantially reducing its maritime entitlements within 200 nautical miles. This cut-off effect occurs as a result of the configuration of the coastline extending from Somalia to Tanzania, independently of the boundary line agreed between Kenya and Tanzania, which in fact mitigates that effect in the south, in the exclusive economic zone and on the continental shelf up to 200 nautical miles.

The Court recalls its jurisprudence and that of international tribunals according to which an adjustment of the provisional equidistance line is warranted if the cut-off effect is "serious" or "significant". In the Court's view, even though the cut-off effect in the present case is less pronounced than in some other cases, it is nonetheless still serious enough to warrant some adjustment to address the substantial narrowing of Kenya's potential entitlements. In order to attenuate this cut-off effect, the Court considers it reasonable to adjust the provisional equidistance line. In view of these considerations,

the Court believes that it is necessary to shift the line to the north so that, from Point A, it follows a geodetic line with an initial azimuth of 114°. This line would attenuate in a reasonable and mutually balanced way the cut-off effect produced by the unadjusted equidistance line due to the geographical configuration of the coasts of Somalia, Kenya and Tanzania. The resulting line would end at its intersection with the 200-nautical-mile limit from the coast of Kenya, at a point (Point B) the co-ordinates of which are given in the Judgment. The line thus adjusted is depicted on sketch-map No. 11 (reproduced in the Annex to this Summary).

5. Disproportionality test (paras. 175–177)

In the final stage, the Court checks whether the envisaged delimitation line leads to a significant disproportionality between the ratio of the lengths of the Parties' respective relevant coasts and the ratio of the size of the relevant areas apportioned by that line. The Court recalls that the relevant coast of Somalia is 733 km long, and that of Kenya, 511 km long. The ratio of the relevant coasts is 1:1.43 in favour of Somalia. The maritime boundary determined by the Court divides the relevant area within 200 nautical miles of the coast in such a way that approximately 120,455 sq km would appertain to Kenya and the remaining part, measuring approximately 92,389 sq km, would appertain to Somalia. The ratio between the maritime zones that would appertain respectively to Kenya and Somalia is 1:1.30 in favour of Kenya. A comparison of these two ratios does not reveal any significant or marked disproportionality. The Court is thus satisfied that the adjusted line that it has established as the maritime boundary for the exclusive economic zones and the continental shelves of Somalia and Kenya within 200 nautical miles in the Indian Ocean achieves an equitable solution as required by Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention.

E. Question of the delimitation of the continental shelf beyond 200 nautical miles (paras. 178–197)

The Court turns finally to the question of the delimitation of the continental shelf beyond 200 nautical miles. It first recalls that both Parties have asked the Court to determine the complete course of the maritime boundary between them, including the continental shelf beyond 200 nautical miles. The Court also recalls that any claim of continental shelf rights beyond 200 miles by a State party to UNCLOS must be in accordance with Article 76 of the Convention and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.

The Court observes that both States have made submissions on the limits of the continental shelf beyond 200 nautical miles to the Commission in accordance with Article 76, paragraph 8, of UNCLOS. The Court notes that both Somalia and Kenya have fulfilled their obligations under Article 76 of the Convention. At the same time, the Commission has yet to consider these submissions and make any recommendations to Somalia and to Kenya on matters related to the establishment of the outer limits of their continental shelves. It is only after such recommendations are made that Somalia and Kenya can establish final and binding outer limits of their continental shelves, in accordance with Article 76, paragraph 8, of UNCLOS.

The Court emphasizes that the lack of delineation of the outer limit of the continental shelf is not, in and of itself, an impediment to its delimitation between two States with adjacent coasts, as is the case here. The exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.

The Court observes that the Parties' entitlements to the continental shelf beyond 200 nautical miles are to be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with Article 76, paragraphs 4 and 5, of UNCLOS. The entitlement of a State to the continental shelf beyond 200 nautical miles thus depends on geological and geomorphological criteria, subject to the constraints set out in Article 76, paragraph 5. An essential step in any delimitation is to determine whether there are entitlements, and whether they overlap. The situation in the present case is not the same as that addressed by the International Tribunal for the Law of the Sea in the *Bangladesh/Myanmar* case. In that case, the unique situation in the Bay of Bengal and the negotiation record at the Third United Nations Conference on the Law of the Sea, which threw a particular light upon the parties' contentions on the subject, were sufficient to enable the Tribunal to proceed with the delimitation of the area beyond 200 nautical miles.

The Court notes that in their submissions to the Commission both Somalia and Kenya claim on the basis of scientific evidence a continental shelf beyond 200 nautical miles, and that their claims overlap. In most of the area of overlapping claims beyond 200 nautical miles, both Parties claim that their continental shelf extends to a maximum distance of 350 nautical miles. The Court further notes that neither Party questions the existence of the other Party's entitlement to a continental shelf beyond 200 nautical miles or the extent of that claim. Their dispute concerns the boundary delimiting that shelf between them. Both Parties in their submissions — Somalia in those presented at the close of the hearings and Kenya in its Rejoinder — request the Court to delimit the maritime boundary between them in the Indian Ocean up to the outer limit of the continental shelf. For the reasons set out above, the Court proceeds to do so.

As regards the relevant circumstances invoked by Kenya for the adjustment of the provisional equidistance line, the Court observes that it has already considered them earlier and adjusted the line accordingly in the exclusive economic zone and on the continental shelf up to 200 nautical miles. It recalls that both Somalia and Kenya have claimed a continental shelf extending up to 350 nautical miles in the greater part of the area of overlapping claims. In view of the foregoing, the Court considers it appropriate to extend the geodetic line used for the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles to delimit the continental shelf beyond 200 nautical miles.

The Court therefore concludes that the maritime boundary beyond 200 nautical miles continues along the same geodetic line as the adjusted line within 200 nautical miles until it reaches the outer limits of the Parties' continental shelves, which are to be delineated by Somalia and Kenya, respectively, on the basis of the recommendations to be made by the Commission, or until it reaches the area where the rights of third States may be affected. The direction of that line is depicted on sketch-map No. 12 (reproduced in the Annex to this Summary).

The Court adds that, depending on the extent of Kenya's entitlement to a continental shelf beyond 200 nautical miles as it may be established in the future on the basis of the Commission's recommendation, the delimitation line might give rise to an area of limited size located beyond 200 nautical miles from the coast of Kenya and within 200 nautical miles from the coast of Somalia, but on the Kenyan side of the delimitation line ("grey area"). This possible grey area is depicted on sketch-map No. 12. Since the existence of this "grey area" is only a possibility, the Court does not consider it necessary, in the circumstances of the present case, to pronounce itself on the legal régime that would be applicable in that area.

The complete course of the maritime boundary is depicted on sketch-map No. 13 (reproduced in the Annex to this Summary).

V. Alleged violations by Kenya of its international obligations (paras. 198–213)

The Court first examines the Applicant's argument that, by its unilateral actions in the disputed area, Kenya has violated Somalia's sovereignty over the territorial sea and its sovereign rights and jurisdiction in the exclusive economic zone and on the continental shelf. The Court recalls that Somalia's submission was made in the context of proceedings regarding a maritime boundary which had never before been settled, and that the present Judgment has the effect of fixing the maritime boundary between the Parties. The Court considers that when maritime claims of States overlap, maritime activities undertaken by a State in an area which is subsequently attributed to another State by a judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States. Somalia complains of surveying and drilling activities conducted or authorized by Kenya in areas located entirely or partially north of the equidistance line claimed by Somalia as the maritime boundary. There is no evidence that Kenya's claims over the zone concerned were not made in good faith. Under the circumstances, the Court concludes that it has not been established that Kenya's maritime activities, including those that may have been conducted in parts of the disputed area that have now been attributed to Somalia, were in violation of Somalia's sovereignty or its sovereign rights and jurisdiction.

The Court then turns to the Applicant's argument that Kenya's activities were in violation of Article 74, paragraph 3, and Article 83, paragraph 3, of UNCLOS. Under these provisions, States with opposite or adjacent coasts that have not reached an agreement on the delimitation of the exclusive economic zone or continental shelf are under an obligation to "make every effort … during this transitional period, not to jeopardize or hamper the reaching of the final agreement". The Court considers that the "transitional period" mentioned in these provisions refers to the period from the moment the maritime delimitation dispute has been established until a final delimitation by agreement or adjudication has been achieved. The Court recalls that it is of the view that a maritime delimitation dispute between the Parties has been established since 2009. Accordingly, the Court only examines whether the activities conducted by Kenya after 2009 jeopardized or hampered the reaching of a final agreement on the delimitation of the maritime boundary.

The Court observes that Somalia complains of certain activities, including the award of oil concession blocks to private operators and the performance of seismic and other surveys in those blocks, which are of a transitory character. In the Court's view, these activities are not of the kind that could lead to permanent physical change in the marine environment, and it has not been established that they had the effect of jeopardizing or hampering the reaching of a final agreement on the delimitation of the maritime boundary. Somalia also complains of certain drilling activities which are of the kind that could lead to permanent physical change in the marine environment. Such activities may alter the *status quo* between the parties to a maritime dispute and could jeopardize or hamper the reaching of a final agreement. However, the Court is of the opinion that, on the basis of the evidence before it, it is not in a position to determine with sufficient certainty that drilling operations that could have led to permanent physical change in the disputed area took place after 2009. The Court further notes that, in 2014, the Parties engaged in negotiations on maritime delimitation and that, in 2016, Kenya suspended its activities in the disputed area and offered to enter into provisional arrangements with Somalia. In light of these circumstances, the Court cannot conclude that the activities carried out by Kenya in the disputed area jeopardized or hampered the reaching of a final agreement on the delimitation of the maritime boundary, in violation of Article 74, paragraph 3, or Article 83, paragraph 3, of UNCLOS.

For these reasons, the Court finds that Kenya has not violated its international obligations through its maritime activities in the disputed area. Since Kenya's international responsibility is not engaged, the Court need not examine Somalia's request for reparation. Somalia's submission must therefore be rejected.

Operative clause (para. 214)

For these reasons,

The Court,

(1) Unanimously,

Finds that there is no agreed maritime boundary between the Federal Republic of Somalia and the Republic of Kenya that follows the parallel of latitude described in paragraph 35 [of the Judgment];

(2) Unanimously,

Decides that the starting-point of the single maritime boundary delimiting the respective maritime areas between

the Federal Republic of Somalia and the Republic of Kenya is the intersection of the straight line extending from the final permanent boundary beacon (PB 29) at right angles to the general direction of the coast with the low-water line, at the point with co-ordinates 1° 39' 44.0" S and 41° 33' 34.4" E (WGS 84);

(3) Unanimously,

Decides that, from the starting-point, the maritime boundary in the territorial sea follows the median line described at paragraph 117 [of the Judgment] until it reaches the 12-nautical-mile limit at the point with co-ordinates 1° 47' 39.1" S and 41° 43' 46.8" E (WGS 84) (Point A);

(4) By ten votes to four,

Decides that, from the end of the boundary in the territorial sea (Point A), the single maritime boundary delimiting the exclusive economic zone and the continental shelf up to 200 nautical miles between the Federal Republic of Somalia and the Republic of Kenya follows the geodetic line starting with azimuth 114° until it reaches the 200-nautical-mile limit measured from the baselines from which the breadth of the territorial sea of the Republic of Kenya is measured, at the point with co-ordinates 3° 4' 21.3" S and 44° 35' 30.7" E (WGS 84) (Point B);

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Bennouna, Xue, Sebutinde, Robinson, Iwasawa, Nolte; Judge *ad hoc* Guillaume;

Against: Judges Abraham, Yusuf, Bhandari, Salam;

(5) By nine votes to five,

Decides that, from Point B, the maritime boundary delimiting the continental shelf continues along the same geodetic line until it reaches the outer limits of the continental shelf or the area where the rights of third States may be affected;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Bennouna, Xue, Sebutinde, Iwasawa, Nolte; Judge *ad hoc* Guillaume;

Against: Judges Abraham, Yusuf, Bhandari, Robinson, Salam;

(6) Unanimously,

Rejects the claim made by the Federal Republic of Somalia in its final submission number 4 [concerning the allegation that the Republic of Kenya, by its conduct in the disputed area, had violated its international obligations].

*

President Donoghue appends a separate opinion to the Judgment of the Court; Judges Abraham and Yusuf append separate opinions to the Judgment of the Court; Judge Xue appends a declaration to the Judgment of the Court; Judge Robinson appends an individual, partly concurring and partly dissenting, opinion to the Judgment of the Court; Judge *ad hoc* Guillaume appends a separate opinion to the Judgment of the Court.

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Separate opinion of President Donoghue

In her separate opinion, President Donoghue explains why she has voted in favour of subparagraph (5) of the dispositive paragraph of the Judgment, pursuant to which the maritime boundary continues beyond 200 nautical miles until it reaches the outer limits of the continental shelf or the area where the rights of third States may be affected. She recalls that both Parties have asked the Court to delimit the continental shelf beyond 200 nautical miles and that neither Party has questioned the other Party's entitlement to outer continental shelf or the other Party's claim that, in certain parts of the area in which the Parties' claims overlap, such entitlement extends to 350 nautical miles. President Donoghue also indicates that she has cast this vote with reluctance, not out of procedural concerns but because the Court has scant evidence regarding the existence, shape, extent and continuity of any outer continental shelf that might appertain to the Parties. She explains that this case is entirely different from other cases in which a tribunal has delimited the outer continental shelf of two States. President Donoghue also makes clear that her doubts about the Court's decision to delimit the outer continental shelf do not result from the particular course of the boundary that the Court has established. Finally, President Donoghue underlines that it cannot be presumed that a line that achieves an equitable delimitation of the 200-nautical-mile zones will also result in equitable delimitation of overlapping areas of two States' outer continental shelf, since the juridical basis for entitlement to outer continental shelf is entirely different from the basis for entitlement within 200 nautical miles.

Separate opinion of Judge Abraham

Judge Abraham agrees with most of the conclusions reached by the Court.

He disagrees, however, with the line chosen by the Court for the maritime boundary both within and, consequently, beyond 200 nautical miles. Judge Abraham disagrees with the manner in which the Court implements the second stage of the "three-stage" method, regarding the existence of relevant circumstances justifying an adjustment of the provisional equidistance line. Judge Abraham notes that the Court's jurisprudence states that, for the Court to be able to justify an adjustment, the concavity of the coastline must lie "within the area to be delimited". Yet, in his view, there is no conspicuous concavity in the configuration of Somalia's coast to the north of Kenya, or in the way in which the Somalian and Kenyan coastlines extend in broadly the same general direction. Although he accepts that it may be reasonable, in some cases, to take account not only of the coastal configuration of the two States parties to the proceedings, but also that of a third State, Judge Abraham considers that the cut-off effect for Kenya, which results mainly from the configuration of its coast in relation to that of Tanzania to the south, is not sufficiently "serious" or "significant" to give rise to an adjustment of the equidistance line, in any event not on the scale of that made by the Court.

Separate opinion of Judge Yusuf

In his separate opinion, Judge Yusuf explains that he agrees with the decision of the Court to reject Kenya's claim that Somalia had acquiesced to a maritime boundary that follows the parallel of latitude. He also points out that the Court was correct in denying Kenya's request to adjudge and declare that the maritime boundary shall follow the parallel of latitude. Judge Yusuf expresses his agreement with the application of the median line for the delimitation of the territorial sea, pursuant to Article 15 of UNCLOS. He disagrees, however, with certain aspects of the implementation of that delimitation. In his view, the way in which the base points have been selected for the construction of the median line departs from the provisions of UNCLOS and from the jurisprudence of the Court. The selected base points have resulted in a contrived median line, the construction of which appears to have been aimed at producing a line which comes as close as possible to a bisector line, although there is nothing that justifies the use of a bisector for the delimitation of the territorial sea between Somalia and Kenya.

With respect to the delimitation of the exclusive economic zone and the continental shelf, Judge Yusuf elucidates his main disagreement with the Judgment's approach to that delimitation. His disagreement relates to the manner in which the three-stage methodology has been implemented in the Judgment, particularly with regard to the adjustment of the provisional equidistance line through an unprecedented search for a concavity and an elusive cut-off in a so-called "broader geographical configuration". In his opinion, taking into account extraneous geographical circumstances that lie beyond the geography and the relevant coastlines of the Parties can only be understood as a "judicial refashioning of geography", which is neither consistent with the cardinal principle that "the land dominates the sea" nor with the practice of the Court. In addition, Judge Yusuf disagrees with what he considers as the incorrect use of the concept of a "serious cut-off" in the Judgment, which does not correspond to the ordinary meaning of the word "cut-off" in English and diverges from its use in international jurisprudence regarding maritime delimitation.

Judge Yusuf further considers that the use of a geodetic line based on an incorrectly adjusted equidistance line brings into the delimitation of the area beyond 200 nautical miles the same flawed reasoning used for the area within the 200-nautical-mile zone. This reasoning does not take into account the fact that any "cut-off" effect of Kenya's coastal projections in the outer continental shelf could solely be due to its agreement with Tanzania, which should have no legal effect on the delimitation between Somalia and Kenya. Moreover, the incorrect adjustment of the equidistance line gives rise to what the Judgment refers to as a "possible grey area", which may also lead in the future to a "Court-created" new problem between the Parties.

Declaration of Judge Xue

1. In Judge Xue's view, this case demonstrates that the question whether the three-stage methodology is suitable for all types of maritime delimitation cases requires review.

2. She emphasizes that there is no mandatory delimitation methodology provided for under UNCLOS; all that is required is to achieve an equitable solution, either through negotiations or by a third-party settlement. The historical developments on the principles for the delimitation of the continental shelf suggest that the equidistance method was never accepted as a rule in international law that applies to maritime delimitations. It is the equitable principles enunciated by the Court in the *North Sea Continental Shelf* Judgment that became the guiding principles for maritime delimitation and subsequently were reflected in Articles 74 and 83 of UNCLOS. Judge Xue considers that the three-stage approach, notwithstanding its methodological certainty and objectivity, is a practice-based method and its criteria and techniques should not be applied mechanically.

3. In the present case, Judge Xue observes that the coastline of the Parties in the area is simply straight, without any particular maritime features or indentations. Being adjacent to each other, the coasts of the Parties are both seaward, abutting the same maritime area and the same continental shelf. As sketch-map No. 8 in the Judgment illustrates, a substantial portion of the relevant coast of Somalia identified by the Court does not generate entitlements that actually overlap with those from the Kenyan coast. She points out that although radial projection is normally used to identify the relevant coasts, it is questionable to use it under the present circumstances. It overstretches the length of the relevant coasts, particularly that on the Somali side. She refers to the *Ghana*/*Côte d'Ivoire* case, which shared many similarities with the present case. In her view, the identification of the relevant coasts and relevant area by the ITLOS Chamber properly reflects the technical nexus between the relevant coasts and the relevant area for the purposes of the delimitation. She stresses that it should be the geographic reality and genuine overlapping entitlements that determine which part of a coast is relevant.

4. Judge Xue also takes the view that the relevant area identified by the Court does not encompass the entire potential overlapping entitlements of the Parties in this case. In her opinion, once the Court decides to go ahead with the delimitation of the boundary in the outer continental shelf, even with care, it means that the relevant area should include the continental shelf beyond 200 nautical miles. With the radial projection methodology, it is difficult to proceed to identifying the relevant coasts and the relevant area so that they include the potential overlapping entitlements in the continental shelf beyond 200 nautical miles, as its outer limits are not yet determined. Referring to the *Bangladesh*/*Myanmar* and *Bangladesh* v. *India* cases, she considers that in the present case, the coasts identified are relevant, irrespective of whether the continental shelf is within 200 nautical miles or beyond. In her view, it is evident that all the overlapping entitlements of the Parties could be generated from the coasts of the Parties within 200 nautical miles. If frontal projections were used, the relevant coasts of the Parties would extend on each side of the land boundary terminus for a 200-nautical-mile distance and the relevant area would extend south-eastward perpendicular to the relevant coasts to the limit of 200 nautical miles, and further down to the limit of 350 nautical miles as claimed by Kenya. In the south, the relevant area is confined by the perpendicular line and the boundary agreed between Kenya and Tanzania, and extends along the agreed boundary until

the 350-nautical-mile limit as claimed by Kenya. To omit the continental shelf beyond 200 nautical miles from the relevant area would not enable the Court to conduct a meaningful assessment of the proportion between the ratio of the length of the relevant coasts of the Parties and the ratio of the shares of the relevant area apportioned to each of them. Judge Xue points out that methodological approaches should only serve as a means to achieve an equitable solution, but not be an end in itself. The paramount consideration should be given to the goal of achieving an equitable solution.

5. The second important aspect that Judge Xue would like to raise is the consideration of the relevant circumstances. She is of the view that maritime delimitation is not just about the sharing of a maritime area. The underlying interests often rest at the heart of the dispute between the parties. When the equidistance method alone cannot fulfil the objective of achieving an equitable solution in all circumstances, the equitable principles should come into play. In essence, the second stage is a crucial means to ensure the equitableness of the final result of the delimitation. If anything, this should be the strength of the three-stage approach.

6. Judge Xue considers that what circumstance is relevant and what is not must be appreciated by the Court in the context of a specific case. They cannot be predetermined or preset by certain criteria. In her opinion, the tendency of attaching legal relevance primarily to geographical circumstances, if continued, would likely render the second stage into a purely geometrical exercise, with a few fixed geophysical factors for the Court to consider, thus reducing the discretion of the Court in its appreciation of the situation. Eventually, the three-stage approach would in effect evolve into a substitute for the equidistance method and the equitable principles would vanish from the process of delimitation. The fear that the boundless proliferation of relevant circumstances would open up a risk of assimilating judgments based on law to those rendered *ex aequo et bono*, in her view, is unfounded, because the notion of relevant circumstances itself is judicially developed and applied.

7. In the present case, Judge Xue fully concurs with the reasoning of the Court with regard to the geographical circumstances in the region concerned and the cut-off effect produced by the equidistance line, but she is not contented with the way in which the adjustment is done. She notes that the Court does not provide much explanation to the adjustment of the provisional equidistance line, and moves on to the last stage to verify the result. On the face of the figures calculated by the Court, no one can seriously challenge its conclusion. However, if the identification of the relevant coasts follows a different method, the proportionality of the ratio of the coastal lengths of the Parties and the ratio of the maritime areas apportioned to the Parties respectively would be different.

8. Judge Xue observes that the distinct status and role of the disproportionality test is sound in theory, but in practice it may not play that role. As is demonstrated in this case, when geographical factors are the only relevant circumstances that call for adjustment of the equidistance line, proportionality between the two ratios would be the primary consideration for the Court to rely on. Once that is done, Judge Xue wonders how much room is left for the disproportionality test to give its checking effect.

Individual opinion, partly concurring and partly dissenting, of Judge Robinson

1. Judge Robinson's opinion addresses four areas of the Court's Judgment, namely, the delimitation of the continental shelf beyond 200 nautical miles, the question of a concavity, the 1927/1933 treaty arrangement and acquiescence.

The delimitation of the continental shelf beyond 200 nautical miles

2. In relation to the delimitation of the continental shelf beyond 200 nautical miles, Judge Robinson disagrees with the finding in paragraph 214 (5) of the Judgment. He argues that the operative paragraph makes clear that the Court has delimited the continental shelf beyond 200 nautical miles. However, in his view, the Court was not in a position to carry out such a delimitation. He gives several reasons for this position.

3. First, he argues that in order to determine a State's entitlement to a continental shelf beyond 200 nautical miles there must be in existence a continental margin that extends beyond 200 nautical miles and he argues that, in order to delimit, the Court must have before it reliable evidence that there is in existence in the area beyond 200 nautical miles a "submerged prolongation of the land mass of the coastal State". According to Judge Robinson, while it is clear that recommendations by the CLCS on the outer limit of the continental shelf do not constitute a necessary precondition for maritime delimitation by the Court, he nonetheless argues that, in order to carry out such a delimitation, the Court must have reliable evidence confirming the existence of a continental shelf in the area beyond 200 nautical miles if it is to be in a position to carry out a delimitation in that area. In his view, the Court has ignored this requirement.

4. He argues that in this case, the Court has proceeded to delimit the Parties' continental shelf in the area beyond 200 nautical miles without any convincing evidence as to the existence of a shelf beyond 200 nautical miles. Judge Robinson contends that the Court's Judgment is bereft of even a scintilla of reliable evidence that the geological and geomorphological criteria, which the Judgment itself refers to in paragraph 193 as being essential in the determination of state entitlements, have been met. According to Judge Robinson, the Court comes closest to identifying evidence of the existence of a continental shelf beyond 200 nautical miles when it noted, in paragraph 194, "that in their submissions to the Commission both Somalia and Kenya claim on the basis of scientific evidence a continental shelf beyond 200 nautical miles and that their claims overlap". However, according to Judge Robinson, this observation does not provide a sufficient basis for the delimitation because nowhere in the Judgment is there any reference to the content of this scientific evidence, and more importantly, nowhere in the Judgment is there any analysis of that content to show that the Court is satisfied that the necessary geological and geomorphological criteria have been met for the existence of a continental shelf beyond 200 nautical

miles. In the circumstances, he contends that it appears that the principal factors that explain the Court's decision to delimit the continental shelf beyond 200 nautical miles are the criterion of the 350-nautical-mile distance as the outer limit of the continental shelf and the volition of the Parties to have the Court effect a delimitation. However, he argues that, in delimiting the continental shelf beyond 200 nautical miles, geological and geomorphological factors supersede distance as the criteria for determining a State's entitlement to that shelf, thereby rendering less consequential the request of the Parties to have the Court effect a delimitation in that area. Consequently, he concludes that the lack of any evidence of geological and geomorphological data to substantiate the existence of a continental shelf, and thus, of the entitlement of the Parties to a continental shelf beyond 200 nautical miles, undermines the validity of the finding in paragraph 214 (5), which is the principal conclusion of the Court in the part of its Judgment devoted to the delimitation of the continental shelf beyond 200 nautical miles.

5. Second, he observes that the Court has carried out a delimitation of the continental shelf beyond 200 nautical miles in an environment riddled with uncertainty. He argues that notwithstanding that delineation of the outer limits of the continental shelf is carried out by coastal States on the basis of the recommendations of the CLCS, and not by the Court, there must be a concern that delimitation and delineation exercises may impact adversely on the Area, defined in Article 1 (1) of the Convention. The Area begins where national jurisdiction ends. He argues that, where it is appropriate, the interests of the international community in exploring and exploiting the Area is a factor that must be taken into account in maritime delimitation in the area beyond 200 nautical miles. Recalling the decision in the *Bangladesh/Myanmar* case where the Tribunal expressly considered the possible impact of the delimitation of the shelf beyond 200 nautical miles on the interests of the international community in the Area, and determined that those interests were not affected, he argues that it would seem that in the instant case, a statement similar to that of the Tribunal in *Bangladesh/Myanmar* could not be made by the Court, because the continental shelf that is the subject of delimitation could possibly extend to the Area.

6. Finally, he criticizes the Judgment on the basis that in the delimitation of the continental shelf beyond 200 nautical miles, the Judgment is silent on the question whether the methodology the Court has used produces an equitable solution. He considers this a significant omission because it raises serious questions as to whether the delimitation, as required by the Convention, has been carried out "in order to achieve an equitable solution".

Concavity

7. Turning to the question of a concavity, Judge Robinson argues that case law is generally unhelpful in identifying the minimum features for a concavity to result in the equidistance line producing a cut-off effect that requires its adjustment in order to achieve an equitable solution. In his view, it is not any and every geographical feature that will be sufficient to constitute a relevant circumstance; it is only a geographical feature meeting the minimum requirement for a concavity and producing a cut-off effect that will constitute a relevant circumstance requiring adjustment of the provisional equidistance line.

8. According to Judge Robinson, in the instant case, there must be a doubt as to whether the curvature in the Kenyan coast or, for that matter, the curvature in the Somali, Kenyan and Tanzanian coasts has the degree of concavity sufficient to result in the equidistance line producing a cut-off effect, requiring an adjustment of that line. In his view, the greater part of the Kenyan coastline may fairly be described as a slight curvature. However, he argues that since, in the result, the Court has held this curvature to be a concavity, the reasonable doubt that exists as to whether the feature constitutes a concavity means that any cut-off resulting would only warrant the slightest adjustment of the equidistance line, because that line does not in any significant way prevent Kenya from achieving its maximum maritime area in accordance with international law; in fact, he argues that the better view might very well be that no adjustment is warranted since the cut-off is neither serious nor severe.

9. Judge Robinson also makes observations on what the Judgment describes as the "broader geographical configuration". He argues that the Court has followed the Tribunal's decision in *Guinea/Guinea-Bissau* rather than its Judgment in *Cameroon* v. *Nigeria*. He points out that in the instant case, the Court refers to the "concavity" of a third State, Tanzania, not to exclude it from the maritime delimitation between Somalia and Kenya, but to include it in that delimitation. In his view, the proposition that, in maritime delimitation, account should be taken of a concavity that is not within the area to be delimited but is part of a so-called broader geographical configuration, is problematic. According to Judge Robinson, in the first place, the concept of a "broader geographical configuration" is itself broad and vague because where the configuration begins and ends is a legitimate question. He contends that the real danger is that the cut-off effect may result more from the geographical feature of a third State—not a party to the dispute and not in the delimitation area—than from the geographical feature on the coast of the State that is a party to the dispute and is within the area to be delimited. He argues that this would appear to be so in the present case, because the Tanzanian "concavity", that is not within the area to be delimited, appears more pronounced than the Kenyan "concavity", that is within the area to be delimited. According to him, the odd result is a refashioning of geography whereby an adjustment is made to the equidistance line, more on account of a "concavity" in the Tanzanian coastline than the "concavity" in the Kenyan coastline—a result that is wholly inconsistent with the Court's finding in *Cameroon* v. *Nigeria* that, in order to qualify as a relevant circumstance for the purpose of adjusting the equidistance line, the concavity must be within the area to be delimited. He concludes that Somalia would appear to have been disadvantaged by reason of a "concavity" that is not within the area to be delimited—an outcome that can scarcely be described as equitable.

The status of the 1927/1933 treaty arrangement

10. Judge Robinson argues that there is a question as to whether the Court has interpreted and applied the 1927/1933 treaty arrangement. According to Judge Robinson, an examination of paragraphs 109 and 118 of the Judgment reveals that the Court has interpreted the treaty arrangement. He observes that the Court could not have concluded that there was a close correspondence between the median line as described in paragraph 117 of the Judgment and the course of a line "at right angles to the general trend of the coastline" without examining and interpreting that phrase, which is to be found in the 1927/1933 treaty arrangement. However, he acknowledges that it might also be argued that in this paragraph the Court has not only interpreted the colonial treaty but also applied it. However, this is not a view that he shares, but he argues that it cannot be ruled out of consideration. His own position is that paragraph 214 (2) of the *dispositif* confirms that the Court has not applied the 1927/1933 treaty arrangement because the starting-point identified—"the intersection of the straight line extending from the final permanent boundary beacon (PB 29) at right angles to the general direction of the coast with the low-water line"—is not the starting-point set out in the 1927/1933 treaty arrangement. He argues that this paragraph of the *dispositif* does not use the phrase "at right angles to the general trend of the coastline", which is to be found in paragraph 118 of the Judgment, and placed in quotation marks to indicate that it is taken from the 1927/1933 treaty arrangement. In his view, this paragraph, in its reference to the low-water line as the starting-point of the boundary, reflects Article 5 of the Convention, which is the applicable law for the Parties, since both States are parties to that Convention. He contends that although it may be said that the formulation of this paragraph is influenced by the 1927/1933 treaty arrangement, it cannot be concluded, that in determining the starting-point the Court has applied the 1927/1933 treaty arrangement.

11. Judge Robinson observes that there must be an explanation as to how the colonial treaties between Italy and the United Kingdom become relevant to the dispute between Somalia and Kenya. According to him, it cannot even be maintained that there is a link between the treaty arrangement and the dispute on the basis that both cover the same geographical area, because the treaties establish a land boundary while the dispute between the Parties relates to the sea. However, even if both the treaties and the dispute covered the same geographical area, that would not provide a sufficient link with Somalia and Kenya, States that were not parties to the 1927/1933 treaty arrangement. In his view, the closest that the Judgment comes to discussing the relationship between the 1927/1933 treaty arrangement and the dispute is in paragraph 32 of the Judgment. He states that in that paragraph, after outlining the various instruments described as the 1927/1933 treaty arrangement between Italy and the United Kingdom, there is a terse reference to Somalia and Kenya gaining their independence in 1960 and 1963 respectively. However, he states that no link is made between the colonial treaties and the attainment of independence between Somalia and Kenya.

12. In Judge Robinson's view, the 1927/1933 treaty arrangement did not establish a boundary in the territorial sea.

13. Judge Robinson observes that the Judgment does not determine whether the 1927/1933 treaty arrangement establishes a boundary in the territorial sea. In his view, it is patent that the Judgment seeks to adopt an approach that would arrive at a conclusion about the delimitation of the territorial sea without any reference to the colonial treaties. Nonetheless, as is evident in paragraphs 109 and 118, the Judgment does not seem capable of escaping references to those treaties.

14. In questioning the jurisprudential basis of the Court's interpretation, he argues that if the jurisprudential basis for the Court's interpretation of the treaty arrangement is not the principle of a succession of States, reflected in the 1978 Vienna Convention on the Succession of States in respect of Treaties, then in his view, it must be that the colonial treaties between Italy and the United Kingdom become relevant to the Court's adjudication in the dispute between Somalia and Kenya on the basis of the right to self-determination.

15. He observes that in response to a question by a Member of the Court, Somalia stated that "[n]either [it] nor Kenya, since their independence and at all times thereafter, has ever claimed that the maritime boundary in the territorial sea follows a line perpendicular to the coast at Dar es Salam, for any distance". It further added that neither party accepted nor argued for the 1927 Agreement as binding on them in regard to a maritime boundary, for any distance. In Judge Robinson's view, in exercise of their sovereignty and independence Somalia and Kenya had the right to determine their relationship with the colonial treaties, that is, whether they accepted or rejected them. These two statements by Somalia, indicating the Parties' non-reliance and non-acceptance of the colonial treaties, classically reflect the exercise of the right to self-determination by newly independent States. Consequently, those treaties are inapplicable in the determination of the maritime dispute between Somalia and Kenya. Since those treaties did not establish a boundary in the territorial sea, the question whether there is an obligation under customary international law to respect boundaries that existed at independence does not arise.

Acquiescence

16. Judge Robinson observes that it is settled that, for acquiescence to apply, there must be an examination of the conduct of the State claiming acquiescence to determine whether it is clear and consistent, and as a consequence, calls for a response from the alleged acquiescing State. Thus, the initial focus is on the conduct of the State claiming acquiescence with a view to deciding whether it calls for a response from the alleged acquiescing State.

17. He argues that there is an inherent conflict between the Court's finding in paragraph 71 and its finding in paragraph 72 of the Judgment. After examining the conduct of Kenya, the Judgment concludes in paragraph 71 "that Kenya has not consistently maintained its claim that the parallel of latitude constitutes the single maritime boundary with Somalia". According to Judge Robinson, in effect, the Court concluded that by virtue of the inconsistency of Kenya's conduct no response was called for by Somalia; consequently, the Court should have dismissed the claim. In his view, there was

no need to move on to determine whether Somalia clearly and consistently accepted a maritime boundary at the parallel of latitude (paragraph 72); to do so undermines the earlier finding that Kenya's conduct was not consistent and consequently no response was called for by Somalia.

18. In Judge Robinson's view, the conflict between paragraphs 71 and 72 of the Judgment is evident because if Kenya did not consistently maintain its claim, it would be impossible to identify with any certainty what Somalia could clearly and consistently have acquiesced to. This explains why the most important aspect of the law on acquiescence is an examination of the conduct of the State claiming acquiescence to determine whether that conduct requires a response. He argues that, in particular the Court's approach flies in the face of the finding in paragraph 71 of the Judgment that "it was reasonable for Somalia to understand that its maritime boundary with Kenya in the territorial sea, in the exclusive economic zone and on the continental shelf would be established by an agreement to be negotiated and concluded in the future". Further, if it is reasonable for Somalia to have this understanding, it is difficult to appreciate why the Court would go on to examine whether Somalia clearly and consistently accepted a maritime boundary at the parallel of latitude. This is so because the Court could only have made this finding on the basis that it had rejected Kenya's claim of Somalia's acquiescence to a boundary along a parallel of latitude—all the more reason why an enquiry into Somalia's conduct was unnecessary.

19. Judge Robinson observes that, having carried out its examination of Somalia's conduct, the Court concludes that the conduct of Somalia between 1979 and 2014 did not demonstrate "Somalia's clear and consistent acceptance of a maritime boundary at the parallel of latitude" (paragraph 80). In his view, an examination of the logic of this conclusion shows why the Court's approach is questionable. He argues that, had the finding been that there was evidence demonstrating Somalia's clear and consistent acceptance of a maritime boundary along a parallel of latitude, it would be impossible to reconcile that finding with the earlier conclusion in paragraph 71 of the Judgment, not only that Kenya's conduct did not require a response from Somalia, but also that it was reasonable for Somalia to expect that on the basis of Kenya's conduct its maritime boundary with that State would be established on the basis of agreement.

Separate opinion of Judge *ad hoc* Guillaume

Judge *ad hoc* Guillaume supports the Court's decision, but disagrees with certain points of its reasoning.

First, he agrees with the Court's finding that Somalia did not acquiesce to Kenya's positions concerning the delimitation of its territorial sea and its continental shelf beyond 200 nautical miles along a parallel of latitude. In his view, however, the situation is different as regards the exclusive economic zone. Indeed, he recalls that Kenya claimed this parallel of latitude in 1979 and 2005 by presidential proclamations circulated to all United Nations Member States, and that Somalia did not object until 2009. He observes that it may nonetheless be asked whether, in matters of such importance, circulation of this kind is sufficient to give rise to a tacit agreement by acquiescence, or whether a State is required to notify its neighbour of its claims directly. He also notes that, prior to 2018, both in its negotiations with Somalia and before the Court, Kenya never claimed that Somalia had acquiesced, and it behaved as if the boundary of the exclusive economic zone had yet to be established. It is for these reasons that Judge *ad hoc* Guillaume ultimately supported the Court's solution on this point.

In addition, like the Court, Judge *ad hoc* Guillaume considers that, as successor States, Kenya and Somalia are bound by the three agreements concluded between Italy and the United Kingdom, the former colonial Powers, in 1924, 1927 and 1933, which fixed the boundary between them. He notes that these agreements were not abrogated in whole or in part by either express or tacit agreement between the Parties. Judge *ad hoc* Guillaume is of the opinion that it was therefore incumbent on the Court to apply them in accordance with Article 15 of the United Nations Convention on the Law of the Sea. Accordingly, the Court should have first determined whether these agreements delimited the territorial sea between the Parties up to 12 nautical miles from the coastline. Judge *ad hoc* Guillaume was thus unable to support the Court's reasoning that it is "unnecessary to decide whether the 1927/1933 treaty arrangement had as an objective the delimitation of the boundary in the territorial sea" (Judgment, paragraph 109). He considers that this was the case, and that, consequently, the delimitation line is a "straight line running in a south-easterly direction at right angles to the general direction of the coast at Dar Es Salam".

Judge *ad hoc* Guillaume nonetheless observes that the delimitation line adopted by the Court is virtually the same as the line fixed under the 1927/1933 treaty arrangement. He therefore voted in favour of the co-ordinates set out in the third subparagraph of the Judgment's operative clause, while disagreeing with the reasoning adopted.

Annex

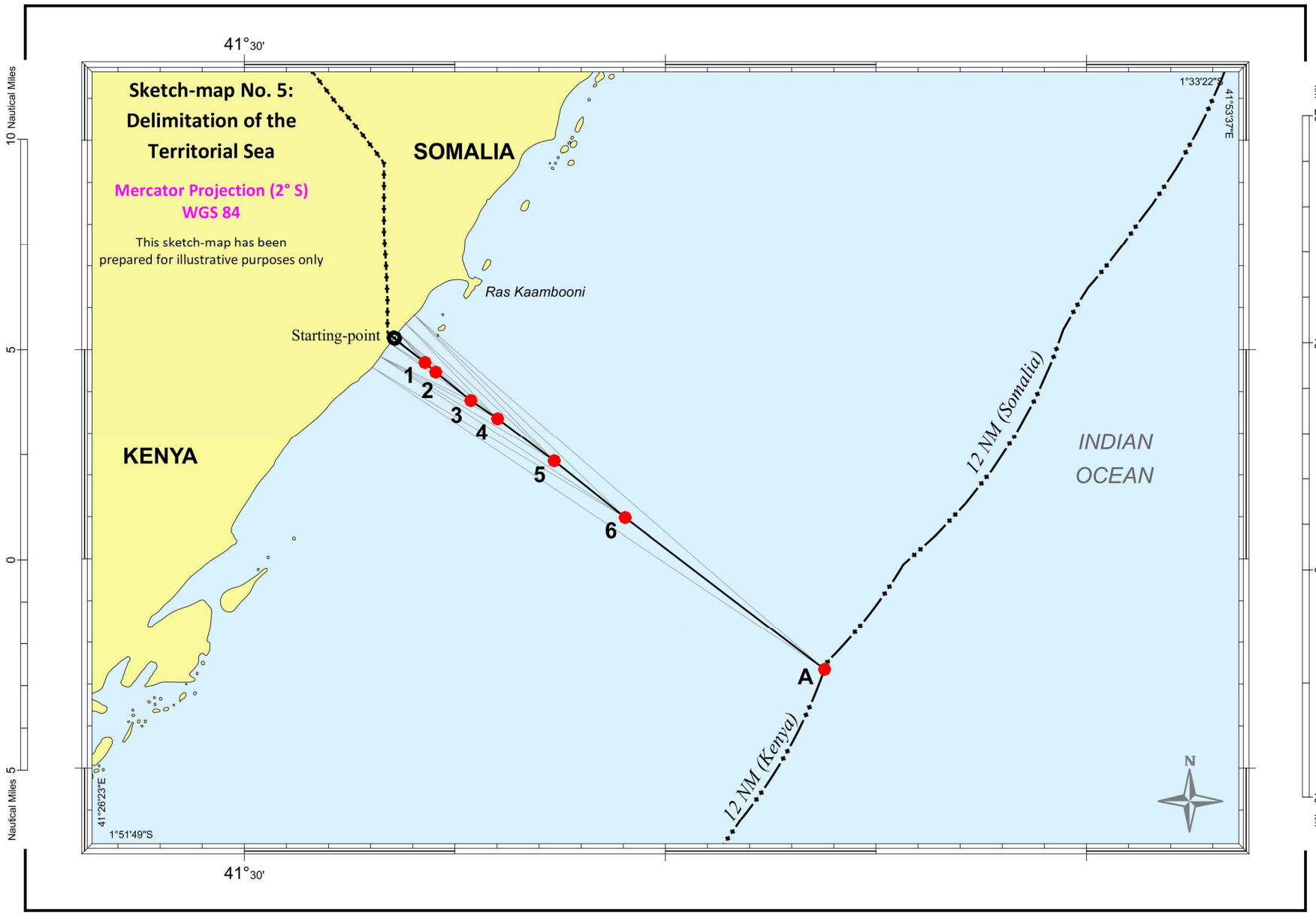
— Sketch-map No. 5: Delimitation of the territorial sea;

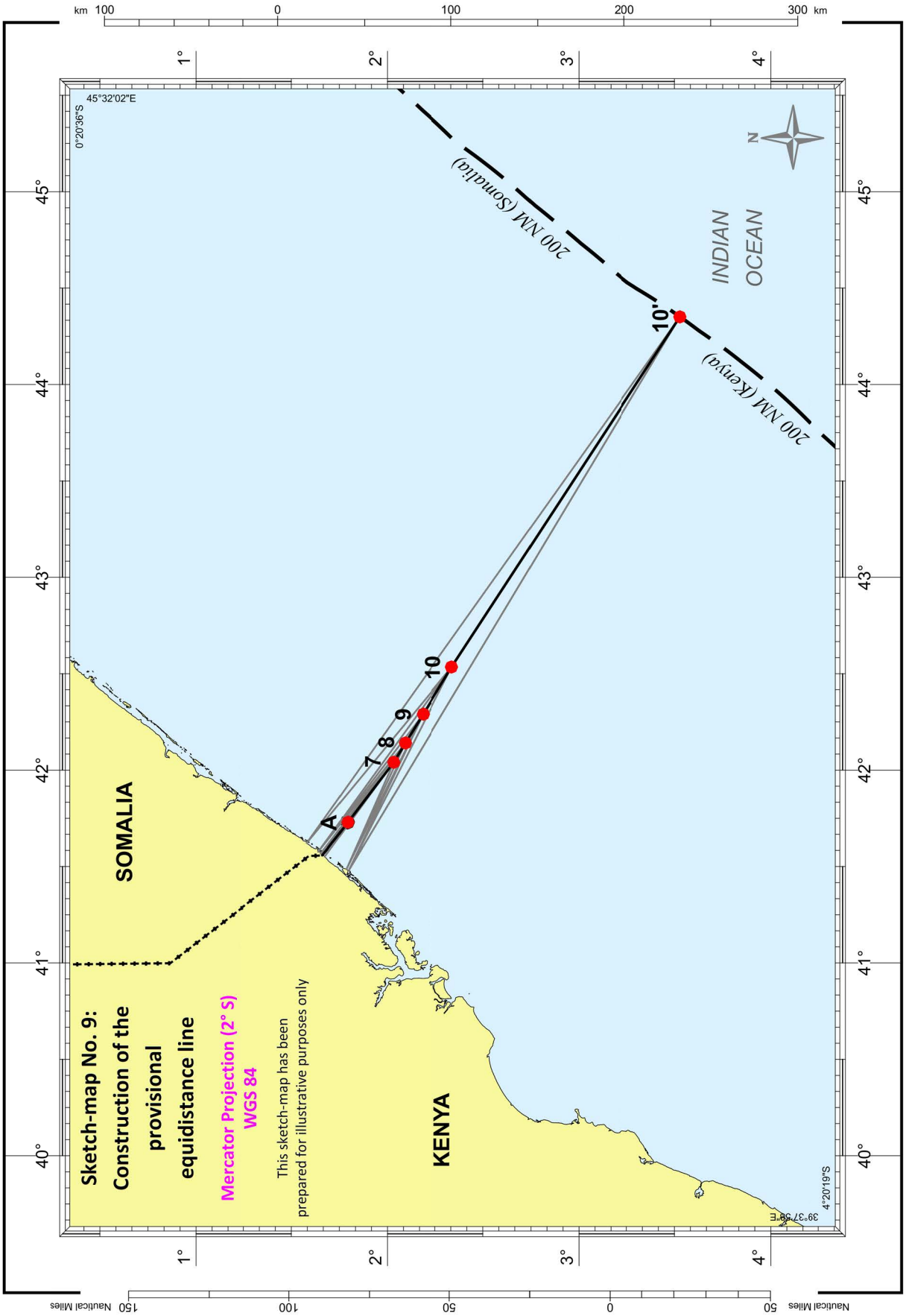
— Sketch-map No. 9: Construction of the provisional equidistance line (within 200 nautical miles);

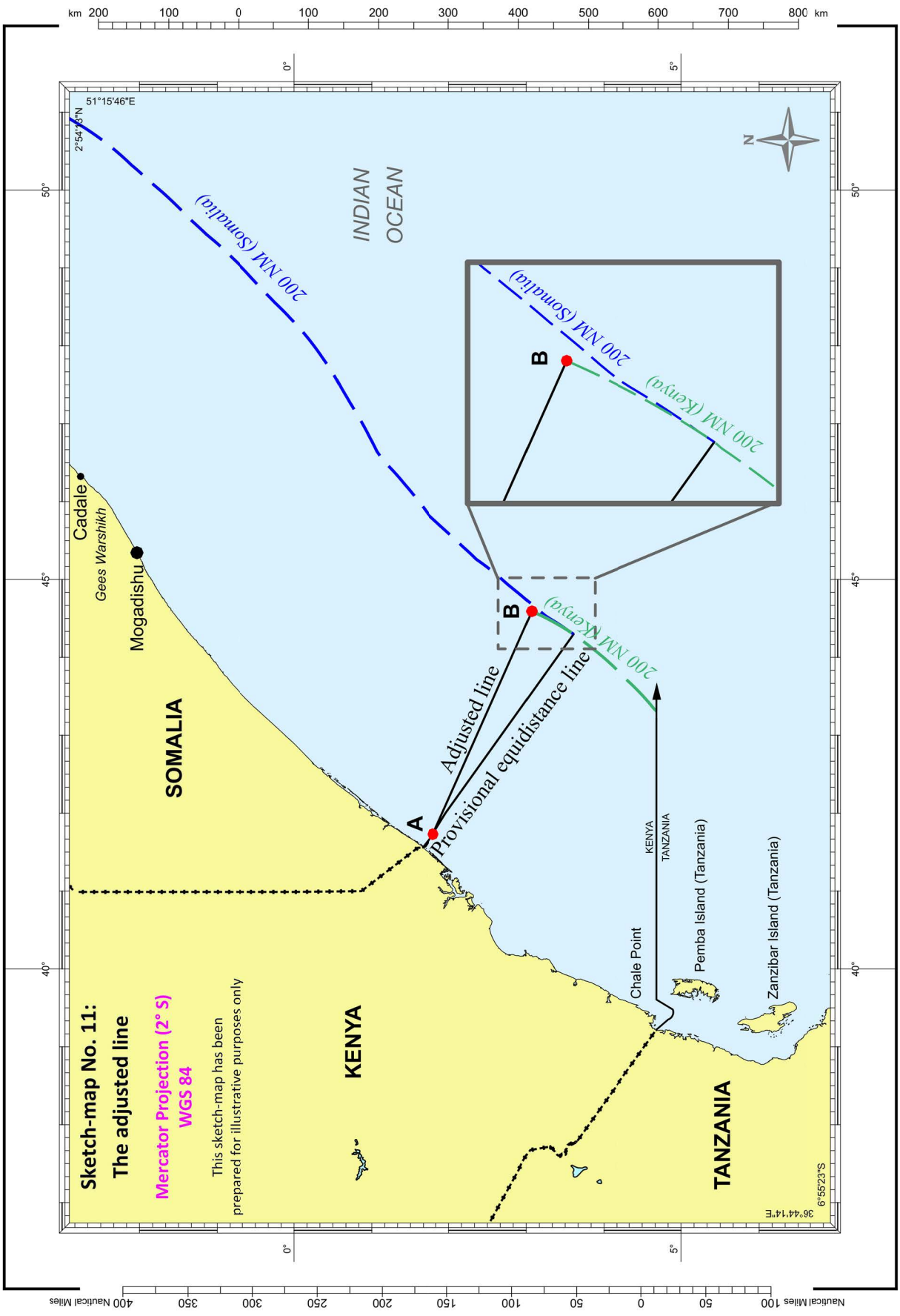
— Sketch-map No. 11: The adjusted line (within 200 nautical miles);

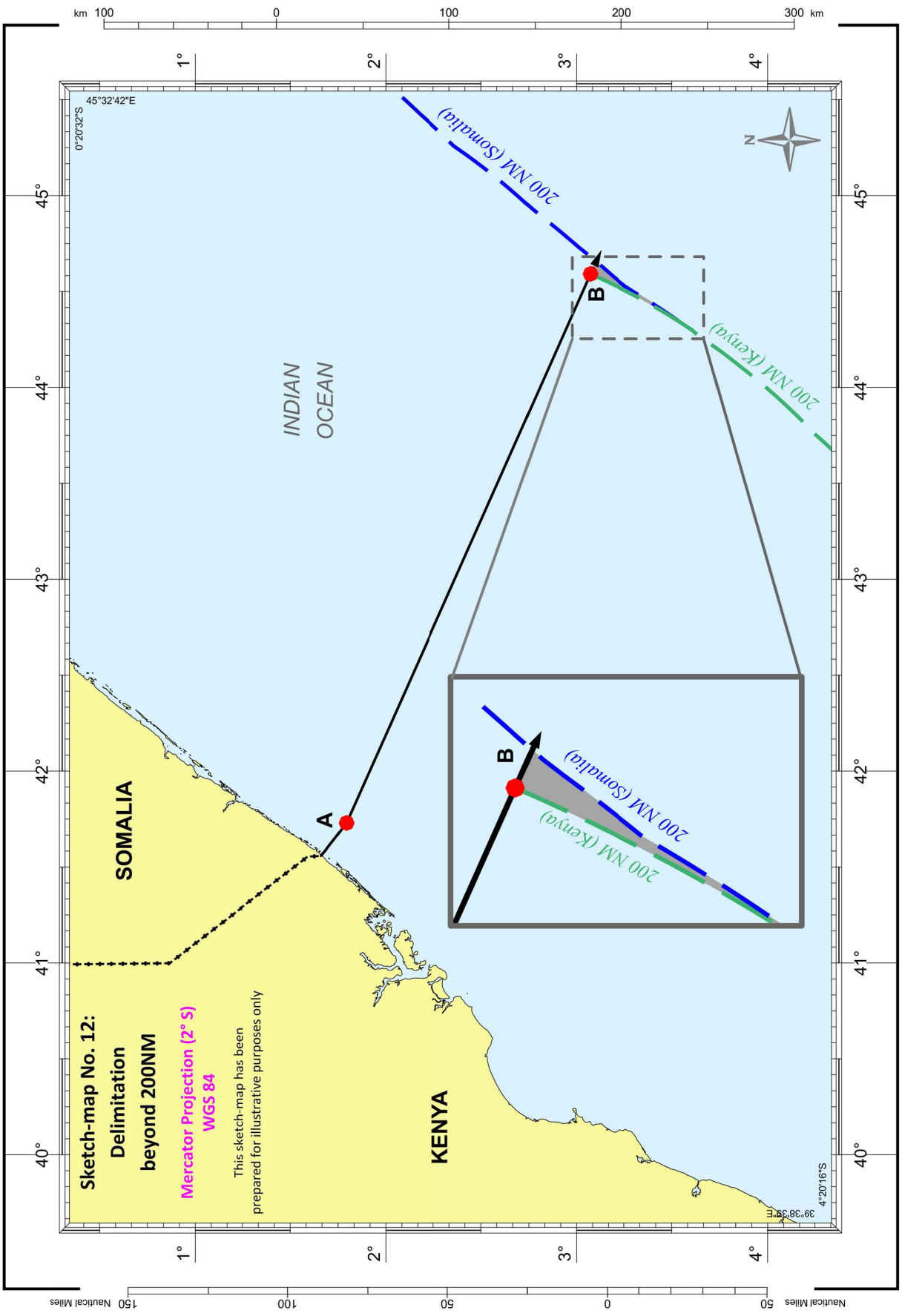
— Sketch-map No. 12: Delimitation beyond 200 nautical miles;

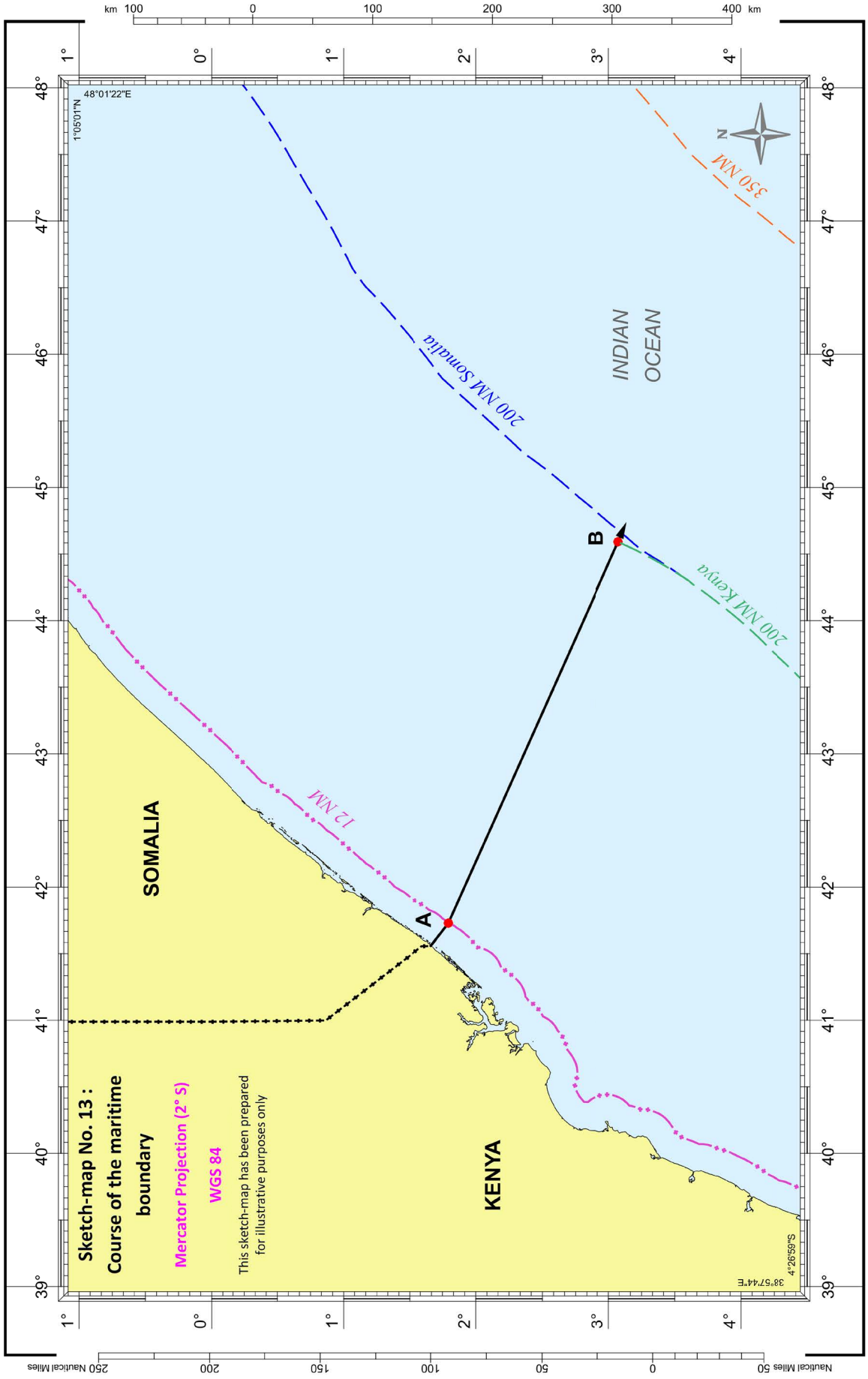
— Sketch-map No. 13: Course of the maritime boundary.


Sketch-map No. 5:
Delimitation of the
Territorial Sea
Mercator Projection (2° S)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
SOMALIA
KENYA
Ras Kaambooni
Starting-point
1
2
3
4
5
6
A
12 NM (Somalia)
12 NM (Kenya)
INDIAN
OCEAN
41°30'
1°33'22"S
41°53'37"E
41°26'23"E
1°51'49"S
N
10 Nautical Miles
5
0
5
Nautical Miles
km 20
10
0
10
km


km 100 0 100 200 300 km
45°32'02"E
0°20'36"S
200 NM (Somalia)
200 NM (Kenya)
INDIAN OCEAN
N
10'
10
9
8
7
A
SOMALIA
KENYA
Sketch-map No. 9:
Construction of the provisional equidistance line
Mercator Projection (2° S)
WGS 84
This sketch-map has been prepared for illustrative purposes only
4°20'19"S
39°37'58"E
1° 2° 3° 4°
40° 41° 42° 43° 44° 45°
Nautical Miles 50 0 50 100 150 Nautical Miles


km 200 100 0 100 200 300 400 500 600 700 800 km
0°
5°
51°15'46"E
2°54'43"N
INDIAN
OCEAN
200 NM (Somalia)
200 NM (Kenya)
B
B
A
Adjusted line
Provisional equidistance line
Cadale
Gees Warshikh
Mogadishu
SOMALIA
KENYA
TANZANIA
Chale Point
Pemba Island (Tanzania)
Zanzibar Island (Tanzania)
Sketch-map No. 11:
The adjusted line
Mercator Projection (2° S)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
6°55'23"S
36°44'14"E
50°
45°
40°
Nautical Miles 100 50 0 50 100 150 200 250 300 350 400 Nautical Miles


km 100 0 100 200 300 km
45°32'42"E
0°20'32"S
200 NM (Somalia)
200 NM (Kenya)
INDIAN OCEAN
A
B
SOMALIA
KENYA
Sketch-map No. 12:
Delimitation
beyond 200NM
Mercator Projection (2° S)
WGS 84
This sketch-map has been
prepared for illustrative purposes only
39°38'33"E
4°20'16"S
Nautical Miles 150 100 50 0 50 Nautical Miles


km 100 0 100 200 300 400 km
1° 0° 1° 2° 3° 4°
48° 47° 46° 45° 44° 43° 42° 41° 40° 39°
48°01'22"E
1°05'01"N
N
350 NM
200 NM Somalia
INDIAN OCEAN
B
200 NM Kenya
12 NM
A
SOMALIA
KENYA
Sketch-map No. 13 : Course of the maritime boundary
Mercator Projection (2° S)
WGS 84
This sketch-map has been prepared for illustrative purposes only
4°26'59"S
38°57'44"E
Nautical Miles 50 0 50 100 150 200 250 Nautical Miles

245. APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ARMENIA *v.* AZERBAIJAN) [PROVISIONAL MEASURES]

Order of 7 December 2021

On 7 December 2021, the International Court of Justice delivered its Order on the Request for the indication of provisional measures made by the Republic of Armenia in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)*. The Court indicated provisional measures to protect certain rights claimed by Armenia and ordered both Parties to refrain from any action which might aggravate or extend the dispute.

The Court was composed as follows: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; Judges *ad hoc* Keith, Daudet; Registrar Gautier.

*

* *

The Court begins by recalling that, on 16 September 2021, Armenia filed in the Registry of the Court an Application instituting proceedings against Azerbaijan concerning alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention"). In its Application, Armenia contends that "[f]or decades, Azerbaijan has subjected Armenians to racial discrimination" and that, "[a]s a result of this State-sponsored policy of Armenian hatred, Armenians have been subjected to systemic discrimination, mass killings, torture and other abuse". According to Armenia, these violations are directed at individuals of Armenian ethnic or national origin regardless of their actual nationality. The Application contained a Request for the indication of provisional measures, seeking "to protect and preserve Armenia's rights and the rights of Armenians from further harm, and to prevent the aggravation or extension of [the] dispute, pending the determination of the merits of the issues raised in the Application". In their Application, the applicant States seek to found the jurisdiction of the Court on Article 84 of the Chicago Convention, in conjunction with Article 36, paragraph 1, and Article 37 of the Statute of the Court.

I. Introduction (paras. 13–14)

The Court sets out the general historical background to the dispute. It recalls in this regard that Armenia and Azerbaijan, both of which were Republics of the former Union of Soviet Socialist Republics, declared independence on 21 September 1991 and 18 October 1991, respectively. In the Soviet Union, the Nagorno-Karabakh region had been an autonomous entity ("oblast") that had a majority Armenian ethnic population, lying within the territory of the Azerbaijani Soviet Socialist Republic. The Parties' competing claims over that region resulted in hostilities that ended with a ceasefire in May 1994. Further hostilities erupted in September 2020 (hereinafter the "2020 Conflict"), and lasted 44 days. On 9 November 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia, and the President of the Russian Federation signed a statement referred to by the Parties as the "Trilateral Statement". Under the terms of this statement, as of 10 November 2020, "[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared". Noting that the differences between the Parties are longstanding and wide-ranging, the Court points out however that the Applicant has invoked Article 22 of CERD as the title of jurisdiction in the present proceedings, and that the scope of the case is therefore circumscribed by that Convention.

II. Prima facie *jurisdiction* (paras. 15–43)

1. General observations (paras. 15–18)

The Court recalls that, pursuant to its jurisprudence, it may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but that it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. In the present case, Armenia seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD. The Court must therefore first determine whether those provisions *prima facie* confer upon it jurisdiction to rule on the merits of the case, enabling it—if the other necessary conditions are fulfilled—to indicate provisional measures.

The Court notes that Armenia and Azerbaijan are both parties to CERD and that neither Party made reservations to Article 22 or to any other provision of CERD.

2. Existence of a dispute relating to the interpretation or application of CERD (paras. 19–29)

The Court recalls that Article 22 of CERD makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation or application of the Convention. Since Armenia has invoked as the basis of the Court's jurisdiction the compromissory clause in an international convention, the Court must ascertain whether the acts and omissions complained of by the Applicant are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.

The Court observes that for the purposes of determining whether there was a dispute between the parties at the time of filing an application, it takes into account in particular any statements or documents exchanged between them. In so doing, it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content". The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure.

The Court notes that Armenia argues that Azerbaijan has acted and continues to act in violation of its obligations under Articles 2, 3, 4, 5, 6 and 7 of CERD and asserts that Azerbaijan bears responsibility, *inter alia*, for the inhuman and degrading treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin held in its custody; for engaging in practices of ethnic cleansing; for glorifying, rewarding and condoning acts of racism; for inciting racial hatred, giving as an example, mannequins depicting Armenian soldiers in a degrading way at the "Military Trophies Park" which opened in Baku in the aftermath of the 2020 Conflict; for facilitating, tolerating and failing to punish and prevent hate speech; and for systematically destroying and falsifying Armenian cultural sites and heritage.

The Court considers that the exchanges between the Parties prior to the filing of the Application indicate that they differ as to whether certain acts or omissions allegedly committed by Azerbaijan gave rise to violations of its obligations under CERD. The Court notes that, according to Armenia, Azerbaijan has violated its obligations under the Convention in various ways, while Azerbaijan has denied that it has committed any of the alleged violations and that the acts complained of fall within the scope of CERD. The Court observes that the divergence of views between Armenia and Azerbaijan regarding the latter's compliance with its commitments under CERD was already apparent in the first exchange of letters between the Ministers for Foreign Affairs of the Parties, dated 11 November 2020 and 8 December 2020 respectively, in the immediate aftermath of the 2020 Conflict. For the Court, the divergence of views is further demonstrated by subsequent exchanges between the Parties. For the purposes of the present proceedings, the Court recalls that it is not required to ascertain whether any violations of Azerbaijan's obligations under CERD have occurred, a finding that could only be made as part of the examination of the merits of the case. At the stage of making an order on provisional measures, the Court's task is to establish whether the acts and omissions complained of by Armenia are capable of falling within the provisions of CERD. In the Court's view, at least some of the acts and omissions alleged by Armenia to have been committed by Azerbaijan are capable of falling within the provisions of the Convention.

The Court finds therefore that there is a sufficient basis at this stage to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation or application of CERD.

3. Procedural preconditions (paras. 30–42)

Turning to the procedural preconditions set out in Article 22 of CERD, the Court observes that, under that Article, a dispute may be referred to the Court only if it is "not settled by negotiation or by the procedures expressly provided for in this Convention". The Court recalls in that regard that it has previously ruled that Article 22 of CERD establishes procedural preconditions to be met before the seisin of the Court. The Court further recalls that it has also held that the above-mentioned preconditions to its jurisdiction are alternative and not cumulative. Since Armenia does not contend that its dispute with Azerbaijan was submitted to "procedures expressly provided for in [the] Convention", which begin with a referral to the Committee on the Elimination of Racial Discrimination under Article 11 of CERD, the Court will only ascertain whether the dispute is one that is "not settled by negotiation", within the meaning of Article 22. In addition, Article 22 of CERD states that a dispute may be referred to the Court at the request of any of the parties to that dispute only if they have not agreed to another mode of settlement. The Court notes in this respect that neither Party contends that they have agreed to another mode of settlement. Thus, at this stage of the proceedings, the Court will examine whether it appears, *prima facie*, that Armenia genuinely attempted to engage in negotiations with Azerbaijan, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under CERD, and whether Armenia pursued these negotiations as far as possible.

Regarding the precondition of negotiation contained in Article 22 of CERD, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is met only when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked. In order to meet this precondition, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question".

The Court notes that, as evidenced by the material before it, Armenia raised allegations of violations by Azerbaijan of its obligations under CERD in various bilateral exchanges subsequent to the signing of the Trilateral Statement in November 2020. In particular, the Parties corresponded through a series of diplomatic Notes over a period running from November 2020 to September 2021 and held several rounds of bilateral meetings covering the procedural modalities, scope and topics of their negotiations concerning alleged violations of obligations arising under CERD.

The Court observes that, between the first exchange between the Ministers for Foreign Affairs of Armenia and Azerbaijan, by letters dated 11 November 2020 and 8 December 2020 respectively, and the last bilateral meeting held on 14–15 September 2021, the positions of the Parties do not appear to have evolved. Although the Parties were able to agree on certain procedural modalities, including scheduling timetables and topics of discussion, no similar progress was made in terms of substantive matters relating to Armenia's allegations of Azerbaijan's non-compliance with its obligations under CERD. The information available to the Court regarding the bilateral sessions held on 15–16 July 2021, 30–31 August 2021 and 14–15 September 2021 shows a lack of progress in reaching common ground on substantive issues. In the view of the Court, despite the fact that Armenia alleged in bilateral exchanges that Azerbaijan had violated a number of obligations under CERD and that the Parties engaged in a significant number of written exchanges and meetings over a period of several months, it seems that their positions on the alleged non-compliance by Azerbaijan with its obligations under CERD remained unchanged and that their negotiations had reached an impasse. It therefore appears to the Court that

the dispute between the Parties regarding the interpretation and application of CERD had not been settled by negotiation as of the date of the filing of the Application.

Recalling that, at this stage of the proceedings, the Court need only decide whether, *prima facie*, it has jurisdiction, the Court finds that the procedural preconditions under Article 22 of CERD appear to have been met.

4. Conclusion as to prima facie *jurisdiction* (para. 43)

In light of the foregoing, the Court concludes that, *prima facie*, it has jurisdiction pursuant to Article 22 of CERD to entertain the case to the extent that the dispute between the Parties relates to the "interpretation or application" of the Convention.

III. The rights whose protection is sought and the link between such rights and the measures requested (paras. 44–68)

In considering the rights whose protection is sought, the Court observes that the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible.

The Court adds, however, that, at this stage of the proceedings, it is not called upon to determine definitively whether the rights which Armenia wishes to see protected exist; it need only decide whether the rights claimed by Armenia on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. It further notes that that Articles 2, 3, 4, 5, 6 and 7 of CERD are intended to protect individuals from racial discrimination and recalls, as it did in past cases in which Article 22 of CERD was invoked as the basis of its jurisdiction, that there is a correlation between respect for individual rights enshrined in the Convention, the obligations of States parties under CERD and the right of States parties to seek compliance therewith.

The Court recalls that a State party to CERD may invoke the rights set out in the above-mentioned articles only to the extent that the acts complained of constitute acts of racial discrimination as defined in Article 1 of the Convention. In the context of a request for the indication of provisional measures, the Court examines whether the rights claimed by an applicant are at least plausible.

The Court considers, on the basis of the information presented to it by the Parties, that at least some of the rights claimed by Armenia are plausible rights under the Convention. In relation to persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath, the Court observes that Armenia asserts two distinct rights: the right to be repatriated and the right to be protected from inhuman or degrading treatment. The Court notes that international humanitarian law governs the release of persons fighting on behalf of one State who were detained during hostilities with another State. It also recalls that measures based on current nationality do not fall within the scope of CERD. The Court does not consider that CERD plausibly requires Azerbaijan to repatriate all persons identified by Armenia as prisoners of war and civilian detainees. Armenia has not placed before the Court evidence indicating that these persons continue to be detained by reason of their national or ethnic origin. However, the Court finds plausible the right of such persons not to be subjected to inhuman or degrading treatment based on their national or ethnic origin while being detained by Azerbaijan. The Court also considers plausible the rights allegedly violated through incitement and promotion to racial hatred and discrimination against persons of Armenian national or ethnic origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage.

The Court then turns to the condition of the link between the rights claimed by Armenia and the provisional measures requested. In this regard the Court recalls that at this stage of the proceedings only some of the rights claimed by Armenia have been found to be plausible. It will therefore limit itself to considering the existence of the requisite link between these rights and the measures requested by Armenia.

The Court is of the view that a link exists between certain measures requested by Armenia and the plausible rights it seeks to protect. This is the case for measures aimed at requesting Azerbaijan to treat all persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath in accordance with its obligations under CERD, including with respect to their right to security of person and protection by the State against all bodily harm; to refrain from espousing hatred against persons of Armenian national or ethnic origin; and to prevent, prohibit and punish vandalism, destruction or alteration of Armenian historic, cultural and religious heritage and to protect the right to access and enjoy that heritage. These measures, in the Court's view, are directed at safeguarding plausible rights invoked by Armenia under CERD.

The Court concludes, therefore, that a link exists between some of the rights claimed by Armenia and some of the requested provisional measures.

IV. Risk of irreparable prejudice and urgency (paras. 69–88)

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case. The Court must therefore consider whether such

a risk exists at this stage of the proceedings. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures.

The Court then considers whether irreparable prejudice could be caused to those rights which it found to be plausible and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to those rights before the Court gives its final decision.

The Court recalls that in past cases in which CERD was at issue, it stated that the rights stipulated in Article 5 (*a*), (*b*), (*c*), (*d*) and (*e*) are of such a nature that prejudice to them is capable of causing irreparable harm. The Court considers that this statement also holds true in respect of the right of persons not to be subject to racial hatred and discrimination that stems from Article 4 of CERD. The Court further observes that, as it has noted previously, individuals subject to inhuman and degrading treatment or torture could be exposed to a serious risk of irreparable prejudice. The Court also recalls that it has recognized that psychological distress, like bodily harm, can lead to irreparable prejudice.

In the view of the Court, acts prohibited under Article 4 of CERD—such as propaganda promoting racial hatred and incitement to racial discrimination or to acts of violence against any group of persons based on their national or ethnic origin—can generate a pervasive racially charged environment within society. This holds particularly true when rhetoric espousing racial discrimination is employed by high-ranking officials of the State. Such a situation may have serious damaging effects on individuals belonging to the protected group. Such damaging effects may include, but are not limited to, the risk of bodily harm or psychological harm and distress. The Court has also indicated previously that cultural heritage could be subject to a serious risk of irreparable prejudice when such heritage "has been the scene of armed clashes between the Parties" and when "such clashes may reoccur".

After reviewing the information placed before the Court by the Parties, the Court concludes that the alleged disregard of the rights deemed plausible by the Court may entail irreparable prejudice to those rights and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case.

V. Conclusion and measures to be adopted (paras. 89–97)

The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Armenia, as identified above. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested.

In the present case, having considered the terms of the provisional measures requested by Armenia and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested. The Court considers that Azerbaijan must, in accordance with its obligations under CERD, protect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law; take all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin; and, take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts.

With regard to certain exhibits in the "Military Trophies Park", the Court takes full cognizance of the representation made by the Agent of Azerbaijan during the oral proceedings regarding these exhibits, namely that mannequins depicting Armenian soldiers and displays of helmets allegedly worn by Armenian soldiers during the 2020 Conflict have been permanently removed from the park and will not be shown in the future. The Court further notes that the Agent of Azerbaijan also referred to two letters, whereby the Director of the "Military Trophies Park" indicated that "all mannequins displayed at the Military Trophies Park … were removed on October 1, 2021" and that, "on October 08, 2021 all helmets were removed from the Military Trophies Park". The Director of the "Military Trophies Park" further indicated that "[t]he mannequins and helmets will not be displayed at the Military Trophy Park or the Memorial Complex/Museum in the future".

Finally, the Court recalls that Armenia has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with Azerbaijan. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require. In the present case, having considered all the circumstances, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute. With regard to Armenia's request that the Court indicate provisional measures directing Azerbaijan "to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of CERD" and to provide regular reports on the implementation of provisional measures, the Court considers that, in the particular circumstances of the case, these measures are not warranted.

VI. Operative paragraph (para. 98)

For these reasons,

The Court,

Indicates the following provisional measures:

(1) The Republic of Azerbaijan shall, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,

(*a*) By fourteen votes to one,

Protect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; Judges *ad hoc* Keith, Daudet;

Against: Judge Yusuf;

(*b*) Unanimously,

Take all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin;

(*c*) By thirteen votes to two,

Take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; Judge *ad hoc* Daudet;

Against: Judge Yusuf; Judge *ad hoc* Keith;

(2) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

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Judge Yusuf appends a dissenting opinion to the Order of the Court; Judge Iwasawa appends a declaration to the Order of the Court; Judge *ad hoc* Keith appends a declaration to the Order of the Court.

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Dissenting opinion of Judge Yusuf

In his dissenting opinion, Judge Yusuf explains the reasons for his disagreement with subparagraphs 1 (*a*) and 1 (*c*) of the *dispositif* of the Order, which he considers as relating to rights that do not fall, even *prima facie*, within the scope of CERD. He expresses his concern that through this Order, the Court may transform CERD into a receptacle in which all sorts of asserted rights may be stuffed. He disagrees with the indication by the Court of provisional measures for the protection of all persons captured by Azerbaijan in relation to the 2020 Conflict from violence and bodily harm without at least some evidence that they are being held or allegedly mistreated due to their ethnic or national origin, thus bringing their situation under CERD. In his view, such persons should certainly be protected from bodily harm and violence, but CERD is neither applicable to their detention nor to their treatment. In this context, he refers to paragraph 60 of the Order, which states that "Armenia has not placed before the Court evidence indicating that these persons continue to be detained by reason of their national or ethnic origin". For Judge Yusuf, if the Court is not satisfied that these persons are being detained by reason of their national or ethnic origin, it is difficult to understand by what means the Court has come to be persuaded, even *prima facie*, that the same persons are allegedly being mistreated because of their national or ethnic origin. It is his view that there are no justifiable grounds in CERD in the present case for the Court to exercise the powers granted to it by Article 41 of the Statute with respect to the alleged mistreatment of such detainees.

Judge Yusuf expresses similar views and concerns with regard to the indication of provisional measures on the prevention and punishment of alleged acts of vandalism and desecration of cultural heritage sites. In his view, considerations of race and racial discrimination cannot and do not apply to the protection of monuments, groups of buildings, sites and artifacts. Also, there is neither a direct link nor a consequential relationship between Article 5 (*e*) (vi) of CERD and the protection of cultural or religious sites, which falls within the ambit of other instruments of international law. Furthermore, Judge Yusuf considers it untenable to assert that religious heritage, in the sense of churches, cathedrals or other places of worship, is plausibly protected under CERD since, amongst other reasons, the drafters of CERD decided not to address religious discrimination or religious intolerance in this Convention, and consequently Article 1, paragraph 1, of CERD does not list religion or creed amongst the prohibited grounds for the purposes of "racial discrimination".

Declaration of Judge Iwasawa

Judge Iwasawa observes that, in accordance with Article 4 of CERD, measures designed to eradicate incitement to racial hatred must be adopted "with due regard to the principles of the Universal Declaration of Human Rights", including freedom of expression. The exercise of the right to freedom of expression may be subject to certain restrictions, which are, however, only permitted under specific conditions. Measures designed to eradicate incitement to racial hatred must meet those conditions.

The Parties to the present case were twice engaged in large-scale hostilities against each other in their recent history. Judge Iwasawa emphasizes that it is in these circumstances that the Court indicates that Azerbaijan shall take all necessary measures to prevent the incitement and promotion of racial hatred targeted at persons of Armenian national or ethnic origin.

Declaration of Judge *ad hoc* Keith

Judge *ad hoc* Keith addresses two matters.

First, he offers an additional reason for the rejection of the request by Armenia for the release of detainees. The relief sought by Armenia in its Application does not include a request for the release or repatriation of detainees, and Armenia's discussion supporting the request for provisional measures does

not go beyond the treatment of detainees, which is the subject of the first provisional measure indicated by the Court.

Second, Judge *ad hoc* Keith explains his negative vote on the measure relating to cultural property. He argues that CERD does not accord protection to cultural property itself. Additionally, access to sites that include Armenian cultural property, to the extent that it is protected under CERD, is made difficult by landmines, rather than because of the national or ethnic origin of those seeking access. Further, restoration works on war-damaged property and public works are not plausible breaches of CERD. Finally, Judge *ad hoc* Keith is unable to find evidence of a real and imminent risk that irreparable prejudice will be caused to the relevant right.

246. APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (AZERBAIJAN *v.* ARMENIA) [PROVISIONAL MEASURES]

Order of 7 December 2021

On 7 December 2021, the International Court of Justice delivered its Order on the Request for the indication of provisional measures submitted by the Republic of Azerbaijan in the case concerning *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Azerbaijan* v. *Armenia)*. In its Order, the Court indicated provisional measures to protect certain rights claimed by Azerbaijan and orders both Parties to refrain from any action which might aggravate or extend the dispute.

The Court was composed as follows: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; Judges *ad hoc* Keith, Daudet; Registrar Gautier.

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The Court begins by recalling that, on 23 September 2021, Azerbaijan filed in the Registry of the Court an Application instituting proceedings against Armenia concerning alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention").

In its Application, Azerbaijan contends that Armenia has engaged and is continuing to engage "in a series of discriminatory acts against Azerbaijanis on the basis of their 'national or ethnic' origin within the meaning of CERD". In particular, the Applicant claims that "Armenia's policies and conduct of ethnic cleansing, cultural erasure and fomenting of hatred against Azerbaijanis systematically infringe the rights and freedoms of Azerbaijanis, as well as Azerbaijan's own rights, in violation of CERD". The Application was accompanied by a Request for the indication of provisional measures seeking to protect the rights invoked by Azerbaijan "against the harm caused by Armenia's ongoing unlawful conduct", pending the Court's final decision in the case.

I. Introduction (paras. 13–14)

The Court sets out the general historical background to the dispute. It recalls in this regard that Azerbaijan and Armenia, both of which were Republics of the former Union of Soviet Socialist Republics, declared independence on 18 October 1991 and 21 September 1991, respectively. In the Soviet Union, the Nagorno-Karabakh region had been an autonomous entity ("oblast") that had a majority Armenian ethnic population, lying within the territory of the Azerbaijani Soviet Socialist Republic. The Parties' competing claims over that region resulted in hostilities that ended with a ceasefire in May 1994. Further hostilities erupted in September 2020 (hereinafter the "2020 Conflict"), and lasted 44 days. On 9 November 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia, and the President of the Russian Federation signed a statement referred to by the Parties as the "Trilateral Statement". Under the terms of this statement, as of 10 November 2020, "[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared". Noting that the differences between the Parties are longstanding and wide-ranging, the Court points out however that the Applicant has invoked Article 22 of CERD as the title of jurisdiction in the present proceedings, and that the scope of the case is therefore circumscribed by that Convention.

II. Prima facie *jurisdiction* (paras. 15–40)

1. General observations (paras. 15–18)

The Court recalls that, pursuant to its jurisprudence, it may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but that it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. In the present case, Azerbaijan seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD. The Court must therefore first determine whether those provisions *prima facie* confer upon it jurisdiction to rule on the merits of the case, enabling it—if the other necessary conditions are fulfilled—to indicate provisional measures.

The Court notes that Azerbaijan and Armenia are both parties to CERD and that neither Party made reservations to Article 22 or to any other provision of CERD.

2. Existence of a dispute relating to the interpretation or application of CERD (paras. 19–28)

The Court recalls that Article 22 of CERD makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation or application of the Convention. Since Azerbaijan has invoked as the basis of the Court's jurisdiction the compromissory clause in an international convention, the Court must ascertain whether the acts and omissions complained of by the Applicant are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.

The Court observes that for the purposes of determining whether there was a dispute between the parties at the time of filing an application, it takes into account in particular any statements or documents exchanged between them. In so doing, it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content". The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure.

The Court notes that Azerbaijan argues that Armenia has acted and continues to act in violation of its obligations

under Articles 2, 3, 4, 5, 6 and 7 of CERD and asserts that Armenia bears responsibility, *inter alia*, for engaging in practices of ethnic cleansing. Azerbaijan specifically alleges that following the 2020 Conflict Armenia prevented the return of displaced ethnic Azerbaijanis to the areas formerly under Armenian control by refusing to share information about the minefields in the area where their former homes were located so as to allow for mine clearance operations. Azerbaijan also asserts that Armenia is responsible for inciting hatred and violence against persons of Azerbaijani national or ethnic origin through hate speech and the dissemination of racist propaganda, including at the highest level of its Government; for harbouring "armed ethno-nationalist hate groups"; for engaging in, sponsoring or supporting disinformation operations across social media; and for failing to investigate and preserve evidence related to violations of obligations arising under CERD with regard to ethnic Azerbaijanis.

The Court considers that the exchanges between the Parties prior to the filing of the Application indicate that they differ as to whether certain acts or omissions allegedly committed by Armenia gave rise to violations of its obligations under CERD. The Court notes that, according to Azerbaijan, Armenia has violated its obligations under the Convention in various ways, while Armenia has denied that it has committed any of the alleged violations and that the acts complained of fall within the scope of CERD. The Court observes that the divergence of views between Azerbaijan and Armenia regarding the latter's compliance with its commitments under CERD was already apparent in the first exchange of letters between the Ministers for Foreign Affairs of the Parties, dated 8 December 2020 and 22 December 2020 respectively, in the immediate aftermath of the 2020 Conflict. For the Court, the divergence of views is further demonstrated by subsequent exchanges between the Parties. For the purposes of the present proceedings, the Court recalls that it is not required to ascertain whether any violations of Armenia's obligations under CERD have occurred, a finding that could only be made as part of the examination of the merits of the case. At the stage of making an order on provisional measures, the Court's task is to establish whether the acts and omissions complained of by Azerbaijan are capable of falling within the provisions of CERD. In the Court's view, at least some of the acts and omissions alleged by Azerbaijan to have been committed by Armenia are capable of falling within the provisions of the Convention.

The Court finds therefore that there is a sufficient basis at this stage to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation or application of CERD.

3. Procedural preconditions (paras. 29–39)

Turning to the procedural preconditions set out in Article 22 of CERD, the Court observes that, under that Article, a dispute may be referred to the Court only if it is "not settled by negotiation or by the procedures expressly provided for in this Convention". The Court recalls in that regard that it has previously ruled that Article 22 of CERD establishes procedural preconditions to be met before the seisin of the Court. The Court further recalls that it has also held that the above-mentioned preconditions to its jurisdiction are alternative and not cumulative. Since Azerbaijan does not contend that its dispute with Armenia was submitted to "procedures expressly provided for in [the] Convention", which begin with a referral to the Committee on the Elimination of Racial Discrimination under Article 11 of CERD, the Court will only ascertain whether the dispute is one that is "not settled by negotiation", within the meaning of Article 22. In addition, Article 22 of CERD states that a dispute may be referred to the Court at the request of any of the parties to that dispute only if they have not agreed to another mode of settlement. The Court notes in this respect that neither Party contends that they have agreed to another mode of settlement. Thus, at this stage of the proceedings, the Court will examine whether it appears, *prima facie*, that Azerbaijan genuinely attempted to engage in negotiations with Armenia, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under CERD, and whether Azerbaijan pursued these negotiations as far as possible.

Regarding the precondition of negotiation contained in Article 22 of CERD, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is met only when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked. In order to meet this precondition, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question".

The Court notes that, as evidenced by the material before it, Azerbaijan raised allegations of violations by Armenia of its obligations under CERD in various bilateral exchanges subsequent to the signing of the Trilateral Statement in November 2020. In particular, the Parties corresponded through a series of diplomatic Notes over a period running from November 2020 to September 2021 and held several rounds of bilateral meetings covering the procedural modalities, scope and topics of their negotiations concerning alleged violations of obligations arising under CERD.

The Court observes that, between the first exchange between the Ministers for Foreign Affairs of Azerbaijan and Armenia, by letters dated 8 December 2020 and 22 December 2020 respectively, and the last bilateral meeting held on 14–15 September 2021, the positions of the Parties do not appear to have evolved. Although the Parties were able to agree on certain procedural modalities, including scheduling timetables and topics of discussion, no similar progress was made in terms of substantive matters relating to Azerbaijan's allegations of Armenia's non-compliance with its obligations under CERD. The information available to the Court regarding the bilateral sessions held on 15–16 July 2021, 30–31 August 2021 and on 14–15 September 2021 shows a lack of progress in reaching common ground on substantive issues. The Court observes moreover that both Parties appear to accept that negotiations between them with a view to addressing the CERD-related complaints levelled by Azerbaijan against Armenia had reached an impasse. In the view of the Court, despite the fact that Azerbaijan alleged in bilateral exchanges that Armenia

had violated a number of obligations under CERD and that the Parties engaged in a significant number of written exchanges and meetings over a period of several months, it seems that their positions on the alleged non-compliance by Armenia with its obligations under CERD remained unchanged and that their negotiations had reached an impasse. It therefore appears to the Court that the dispute between the Parties regarding the interpretation and application of CERD had not been settled by negotiation as of the date of the filing of the Application.

Recalling that, at this stage of the proceedings, the Court need only decide whether, *prima facie*, it has jurisdiction, the Court finds that the procedural preconditions under Article 22 of CERD appear to have been met.

4. Conclusion as to prima facie *jurisdiction* (para. 40)

In light of the foregoing, the Court concludes that, *prima facie*, it has jurisdiction pursuant to Article 22 of CERD to entertain the case to the extent that the dispute between the Parties relates to the "interpretation or application" of the Convention.

III. The rights whose protection is sought and the link between such rights and the measures requested (paras. 41–58)

In considering the rights whose protection is sought, the Court observes that the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible.

The Court adds, however, that, at this stage of the proceedings, it is not called upon to determine definitively whether the rights which Azerbaijan wishes to see protected exist; it need only decide whether the rights claimed by Azerbaijan on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

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The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. It further notes that Articles 2, 3, 4, 5, 6 and 7 of CERD are intended to protect individuals from racial discrimination and recalls, as it did in past cases in which Article 22 of CERD was invoked as the basis of its jurisdiction, that there is a correlation between respect for individual rights enshrined in the Convention, the obligations of States parties under CERD and the right of States parties to seek compliance therewith.

The Court further recalls that a State party to CERD may invoke the rights set out in the above-mentioned articles only to the extent that the acts complained of constitute acts of racial discrimination as defined in Article 1 of the Convention. In the context of a request for the indication of provisional measures, the Court examines whether the rights claimed by an applicant are at least plausible.

The Court considers, on the basis of the information presented to it by the Parties, that at least some of the rights claimed by Azerbaijan are plausible rights under the Convention. This is the case, with respect to rights allegedly violated through Armenia's failure to condemn the activities within its territory of groups that, according to Azerbaijan, are armed ethnonationalist hate groups that incite violence against ethnic Azerbaijanis, and to punish those responsible for such activities. With regard to rights under CERD asserted by Azerbaijan with respect to Armenia's alleged conduct in relation to landmines, the Court recalls that Azerbaijan claims that this conduct is part of a longstanding campaign of ethnic cleansing. The Court recognizes that a policy of driving persons of a certain national or ethnic origin from a particular area, as well as preventing their return thereto, can implicate rights under CERD and that such a policy can be effected through a variety of military means. However, the Court does not consider that CERD plausibly imposes any obligation on Armenia to take measures to enable Azerbaijan to undertake demining or to cease and desist from planting landmines. Azerbaijan has not placed before the Court evidence indicating that Armenia's alleged conduct with respect to landmines has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing," of rights of persons of Azerbaijani national or ethnic origin.

The Court then turns to the condition of the link between the rights claimed by Azerbaijan and the provisional measures requested. In this regard the Court recalls that at this stage of the proceedings only some of the rights claimed by Azerbaijan have been found to be plausible. It will therefore limit itself to considering the existence of the requisite link between these rights and the measures requested by Azerbaijan.

The Court is of the view that a link exists between one of the measures requested by Azerbaijan and the plausible rights it seeks to protect. This is the case for the measure aimed at ensuring that any organizations and private persons in the territory of Armenia do not engage in the incitement and promotion of racial hatred and racially motivated violence targeted at people of Azerbaijani national or ethnic origin. This measure, in the view of the Court, is directed at safeguarding plausible rights invoked by Azerbaijan under CERD.

The Court concludes, therefore, that a link exists between some of the rights claimed by Azerbaijan and one of the requested provisional measures.

IV. Risk of irreparable prejudice and urgency (paras. 59–67)

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision

on the case. The Court must therefore consider whether such a risk exists at this stage of the proceedings. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures.

The Court then considers whether irreparable prejudice could be caused to those rights which it found to be plausible and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to those rights before the Court gives its final decision.

The Court recalls that in past cases in which CERD was at issue, it stated that the rights stipulated in Article 5 (*a*), (*b*), (*c*), (*d*) and (*e*) are of such a nature that prejudice to them is capable of causing irreparable harm. The Court considers that this statement also holds true in respect of the right of persons not to be subject to racial hatred and discrimination that stems from Article 4 of CERD.

In the view of the Court, acts prohibited under Article 4 of CERD ¾ such as propaganda promoting racial hatred and incitement to racial discrimination or to acts of violence against any group of persons based on their national or ethnic origin ¾ can generate a pervasive racially charged environment within society. Such a situation may have serious damaging effects on individuals belonging to the protected group. Such damaging effects may include, but are not limited to, the risk of bodily harm or psychological harm and distress.

In light of these considerations, the Court concludes that the alleged disregard of the rights deemed plausible by the Court may entail irreparable prejudice to those rights and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case.

V. Conclusion and measures to be adopted (paras. 68–75)

The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Azerbaijan, as identified above. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested.

In the present case, having considered the terms of the provisional measures requested by Azerbaijan and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested. The Court considers that Armenia must, pending the final decision in the case and in accordance with its obligations under CERD, take all necessary measures to prevent the incitement and promotion of racial hatred, including by organizations and private persons in its territory, targeted at persons of Azerbaijani national or ethnic origin.

The Court recalls that Azerbaijan has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with Armenia. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require. In the present case, having considered all the circumstances, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute. With regard to Azerbaijan's request that the Court indicate provisional measures directing Armenia to "take effective measures to collect, to prevent the destruction and ensure the preservation of, evidence related to allegations of ethnically-motivated crimes against Azerbaijanis" and to provide regular reports on the implementation of provisional measures, the Court considers that, in the particular circumstances of the case, these measures are not warranted.

VI. Operative paragraph (para. 76)

For these reasons,

The Court,

Indicates the following provisional measures:

(1) Unanimously,

The Republic of Armenia shall, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, take all necessary measures to prevent the incitement and promotion of racial hatred, including by organizations and private persons in its territory, targeted at persons of Azerbaijani national or ethnic origin;

(2) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

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Judge Iwasawa appends a declaration to the Order of the Court.

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Declaration of Judge Iwasawa

Judge Iwasawa observes that, in accordance with Article 4 of CERD, measures designed to eradicate incitement to racial hatred must be adopted "with due regard to the principles of the Universal Declaration of Human Rights", including freedom of expression. The exercise of the right to freedom of expression may be subject to certain restrictions, which are, however, only permitted under specific conditions. Measures designed to eradicate incitement to racial hatred must meet those conditions.

The Parties to the present case were twice engaged in large-scale hostilities against each other in their recent history. Judge Iwasawa emphasizes that it is in these circumstances that

the Court indicates that Armenia shall take all necessary measures to prevent the incitement and promotion of racial hatred targeted at persons of Azerbaijani national or ethnic origin.

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247. ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (DEMOCRATIC REPUBLIC OF THE CONGO *v.* UGANDA) [REPARATIONS]

Judgment of 9 February 2022

On 9 February 2022, the International Court of Justice delivered its Judgment on the question of reparations in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*. In its Judgment, the Court fixed the amounts of compensation due from the Republic of Uganda to the Democratic Republic of the Congo.

The Court was composed as follows: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; Judge *ad hoc* Daudet; Registrar Gautier.

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History of the proceedings (paras. 1–47)

The Court recalls that, on 23 June 1999, the Democratic Republic of the Congo (hereinafter the "DRC") filed in the Registry of the Court an Application instituting proceedings against the Republic of Uganda (hereinafter "Uganda") in respect of a dispute concerning "acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity" (emphasis in the original). It also notes that Uganda submitted three counter-claims, two of which were found to be admissible as such.

The Court then states that, in its Judgment on the merits dated 19 December 2005 (hereinafter the "2005 Judgment"), it found that Uganda had violated certain obligations incumbent on it and was under an obligation to make reparation to the DRC for the injury caused.

In relation to the counter-claims presented by Uganda, the Court found that the DRC had violated certain obligations incumbent on it and that it was under an obligation to make reparation to Uganda for the injury caused.

The Court then notes that it further decided in its 2005 Judgment that, failing agreement between the Parties, the question of reparations due would be settled by the Court.

It recalled in this regard that, in May 2015, the DRC requested that the proceedings be resumed, which the Court decided to do by an Order of 1 July 2015.

The Court states that, by an Order dated 8 September 2020, it decided to arrange for an expert opinion, pursuant to Article 67 of its Rules, regarding certain heads of damage alleged by the Applicant, namely, loss of human life, loss of natural resources and property damage. By an Order of 12 October 2020, it appointed the following four experts: Ms Debarati Guha-Sapir, Mr. Michael Nest, Mr. Geoffrey Senogles and Mr. Henrik Urdal. In December 2020, they filed their reports, which were transmitted to the Parties for their observations.

The Court then recalls that public hearings on the question of reparations were held in a hybrid format from 20 to 30 April 2021.

Finally, the Court observes that, at the end of the hearings, the Agent of Uganda informed it that his Government "officially waive[d] its counter-claim for reparation for the injury caused by the conduct of the DRC's armed forces, including attacks on the Ugandan diplomatic premises in Kinshasa and the maltreatment of Ugandan diplomats".

I. Introduction (paras. 48–59)

Noting that it falls to the Court to determine the nature and amount of reparations to be awarded to the DRC for injury caused by Uganda's violations of its international obligations, pursuant to the findings it set out in the 2005 Judgment, the Court begins by recalling certain facts and conclusions that led it to hold Uganda internationally responsible in that Judgment, noting that it will recall the context and other relevant facts of the case in more detail when setting out general considerations with respect to the question of reparations (Part II, Section A) and when addressing the DRC's claims for various forms of damage (Parts III and IV).

II. General considerations (paras. 60–131)

A. Context (paras. 61–68)

Having recalled the positions of the Parties, the Court states that the context of the present case is particularly relevant for the analysis of the facts. First and foremost, this case concerns one of the most complex and deadliest armed conflicts to have taken place on the African continent. There were numerous actors operating on the territory of the DRC between 1998 and 2003, including the armed forces of various States, as well as irregular armed forces that often acted in collaboration with the intervening States.

The Court then emphasizes that this case is characterized by Uganda's violation of some of the most fundamental principles and rules of international law, namely the principles of non-use of force and of non-intervention, international humanitarian law and basic human rights. Its actions resulted in massive infringements of those rights and serious violations of international humanitarian law, in the form of, *inter alia*, killings, injuries, cruel and inhuman treatment, damage to property and the plundering of Congolese natural resources. The entire district of Ituri fell under the military occupation and effective control of Uganda. In Kisangani, Uganda engaged in large-scale fighting against Rwandan forces.

The Court further observes that the time that has elapsed between the current phase of the proceedings and the unfolding of the conflict, namely some 20 years, makes the task of establishing the course of events and their legal characterization even more difficult. The Court notes, however, that the Parties have been aware since the 2005 Judgment that they could be called upon to provide evidence in reparation proceedings.

The Court is mindful of the fact that evidentiary difficulties arise, to a certain extent, in most situations of international

armed conflict. However, questions of reparation are often resolved through negotiations between the parties concerned. The Court notes that it can only regret the failure, in this case, of the negotiations through which the Parties were to "seek in good faith an agreed solution" based on the findings of the 2005 Judgment (*I.C.J. Reports 2005*, p. 257, para. 261).

The Court states that it will take the context of this case into account when determining the extent of the injury and assessing the reparation owed (see Parts III and IV).

B. The principles and rules applicable to the assessment of reparations in the present case (paras. 69–110)

Having recalled that, in its 2005 Judgment, it found that Uganda was under an obligation to make reparation for the damage caused by internationally wrongful acts (actions and omissions) attributable to it, the Court begins by determining the principles and rules applicable to the assessment of reparations in the present case. It does so, first, by distinguishing between the different situations that arose during the conflict in Ituri and in other areas of the DRC (Subsection 1); second, by analysing the required causal nexus between Uganda's internationally wrongful acts and the injury suffered by the Applicant (Subsection 2); and, finally, by examining the nature, form and amount of reparation (Subsection 3).

1. The principles and rules applicable to the different situations that arose during the conflict (paras. 73–84)

The Court recalls that the Parties disagree about the scope of Uganda's obligation to make reparation for the injury suffered in two different situations: in the district of Ituri, under Ugandan occupation, and in other areas of the DRC outside Ituri, including Kisangani where Ugandan and Rwandan armed forces were operating simultaneously.

(*a*) *In Ituri* (paras. 74–79)

The Court observes that the Parties hold opposing views on whether the reparation owed by Uganda to the DRC extends to damage caused by third parties in the district of Ituri.

Having recalled the arguments of the Parties in this regard, the Court considers that the status of the district of Ituri as an occupied territory has a direct bearing on questions of proof and the requisite causal nexus. As an occupying Power, Uganda had a duty of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account. Given this duty of vigilance, the Court concluded that the Respondent's responsibility was engaged "by its failure … to take measures to … ensure respect for human rights and international humanitarian law in Ituri district" (2005 Judgment, *I.C.J. Reports 2005*, p. 231, paras. 178–179, p. 245, para. 211, and p. 280, para. 345, subpara. (3) of the operative part). It is thus of the opinion that, taking into account this conclusion, it is for Uganda to establish, in this phase of the proceedings, that a particular injury alleged by the DRC in Ituri was not caused by Uganda's failure to meet its obligations as an occupying Power. In the absence of evidence to that effect, it may be concluded that Uganda owes reparation in relation to such injury.

With respect to natural resources, the Court recalls that, in its 2005 Judgment, it considered that Uganda, as an occupying Power, had an "obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory [by] private persons in [Ituri] district" (*ibid*., p. 253, para. 248). The Court found that Uganda had "fail[ed] to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory" (*ibid*., p. 253, para. 250) and that its international responsibility was thereby engaged (*ibid*., p. 281, para. 345, subpara. (4) of the operative part). The reparation owed by Uganda in respect of acts of looting, plundering and exploitation of natural resources in Ituri will be addressed below.

(*b*) *Outside Ituri* (paras. 80–84)

As regards damage that occurred outside Ituri, the Court recalls the findings in its 2005 Judgment that the rebel groups operating in the territory of the DRC outside of Ituri were not under Uganda's control, that their conduct was not attributable to it and that Uganda was not in breach of its duty of vigilance with regard to the illegal activities of such groups (*I.C.J. Reports 2005*, p. 226, paras. 160–161, pp. 230–231, para. 177, and p. 253, para. 247). Consequently, no reparation can be awarded for damage caused by the actions of those groups.

The Court found, in the same Judgment, that, even if the MLC was not under the Respondent's control, the latter provided support to the group (*ibid*., p. 226, para. 160), and that Uganda's training and support of the ALC violated certain obligations of international law (*ibid*., p. 226, para. 161). The Court will take this finding into account when it considers the DRC's claims for reparation.

It falls to the Court to assess each category of alleged damage on a case-by-case basis and to examine whether Uganda's support of the relevant rebel group was a sufficiently direct and certain cause of the injury. The extent of the damage and the consequent reparation must be determined by the Court when examining each injury concerned. The same applies in respect of the damage suffered specifically in Kisangani, which the Court will consider in Part III.

2. The causal nexus between the internationally wrongful acts and the injury suffered (paras. 85–98)

The Court then recalls that the Parties differ on whether reparation should be limited to the injury directly linked to an internationally wrongful act or should also cover the indirect consequences of that act.

If further recalls that it may award compensation only when an injury is caused by the internationally wrongful act of a State. As a general rule, it falls to the party seeking compensation to prove the existence of a causal nexus between the internationally wrongful act and the injury suffered. In accordance with the jurisprudence of the Court, compensation can be awarded only if there is "a sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered by the Applicant, consisting of all damage of any type, material or moral" (*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). The Court applied this same criterion in two other cases in which the question of reparation arose. However, it should be noted that the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury.

In particular, in the case of damage resulting from war, the question of the causal nexus can raise certain difficulties. In a situation of a long-standing and large-scale armed conflict, as in this case, the causal nexus between the wrongful conduct and certain injuries for which an applicant seeks reparation may be readily established. For some other injuries, the link between the internationally wrongful act and the alleged injury may be insufficiently direct and certain to call for reparation. It may be that the damage is attributable to several concurrent causes, including the actions or omissions of the respondent. It is also possible that several internationally wrongful acts of the same nature, but attributable to different actors, may result in a single injury or in several distinct injuries. The Court notes that it will consider these questions as they arise, in light of the facts of this case and the evidence available. Ultimately, it is for the Court to decide if there is a sufficiently direct and certain causal nexus between Uganda's internationally wrongful acts and the various forms of damage allegedly suffered by the DRC.

The Court is of the opinion that, in analysing the causal nexus, it must make a distinction between the alleged actions and omissions that took place in Ituri, which was under the occupation and effective control of Uganda, and those that occurred in other areas of the DRC, where Uganda did not necessarily have effective control, notwithstanding the support it provided to several rebel groups whose actions gave rise to damage. The Court recalls that Uganda is under an obligation to make reparation for all damage resulting from the conflict in Ituri, even that resulting from the conduct of third parties, unless it has established, with respect to a particular injury, that it was not caused by Uganda's failure to meet its obligations as an occupying Power.

Lastly, the Court cannot accept the Respondent's argument based on an analogy with the 2007 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, in which the Court expressly confined itself to determining the specific scope of the duty to prevent in the Genocide Convention and did not purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts (*ibid.*, pp. 220–221, para. 429). The Court considers that the legal régimes and factual circumstances in question are not comparable, given that, unlike the above-mentioned *Genocide* case, the present case concerns a situation of occupation.

As regards the injury suffered outside Ituri, the Court must take account of the fact that some of this damage occurred as a result of a combination of actions and omissions attributable to other States and to rebel groups operating on Congolese territory. The Court cannot accept the Applicant's assessment that Uganda is obliged to make reparation for 45 per cent of all the damage that occurred during the armed conflict on Congolese territory. This assessment, which purports to correspond to the proportion of Congolese territory under Ugandan influence, has no basis in law or in fact. However, the fact that the damage was the result of concurrent causes is not sufficient to exempt the Respondent from any obligation to make reparation.

The Parties having also addressed the applicable law in situations in which multiple actors engage in conduct that gives rise to injury, which has particular relevance to the events in Kisangani, where the damage alleged by the DRC arose out of conflict between the forces of Uganda and those of Rwanda, the Court recalls that, in certain situations in which multiple causes attributable to two or more actors have resulted in injury, a single actor may be required to make full reparation for the damage suffered. In other situations, in which the conduct of multiple actors has given rise to injury, responsibility for part of such injury should instead be allocated among those actors. The Court states that it will return to this issue in assessing the DRC's claims for compensation in relation to Kisangani.

3. The nature, form and amount of reparation (paras. 99–110)

The Court then recalls certain international legal principles that inform the determination of the nature, form and amount of reparation under the law on the international responsibility of States in general and in situations of mass violations in the context of armed conflict in particular.

It thus notes that it is well established in international law that the breach of an engagement involves an obligation to make reparation in an adequate form. According to the jurisprudence of the Court, this is an obligation to make full reparation for the damage caused by an internationally wrongful act.

As stated in Article 34 of the ILC Articles on State Responsibility, "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination". Thus, in accordance with the jurisprudence of the Court, compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible.

In view of the circumstances of the present case, the Court emphasizes that it is well established in international law that reparation due to a State is compensatory in nature and should not have a punitive character. The Court observes, moreover, that any reparation is intended, as far as possible, to benefit all those who suffered injury resulting from internationally wrongful acts.

The Court notes, however, that the Parties do not agree on the principles and methodologies applicable to the assessment of damage resulting from an armed conflict or to the quantification of compensation due.

It recalls in this regard that reparation must, as far as possible, wipe out all the consequences of the illegal act. The Court notes that it has recognized in other cases that the absence of adequate evidence of the extent of material damage will not, in all situations, preclude an award of compensation for that damage. While the Court recognizes that there is some uncertainty about the exact extent of the damage caused, this does not preclude it from determining the amount of compensation. The Court may, on an exceptional basis, award

compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking account of equitable considerations. Such an approach may be called for where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the extent or scale of such injury.

The Court observes that, in most instances, when compensation has been granted in cases involving a large group of victims who have suffered serious injury in situations of armed conflict, the judicial or other bodies concerned have awarded a global sum, for certain categories of injury, on the basis of the evidence at their disposal. The Eritrea-Ethiopia Claims Commission (hereinafter the "EECC"), for example, noted the intrinsic difficulties faced by judicial bodies in such situations. It acknowledged that the compensation it awarded reflected "the damage that could be established with sufficient certainty through the available evidence" (*Final Award, Eritrea's Damages Claims, Decision of 17 August 2009*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVI, p. 516, para. 2), even though the awards "probably d[id] not reflect the totality of damage that either Party suffered in violation of international law" (*ibid.*). It also recognized that, in the context of proceedings aimed at providing compensation for injuries affecting large numbers of victims, the relevant institutions have adopted less rigorous standards of proof. They have accordingly reduced the levels of compensation awarded in order to account for the uncertainties that flow from applying a lower standard of proof (*ibid.*, pp. 528–529, para. 38).

The Court is convinced that it should proceed in this manner in the present case. It will take due account of the above-mentioned conclusions regarding the nature, form and amount of reparation when considering the different forms of damage claimed by the DRC.

The Court then turns to the question whether, in determining the amount of compensation, account should be taken of the financial burden imposed on the responsible State, given its economic condition, in particular if there is any doubt about the State's capacity to pay without compromising its ability to meet its people's basic needs. Recalling that the EECC raised the matter of the respondent State's financial capacity (*ibid.*, Vol. XXVI, pp. 522–524, paras. 19–22), the Court notes that it will further address this question below.

C. Questions of proof (paras. 111–126)

Having established the principles and rules applicable to the assessment of reparations in the present case, the Court examines questions of proof in order to determine who bears the burden of proving a fact, the standard of proof, and the weight to be given to certain kinds of evidence.

It recalls, as a preliminary matter, that the Court does not accept Uganda's contention that the DRC must prove the exact injury suffered by a specific person or property in a given location and at a given time for it to award reparation. In cases of mass injuries like the present one, the Court may form an appreciation of the extent of damage on which compensation should be based without necessarily having to identify the names of all victims or specific information about each building or other property destroyed in the conflict.

1. The burden of proof (paras. 115–119)

The Court begins by recalling the rules governing the burden of proof. In accordance with its well-established jurisprudence on the matter, "as a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact". In principle, therefore, it falls to the party alleging a fact to submit the relevant evidence to substantiate its claims.

However, the Court considers that this is not an absolute rule applicable in all circumstances. There are situations where, as it stated in the *Ahmadou Sadio Diallo* case *(Republic of Guinea* v. *Democratic Republic of the Congo)*, "this general rule would have to be applied flexibly … and, in particular, [where] the Respondent may be in a better position to establish certain facts". As noted in the case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening*, the Court "cannot however apply a presumption that evidence which is unavailable would, if produced, have supported a particular party's case; still less a presumption of the existence of evidence which has not been produced".

The Court has thus underlined, in the *Ahmadou Sadio Diallo* case *(Republic of Guinea* v. *Democratic Republic of the Congo)*, that "[t]he determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case". It is for the Court to evaluate all the evidence produced by the parties and which has been duly subjected to their scrutiny, with a view to forming its conclusions. Depending on the circumstances of the case, it may be that neither party is alone in bearing the burden of proof.

As regards the damage that occurred in the district of Ituri, which was under Ugandan occupation, the Court recalls the conclusion it reached above (Subsection 1 (*a*)). In this phase of the proceedings, it is for Uganda to establish that a particular injury suffered by the DRC in Ituri was not caused by its failure to meet its obligations as an occupying Power.

However, as regards damage that occurred on Congolese territory outside Ituri, and although the existence of armed conflict may make it more difficult to establish the facts, the Court is of the view, in accordance with its jurisprudence, that "[u]ltimately … it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved".

2. The standard of proof and degree of certainty (paras. 120–126)

In practice, the Court has applied various criteria to assess evidence. It considers that the standard of proof may vary from case to case and may depend on the gravity of the acts alleged. It has also recognized that a State that is not in a position to provide direct proof of certain facts should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.

The Court has previously addressed the question of the weight to be given to certain kinds of evidence. It recalls, as noted in its 2005 Judgment, that it

> "will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a

single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41. para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains." (2005 Judgment, *I.C.J. Reports 2005*, p. 201, para. 61; see also *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. 130–131, para. 213.)

The Court stated that the value of reports from official or independent bodies depends on a number of factors.

The Court considers it helpful to refer to the practice of other international bodies that have addressed the determination of reparation concerning mass violations in the context of armed conflict. The EECC recognized the difficulties associated with questions of proof in its examination of compensation claims for violations of obligations under the *jus in bello* and *jus ad bellum* committed in the context of an international armed conflict. While it required "clear and convincing evidence to establish that damage occurred", the EECC noted that if the same high standard were required for quantification of the damage, it would thwart any reparation. It therefore required "less rigorous proof" for the purposes of quantification (*Final Award, Eritrea's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, p. 528, para. 36). Moreover, in its Order for Reparations in the *Katanga* case, which concerns acts that took place in the course of the same armed conflict as in the present case, the International Criminal Court (hereinafter the "ICC") was mindful of the fact that "the Applicants were not always in a position to furnish documentary evidence in support of all of the harm alleged, given the circumstances in the DRC" (*The Prosecutor* v. *Germain Katanga*, ICC-01/04–01/07, Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, p. 38, para. 84).

In light of the foregoing and given that a large amount of evidence has been destroyed or rendered inaccessible over the years since the armed conflict, the Court is of the view that the standard of proof required to establish responsibility is higher than in the present phase on reparation, which calls for some flexibility.

The Court notes that the evidence included in the case file by the DRC is, for the most part, insufficient to reach a precise determination of the amount of compensation due. However, given the context of armed conflict in this case, the Court must take account of other evidence, such as the various investigative reports in the case file, in particular those from United Nations organs. The Court already examined much of this evidence in its 2005 Judgment and took the view that some of the United Nations reports, as well as the final report of the Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC established in 2001 (hereinafter the "Porter Commission Report"), had probative value when corroborated by other reliable sources (*I.C.J. Reports 2005*, p. 249, para. 237). Although the Court noted in 2005 that it was not necessary for it to make findings of fact for each individual incident, these documents nevertheless record a considerable number of incidents on which the Court can now rely in evaluating the damage and the amount of compensation due. The Court will also take more recent evidence into account, notably the "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003", which was published in 2010 by the Office of the High Commissioner for Human Rights (hereinafter the "Mapping Report"). The Court will also take account of the reports by the Court-appointed experts, where it considers them to be relevant.

In the circumstances of the case and given the context and the time that has elapsed since the facts in question occurred, the Court considers that it must assess the existence and extent of the damage within the range of possibilities indicated by the evidence. This may be evidence included in the case file by the Parties, in the reports submitted by the Court-appointed experts or in reports of the United Nations and other national or international bodies. Finally, the Court considers that, in such circumstances, an assessment of the existence and extent of the damage must be based on reasonable estimates, taking into account whether a particular finding of fact is supported by more than one source of evidence.

D. The forms of damage subject to reparation (paras. 127–131)

The Parties disagree about which forms of damage fall within the scope of the 2005 Judgment and thus must be taken into account by the Court during this phase of the proceedings.

The Court has already determined, in its 2005 Judgment, that Uganda is under an obligation to make reparation for the injury caused to the DRC by several actions and omissions attributable to it. It is of the opinion that its task, at this stage of the proceedings, is to rule on the nature and amount of reparation owed to the DRC by Uganda for the forms of damage established in 2005 that are attributable to it. Indeed, the Court's objective in its 2005 Judgment was not to determine the precise injuries suffered by the DRC. It is sufficient for an injury claimed by the Applicant to fall within the categories established in 2005. As the Court has done in previous cases on reparation, it will determine whether each of the claims for reparation falls within the scope of its prior findings on liability.

III. Compensation claimed by the DRC (paras. 132–384)

The Court recalls that the DRC claims compensation for damage to persons (Section A), damage to property (Section B), damage to natural resources (Section C) and for macroeconomic damage (Section D). It will thus examine these claims on the basis of the general considerations described above.

A. Damage to persons (paras. 133–226)

Having recalled the findings set out in its 2005 Judgment, the Court notes that the DRC claims a total of at least US$4,350,421,800 in compensation for damage to persons caused by the internationally wrongful acts of Uganda, and that it divides this claim by reference to five forms of damage:

loss of life, injuries and mutilations, rape and sexual violence, recruitment and deployment of child soldiers, as well as displacement of populations.

1. Loss of life (paras. 135–166)

The Court recalls that the DRC claims compensation for the loss of 180,000 civilian lives. To this, the DRC adds a claim for the loss of the lives of 2,000 members of the Congolese armed forces who were allegedly killed in fighting with the Ugandan army or Ugandan-backed armed groups, figures which Uganda disputes.

It also recalls that, in its 2005 Judgment, it found, *inter alia*, that Uganda had committed acts of killing among the civilian population, had failed to distinguish between civilian and military targets, had not protected the civilian population in fighting with other combatants and, as an occupying Power, had failed to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri (*I.C.J. Reports 2005*, p. 241, para. 211, and p. 280, para. 345, subpara. (3) of the operative part). Furthermore, the Court found that Uganda, through its unlawful military intervention in the DRC, had violated the prohibition of the use of force as expressed in Article 2, paragraph 4, of the United Nations Charter (*ibid*., p. 227, para. 165). The Court reaffirms that, as a matter of principle, the loss of life caused by these internationally wrongful acts gives rise to the obligation of Uganda to make full reparation. To award compensation, the Court must determine the existence and extent of the injury suffered by the Applicant and satisfy itself that there exists a sufficiently direct and certain causal nexus between the Respondent's internationally wrongful act and the injury suffered.

The Court examines in turn the various items of evidence presented to it, *i.e.* the victim identification forms submitted by the DRC, the scientific studies relied on by the Applicant, and the report prepared by the Court-appointed expert Mr. Urdal. It also examines other forms of evidence, *i.e.* reports produced under the auspices of the United Nations (including the Mapping Report) and other documents prepared by independent third parties.

In considering the deficiencies in the evidence presented by the DRC, the Court takes into account the extraordinary circumstances of the present case, which have restricted the ability of the DRC to produce evidence with greater probative value (see above). The Court recalls that from 1998 to 2003, the DRC did not exercise effective control over Ituri, due to belligerent occupation by Uganda. In the *Corfu Channel* case, the Court found that the exclusive territorial control that is normally exercised by a State within its frontiers has a bearing upon the methods of proof available to other States, which may be allowed to have a more liberal recourse to inferences of fact and circumstantial evidence. This general principle also applies to situations in which a State that would normally bear the burden of proof has lost effective control over the territory where crucial evidence is located on account of the belligerent occupation of its territory by another State.

The Court considers that the DRC rightly emphasizes that the kind of evidence that is usually provided in cases concerning damage to persons, such as death certificates and hospital records, is often not available in remote areas lacking basic civilian infrastructure, and that this reality has also been recognized by the ICC. The Court recalls the finding of the ICC according to which victims of the same conflict were not always in a position to furnish documentary evidence (see above). In those proceedings, however, many such victims did in fact provide death certificates and medical reports (*The Prosecutor* v. *Germain Katanga*, ICC-01/04–01/07, Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, paras. 111–112). While it would not have been impossible for the DRC to produce such documentation for a certain number of persons in the present case, the Court recognizes the difficulties in obtaining such documentation for tens of thousands of alleged victims.

The Court states that it is aware that detailed proof of specific events that have occurred in a devastating war, in remote areas, and almost two decades ago, is often not available. At the same time, the Court considers that notwithstanding the difficult situation in which the DRC found itself, more evidence relating to loss of life could be expected to have been collected since the Court delivered its 2005 Judgment (see above).

In the Court's opinion, neither the materials presented by the DRC, nor the reports provided by the Court-appointed experts or prepared by United Nations bodies contain sufficient evidence to determine a precise or even an approximate number of civilian deaths for which Uganda owes reparation. Bearing these limitations in mind, the Court considers that the evidence presented to it suggests that the number of deaths for which Uganda owes reparation falls in the range of 10,000 to 15,000 persons.

Turning to valuation, the Court considers that the DRC has not presented convincing evidence for its claim that the average amount awarded by Congolese courts to the families of victims of war crimes amounts to US$34,000.

Concerning the DRC's request for compensation for 2,000 lives allegedly lost among members of its armed forces, the Court also notes that the DRC has provided very little evidence in support of this claim.

The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see above). The Court notes that, while the available evidence is not sufficient to determine a reasonably precise or even an approximate number of civilian lives lost that are attributable to Uganda, it is nevertheless possible to identify a range of possibilities with respect to the number of such civilian lives lost (see above). Taking into account all the available evidence, the various methodologies proposed to determine the amount of compensation for a human life lost, as well as its jurisprudence and the pronouncements of other international bodies, the Court decides to award compensation for the loss of civilian lives as part of a global sum for all damage to persons (see below).

2. Injuries to persons (paras. 167–181)

The Court then recalls that the DRC requests the Court to award US$54,464,000 in compensation for injuries and mutilations among the civilian population.

This claim includes injuries due to deliberate attacks on the civilian population, such as direct targeting, mutilation or torture, as well as injuries suffered as collateral damage resulting from military operations.

The Court notes in this regard that, in its 2005 Judgment, it found Uganda responsible for torture and other forms of inhuman treatment of the civilian population, as well as for failing to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, as well as for failing, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district (*I.C.J. Reports 2005*, p. 280, para. 345, subpara. (3) of the operative part). Therefore, injuries among the civilian population which arise from these acts, as well as from the violation of the prohibition of the use of force and the principle of non-intervention (*ibid*., p. 280, para. 345, subpara. (1) of the operative part), fall within the scope of the 2005 Judgment and are, as a matter of principle, subject to the obligation to make reparation.

On the basis of the evidence reviewed, the Court considers that it is unable to determine, with a sufficient level of certainty, even an approximate estimate of the number of civilians injured by internationally wrongful acts of Uganda. It notes that the DRC has failed to produce appropriate evidence to corroborate its claim that 30,000 civilians were injured in Ituri. However, the Court reiterates its conclusions with regard to the difficult circumstances prevailing in the DRC and their effect on the ability of the Applicant to furnish the kind of evidence normally expected in claims relating to personal injuries. It considers that the available evidence at least confirms the occurrence of a significant number of injuries in many localities.

Regarding valuation, the Court is of the view that the DRC does not provide convincing evidence in respect of the figures it puts forward.

The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see above). The Court notes that the available evidence for personal injuries is less substantial than that for loss of life, and that it is impossible to determine, even approximately, the number of persons injured as to whom Uganda owes reparation. The Court can only find that a significant number of such injuries occurred and that local patterns can be detected. Taking into account all the available evidence, the methodologies proposed to assign a value to personal injuries, as well as its jurisprudence and the pronouncements of other international bodies, the Court decides to award compensation for personal injuries as part of a global sum for all damage to persons (see below).

3. Rape and sexual violence (paras. 182–193)

The Court recalls that the DRC seeks US$33,458,000 in compensation for 1,710 victims of rape and sexual violence in Ituri and for 30 victims of such acts in other parts of the DRC, including Kisangani.

The Court notes that, in its 2005 Judgment, Uganda was found to be responsible for violations of its obligations under international humanitarian law and international human rights law, including by acts of torture and other forms of inhuman treatment (*I.C.J. Reports 2005*, p. 241, para. 211). It further notes that international criminal tribunals as well as human rights courts and bodies have recognized that rape and other acts of sexual violence committed in the context of armed conflict may amount to grave breaches of the Geneva Conventions or violations of the laws and customs of war, and that they may also constitute a form of torture and inhuman treatment. The Court therefore considers that Uganda can be required to pay compensation for acts of rape and sexual violence, to the extent substantiated by the relevant evidence, even though such acts were not mentioned specifically in the 2005 Judgment (see above).

The Court is of the opinion that it is impossible to derive even a broad estimate of the number of victims of rape and other forms of sexual violence from the reports and other data available to it. However, the Court finds that it is beyond doubt that rape and other forms of sexual violence were committed in the DRC on a large and widespread scale.

Regarding the valuation of the harm suffered by victims of rape and sexual violence, the Court finds that the DRC has not provided sufficient evidence that would corroborate the average amounts that it puts forward.

The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see above). It notes that the available evidence for rape and sexual violence is less substantial than that for loss of life, and that it is not possible to determine even an approximate number of cases of rape and sexual violence attributable to Uganda. The Court can only find that a significant number of such injuries occurred. Taking into account all the available evidence, the methodologies proposed to assign a value to rape and sexual violence, as well as its jurisprudence and the pronouncements of other international bodies, the Court decides to award compensation for rape and sexual violence as part of a global sum for all damage to persons (see below).

4. Recruitment and deployment of child soldiers (paras. 194–206)

The Court recalls that the DRC claims US$30,000,000 as compensation for the recruitment of 2,500 child soldiers by Uganda and by armed groups supported by Uganda.

It notes that, in its 2005 Judgment, the Court found that "there [was] convincing evidence of the training in UPDF [Uganda Peoples' Defence Forces] training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control" (*I.C.J. Reports 2005*, p. 241, para. 210). The DRC's claim is thus encompassed by the 2005 Judgment.

The Court finds that there is limited evidence supporting the DRC's claims regarding the number of child soldiers recruited or deployed.

Concerning the valuation of the harm caused with respect to child soldiers, the Court observes that the DRC did not provide evidence for the sums that it puts forward. Nor is

it convinced by the figures provided by the Court-appointed expert Mr. Senogles.

The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see above). The Court notes that the available evidence for the recruitment and deployment of child soldiers provides a range of the possible number of victims in relation to whom Uganda owes reparation (see above). Taking into account all the available evidence, the methodologies proposed to assign a value to the damage caused by the recruitment and deployment of child soldiers, as well as its jurisprudence and the pronouncements of other international bodies, the Court decides to award compensation for the recruitment and deployment of child soldiers as part of a global sum for all damage to persons (see below).

5. Displacement of populations (paras. 207–225)

The DRC claims US$186,853,800 in compensation for the flight and displacement of parts of the population in Ituri and elsewhere in the DRC.

The Court reiterates that, in its 2005 Judgment, it held Uganda responsible for indiscriminate and deliberate attacks on the civilian population and for its failure to protect the civilian population in the course of fighting against other troops (*I.C.J. Reports 2005*, p. 241, para. 211). In addition, the Court found that Uganda did not comply with its obligations as an occupying Power and incited ethnic conflict in Ituri (*ibid.*). Uganda is under an obligation to make reparation for any displacement of civilians that was caused in a sufficiently direct and certain way by these acts (see above). This includes cases of displacement that have a sufficiently direct and certain causal nexus to Uganda's violation of the *jus ad bellum*, even if they were not accompanied by violations of international humanitarian law or human rights obligations (EECC, *Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, p. 731, para. 322).

The Court recognizes that a large majority of cases of displacement for which the DRC seeks compensation occurred in Ituri.

After examining the various items of evidence presented to it, the Court considers that they do not establish a sufficiently certain number of displaced persons for whom compensation could be awarded separately. The evidence does, however, indicate a range of possibilities resulting from substantiated estimates. The Court is convinced that Uganda owes reparation in relation to a significant number of displaced persons, taking into account that displacements in Ituri alone appear to have been in the range of 100,000 to 500,000 persons.

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Regarding the valuation of loss resulting from displacement, the Court considers that the DRC does not sufficiently explain the basis for the figures that it puts forward.

The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see above). The Court notes that the available evidence for the displacement of persons provides a range of the possible number of victims attributable to Uganda (see above). Taking into account all the available evidence, possible methodologies to assign a value to the displacement of a person, as well as its jurisprudence and the pronouncements of other international bodies, the Court decides to award compensation for the displacement of persons as part of a global sum for all damage to persons (see below).

6. Conclusion (para. 226)

On the basis of all the preceding considerations, and given that Uganda has not established that particular injuries alleged by the DRC in Ituri were not caused by its failure to meet its obligations as an occupying Power, the Court finds it appropriate to award a single global sum of US$225,000,000 for the loss of life and other damage to persons.

B. Damage to property (paras. 227–258)

The DRC also maintains that Uganda must make reparation in the form of compensation for damage to property.

1. General aspects (paras. 240–242)

The Court recalls that, in its 2005 Judgment, it found that Uganda was responsible for damage to property, both inside and outside Ituri. The Court concluded that UPDF troops "destroyed villages and civilian buildings" and "failed to distinguish between civilian and military targets" (*I.C.J. Reports 2005*, p. 241, para. 211).

In the same Judgment, the Court also determined that Uganda "fail[ed], as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district" (*ibid.*, p. 280, para. 345, subpara. (3) of the operative part). The Court recalls that, in this phase of the proceedings, it is for Uganda to establish that the damage to particular property in Ituri alleged by the DRC was not caused by its failure to meet its obligations as an occupying Power. In the absence of evidence to that effect, it may be concluded that Uganda owes reparation in relation to such damage (see above).

The Court emphasizes that, given the extraordinary character of the conflict and the ensuing difficulty of gathering detailed evidence for most forms of property damage, the DRC cannot be expected to provide specific documentation for each individual building destroyed or seriously damaged during the five years of Uganda's unlawful military involvement in the DRC (see above). At the same time, the Court considers that, notwithstanding the difficult situation in which the DRC found itself, more evidence could be expected to have been collected by the DRC since the Court delivered its 2005 Judgment, particularly in relation to assets and infrastructure owned by the DRC itself and of which it was in possession and control. The Court will bear these considerations in mind when assessing the evidence tendered by the DRC.

2. Ituri (paras. 243–249)

The Court considers that evidence presented by the DRC does not permit the Court to even approximate the extent of the damage and that the report of the Court-appointed

expert does not provide any relevant additional information. The Court must therefore base its own assessment on United Nations reports, particularly on the Mapping Report. The Court considers that this report contains several credible findings on the destruction of "dwellings", "buildings", "villages", "hospitals" and "schools" in Ituri.

The Court further notes that the Mapping Report and other United Nations reports establish a convincing record of large-scale pillaging in Ituri, both by Uganda's armed forces and by other actors.

With regard to the valuation of the property lost, the Court considers that proceedings before the ICC relating to the same conflict are relevant.

3. Outside Ituri (paras. 250–253)

The evidence presented by the DRC does not permit the Court to assess the extent of the damage even approximately, and the report of the Court-appointed expert does not provide any relevant additional information.

The Court considers, however, that the Mapping Report and the report of the United Nations inter-agency assessment mission to Kisangani contain sufficient evidence to conclude that Uganda caused extensive property damage in Kisangani. It recalls that, in the view of the DRC, Uganda owes reparation for all the damage in Kisangani, because that damage had both cumulative and complementary causes. Uganda, on the other hand, maintains that the two States, Uganda and Rwanda, separately committed internationally wrongful acts and that each is responsible only for the damage caused by its own wrongful actions. The Court considers that each State is responsible for damage in Kisangani that was caused by its own armed forces acting independently. However, based on the very limited evidence available to it, the Court is not in a position to apportion a specific share of the damage to Uganda. It has taken into account the available evidence on damage to property in Kisangani in arriving at the global sum awarded for all damage to property (see below).

4. Société nationale d'électricité (SNEL) (paras. 254–255)

The Court next addresses the claim of the DRC for damage caused to SNEL.

The Court notes that, given the Government's close relationship with SNEL, the DRC could have been expected to provide some evidence substantiating its claim to the Court.

The Court considers, however, that the DRC has not discharged its burden of proof regarding its claim for damage to SNEL.

5. Military property (para. 256)

Turning to the DRC's claim for damage to certain property of its armed forces, the Court takes the view that similar considerations apply. It dismisses this claim of the DRC for lack of evidence, and states that it will not address any other question in relation to this claim.

6. Conclusion (para. 257)

The Court finds that the evidence presented by the DRC regarding damage to property is particularly limited. The Court is nevertheless persuaded that a significant amount of damage to property was caused by Uganda's unlawful conduct, as the Court found in its 2005 Judgment (*I.C.J. Reports 2005*, p. 241, para. 211). The Mapping Report, in particular, provides reliable and corroborated information about many instances of damage to property caused by Uganda, and also by other actors in Ituri. The Court also concludes that Uganda has not established that the particular damage to property alleged by the DRC in Ituri was not caused by Uganda's failure to meet its obligations as an occupying Power.

The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see above). The Court notes that the available evidence in relation to damage to property caused by Uganda is limited, but that the Mapping Report at least substantiates many instances of damage to property caused by Uganda. Taking into account all the available evidence, the proposals regarding the assignment of value to damage to property, as well as its jurisprudence and the pronouncements of other international bodies, the Court awards compensation for damage to property as a global sum of US$40,000,000 (see above).

C. Damage related to natural resources (paras. 259–366)

The Court recalls that, in its 2005 Judgment, it found that

> "the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law" (*I.C.J. Reports 2005*, pp. 280–281, para. 345, subpara. (4) of the operative part).

The Court also recalls that both the DRC and Uganda are parties to the African Charter on Human and Peoples' Rights of 27 June 1981, Article 21, paragraph 2, of which states that "[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation".

The Court explains that, in its final submissions presented at the oral proceedings, the DRC asked the Court to adjudge and declare that Uganda is required to pay US$1,043,563,809 as compensation for damage to Congolese natural resources caused by acts of looting, plundering and exploitation. This sum comprises claims for the loss of minerals, including gold, diamonds, coltan, tin and tungsten, for the loss of coffee and timber, for damage to flora through deforestation, and damage to fauna.

1. General aspects (paras. 273–281)

In its 2005 Judgment, the Court stated that "[i]n reaching its decision on the DRC's claim [regarding natural resources], it was not necessary for the Court to make findings of fact with regard to each individual incident alleged" (*I.C.J. Reports 2005*, p. 249, para. 237). The Court then found that "it d[id] not have at its disposal credible evidence to prove that there [had been] a governmental policy of Uganda directed at the exploitation

of natural resources of the DRC or that Uganda's military intervention [had been] carried out in order to obtain access to Congolese resources" (*ibid*., p. 251, para. 242). However, it "consider[ed] that it ha[d] ample credible and persuasive evidence to conclude that officers and soldiers of the UPDF, including the most high-ranking officers, [had been] involved in the looting, plundering and exploitation of the DRC's natural resources and that the military authorities [had] not take[n] any measures to put an end to these acts" (*ibid*.).

With respect to the natural resources located outside Ituri, the Court established that Uganda bears responsibility for looting, plundering and exploitation of natural resources "whenever" members of the UPDF were involved (*ibid*., p. 252, para. 245), but not for any such acts committed by members of "rebel groups" that were not under Uganda's control (*ibid*., p. 253, para. 247). The 2005 Judgment did not specify which acts of looting, plundering and exploitation of natural resources the Court considered to be attributable to Uganda. That decision was left to the reparations phase, in which the DRC would have to provide evidence regarding the extent of damage to natural resources outside Ituri, as well as its attribution to Uganda.

With respect to natural resources located in Ituri, the Court found "sufficient credible evidence" to establish that Uganda had violated "its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory" (*ibid*., p. 253, para. 250). This means Uganda is liable to make reparation for all acts of looting, plundering or exploitation of natural resources in Ituri, even if the persons who engaged in such acts were members of armed groups or other third parties (*ibid*., p. 253, para. 248). It remains for the Court in the reparations phase to satisfy itself that the available evidence establishes the existence of the alleged injury from looting, plundering and exploitation of natural resources and, in the exceptional circumstances of this case, to identify at least a range of possibilities regarding its extent.

The Court recalls that it is limited to deciding on the amount of compensation due for the injuries resulting from the internationally wrongful acts that the Court identified in its 2005 Judgment (*ibid*., p. 257, para. 260), in which it specifically addressed reports regarding the exploitation of gold (*ibid*., pp. 249–250, para. 238, pp. 250–251, paras. 240–242), diamonds (*ibid*., p. 250, para. 240, p. 251, para. 242, and p. 253, para. 248), and coffee (*ibid*., p. 250, para. 240). The Court did not mention coltan, tin, tungsten, timber or damage to fauna and flora. Coltan, tin, tungsten and timber are nonetheless raw materials which are encompassed by the generic term "natural resources". Furthermore, the Court is of the view that claims relating to fauna are covered by the scope of the 2005 Judgment, in which the "hunting and plundering of protected species" was referred to as part of the DRC's allegations regarding natural resources (*ibid*., p. 246, para. 223). To the extent that damage to flora represents a direct consequence of the plundering of timber through deforestation, the Court considers that such damage falls within the scope of the 2005 Judgment. The Court must nevertheless satisfy itself in the present reparations phase that the alleged exploitation of resources which were not mentioned explicitly in the 2005 Judgment actually occurred and that Uganda is liable to make reparation for the ensuing damage.

After setting out general considerations on the value of the various evidence submitted to it, the Court states that it will draw its conclusions on the basis of the evidence that it finds reliable in order to determine the damage caused by Uganda to Congolese natural resources and the compensation to be awarded.

2. Minerals (paras. 282–327)

(*a*) *Gold* (paras. 282–298)

As regards gold, the Court is of the view that there is sufficient evidence to conclude that Uganda is responsible for a substantial amount of damage resulting from looting, plundering and exploitation of gold within the range of the assessment of the expert report. On this basis, the Court decides to award compensation for this form of damage as part of a global sum for all damage to natural resources (see below).

(*b*) *Diamonds* (paras. 299–310)

As regards diamonds, the Court considers that there is sufficient evidence to conclude that Uganda is responsible for damage resulting from the looting, plundering and exploitation of diamonds within the range of the assessment of the expert report. On this basis, the Court decides to award compensation for this form of damage as part of a global sum for all damage to natural resources (see below).

(*c*) *Coltan* (paras. 311–322)

With respect to coltan, the Court considers that there is sufficient evidence to conclude that Uganda is responsible for damage resulting from the looting, plundering and exploitation of coltan within the range of the assessment of the expert report. On this basis, the Court decides to award compensation for this form of damage as part of a global sum for all damage to natural resources (see below).

(*d*) *Tin and tungsten* (paras. 323–327)

As regards tin and tungsten, the Court considers that the inclusion of tin and tungsten in the scope of the expert report was permissible under the terms of reference. The Court notes that Mr. Nest's report refers only to evidence of the transit of small quantities of tin and tungsten through Ituri, which in itself does not constitute looting, plundering or exploitation. In particular, he underlines that he included those two minerals only "in order to flag their relative insignificance as sources of value exploited by personnel in either Ituri or non-Ituri".

Given that there is limited evidence relating to tin and tungsten and that the expert noted the relative insignificance of these resources, in terms of the quantities exploited and the corresponding value, the Court decides that it will not take these two minerals into account in determining the compensation due for damage to natural resources.

3. Flora (paras. 328–350)

(*a*) *Coffee* (paras. 328–332)

The Court considers that the inclusion of coffee in the scope of the expert report was permissible under the terms

of reference. It notes that Mr. Nest's findings with respect to coffee are corroborated to a certain extent by other evidence. The Court therefore considers that there is sufficient evidence to conclude that Uganda is responsible for damage resulting from the looting, plundering and exploitation of coffee.

However, since these reports only contain anecdotal evidence, and since the expert could otherwise only rely on an uncorroborated report by a Congolese non-governmental organization, the Court considers that it is appropriate to award compensation at a level lower than that calculated by the Court-appointed expert. On this basis, the Court decides to award compensation for this form of damage as part of a global sum for all damage to natural resources (see below).

(*b*) *Timber* (paras. 333–344)

The Court considers that there is sufficient evidence to conclude that Uganda owes reparation for damage resulting from the looting, plundering and exploitation of timber. The Court nevertheless notes that Mr. Nest's calculations in relation to timber are based on less precise information and rougher estimates than were available to him, for example, in relation to gold. The amount of compensation should therefore be considerably lower than his estimate. On this basis, the Court decides to award compensation for this form of damage as part of a global sum for all damage to natural resources (see below).

(*c*) *Environmental damage resulting from deforestation* (paras. 345–350)

With respect to environmental damage resulting from deforestation, the Court recalls in particular that, in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, it held that "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" and 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".

It notes, however, that in the present case the DRC did not provide the Court with any basis for assessing damage to the environment, in particular to biodiversity, through deforestation. Being thus unable to determine the extent of the DRC's injury, even on an approximate basis, the Court dismisses the claim for environmental damage resulting from deforestation.

4. *Fauna* (paras. 351–363)

The Court recalls that it found that the DRC's claims relating to damage to fauna are encompassed by the scope of its 2005 Judgment (see above).

While the available evidence is not sufficient to determine a reasonably precise or even an approximate number of animal deaths for which Uganda owes reparation, the Court is nevertheless satisfied, on the basis of reports submitted to it, that Uganda is responsible for a significant amount of damage to fauna in the Okapi Wildlife Reserve and in the northern part of Virunga National Park, to the extent that these parks are located in Ituri. On this basis, the Court decides to award compensation for this form of damage as part of a global sum for all damage to natural resources (see below).

5. *Conclusion* (paras. 364–366)

The Court observes that the evidence presented to it and the expert report by Mr. Nest demonstrate that a large quantity of natural resources was looted, plundered and exploited in the DRC between 1998 and 2003. In respect of Ituri, Uganda is liable to make reparation for all such acts. As to areas outside of Ituri, a significant amount of natural resources looted, plundered and exploited is attributable to Uganda. However, neither the report by the Court-appointed expert nor the evidence presented by the DRC or set out in reports by the Porter Commission, United Nations bodies and non-governmental organizations is sufficient to prove the precise extent of the looting, plundering and exploitation for which Uganda is liable. The expert report by Mr. Nest provides a methodologically solid and persuasive estimate on the basis of the available evidence. This expert report is particularly helpful regarding the valuation of the different natural resources it covers (minerals, coffee and timber). However, while the expert report by Mr. Nest, and, with respect to fauna, the reports by specialized United Nations bodies, may offer the best possible estimate of the scale of the exploitation of natural resources under the circumstances, they do not permit the Court to reach a sufficiently precise determination of the extent or the valuation of the damage.

As it did with respect to damage to persons and to property, the Court must take account of the extraordinary circumstances of the present case, which have restricted the ability of the DRC and of the expert to present evidence with greater probative value (see above). The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see above).

Taking into account all the available evidence, in particular the findings and estimates contained in the report by the Court-appointed expert Mr. Nest, as well as its jurisprudence and the pronouncements of other international bodies, the Court awards compensation for the looting, plundering and exploitation of natural resources in the form of global sum of US$60,000,000.

D. Macroeconomic damage (paras. 367–384)

Lastly, the Court recalls that the DRC claims US$5,714,000,775 for macroeconomic damage.

The Court notes that, in the operative part of its 2005 Judgment, it found that "Uganda, by engaging in military activities against the Democratic Republic of the Congo … violated the principle of non-use of force in international relations and the principle of non-intervention" and held "that the Republic of Uganda is under obligation to make reparation to the Democratic Republic of the Congo for the injury caused" (*I.C.J. Reports 2005*, pp. 280–282, para. 345, subparas. (1) and (5)). The Court did not, however, specifically mention macroeconomic damage.

The Court is of the opinion that it does not need to decide, in the present proceedings, whether a claim for macroeconomic damage resulting from a violation of the prohibition of the use of force, or a claim for such damage more generally, is compensable under international law. It is enough for the Court to note that the DRC has not shown a sufficiently direct and certain causal nexus between the internationally wrongful act of Uganda and any alleged macroeconomic damage. In any event, the DRC has not provided a basis for arriving at even a rough estimate of any possible macroeconomic damage.

The Court thus rejects the claim of the DRC for macroeconomic damage.

IV. Satisfaction (paras. 385–392)

The Court recalls that the DRC argues that, regardless of the amount awarded by the Court, compensation as a form of reparation is not sufficient to remedy fully the damage caused to the DRC and its population. It therefore asks that Uganda be required to give satisfaction through: (i) the criminal investigation and prosecution of officers and soldiers of the UPDF; (ii) the payment of US$25 million for the creation of a fund to promote reconciliation between the Hema and the Lendu in Ituri; and (iii) the payment of US$100 million for the non-material harm suffered by the DRC as a result of the war.

Before examining the three forms of satisfaction sought by the DRC, the Court recalls that, in general, a declaration of violation is, in itself, appropriate satisfaction in most cases. However, satisfaction can take an entirely different form depending on the circumstances of the case, and in so far as compensation does not wipe out all the consequences of an internationally wrongful act.

With respect to the first measure sought by the DRC, namely the conduct of criminal investigations and prosecutions, the Court recalls Article 37 of the ILC Articles on State Responsibility. It observes that the forms of satisfaction listed in the second paragraph of this provision (namely an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality) are not exhaustive. In principle, satisfaction can include measures such as "disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act" (commentary to Article 37 of the ILC Articles on State Responsibility, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 106, para. 5).

The Court recalls that, in its 2005 Judgment, it found that Ugandan troops had committed grave breaches of the Geneva Conventions. The Court observes that, pursuant to Article 146 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and to Article 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Uganda has a duty to investigate, prosecute and punish those responsible for the commission of such violations. There is no need for the Court to order any additional specific measure of satisfaction relating to the conduct of criminal investigations or prosecutions. The Respondent is required to investigate and prosecute by virtue of the obligations incumbent on it.

As regards the second measure of satisfaction sought by the DRC, the Court recalls that in its 2005 Judgment it considered that the UPDF had "incited ethnic conflicts and t[aken] no action to prevent such conflicts in Ituri district" (*I.C.J. Reports 2005*, p. 240, para. 209). In this case, however, the material damage caused by the ethnic conflicts in Ituri is already covered by the compensation awarded for damage to persons and to property. The Court nevertheless invites the Parties to co-operate in good faith to establish different methods and means of promoting reconciliation between the Hema and Lendu ethnic groups in Ituri and ensure lasting peace between them.

Lastly, the Court cannot uphold the third measure of satisfaction sought by the DRC. There is no basis for granting satisfaction for non-material harm to the DRC in such circumstances, given the subject-matter of reparation in international law and international practice in this regard. The EECC rejected Ethiopia's claim for moral damage suffered by Ethiopians and by the State itself on account of Eritrea's illegal use of force (*Final Award, Ethiopia's Damages Claims, Decision of 17 August 2009, RIAA*, Vol. XXVI, pp. 662, 664, paras. 54–55, 61). In the circumstances of the case, the Court considers that the non-material harm for which the DRC seeks satisfaction is included in the global sums awarded by the Court for various heads of damage.

V. Other requests (paras. 393–404)

The Court then turns to the other requests made by the DRC in its final submissions, namely that the Court order Uganda to reimburse the DRC's costs incurred during the proceedings, that the Court grant pre-judgment and post-judgment interest, and that the Court remain seised of the case until Uganda has fully made the reparations and paid compensation as ordered by it.

A. Costs (paras. 394–396)

The Court recalls that, in its final submissions, the DRC requests the Court to order that the costs it incurred in the present case be reimbursed by Uganda.

It notes in this regard that Article 64 of its Statute provides that "[u]nless otherwise decided by the Court, each party shall bear its own costs". Taking into account the circumstances of this case, including the fact that Uganda prevailed on one of its counter-claims against the DRC and subsequently waived its own claim for compensation, the Court sees no sufficient reason that would justify departing, in the present case, from the general rule set forth in Article 64 of the Statute. Accordingly, each Party shall bear its own costs.

B. Pre-judgment and post-judgment interest (paras. 397–402)

In its final submissions, the DRC requests the Court to order Uganda to pay pre-judgment interest and post-judgment interest.

With respect to the DRC's claim for pre-judgment interest, the Court observes that, in the practice of international courts and tribunals, while pre-judgment interest may be awarded if full reparation for injury caused by an internationally wrongful act so requires, interest is not an autonomous

form of reparation, nor is it a necessary part of compensation in every case. The Court notes that in determining the amount to be awarded for each head of damage, it has taken into account the passage of time. In this regard, the Court observes that the DRC itself has stated in its final submissions that it is not requesting pre-judgment interest in respect of damage for which "the amount of compensation awarded by the Court, based on an overall assessment, already takes account of the passage of time". The Court considers that there is thus no need to award pre-judgment interest in the circumstances of the case.

With regard to the DRC's claim for post-judgment interest, the Court recalls that it has granted such interest in past cases in which it has awarded compensation, having observed that the award of post-judgment interest was consistent with the practice of other international courts and tribunals. The Court expects timely payment and has no reason to assume that Uganda will not act accordingly. Nevertheless, consistent with its practice, the Court decides that, should payment be delayed, post-judgment interest shall be paid. It will accrue at an annual rate of 6 per cent on any overdue amount (see below).

C. Request that the Court remain seised of the case (paras. 403–404)

The Court observes that the DRC, by its request that the Court remain seised of the case, is essentially asking the Court to supervise the implementation of its Judgment. In this regard, the Court notes that in none of its previous judgments on compensation has it considered it necessary to remain seised of the case until a final payment was received. The Court moreover considers that the award of post-judgment interest addresses the DRC's concerns regarding timely compliance by the Respondent with the payment obligations set out in the present Judgment. In light of the above, there is no reason for the Court to remain seised of the case and the request of the DRC must therefore be rejected.

VI. Total sum awarded (paras. 405–408)

The total amount of compensation awarded to the DRC is US$325,000,000. This global sum includes US$225,000,000 for damage to persons, US$40,000,000 for damage to property, and US$60,000,000 for damage related to natural resources.

The Court states that the total sum is to be paid in annual instalments of US$65,000,000, due on 1 September of each year, from 2022 to 2026. The Court decides that, should payment be delayed, post-judgment interest at an annual rate of 6 per cent on each instalment will accrue on any overdue amount from the day which follows the day on which the instalment was due.

The Court declares itself satisfied that the total sum awarded, and the terms of payment, remain within the capacity of Uganda to pay. Therefore, the Court finds that it need not consider the question whether, in determining the amount of compensation, account should be taken of the financial burden imposed on the responsible State, given its economic condition (see above).

The Court notes that the reparation awarded to the DRC for damage to persons and to property reflects the harm suffered by individuals and communities as a result of Uganda's breach of its international obligations. In this regard, the Court takes full cognizance of, and welcomes, the undertaking given by the Agent of the DRC during the oral proceedings regarding the fund that has been established by the Government of the DRC, according to which the compensation to be paid by Uganda will be fairly and effectively distributed to victims of the harm, under the supervision of organs whose members include representatives of victims and civil society and whose operation is supported by international experts. In distributing the sums awarded, the fund is encouraged to consider also the possibility of adopting measures for the benefit of the affected communities as a whole.

Operative clause (para. 409)

For these reasons,

The Court,

(1) *Fixes* the following amounts for the compensation due from the Republic of Uganda to the Democratic Republic of the Congo for the damage caused by the violations of international obligations by the Republic of Uganda, as found by the Court in its Judgment of 19 December 2005:

(*a*) By twelve votes to two,

US$225,000,000 for damage to persons;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Iwasawa, Nolte;

Against: Judge Salam; Judge *ad hoc* Daudet;

(*b*) By twelve votes to two,

US$40,000,000 for damage to property;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Iwasawa, Nolte;

Against: Judge Salam; Judge *ad hoc* Daudet;

(*c*) Unanimously,

US$60,000,000 for damage related to natural resources;

(2) By twelve votes to two,

Decides that the total amount due under point 1 above shall be paid in five annual instalments of US$65,000,000 starting on 1 September 2022;

In favour: President Donoghue; Vice-President Gevorgian; Judges Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte;

Against: Judge Tomka; Judge *ad hoc* Daudet;

(3) Unanimously,

Decides that, should payment be delayed, post-judgment interest of 6 per cent will accrue on any overdue amount as from the day which follows the day on which the instalment was due;

(4) By twelve votes to two,

Rejects the request of the Democratic Republic of the Congo that the costs it incurred in the present case be borne by the Republic of Uganda;

In favour: President Donoghue; Vice-President Gevorgian; Judges Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte;

Against: Judge Tomka; Judge *ad hoc* Daudet;

(5) Unanimously,

Rejects all other submissions made by the Democratic Republic of the Congo.

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Judge Tomka appends a declaration to the Judgment of the Court; Judge Yusuf appends a separate opinion to the Judgment of the Court; Judge Robinson appends a separate opinion to the Judgment of the Court; Judge Salam appends a declaration to the Judgment of the Court; Judge Iwasawa appends a separate opinion to the Judgment of the Court; Judge *ad hoc* Daudet appends a dissenting opinion to the Judgment of the Court.

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Declaration of Judge Tomka

In his declaration, Judge Tomka notes that the Court was not able to stop the involvement of Uganda in the armed conflict in the territory of the DRC despite its Order of 1 July 2000 unanimously indicating certain provisional measures. He recalls that in its Judgment on the merits, rendered on 19 December 2005, the Court found that Uganda had breached the fundamental rule of international law prohibiting the use of force in international relations and violated several obligations incumbent on it under international humanitarian law and international human rights law.

He points out that the Court found that "Uganda did not comply with the Order of the Court on provisional measures of 1 July 2000".

In the opinion of Judge Tomka, the amount of compensation awarded by the Court, in particular for personal injury and damage to property, does not reflect the extent of the damage inflicted to the DRC and its people by Uganda.

Judge Tomka underlines that Article 56, paragraph 1, of the Statute requires that the judgment shall state the reasons on which it is based. He doubts, however, that the Court provided sufficient reasons for the reader to understand how it arrived at the particular amounts of compensation fixed for various heads of damages.

While agreeing with the first, third and fifth operative clauses of the Judgment, Judge Tomka voted against the second operative clause, which decides that the total amount of compensation due from Uganda to the DRC for the damage caused by the violations of international obligations by Uganda shall be paid in five instalments over a period of five years. The Court's decision, in his view, is not fair to the Applicant. He notes that the real value of the compensation awarded to the DRC will necessarily decrease with the passage of time and is not protected by the Court's decision.

Judge Tomka also disagreed with the fourth operative clause of the Judgment, which rejects the request of the DRC that the costs it incurred in the case be borne by Uganda. He notes that Article 64 of the Statute of the Court gives a power to the Court to award costs if it considers that this would be appropriate. As the victim of an unlawful use of force, with part of its territory occupied for an extended period and whose population gravely suffered, the DRC had no other choice but to vindicate its rights before the Court. He also emphasizes that Uganda did not comply with the Order of the Court on provisional measures of 1 July 2000, which resulted in further suffering and losses for the DRC and its people.

In his view, these circumstances militated in favour of granting the DRC's request for the reimbursement of costs. Judge Tomka regrets that the opening phrase in Article 64 of the Statute "[u]nless otherwise decided" remains a dead letter. He opines that, if any case called for the reimbursement of the reasonable amount of the Applicant's costs of legal representation, it was this one.

Separate opinion of Judge Yusuf

In his separate opinion, Judge Yusuf explains the reasons of his disagreement with the reasoning of the Court that led to determination of the "global sums" awarded as compensation and, with regard to certain aspects, the lack of appropriate analysis or explanation. Even though he considers that the Court has reached an overall reasonable amount of compensation—despite the fact that satisfactory evidence was not put at its disposal—Judge Yusuf takes issue with the unprecedented evidentiary burden placed on Uganda through a radical reversal of the burden of proof, the methodology used to determine the "global sums" and the overly narrow approach to reparations.

Judge Yusuf disagrees with the reversal of the burden of proof upon the Respondent with regard to the injuries that allegedly occurred in Ituri, whereby Uganda is required to prove a double negative fact, namely, that the injury alleged by the DRC was not caused by its failures as an occupying Power. In his view, this unprecedented standard finds no support in the jurisprudence of the Court and is not consistently applied to the facts of the case or to the assessment of the alleged injuries in the Judgment. In Judge Yusuf's view, such an inequitable reversal of the burden of proof is not consistent with the nature of the duty of vigilance incumbent upon the occupying Power as an obligation of due diligence, rather than an obligation of result, and extends the scope of Uganda's obligation beyond what was required of it under Article 43 of the Hague Regulations of 1907, through the mechanism of responsibility. According to him, a more balanced outcome could have been achieved by requiring Uganda to prove that it took all necessary measures in compliance with its duty of vigilance, and the burden would then shift to the DRC to disprove Uganda's contentions.

Judge Yusuf also disagrees with the repeated references throughout the Judgment to "equitable considerations" and the "range of possibilities indicated by the evidence", a vague term whose scope of application or meaning is not explained anywhere in the Judgment. With regard to the lack of reasoning on how "equitable considerations" were used in the Judgment, Judge Yusuf emphasizes that there is an essential difference between recourse to equitable considerations

within the limits of the law (equity *infra legem*) and determining compensation *ex aequo et bono*, which requires the Parties' consent pursuant to Article 38, paragraph 2, of the Statute. In his view, the Judgment appears to rely upon equitable considerations as a substitute for a reasoned analysis that would identify the evidence presented by the Parties as corroborating the extent of the injury caused by Uganda, and a cognizable method for the valuation of that injury. By contrast, the Judgment offers no reasoning to explain how it arrived at these "global sums", and on the basis of what evidence and methodology. Thus, the impression is given that the Court has arrived at these figures by way of *ex aequo et bono*, not on the basis of law and evidence.

Finally, Judge Yusuf disagrees with the overly narrow approach taken in the Judgment with respect to the appropriate forms of reparations. He regrets that the Judgment reflects an outdated, State-centred approach reminiscent of the law of diplomatic protection, disregarding the fact that the injury caused by Uganda's wrongful conduct was primarily suffered by human beings. Judge Yusuf refers to recent developments in human rights and international humanitarian law which have led to a widespread recognition that, in circumstances such as these, reparation should accrue not only to the State, but also to the injured individual or community as the beneficiaries of the obligation that has been breached. The one-size-fits-all approach to reparation in the form of "global sums" does not adequately do justice to the injuries suffered by individuals and communities, nor does it correspond to the DRC's request during the oral hearings for guidance from the Court on the disbursement of the compensation to the victims of the unlawful acts of Uganda. In his view, it was possible for the Court to envisage different forms of reparation that take into account the sensitivities involved in these categories of injury, such as collective reparations, rehabilitation and non-pecuniary satisfaction. It is thus regrettable that the Court has missed the opportunity to make a substantial contribution to the development of the jurisprudence on reparations for injury in international law.

Separate opinion of Judge Robinson

1. In his opinion, Judge Robinson explains that although he voted in favour of the Court's award of US$225 million as compensation for damage to persons, he wishes to make some observations about the reasoning employed by the Court to arrive at that sum and its treatment of the standard of proof at the reparations phase.

2. First, he addresses the Court's approach to the award of compensation. In this regard, he explains that the head of damage, damages to persons, has five categories of injuries. In respect of each category, after analysing the extent and valuation of the damage or injury, the Court decided to award compensation for each category of injury as part of a global sum. He observes that the Court did not fix compensation for each category of injury, and ultimately awarded what it described as a global sum of US$225 million for damage to persons.

3. Judge Robinson notes that the use by the Court of the concept of the global sum is unprecedented in its work. He notes that in the *Corfu Channel* case, the Court awarded a total sum as compensation reflecting the aggregation of specific awards that it had made in respect of each of the three heads of damage. He states that in *Ahmadou Sadio Diallo*, the Court awarded a total sum that reflected the aggregation of awards that it had made in respect of each of the three heads of damage. Further, in *Certain Activities*, the Court also awarded a total sum of compensation that reflected the aggregation of specific awards that it had made in respect of each of the two heads of damages. In Judge Robinson's opinion, in this case, therefore, the Court is in a "brave new world" in the approach that it has adopted of making a final award in respect of the five categories of injuries, without previously making specific awards for those five categories.

4. According to Judge Robinson, the reliance placed by the Court on the Eritrea-Ethiopia Claims Commission (EECC or the Commission) Award is wholly misplaced. He explains that the Court states that in respect of cases of mass casualties resulting from an armed conflict, "the judicial or other bodies concerned have awarded a global sum, for certain categories of injury, on the basis of the evidence at their disposal". He notes that the Court then refers to the EECC's Final Award on *Eritrea's Damages Claims* (2009). He observes that, although the language in that paragraph does not mean that the Court was implying that the EECC used the term "global sum", it must be clarified that that term is not used by the Commission in any part of its Award. In his view, an examination of that Award shows that the EECC did not do anything that was remotely similar to what the Court has done in this case. The EECC awarded compensation in the form of a specific sum for each category of injury and then made a final award that reflected an aggregation of those specific sums, which it described as the "total monetary compensation".

5. In Judge Robinson's view, the Court should have made a specific award of compensation in respect of each category of injury. He states that such a course would have rendered the Court's ultimate award of compensation more comprehensible. In his opinion, had the Court followed that approach, an award for a specific category of injury, such as rape, made on the basis of its appreciation of the extent of injury should not be treated as part of a global sum, because it is inevitable that in cases of mass casualties an approach is taken reflecting the totality of the wrongfulness relating to a specific category of injury rather than the specificity of individual acts constituting that totality.

6. Judge Robinson also makes comments regarding the concept of an award of compensation in the form of a global sum within the range of possibilities indicated by the evidence. He compares the Court's approach to the award of compensation within the range of possibilities indicated by the evidence with the approach of the EECC's Award on *Eritrea Damages Claims*. He notes that four points can be made about the manner in which the Commission uses the term "within the range of possibilities indicated by the evidence" which distinguishes it from the Court's approach.

7. First, the Commission is careful to set the context in which recourse may be had to the concept of an award of compensation within the range of possibilities indicated by

the evidence: (i) the quantification of damages for serious violations of international law resulting in harm to individuals calls for the exercises of judgment and approximation, particularly in relation to mass conflicts, which inevitably lead to uncertainties with regard to the extent and valuation of damage; (ii) in light of this particular context, there is a lower standard of proof at the reparations phase; (iii) in applying that lower standard of proof, a court or tribunal has an "obligation to determine appropriate compensation, even if the process involves estimation or guesswork within the range of possibilities indicated by the evidence"; and (iv) the trade-off for a court or tribunal relying on estimation or guesswork of compensation due in a case of mass casualties such as a war is that compensation may be reduced. In Judge Robinson's view, the Court's use of the concept does not reveal any sensitivity to that context which the Commission was careful to identify for its use. In particular, he argues that no sensitivity is shown by the Court to the linkage between the use of the concept and the lower standard of proof at the reparations phase. In his view, in the vast majority of instances where the Court finds that the evidence does not allow it to even approximate the extent of the damage, the evidence is such that, had the Court been sensitive to the lower standard of proof, it would have been in a position, either by estimation or guesswork, to determine the extent and valuation of the damage; nor, in his view, does the Court's approach reveal any sensitivity to reducing the compensation sum as a trade-off for "uncertainties flowing from the lower standard of proof".

8. Second, Judge Robinson observes that it is within that special context and against that special background that the phrase "within the range of possibilities indicated by the evidence" must be interpreted. He explains that the Commission is not at large in the estimation or guesswork that it is allowed to engage in; rather, it must discharge its functions having regard to the evidence, but in doing so, it considers possible assessments of the evidence and exercises its judgment in adopting an appreciation of the evidence that allows it to estimate the extent and value of the injury. According to Judge Robinson, the Commission's approach is that the estimation or guesswork is to be carried out within the range of possibilities indicated by the evidence; in other words, the range of possibilities indicated by the evidence functions as a restraint or rein on the circumstances in which recourse may be had to estimation or guesswork, the latter being nothing more than a method of approximating compensation.

9. Third, Judge Robinson observes that the purpose for which the Commission uses the concept of "within the range of possibilities indicated by the evidence" would seem to be wholly different from the purpose for which it is used by the Court. He notes that the Commission sets out its understanding of the concept at the beginning of the Award. Although it does not make any explicit reference to that concept in its analysis of any of the categories of injuries, in his view, it is safe to presume that its analysis on compensation is informed by that concept as outlined at the beginning of the Award. In that regard, he notes that the Commission determines a specific sum for each category of injury within the range of possibilities indicated by the evidence. On the other hand, the Court, although purporting to use the concept of "within the range of possibilities indicated by the evidence", refrains from determining a specific sum as compensation for each category of injury. Consequently, Judge Robinson concludes that the Court has not applied the concept in the way that it was used by the Commission. In his view, this difference is explained by the Court's use of a global sum, a concept which does not appear to admit of specific determinations of compensation for a category of injury. He concludes that, to the extent that the Court's concept of a global sum does not involve estimating compensation for each category of injury, it is inconsistent with the Commission's concept of compensation involving estimation or guesswork within the range of possibilities indicated by the evidence.

10. Fourth, Judge Robinson observes that, unlike the Commission, it appears that the Court does not see itself as having an obligation to determine appropriate compensation even if it has to use estimation or guesswork within the range of possibilities indicated by the evidence. According to Judge Robinson, it is odd that the Court seizes on the last part of the Commission's dictum ¾ within the range of possibilities indicated by the evidence ¾ but ignores the first part which refers to the obligation to determine appropriate compensation by estimation or even by guesswork. He expresses the view that the Commission's approach calls for action by the tribunal to determine appropriate compensation even by estimation or guesswork but places a restraint on that action. He states that, by ignoring that obligation, the Court has not followed the Commission's approach on the nine occasions that the Judgment uses the phrase "within the range of possibilities indicated by the evidence". He notes that it would seem that the Court is still searching for a precision in the evidence that the law does not require. He opines that the Court does not appear to acknowledge that the quantification of damages in situations of mass casualties resulting from a war requires what the Commission calls "exercises of judgment and approximation". He concludes that regrettably, the Court appears to approach the reliability of the evidence for the purpose of determining the extent and valuation of the damage or injury with the rigour of an insurer examining a claim for damages arising from an accident between two motor vehicles.

11. Judge Robinson then addresses the issues raised in comprehending the Court's concept of a global sum. He notes that compensation is based on a determination of the extent of damage or injury and its valuation. According to Judge Robinson, if the determination of the extent of damage or injury is wrong, compensation based on the valuation will also be wrong. He notes that, since the Court awards compensation for each category of injury as part of a global sum, it is reasonable to expect that when added together, the aggregation of those five parts would comprise the global sum of US$225 million. In his view, in effect, the Court's approach calls for the addition of a specific number of persons from the range that is identified for loss of life and displacement of populations to what is described as a "significant number" in respect of rape and sexual violence, and injuries to persons. However, he states that it is not possible to add the certain and precise number that may be identified within those two ranges to something that is as uncertain and imprecise as a "significant number" and arrive at the global sum of US$225 million. In his view, the matter is rendered more complicated by the fact that, in

respect of the recruitment and deployment of child soldiers, the Court states that there is a range but does not identify the range. He notes that although two numbers, 1,800 and 2,500, are indicated in paragraph 204 on the recruitment of child soldiers, there is nothing to show how these numbers could constitute a range. He expresses the view that the Court's approach would have been more comprehensible if it had identified a range in respect of all five categories of injuries. He concludes that, regrettably, since the Court's assessment of the extent of the damage is open to criticism, its global award of compensation of US$225 million is also open to question.

12. Judge Robinson notes that the Court does not explain the concept of the global sum. According to Judge Robinson, although the concept, as developed by the Court, suggests that the addition of the five parts in respect of the categories of injuries constitutes the global sum, the analysis carried out shows that the five parts are not susceptible to addition. He states that, in any event, the Court's use of the concept of the global sum does not appear to allow a specific determination of compensation for each category of injury; if it did, the final award would not be global. He argues that the dilemma is that, absent an award for each category of injury, the global sum is difficult to comprehend and appears to be snatched from thin air. In his view, the global sum is incompatible with a specific determination of compensation for each category of injury but is incomprehensible without such a determination. He states that another difficulty is that, since compensation is awarded for each of the five categories of injuries as *part* of the global sum, it is evident that the global sum may be partitioned, thereby implying that it is capable of disaggregation, with the result that the sum loses its global character.

13. According to Judge Robinson, by stating that it may exceptionally award compensation in the form of a global sum, the Court acknowledges that the more usual practice is for a final award of compensation to reflect the aggregation of specific awards for each category of injury. In Judge Robinson's view, *DRC* v. *Uganda* was not an appropriate case to depart from the more usual practice. This is a case in which the Court has found that one Party has committed breaches not only of international humanitarian law but also of international human rights law, giving rise to claims for compensation for loss of life, injuries to persons, rape and sexual violence, the recruitment and deployment of child soldiers, and displacement of populations. Each category of injury is unique, having its own peculiar characteristics, warranting individual treatment by the Court in its award of compensation. The uniqueness and peculiarity of each category of injury are lost in the award of a global sum for all five categories. For example, given the significance that international human rights law attaches to the right to life ¾ it is a predicate to the enjoyment and exercise of all other human rights, and is the first article in the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights ¾ it is inappropriate to award a sum as compensation not only for the loss of life, but also for another category of injury such as the displacement of populations. There is no justification for commingling an award of compensation for loss of life with an award of compensation for any other category of injury.

14. After examining the case law of the Court and other international courts, Judge Robinson concludes that the elements of the principle of equitable considerations are reasonableness, flexibility, judgment, approximation and fairness. Turning to the principle of equitable considerations, he opines that, had the Court applied the principle of equitable considerations, it would have been able to determine a specific sum for compensation in practically every case in which the DRC made a claim for compensation. In those cases, the Court had before it, evidence from the DRC as to the extent of damage or injury and the valuation of the damage or injury. It also had before it, evidence from its own experts as well as from United Nations bodies and non-governmental organizations. Whenever the Court has evidence of that kind before it, he concludes that it is always in a position to weigh the varying proposals from the parties and others and determine a sum for compensation on the basis of equitable considerations. Even if the Court only has evidence from the applicant and the respondent, or from one party alone, by becoming actively engaged with the evidence, it is in a position to determine a sum for compensation on the basis of equitable considerations. It is not the case, as the Court asserts in relation to loss of life, injuries to persons and rape, that the evidence did not allow it to even approximate the number of persons or injuries involved. Eritrea and Ethiopia, like the DRC and Uganda, are poor, developing countries with relatively limited infrastructural facilities, and it is therefore not surprising that, except in relation to evidence for damage to buildings, the evidence before the EECC was of the same quality as the evidence before the Court. Nonetheless, the EECC found it possible in respect of all the claims, except for those dismissed for lack of evidence, to fix a sum as compensation on the basis of a reasonable estimate.

15. According to Judge Robinson, the Court should have become more active and more engaged in fixing compensation by introducing its own determination of the extent and valuation of the damage or injury. The Court appears to see itself as performing a passive role as the recipient of the parties' submissions and the evidence as a whole. Unlike the Commission, it does not see itself as being under an "obligation to determine appropriate compensation, even if the process involves estimation or guesswork within the range of possibilities indicated by the evidence". *Certain Activities* provides a precedent for the Court becoming very engaged in the determination of compensation. In that case, the Court rejected the methodologies proposed by both parties for determining compensation for environmental damage, and advanced its own methodology, albeit in some respects borrowing from the parties' methodologies. It was on the basis of its own methodology that the Court awarded compensation to Costa Rica on the basis of equitable considerations. Thus, had the Court determined compensation on the basis of equitable considerations, it would have been in a position to award a specific sum as compensation for each category of injury.

16. Turning to the standard of proof, Judge Robinson states that the Court rightly concluded that the standard of proof at the merits phase is higher than it is at the reparations phase. However, it does not explicitly identify the lower standard applicable to the reparations phase. That omission may be

overlooked if the findings of the Court on questions of compensation are consistent with the use of a lower standard of proof.

17. According to Judge Robinson, there are instances in which the Court has used a standard of proof that is questionable because a lower standard should have been used in relation to the extent or valuation of damage or injury. For example, he cites paragraph 163 which states: "[t]urning to valuation, the Court considers that the DRC has not presented convincing evidence for its claim that the average amount awarded by Congolese courts to the families of victims of war crimes amounts to US$34,000"; and paragraph 180 which states: "[t]he DRC does not provide convincing evidence that these figures are derived from the average amounts awarded by Congolese courts in the context of the perpetration of serious international crimes"; other instances are set out in the opinion.

18. According to Judge Robinson, these are instances in which the Court has rejected claims on the basis that the evidence was not convincing. This is too high a standard for the reparations phase. Notably, at the merits phase the Court used the standard of convincing evidence in relation to questions of responsibility. For example, paragraph 72 of the 2005 Judgment states: "[t]he Court must first establish which relevant facts it regards as having been convincingly established by the evidence, and which thus fall for scrutiny by reference to the applicable rules of international law"; paragraph 210 states: "[t]he Court finds that there is convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control". Judge Robinson concludes that there are other instances in which the Court uses the standard of convincing evidence at the merits phase. It follows that, if convincing evidence is the correct standard of proof for the merits phase, it cannot be the correct standard for the reparations phase where the standard is lower. Finally, Judge Robinson comments on macroeconomic damage, concluding that such damage is compensable under international law.

Declaration of Judge Salam

In his declaration, Judge Salam indicates that while he supports the principles and rules applicable to the assessment of reparations set out by the Court, he remains convinced that a better application of these principles was possible in this case, in order to grant the DRC a more just and satisfactory reparation. Indeed, he considers that in proceedings such as these, which concern the granting of reparation following an earlier finding of massive human rights violations and serious breaches of international law, the Court should show reasonable flexibility regarding evidentiary issues in order to be able to ensure fair reparation.

Judge Salam thus regrets that, despite recalling the specific context of the case and the evidentiary difficulties that occur in situations of armed conflict, the Court did not draw all the necessary conclusions and, in fact, displayed a certain rigidity and an excessive formalism in its evaluation of the extent of the damage and the determination of the reparation due, particularly with respect to the harm caused to persons and property. He considers in this regard that the Court was severe in its assessment of the evidence submitted by the DRC, the deficiencies of which it did not fail to point out, thus ignoring the continuation of the conflict in the country, at varying rates of intensity, even after the 2005 Judgment. Judge Salam considers that the Court could have taken a more balanced approach in the specific context of this case, drawing the necessary conclusions from Uganda's failure, as the occupying Power in Ituri, to establish the facts pertaining to an area of the Congolese territory which it controlled.

Judge Salam also criticizes the approach followed by the Court to allocate the compensation due to the DRC. In particular, he criticizes the Judgment for not clearly setting out the method used to calculate the compensation awarded and for limiting itself to "global" sums which do not distinguish between the separate types of injuries within each of the different categories of damage. Such an approach is problematic for Judge Salam, in so far as it does not allow for an approach focused on the victims, groups of victims and communities who should be the ultimate beneficiaries of the reparation. By opting for the discretionary award of "global" sums, the Court leaves the door open to an arbitrary distribution of the reparation by the DRC.

Separate opinion of Judge Iwasawa

In his separate opinion, Judge Iwasawa offers his views on two aspects of the Judgment: its reliance on equitable considerations and its reference to criminal investigation and prosecution.

When mass violations have occurred in the context of armed conflict, judicial and other bodies have awarded compensation on the basis of the evidence at their disposal. Judge Iwasawa explains that, in view of the magnitude and complexity of the armed conflict in the DRC and given that a large amount of evidence has been destroyed or rendered inaccessible, the Court adopts the same approach in the present case and awards compensation "in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations".

Judge Iwasawa stresses that the Court decides this case in accordance with international law and not *ex aequo et bono*. The Court has determined the global sum on the basis of the legal principles and rules applicable to the assessment of reparations. In his view, while the Court, as a court of law, is obligated to quantify the damage based on the evidence before it, it is equally justified in taking into account equitable considerations.

Judge Iwasawa provides a number of examples in which international courts and tribunals have applied equity *infra legem* in determining the amount of compensation. Equity *infra legem* refers to the power of courts to select from among possible interpretations of the law the one which achieves the most equitable result. International courts have the inherent power to apply equity *infra legem* without the specific authorization of the parties. Judge Iwasawa emphasizes that taking into account equitable considerations in awarding a global sum is an application of equity *infra legem* and should not be confused with a decision *ex aequo et bono*.

Judge Iwasawa then turns to the issue of criminal investigation and prosecution of UPDF officers and soldiers.

Under the International Covenant on Civil and Political Rights, criminal investigation and, where appropriate, prosecution are necessary remedies for violations of human rights protected by Articles 6 (right to life) and 7 (right not to be subjected to torture). Judge Iwasawa is of the view that the Court could have given this as an additional reason to reject the DRC's request for satisfaction in the form of criminal investigation and prosecution. He observes that this interpretation of the Covenant corresponds to the interpretation consistently maintained in the jurisprudence of the Human Rights Committee, the body established by the Covenant to monitor its implementation.

Dissenting opinion of Judge *ad hoc* Daudet

In his dissenting opinion appended to the Judgment, Judge *ad hoc* Daudet explains that he does not share the majority opinion as regards the way in which the compensation was calculated or the amount of reparation awarded for the human damage caused.

While he commends the Court for the substantial work that it carried out in fixing what it considered to be the fairest possible compensation for the various heads of damage, he regrets that the Judgment lacks the momentum of the decision on the merits handed down to the Parties on 19 December 2005. In his view, the Court's approach in the present proceedings is not consistent with the 2005 Judgment, since its sometimes unduly rigorous stand precludes the granting of compensation more in line with the responsibilities so clearly established by the Court in 2005.

Judge *ad hoc* Daudet also draws attention to a glaring inconsistency between Parts II and III of the Judgment. While he readily agrees with the discussion on general considerations of proof set out by the Court in Part II, he finds Part III, which was meant to comprise some sort of application of the stated principles, at a remove from and out of step with those principles. This led the Court to adopt what he regards as particularly conservative levels of compensation, especially for damage to persons.

While he understands the need to proceed with caution in a case such as this, Judge *ad hoc* Daudet also considers that greater account could have been taken of the specific context and circumstances of the case. He notes, however, that although the Court did pay attention to these factors, it did not give them full practical effect when quantifying the damage. He thus regrets the rigour shown by the Court, which, in his view, could have taken a different approach in assessing the effect of the passage of time on the DRC's ability to compile precise evidence relating to events which took place more than 20 years ago. All these considerations would have justified some leniency and flexibility in Part III of the Judgment.

The dissenting opinion also criticizes the Judgment for confining itself to a very literal interpretation of paragraph 260 of the 2005 Judgment. In Judge *ad hoc* Daudet's view, when referring in that paragraph to the "exact injury" suffered by the DRC and "specific actions" of Uganda, the Court did not intend to add more rigorous conditions to the principle of full reparation for injury caused by internationally wrongful acts. He regrets that the Court nonetheless opted for a strict reading of the paragraph, in line with that of Uganda, the stringent requirements of which diminished the prospect of accommodation being made for the local situation, circumstances, habits or customs.

Finally, with regard to the amount of the reparation for damage to persons, Judge *ad hoc* Daudet does not understand why the Court opted for the lowest figure in the sizable range of victim numbers, even though it is acknowledged that this figure may be an underestimation. He believes that, in reaching its decision, the Court could have been guided by equitable considerations, reference to which was appropriate to try to better pinpoint the bases for compensation. He also regrets the Court's choice of a global sum covering a broad array of heads of damage without distinction, which makes it impossible to assess the share of compensation allocated to each. In his view, this makes it difficult in some respects to apply the principle expressed by the Court in paragraph 102 of its Judgment, according to which "any reparation is intended, as far as possible, to benefit all those who suffered injury resulting from internationally wrongful acts".

Judge *ad hoc* Daudet concludes his opinion by expressing his dismay that the failure of negotiations between the two countries prevented the question of reparation from being settled following the 2005 Judgment. He is convinced that only good faith negotiations, had they been able to take place, could have brought to the fore the basic principles that might have resulted in greater, fairer compensation. He hopes that, any disappointment on the DRC's part notwithstanding, the two States will resume the peaceful relations that their people desire as soon as possible.

248. ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (UKRAINE *v.* RUSSIAN FEDERATION) [PROVISIONAL MEASURES]

Order of 16 March 2022

On 16 March 2022, the International Court of Justice delivered its Order on the Request for the indication of provisional measures submitted by Ukraine in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation)*. The Court indicated provisional measures.

The Court was composed as follows: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; Judge *ad hoc* Daudet; Registrar Gautier.

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The Court begins by recalling that, on 26 February 2022, at 9.30 p.m., Ukraine filed in the Registry of the Court an Application instituting proceedings against the Russian Federation concerning "a dispute … relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide" (hereinafter the "Genocide Convention" or the "Convention"). In its Application, Ukraine contends that the Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, recognized on that basis the so-called "Donetsk People's Republic" and "Luhansk People's Republic", and then declared and implemented a "special military operation" against Ukraine with the express purpose of preventing and punishing purported acts of genocide that have no basis in fact. Ukraine emphatically denies that any such genocide has occurred.

The Court then recalls that, together with the Application, Ukraine submitted a Request for the indication of provisional measures, seeking in particular that the Russian Federation immediately suspend the military operations commenced on 24 February 2022 that have as their stated purpose and objective the prevention and punishment of a claimed genocide in the Luhansk and Donetsk oblasts of Ukraine, and immediately ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations which have as their stated purpose and objective preventing or punishing Ukraine for committing genocide.

Lastly, the Court notes that the Russian Federation indicated, on 5 March 2022, that it had decided not to participate in the oral proceedings. It further notes, however, that, on 7 March 2022, the Ambassador of the Russian Federation to the Kingdom of the Netherlands communicated to the Court a document setting out "the position of the Russian Federation regarding the lack of jurisdiction of the Court in t[he] case", in which it contends that the Court lacks jurisdiction to entertain the case and "requests [it] to refrain from indicating provisional measures and to remove the case from its list".

I. Introduction (paras. 17–23)

The Court observes that the context in which the present case comes before it is well known. On 24 February 2022, the President of the Russian Federation, Mr. Vladimir Putin, declared that he had decided to conduct a "special military operation" against Ukraine. Since then, there has been intense fighting on Ukrainian territory, which has claimed many lives, has caused extensive displacement and has resulted in widespread damage. The Court is acutely aware of the extent of the human tragedy that is taking place in Ukraine and is deeply concerned about the continuing loss of life and human suffering.

The Court declares itself to be profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious issues of international law. The Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of international peace and security, as well as in the peaceful settlement of disputes under the Charter and the Statute of the Court. It deems it necessary to emphasize that all States must act in conformity with their obligations under the United Nations Charter and other rules of international law, including international humanitarian law.

The Court further notes that the ongoing conflict between the Parties has been addressed in the framework of several international institutions. The General Assembly of the United Nations adopted a resolution referring to many aspects of the conflict on 2 March 2022 (doc. A/RES/ES-11/1). The present case before the Court, however, is limited in scope, as Ukraine has instituted these proceedings only under the Genocide Convention.

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The Court regrets the decision taken by the Russian Federation not to participate in the oral proceedings on the Request for the indication of provisional measures. It recalls in this regard that the non-appearance of a party has a negative impact on the sound administration of justice, as it deprives the Court of assistance that a party could have provided to it. Nevertheless, the Court must proceed in the discharge of its judicial function at any phase of the case.

The Court notes that, though formally absent from the proceedings, non-appearing parties sometimes submit to the Court letters and documents in ways and by means not contemplated by its Rules. Since it is valuable to know the views of both parties in whatever form those views may have been expressed, the Court states that it will take account of the document communicated by the Russian Federation to the extent that it finds this appropriate in discharging its duties.

The Court lastly observes that the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures and emphasizes that the non-participation of a party in the proceedings at any

stage of the case cannot, in any circumstances, affect the validity of its decision.

II. Prima facie *jurisdiction* (paras. 24–49)

1. General observations (paras. 24–27)

The Court recalls that, according to its jurisprudence, it may indicate provisional measures only if the provisions relied on by the applicant appear, *prima facie,* to afford a basis on which its jurisdiction could be founded, but it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. In the present case, Ukraine seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention. The Court must therefore first determine whether those provisions *prima facie* confer upon it jurisdiction to rule on the merits of the case, enabling it ¾ if the other necessary conditions are fulfilled ¾ to indicate provisional measures.

The Court notes that Ukraine and the Russian Federation are both parties to the Genocide Convention and that neither has a reservation in force with regard to Article IX.

2. Existence of a dispute relating to the interpretation, application or fulfilment of the Genocide Convention (paras. 28–47)

The Court recalls that Article IX of the Genocide Convention makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the Convention. Since Ukraine has invoked, as the basis of the Court's jurisdiction, the compromissory clause in an international convention, the Court must ascertain whether it appears that the acts complained of by the Applicant are capable of falling within the scope of that convention *ratione materiae*.

The Court recalls that, for the purposes of deciding whether there was a dispute between the Parties at the time of the filing of the Application, it takes into account in particular any statements or documents exchanged between the Parties, as well as any exchanges made in multilateral settings. In so doing, it pays special attention to the author of the statement or document, their intended or actual addressee, and their content.

Having examined the arguments of the Parties, the Court observes that, since 2014, various State organs and senior representatives of the Russian Federation have referred, in official statements, to the commission of acts of genocide by Ukraine in the Luhansk and Donetsk regions. It observes in particular that the Investigative Committee of the Russian Federation ¾ an official State organ ¾ has, since 2014, instituted criminal proceedings against high-ranking Ukrainian officials regarding the alleged commission of acts of genocide against the Russian-speaking population living in the above-mentioned regions "in violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide".

The Court also recalls that, in an address made on 21 February 2022, the President of the Russian Federation, Mr. Vladimir Putin, described the situation in Donbass as a "horror and genocide, which almost 4 million people are facing".

By a letter dated 24 February 2022, the Permanent Representative of the Russian Federation to the United Nations requested the Secretary-General to circulate, as a document of the Security Council, the "text of the address of the President of the Russian Federation, Vladimir Putin, to the citizens of Russia, informing them of the measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence". In his address, delivered on 24 February 2022, the President of the Russian Federation explained that he had decided,

> "in accordance with Article 51 (chapter VII) of the Charter of the United Nations … to conduct a special military operation with the approval of the Federation Council of Russia and pursuant to the treaties on friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic".

He specified that the "purpose" of the special operation was "to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years". He added that the Russian Federation had to stop "a genocide" against millions of people and that it would seek the prosecution of those who had committed numerous bloody crimes against civilians, including citizens of the Russian Federation.

The Permanent Representative of the Russian Federation to the United Nations, referring to the address by the President of the Russian Federation of 24 February 2022, explained at a meeting of the Security Council on Ukraine that "the purpose of the special operation [was] to protect people who ha[d] been subjected to abuse and genocide by the Kyiv regime for eight years".

Two days later, the Permanent Representative of the Russian Federation to the European Union stated in an interview that the operation was a "peace enforcement special military operation" carried out in an "effort aimed at de-Nazification", adding that people had been actually "exterminated" and that "the official term of genocide as coined in international law[, if one] read[s] the definition, … fits pretty well".

The Court notes that, in response to the Russian Federation's allegations and its military actions, the Ministry of Foreign Affairs of Ukraine issued a statement on 26 February 2022, saying that Ukraine "strongly denies Russia's allegations of genocide" and disputes "any attempt to use such manipulative allegations as an excuse for Russia's unlawful aggression".

The Court recalls that, at the present stage of these proceedings, it is not required to ascertain whether any violations of obligations under the Genocide Convention have occurred in the context of the present dispute. Such a finding could be made by the Court only at the stage of the examination of the merits of the present case. At the stage of making an order on a request for the indication of provisional measures, the Court's task is to establish whether the acts complained of by Ukraine appear to be capable of falling within the provisions of the Genocide Convention.

The Court further recalls that, while it is not necessary for a State to refer expressly to a specific treaty in its exchanges with the other State to enable it later to invoke the compromissory clause of that instrument to institute proceedings before it, the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim

is made to ascertain that there is, or may be, a dispute with regard to that subject-matter. The Court considers that, in the present proceedings, the evidence in the case file demonstrates *prima facie* that statements made by the Parties referred to the subject-matter of the Genocide Convention in a sufficiently clear way to allow Ukraine to invoke the compromissory clause in this instrument as a basis for the Court's jurisdiction.

The Court notes that statements made by the State organs and senior officials of the Parties indicate a divergence of views as to whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention. In the Court's view, the acts complained of by the Applicant appear to be capable of falling within the provisions of the Genocide Convention.

The Court recalls the Russian Federation's assertion that its "special military operation" is based on Article 51 of the United Nations Charter and customary international law. It observes in this respect that certain acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty. The above-mentioned assertion of the Russian Federation does not therefore preclude a *prima facie* finding by the Court that the dispute presented in the Application relates to the interpretation, application or fulfilment of the Genocide Convention.

The Court finds, therefore, that the above-mentioned elements are sufficient at this stage to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

3. Conclusion as to prima facie *jurisdiction* (paras. 48–49)

In light of the foregoing, the Court concludes that, *prima facie*, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case. Given the above conclusion, the Court considers that it cannot accede to the Russian Federation's request that the case be removed from the General List for manifest lack of jurisdiction.

III. The rights whose protection is sought and the link between such rights and the measures requested (paras. 50–64)

Regarding the rights whose protection is sought, the Court points out that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

The Court notes that, in the present proceedings, Ukraine argues that it seeks provisional measures to protect its rights "not to be subject to a false claim of genocide", and "not to be subjected to another State's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention". It states that the Russian Federation has acted inconsistently with its obligations and duties, as set out in Articles I and IV of the Convention.

The Court observes that, in accordance with Article I of the Convention, all States parties thereto have undertaken "to prevent and to punish" the crime of genocide. Article I does not specify the kinds of measures that a Contracting Party may take to fulfil this obligation. However, the Contracting Parties must implement this obligation in good faith, taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its Preamble.

Pursuant to Article VIII of the Convention, a Contracting Party that considers that genocide is taking place in the territory of another Contracting Party "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III". In addition, pursuant to Article IX, such a Contracting Party may submit to the Court a dispute relating to the interpretation, application or fulfilment of the Convention.

A Contracting Party may resort to other means of fulfilling its obligation to prevent and punish genocide that it believes to have been committed by another Contracting Party, such as bilateral engagement or exchanges within a regional organization. However, the Court emphasizes that, in discharging its duty to prevent genocide, "every State may only act within the limits permitted by international law".

The acts undertaken by the Contracting Parties "to prevent and to punish" genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter.

The Court can only take a decision on the Applicant's claims if the case proceeds to the merits. At the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State, for the purpose of preventing or punishing an alleged genocide.

Under these circumstances, the Court considers that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine.

The Court then turns to the condition of the link between the rights claimed by Ukraine and the provisional measures requested. It recalls that Ukraine is asserting a right that is plausible under the Genocide Convention. It considers that, by their very nature, the first two provisional measures sought by Ukraine (see above) are aimed at preserving the right of Ukraine that the Court has found to be plausible. As to the third and fourth provisional measures requested by Ukraine, the Court notes that the question of their link with that plausible right does not arise, in so far as such measures would be directed at preventing any action which may aggravate or

extend the existing dispute or render it more difficult to resolve, and at providing information on the compliance with any specific provisional measure indicated by the Court.

The Court concludes, therefore, that a link exists between the right of Ukraine that the Court has found to be plausible and the requested provisional measures.

IV. Risk of irreparable prejudice and urgency (paras. 65–77)

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences. However, this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case. The Court must therefore consider whether such a risk exists at this stage of the proceedings. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of obligations under the Genocide Convention, but to determine whether the circumstances require the indication of provisional measures for the protection of the right found to be plausible.

Having determined that Ukraine can plausibly assert a right under the Genocide Convention and that there is a link between this right and the provisional measures requested, the Court then considers whether irreparable prejudice could be caused to this right and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to this right before the Court gives its final decision.

The Court considers that the right of Ukraine that it has found to be plausible is of such a nature that prejudice to it is capable of causing irreparable harm. Indeed, any military operation, in particular one on the scale carried out by the Russian Federation on the territory of Ukraine, inevitably causes loss of life, mental and bodily harm, and damage to property and to the environment.

The Court considers that the civilian population affected by the present conflict is extremely vulnerable. The "special military operation" being conducted by the Russian Federation has resulted in numerous civilian deaths and injuries. It has also caused significant material damage, including the destruction of buildings and infrastructure. Attacks are ongoing and are creating increasingly difficult living conditions for the civilian population. Many persons have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating. A very large number of people are attempting to flee from the most affected cities under extremely insecure conditions.

In this regard, the Court takes note of resolution A/RES/ES-11/1 of 2 March 2022, of the General Assembly of the United Nations, which, *inter alia*, "*[e]xpress[es] grave concern* at reports of attacks on civilian facilities such as residences, schools and hospitals, and of civilian casualties, including women, older persons, persons with disabilities, and children", "*[r]ecogniz[es]* that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades and that urgent action is needed to save this generation from the scourge of war", "*[c]ondemn[s]* the decision of the Russian Federation to increase the readiness of its nuclear forces" and "*[e]xpress[es] grave concern* at the deteriorating humanitarian situation in and around Ukraine, with an increasing number of internally displaced persons and refugees in need of humanitarian assistance".

In light of these circumstances, the Court concludes that disregard of the right deemed plausible by the Court could cause irreparable prejudice to this right and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case.

V. Conclusion and measures to be adopted (paras. 78–85)

The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the right of Ukraine that the Court has found to be plausible. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested.

In the present case, having considered the terms of the provisional measures requested by Ukraine and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested. The Court considers that, with regard to the situation described above, the Russian Federation must, pending the final decision in the case, suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine. In addition, recalling the statement of the Permanent Representative of the Russian Federation to the United Nations that the "Donetsk People's Republic" and the "Lugansk People's Republic" had turned to the Russian Federation with a request to grant military support, the Court considers that the Russian Federation must also ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of these military operations.

The Court recalls that Ukraine also requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with the Russian Federation. When it indicates provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of the dispute if it considers that the circumstances so require. In the present case, having considered all the circumstances, in addition to the specific measures it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of the dispute.

The Court further recalls that Ukraine requested it to indicate a provisional measure directing the Russian Federation

to "provide a report to the Court on measures taken to implement the Court's Order on Provisional Measures one week after such Order and then on a regular basis to be fixed by the Court". In the circumstances of the present case, however, the Court declines to indicate this measure.

VI. Operative clause (para. 86)

For these reasons,

The Court,

Indicates the following provisional measures:

(1) By thirteen votes to two,

The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;

In favour: President Donoghue; Judges Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; Judge *ad hoc* Daudet;

Against: Vice-President Gevorgian; Judge Xue;

(2) By thirteen votes to two,

The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above;

In favour: President Donoghue; Judges Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; Judge *ad hoc* Daudet;

Against: Vice-President Gevorgian; Judge Xue;

(3) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

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Vice-President Gevorgian appends a declaration to the Order of the Court; Judges Bennouna and Xue append declarations to the Order of the Court; Judge Robinson appends a separate opinion to the Order of the Court; Judge Nolte appends a declaration to the Order of the Court; Judge *ad hoc* Daudet appends a declaration to the Order of the Court.

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Declaration of Vice-President Gevorgian

Vice-President Gevorgian voted against the first and the second provisional measure indicated by the Court in its Order, basing his position on a purely substantial legal ground. He does not believe that the Court has jurisdiction over this case, even of *prima facie* character. In this connection he stresses that the Court's jurisdiction is based on consent and that such consent given by the Russian Federation and by Ukraine is limited to disputes over the 1948 Genocide Convention.

In the present case, the dispute that Ukraine wants the Court to decide upon relates to the use of force. However, as the Court has held in previous cases, the use of force is not governed by the Genocide Convention. Therefore, he concludes that the Court lacks jurisdiction and cannot indicate the provisional measures sought by Ukraine.

This conclusion notwithstanding, the Vice-President declares that he voted in favour of requesting the Parties not to aggravate their dispute since the power to indicate such measure is a power inherent to the Court.

Declaration of Judge Bennouna

In his declaration, Judge Bennouna states that he voted in favour of the Order because he felt compelled by this tragic situation, in which terrible suffering is being inflicted on the Ukrainian people, to join the call by the World Court to bring an end to the war.

Judge Bennouna is nonetheless not persuaded that the Genocide Convention was conceived to enable a State, Ukraine, to seise the Court of a dispute concerning allegations of genocide made against it by another State, the Russian Federation.

Noting that this concept of genocide has been overused and indiscriminately employed by propagandists of all persuasions, Judge Bennouna considers that artificially linking a dispute concerning the unlawful use of force to the Genocide Convention does nothing to strengthen that instrument, in particular its Article IX on the peaceful settlement of disputes by the Court, an essential provision in the prevention and punishment of the crime of genocide.

Declaration of Judge Xue

1. While fully endorsing the call that the military operations in Ukraine should immediately be brought to an end so as to restore peace in the country as well as in the region, Judge Xue reserves her position on the first two provisional measures indicated in the Order. She considers that those measures are not linked with the rights that Ukraine may plausibly claim under the Genocide Convention. More importantly, given the complicated circumstances that give rise to the conflict between Ukraine and the Russian Federation, she questions whether the measures that the Russian Federation is solely required to take will contribute to the resolution of the crisis in Ukraine.

2. Judge Xue considers that the acts complained of by Ukraine ¾ namely Russia's recognition of the independence of the Luhansk and Donetsk regions of Ukraine and Russia's military operations in Ukraine ¾ cannot be directly addressed by the interpretation and application of the provisions of the Genocide Convention, as the issues they have raised are concerned with questions of recognition and use of force in international law. They do not appear to be capable of falling within the scope of the Genocide Convention.

3. Judge Xue states that Ukraine's contention is based on a mischaracterization of the Russian Federation's position on its military operations. She notes that the Russian Federation invokes Article 51 of the United Nations Charter on self-defence and customary international law as the legal basis for its military operations. Nowhere has the Russian Federation claimed that the Genocide Convention authorizes

it to use force against Ukraine as a means of fulfilling its obligation under Article I thereof to prevent and punish genocide. Whether the Russian Federation may exercise self-defence as it claims under the circumstances is apparently not governed by the Genocide Convention.

4. Judge Xue points out that as Ukraine's claim ultimately boils down to the very question whether recourse to use of force is permitted under international law in case of genocide, Ukraine's grievances against the Russian Federation directly bear on the legality of use of force by Russia under general international law rather than the Genocide Convention; therefore, the rights and obligations that Ukraine claims are not plausible under the Genocide Convention.

5. Judge Xue refers to the *Legality of Use of Force* cases, where the Court reminded the States before it that "they remain in any event responsible for acts attributed to them that violate international law, including humanitarian law; whereas any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties".

6. Judge Xue underscores that the present situation in Ukraine demands all efforts that will contribute to a peaceful resolution of the dispute between Ukraine and the Russian Federation. She regrets that the Order prejudges the merits of the case (see paragraphs 56–59 of the Order) and doubts that the measures indicated can be meaningfully and effectively implemented by only one Party to the conflict. When the situation on the ground requires urgent and serious negotiations of the Parties to the conflict for a speedy settlement, the impact of this Order remains to be seen.

Separate opinion of Judge Robinson

1. In his opinion, Judge Robinson explains why he has supported the orders granted by the Court, and in particular the order requiring Russia to suspend its military operation in Ukraine.

2. First, Judge Robinson considers the question of the Court's *prima facie* jurisdiction. He finds that the evidence before the Court clearly shows a claim by Russia that Ukraine has committed acts that constitute genocide under the 1948 Genocide Convention and a denial by Ukraine of that claim. In Judge Robinson's view, this is the real issue in the dispute before the Court ¾ and not the use of force, as argued by Russia. This conclusion, Judge Robinson notes, is supported by the several investigations carried out by the Russian Investigative Committee in the period from 2014 to 2017 into alleged acts of genocide committed by Ukrainian officials against the Russian-speaking population in the Donetsk and Luhansk oblasts, in breach of the Genocide Convention. He concludes that the Court has *prima facie* jurisdiction to entertain the dispute brought by Ukraine.

3. Judge Robinson next considers the second element of the dispute as put forward by Ukraine, that is, that there is a legal dispute between the Parties as to whether Russia may take military action in and against Ukraine to punish and prevent alleged acts of genocide within the meaning of Article I of the Convention. He finds that, although Russia has relied on the right of self-defence provided for in Article 51 of the United Nations Charter in justifying its "special military campaign" in Ukraine, Russia has expressed that the aim of the military operation is to protect against alleged acts of genocide committed by Ukraine, acts which Russia previously classified as being contrary to Ukraine's obligations under the Genocide Convention. Judge Robinson concludes that the fact that there may be a question of the lawfulness of Russia's use of force within the framework of the United Nations Charter and customary international law does not preclude the Court from assuming jurisdiction with respect to the aspect of the dispute which falls within its jurisdiction under the Genocide Convention.

4. According to Judge Robinson, the *Legality of Use of Force* cases must be distinguished. He notes that the finding of the Court in the cases brought against Spain and the United States that Article IX of the Genocide Convention "manifestly does not constitute a basis of jurisdiction … even *prima facie*" was not related to the action that formed the basis of the claims, that is, the use of force by the respondent States; rather, the Court's manifest lack of jurisdiction resulted from reservations made by the respondent States to Article IX which had the effect of excluding the jurisdiction of the Court in those cases. In Judge Robinson's view, the Court does not manifestly lack jurisdiction in the present case since both Ukraine and Russia are parties to the Genocide Convention and neither State has entered a reservation to Article IX of the Convention. Judge Robinson further notes that Ukraine has not put before the Court a general question of the legality of Russia's use of force but has asked the Court to adjudge and declare that the operation carried out by Russia "is based on a false claim of genocide and therefore has no basis in the Genocide Convention".

5. In Judge Robinson's view, given the object and purpose of the Genocide Convention and the circumstances of its conclusion, it is possible to interpret the duty under Article I to prevent and punish genocide as precluding the force used by Russia in its "special military operation" in Ukraine. Consequently, and in view of the relatively low evidentiary threshold applicable at this stage of the proceedings, Judge Robinson concludes that the breach of the Genocide Convention alleged by Ukraine, that is, that Russia has acted contrary to Article I of the Convention in initiating a military campaign with the aim of preventing genocide, appears to be capable of falling with the provisions of the Convention.

6. In conclusion, Judge Robinson offers comments on the measures granted by the Court. First, he notes that, in view of the plausibility of Ukraine's right not to have force used against it by Russia as a means of preventing the alleged genocide in Ukraine, the patent irreparable harm caused by the special military operation and the urgent need for measures, it is appropriate for the Court to grant Ukraine's request for an order requiring Russia to suspend its military operation. Second, while he voted in favour of the non-aggravation measure ordered by the Court, Judge Robinson expresses the view that there is no justification for directing this measure to Ukraine. Finally, Judge Robinson opines that it is regrettable that the Court did not grant Ukraine's request for the Russian Federation to provide periodic reports on the measures taken to implement the Court's Order in view of the very grave situation in Ukraine caused by the military operation.

Declaration of Judge Nolte

In his declaration, Judge Nolte observes that the decision of the Court to order the suspension of military operations by way of a provisional measure is consistent with its decisions in the *Legality of Use of Force* cases. In these earlier cases, the Court found that it lacked *prima facie* jurisdiction under the Genocide Convention to order the cessation of acts of use of force by certain member States of NATO, as had been requested by the Federal Republic of Yugoslavia. Judge Nolte notes that the subject-matter of the application by the Federal Republic of Yugoslavia was whether the use of force by the intervening States amounted to genocide. In contrast, the subject-matter of the Application submitted by Ukraine concerns the question whether the allegations of genocide and the military operations undertaken by the Russian Federation with the stated purpose of preventing and punishing genocide are in conformity with the Genocide Convention. Judge Nolte believes that the differences between the present case and the earlier cases justify that the Court has, in the present case, found *prima facie* jurisdiction based on Article IX of the Genocide Convention.

Declaration of Judge *ad hoc* Daudet

In his declaration appended to the Judgment, Judge *ad hoc* Daudet expresses his regret that both Parties are instructed to refrain from any action which might aggravate the dispute. Although he voted in favour of the measure, he is of the view that, in the circumstances of the case, it should have been addressed to the Russian Federation. The obvious escalation of the conflict, as it is developing day by day, is largely due, in his opinion, to Russian military strikes and increasing human rights violations committed against civilians, particularly women and children.

249. ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA (NICARAGUA *v.* COLOMBIA)

Judgment of 21 April 2022

On 21 April 2022, the International Court of Justice delivered its Judgment in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. The Court found that Colombia violated Nicaragua's sovereign rights and jurisdiction in the latter's exclusive economic zone.

The Court was composed as follows: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; Judges *ad hoc* Daudet, McRae; Registrar Gautier.

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I. General Background (paras. 25–32)

The Court begins by recalling the geographical and legal background of the case. It notes in particular that the maritime spaces with which the present proceedings are concerned are located in the Caribbean Sea, and that, in the Judgment rendered by the Court on 19 November 2012 in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (hereinafter the "2012 Judgment"), it decided that Colombia had sovereignty over certain islands and established a single maritime boundary delimiting the continental shelf and the exclusive economic zones of Nicaragua and Colombia up to the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured. However, the precise location of the eastern endpoints of the maritime boundary could not be determined because Nicaragua had not yet notified the Secretary-General of the United Nations of the location of those baselines.

The Court notes that, in the present case, Nicaragua alleges that Colombia has violated Nicaragua's sovereign rights and jurisdiction in Nicaragua's exclusive economic zone in various ways. First, it contends that Colombia has interfered with Nicaraguan-flagged or Nicaraguan-licensed fishing and marine scientific research vessels in this maritime zone in a series of incidents involving Colombian naval vessels and aircraft. Nicaragua also claims that Colombia repeatedly directed its naval frigates and military aircraft to obstruct the Nicaraguan Navy in the exercise of its mission in Nicaraguan waters. Secondly, Nicaragua states that Colombia has granted permits for fishing and authorizations for marine scientific research in Nicaragua's exclusive economic zone to Colombians and nationals of third States. Thirdly, Nicaragua alleges that Colombia has violated its exclusive sovereign right to explore and exploit the natural resources in its exclusive economic zone by offering and awarding hydrocarbon blocks encompassing parts of that zone.

Nicaragua further objects to Presidential Decree No. 1946 of 9 September 2013, as amended by Decree No. 1119 of 17 June 2014 (hereinafter "Presidential Decree 1946"), whereby Colombia established an "integral contiguous zone", which "ostensibly unified the maritime 'contiguous zones' of all of Colombia's islands, keys and other maritime features in the area". Nicaragua claims that the "integral contiguous zone" overlaps with waters attributed by the Court to Nicaragua as its exclusive economic zone and therefore "substantially transgresses areas subject to Nicaragua's exclusive sovereign rights and jurisdiction". Nicaragua further claims that the Decree violates customary international law and that its mere enactment engages Colombia's international responsibility.

In its counter-claims, Colombia first asserts that the inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy artisanal fishing rights in the traditional fishing banks located beyond the territorial sea of the islands of the San Andrés Archipelago. It contends that Nicaragua has infringed the traditional fishing rights of the inhabitants of the San Andrés Archipelago to access their traditional fishing banks located in the maritime areas beyond the territorial sea of the islands of the San Andrés Archipelago and those banks located in the Colombian maritime areas, access to which requires navigating outside the territorial sea of the islands of the San Andrés Archipelago.

Secondly, Colombia challenges the lawfulness of Nicaragua's straight baselines established by Decree No. 33–2013 of 19 August 2013 (hereinafter "Decree 33"), which was enacted by Nicaragua on 27 August 2013 and then amended in 2018. More specifically, Colombia contends that the straight baselines, which connect a series of maritime features appertaining to Nicaragua east of its continental coast in the Caribbean Sea, have the effect of pushing the external limit of its territorial sea far east of the 12-mile limit permitted by international law, expanding Nicaragua's internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf. According to Colombia, Nicaragua's straight baselines thus directly impede the rights and jurisdiction to which Colombia is entitled in the Caribbean Sea.

Before examining Nicaragua's claims and Colombia's counter-claims, the Court first addresses the scope of its jurisdiction *ratione temporis*, an issue raised by Colombia in its Counter-Memorial.

II. Scope of the jurisdiction ratione temporis *of the Court* (paras. 33–47)

In its 2016 Judgment, the Court concluded that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua. The question now before the Court is whether its jurisdiction over that dispute extends to facts or events that allegedly occurred after 27 November 2013, the date on which the Pact ceased to be in force for Colombia.

The Court considers that there is nothing in its jurisprudence to suggest that the lapse of the jurisdictional title after the institution of proceedings has the effect of limiting the Court's

jurisdiction *ratione temporis* to facts which allegedly occurred before that lapse. In the view of the Court, the criteria that it has considered relevant in its jurisprudence to determine the limits *ratione temporis* of its jurisdiction with respect to a claim or submission made after the filing of the application, or the admissibility thereof, should apply to the Court's examination of the scope of its jurisdiction *ratione temporis* in the present case.

The Court notes that, in cases involving the adjudication of a claim or submission made after the filing of the application, it has in such instances considered whether such a claim or submission arose directly out of the question which is the subject-matter of the application or whether entertaining such a claim or submission would transform the subject of the dispute originally submitted to the Court. With regard to facts or events subsequent to the filing of the application, the Court has affirmed the relevance of criteria relating to "continuity" and "connexity" for determining limits *ratione temporis* to its jurisdiction.

In the 2016 Judgment, the Court did not address the question of jurisdiction *ratione temporis* with regard to those alleged incidents that occurred after the denunciation of the Pact of Bogotá came into effect. However, its Judgment implies that the Court has jurisdiction to examine every aspect of the dispute that the Court found to have existed at the time of the filing of the Application. It follows that the task of the Court is to decide whether the incidents alleged to have occurred after the lapse of the jurisdictional title meet the aforementioned criteria drawn from the Court's jurisprudence.

The Court observes that the incidents said to have occurred after 27 November 2013 generally concern Colombian naval vessels and aircraft allegedly interfering with Nicaraguan fishing activities and marine scientific research in Nicaragua's maritime zones, Colombia's alleged policing operations and interference with Nicaragua's naval vessels in Nicaragua's maritime waters and Colombia's alleged authorization of fishing activities and marine scientific research in Nicaragua's exclusive economic zone. These alleged incidents are of the same nature as those that allegedly occurred before 26 November 2013. They all give rise to the question whether Colombia has breached its international obligations under customary international law to respect Nicaragua's rights in the latter's exclusive economic zone, a question which concerns precisely the dispute over which the Court found it had jurisdiction in the 2016 Judgment.

In light of the foregoing considerations, the Court concludes that the claims and submissions made by Nicaragua in relation to incidents that allegedly occurred after 27 November 2013 arose directly out of the question which is the subject-matter of the Application, that those alleged incidents are connected to the alleged incidents that have already been found to fall within the Court's jurisdiction, and that consideration of those alleged incidents does not transform the nature of the dispute between the Parties in the present case. The Court therefore has jurisdiction *ratione temporis* over Nicaragua's claims relating to those alleged incidents.

III. Alleged violations by Colombia of Nicaragua's rights in its maritime zones (paras. 48–199)

The dispute between the Parties in the present case raises questions concerning the rights and duties of the coastal State and the rights and duties of other States in the exclusive economic zone. The Applicant and the Respondent agree that the applicable law between them is customary international law.

A. Colombia's contested activities in Nicaragua's maritime zones (paras. 49–144)

1. Incidents alleged by Nicaragua in the south-western Caribbean Sea (paras. 49–101)

The Court notes that customary rules on the rights and duties in the exclusive economic zone of coastal States and other States are reflected in several articles of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), including Articles 56, 58, 61, 62 and 73.

The Court further notes that, in considering whether the evidence establishes the violations of customary international law alleged by Nicaragua, it will be guided by its jurisprudence on questions of proof. 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. The Court will treat with caution evidentiary materials prepared for the purposes of a case, as well as evidence from secondary sources. It will consider evidence that comes from contemporaneous and direct sources to be more probative and credible. The Court will also give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them. Finally, while press articles and documentary evidence of a similar secondary nature are not capable of proving facts, they can corroborate, in some circumstances, the existence of facts established by other evidence.

Upon examination of the evidence submitted by Nicaragua, the Court finds that for many alleged incidents, Nicaragua seeks to establish that Colombian naval vessels violated Nicaragua's rights in its maritime zones; yet its evidence does not prove, to the satisfaction of the Court, that Colombia's conduct in Nicaragua's exclusive economic zone went beyond what is permitted under customary international law as reflected in Article 58 of UNCLOS. In relation to a number of other alleged incidents, Nicaragua's evidence is primarily based on what fishermen reported to the owners of their vessels, on materials that were apparently prepared for the purposes of the present case without other corroborating evidence, on audio recordings that are not sufficiently clear, or on media reports that either do not indicate the source of their information or are otherwise uncorroborated. The Court does not consider that such evidence suffices to establish Nicaragua's allegations against Colombia. It is of the view that, with regard to the alleged incidents referred to above, Nicaragua has failed to discharge its burden of proof to establish a breach by Colombia of its international obligations. The Court therefore dismisses those allegations for lack of proof.

With regard to the rest of the alleged incidents, the Court considers that a number of facts on which Nicaragua's claim rests are established. First of all, as to many of the alleged incidents, the evidence supports Nicaragua's allegations regarding the location of Colombian frigates (see the alleged incidents of 17 November 2013; 27 January 2014; 12 and 13 March 2014; 3 April 2014; 28 July 2014; 21 August 2016; 6 and 8 October 2018). Further, Colombia's own naval reports

and navigation logs, as contemporaneous documents, also corroborate the specific geographic co-ordinates presented by Nicaragua, which lie within the area east of the 82° meridian, often in the fishing ground at or around Luna Verde, located within the maritime area that was declared by the Court to appertain to Nicaragua.

Moreover, the Colombian naval vessels purported to exercise enforcement jurisdiction in Nicaragua's exclusive economic zone (see the alleged incidents of 27 January 2014; 13 March 2014; 3 April 2014; 28 July 2014; 26 March 2015; 21 August 2016). In communications with Nicaraguan naval vessels and fishing vessels operating in Nicaragua's exclusive economic zone, Colombian naval officers, at times reading from a government proclamation, requested Nicaraguan fishing vessels to discontinue their fishing activities, alleging that those activities were environmentally harmful and were illegal or not authorized. These officials also stated to the Nicaraguan vessels that the maritime spaces concerned were Colombian jurisdictional waters over which Colombia would continue to exercise sovereignty on the basis of the determination by the Colombian Government that the 2012 Judgment was not applicable. The evidence sufficiently proves that the conduct of Colombian naval vessels was carried out to give effect to a policy whereby Colombia sought to continue to control fishing activities and the conservation of resources in the area that lies within Nicaragua's exclusive economic zone.

The Court notes that Colombia relies on two legal grounds to justify its conduct at sea. First, Colombia claims that its actions, even if proved, are permitted as an exercise of its freedoms of navigation and overflight. Secondly, Colombia asserts that it has an international obligation to protect and preserve the marine environment of the south-western Caribbean Sea and the habitat of the Raizales and other inhabitants of the Archipelago.

According to customary international law on the exclusive economic zone, Nicaragua, as the coastal State, enjoys sovereign rights to manage fishing activities and jurisdiction to take measures to protect and preserve the maritime environment in its exclusive economic zone. The evidence before the Court shows that the conduct of Colombian naval frigates in Nicaraguan maritime zones was not limited to "observing" predatory or illegal fishing activities or "informing" fishing vessels of such activities, as claimed by Colombia. This conduct often amounted to exercising control over fishing activities in Nicaragua's exclusive economic zone, implementing conservation measures on Nicaraguan-flagged or Nicaraguan-licensed ships, and hindering the operations of Nicaragua's naval vessels. The Court considers that Colombia's legal arguments do not justify its conduct within Nicaragua's exclusive economic zone. Colombia's conduct is in contravention of customary rules of international law as reflected in Articles 56, 58 and 73 of UNCLOS.

In light of the foregoing considerations, the Court finds that Colombia has violated its international obligation to respect Nicaragua's sovereign rights and jurisdiction in the latter's exclusive economic zone by interfering with fishing activities and marine scientific research by Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaragua's naval vessels, and by purporting to enforce conservation measures in that zone.

2. Colombia's alleged authorization of fishing activities and marine scientific research in Nicaragua's exclusive economic zone (paras. 102–134)

Before turning to the evidence relating to the incidents at sea alleged by Nicaragua, the Court first considers the resolutions under which Nicaragua claims Colombia authorized fishing by Colombian-flagged and foreign vessels in Nicaragua's exclusive economic zone.

The resolutions in question were issued by two Colombian governmental authorities: the General Maritime Directorate of the Ministry of National Defence of Colombia (hereinafter "DIMAR") and the Governor of the San Andrés Archipelago. With regard to the DIMAR resolutions, the Court observes that they do not specify the extent of the jurisdiction of the San Andrés and Providencia Harbour Master's Offices, a crucial issue for the purposes of the present case. Thus, on the basis of the resolutions themselves, the Court cannot determine whether the geographical scope of the area in which the listed fishing vessels were authorized to operate extends into Nicaragua's maritime spaces. As regards the resolutions of the Governor of the San Andrés Archipelago, the Court notes that the express inclusion of the fishing ground "*La Esquina* or *Luna Verde*" in the fishing zone described in resolutions issued after the 2012 Judgment suggests that Colombia continues to assert the right to authorize fishing activities in parts of Nicaragua's exclusive economic zone. The Court then examines the alleged incidents at sea to determine whether Colombia authorized fishing activities and marine scientific research in Nicaragua's exclusive economic zone.

The Court considers that the evidence presented by the Parties reveals at least three facts. First, the fishing vessels allegedly authorized by Colombia did engage in fishing activities in Nicaragua's exclusive economic zone during the relevant time. Secondly, such fishing activities were often conducted under the protection of Colombian frigates. Thirdly, Colombia recognizes that the Luna Verde area is in Nicaragua's exclusive economic zone.

As regards Colombia's alleged authorization of marine scientific research in Nicaragua's exclusive economic zone, the Court cannot find in the resolutions before it any express reference to authorization of marine scientific research operations. Without other credible evidence to corroborate Nicaragua's claim in this regard, the Court cannot draw a conclusion from the available evidence that Colombia also authorized marine scientific research in Nicaragua's exclusive economic zone.

On the basis of the above considerations, the Court concludes that Colombia has violated Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone by authorizing vessels to conduct fishing activities in Nicaragua's exclusive economic zone.

3. Colombia's alleged oil exploration licensing (paras. 135–143)

The Court first addresses the admissibility of Nicaragua's claim concerning Colombia's alleged oil exploration licensing.

The Court notes that Nicaragua's allegation regarding Colombia's oil exploration licensing concerns the question whether Colombia has violated Nicaragua's sovereign rights in the exclusive economic zone. Although a different kind of activity is involved, Nicaragua's claim does not transform the subject-matter of the dispute as stated in the Application, since the dispute between the Parties involves the rights of the Parties in all maritime zones as delimited by the 2012 Judgment. The Court is of the view that Nicaragua's claim arises directly out of the question which is the subject-matter of the Application, and that it is therefore admissible.

Regarding the merits of the claim, the Court is of the opinion that the evidence shows, including by Nicaragua's own account, that Colombia offered 11 oil concession blocks for licensing and awarded two blocks in 2011, at a time when the maritime boundary between the Parties had not yet been delimited. The documents before the Court also demonstrate that signature of the contracts for the said petroleum blocks was first suspended by the parties concerned in 2011 and later by a decision of the administrative tribunal of San Andrés, Providencia and Santa Catalina in 2012. Nicaragua also concedes that, to date, the contracts in question have not been signed. As regards the facts since then, there is no credible evidence that the National Hydrocarbon Agency still intends to offer and award those blocks. The Court notes in this regard that Nicaragua did not pursue its claim during the oral proceedings and that it acknowledged Colombia's statement that no concessions had been awarded in the areas concerned. Colombia, for its part, reiterated that the blocks in question had not been implemented and would not be pursued or offered.

In light of the foregoing, the Court finds that Nicaragua has failed to prove that Colombia continues to offer petroleum blocks situated in Nicaragua's exclusive economic zone. It therefore rejects the allegation that Colombia violated Nicaragua's sovereign rights by issuing oil exploration licences.

4. Conclusions (para. 144)

In light of the foregoing considerations, the Court finds that Colombia has breached its international obligation to respect Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone (i) by interfering with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in Nicaragua's exclusive economic zone; (ii) by purporting to enforce conservation measures in Nicaragua's exclusive economic zone; and (iii) by authorizing fishing activities in Nicaragua's exclusive economic zone. Colombia's wrongful conduct engages its responsibility under international law.

B. Colombia's "integral contiguous zone" (paras. 145–194)

The Court notes that among its allegations of Colombia's violations of Nicaragua's rights in its maritime zones, Nicaragua refers to Colombia's Presidential Decree 1946, which establishes an "integral contiguous zone" around Colombian islands in the western Caribbean Sea. Nicaragua does not deny Colombia's entitlement to a contiguous zone, but it maintains that both the geographical extent of the "integral contiguous zone" and the material scope of the powers which Colombia claims it may exercise therein exceed the limits permitted under customary international rules on the contiguous zone. In Nicaragua's view, by establishing the "integral contiguous zone", Colombia violated Nicaragua's rights in the latter's exclusive economic zone.

1. The applicable rules on the contiguous zone (paras. 147–155)

The Court first notes that, under the law of the sea, the contiguous zone is distinct from other maritime zones in the sense that the establishment of a contiguous zone does not confer upon the coastal State sovereignty or sovereign rights over this zone or its resources. The drafting history of Article 24 of the 1958 Convention and that of Article 33 of UNCLOS demonstrate that States have generally accepted that the powers in the contiguous zone are confined to customs, fiscal, immigration and sanitary matters as stated in Article 33, paragraph 1. With regard to the breadth of the contiguous zone, most States that have established such zones have set the breadth thereof within a 24-nautical-mile limit consistent with Article 33, paragraph 2, of UNCLOS. Some States have even reduced the breadth of previously established contiguous zones to conform to that limit.

In conclusion, the Court considers that Article 33 of UNCLOS reflects contemporary customary international law on the contiguous zone, both in respect of the powers that a coastal State may exercise there and the limitation of the breadth of the contiguous zone to 24 nautical miles.

2. Effect of the 2012 Judgment and Colombia's right to establish a contiguous zone (paras. 156–163)

The Court notes that in the proceedings leading to the 2012 Judgment, the Parties discussed the contiguous zone but did not request the Court to delimit it in drawing a single maritime boundary, nor did the Court address the contiguous zone, as the issue did not arise during the delimitation. The Court considers that the 2012 Judgment does not delimit, expressly or otherwise, the contiguous zone of either Party.

The Court then notes that the contiguous zone and the exclusive economic zone are governed by two distinct régimes. It considers that the establishment by one State of a contiguous zone in a specific area is not, as a general matter, incompatible with the existence of the exclusive economic zone of another State in the same area. In principle, the maritime delimitation between Nicaragua and Colombia does not abrogate Colombia's right to establish a contiguous zone around the San Andrés Archipelago. The Court adds that, under the law of the sea, the powers that a State may exercise in the contiguous zone are different from the rights and duties that a coastal State has in the exclusive economic zone. The two zones may overlap, but the powers that may be exercised therein and the geographical extent are not the same. The contiguous zone is based on an extension of control by the coastal State for the purposes of prevention and punishment of certain conduct that is illegal under its national laws and regulations, while the exclusive economic zone, on the other hand, is established to safeguard the coastal State's sovereign rights over natural resources and jurisdiction with regard to the protection of the marine environment. In exercising the

rights and duties under either régime, each State must have due regard to the rights and duties of the other State.

The Court is of the view that, in the parts of the "integral contiguous zone" which overlap with Nicaragua's exclusive economic zone, Colombia may exercise its powers of control in accordance with customary rules on the contiguous zone as reflected in Article 33, paragraph 1, of UNCLOS and it has the rights and duties under customary law as reflected in Article 58 of UNCLOS. In exercising the rights and duties under the contiguous zone régime, Colombia is under an obligation to have due regard to the sovereign rights and jurisdiction which Nicaragua enjoys in its exclusive economic zone under customary law as reflected in Articles 56 and 73 of UNCLOS.

Given the above considerations, the Court concludes that Colombia has the right to establish a contiguous zone around the San Andrés Archipelago in accordance with customary international law.

3. The compatibility of Colombia's "integral contiguous zone" with customary international law (paras. 164–186)

The Parties are divided over the conformity with customary international law of the provisions of Article 5 of Presidential Decree 1946, which set out the geographical extent of the "integral contiguous zone" and the material scope of the powers that may be exercised therein.

The Court begins by recalling that the 24-nautical-mile rule provided for in Article 33, paragraph 2, of UNCLOS is an established customary rule. The simplified configuration of Colombia's "integral contiguous zone" has the effect of extending its breadth beyond 24 nautical miles. The Court is of the view that Colombia may choose to reduce the breadth of the "integral contiguous zone" if it wishes to simplify the configuration of the zone, but it has no right to expand it beyond the 24-nautical-mile limit to the detriment of the exercise by Nicaragua of its sovereign rights and jurisdiction in its exclusive economic zone. It follows that the geographical extent of Colombia's "integral contiguous zone" is not in conformity with customary international law.

With regard to the material scope of Colombia's powers within the "integral contiguous zone", Article 5 (3) (*a*) of Presidential Decree 1946 provides that Colombia shall exercise powers in the "integral contiguous zone" to prevent and control infringements of laws and regulations regarding "the integral security of the State, including piracy, trafficking of drugs and psychotropic substances, as well as conduct contrary to the security in the sea and the national maritime interests, the customs, fiscal, migration and sanitary matters" and that "[i]n the same manner, violations against the laws and regulations related with the preservation of the maritime environment and the cultural heritage will be prevented and controlled". Under this provision, the scope of the powers under which the Colombian authorities may exercise control in the contiguous zone is therefore much broader than the material scope of the powers enumerated in Article 33, paragraph 1, of UNCLOS.

The Court notes that security was not a matter that States agreed to include in the list of matters over which a coastal State may exercise control in the contiguous zone; nor has there been any evolution of customary international law in this regard since the adoption of UNCLOS. The inclusion of security in the material scope of Colombia's powers within the "integral contiguous zone" is therefore not in conformity with the relevant customary rule.

In respect of the power to protect "national maritime interests", Article 5 (3) of Presidential Decree 1946, through its broad wording alone, appears to encroach on the sovereign rights and jurisdiction of Nicaragua as set forth in Article 56, paragraph 1, of UNCLOS. This is also true with regard to violations of "laws and regulations related with the preservation of the environment", since the coastal State, Nicaragua in the present case, has jurisdiction in its exclusive economic zone over the "protection and preservation of the marine environment". Yet, if exercised in the area overlapping with Nicaragua's exclusive economic zone, the powers conferred on the Colombian authorities under Article 5 (3) of Presidential Decree 1946 would encroach on the sovereign rights and jurisdiction of Nicaragua.

Article 5 (3) (*a*) of Presidential Decree 1946 also refers to cultural heritage. In support of its position, Colombia invokes Article 303, paragraph 2, of UNCLOS, which gives the coastal State the power to exercise control over objects of an archaeological and historical nature found in its contiguous zone and provides that the removal of such objects can be regarded as an infringement of its laws and regulations on customs, fiscal, immigration or sanitary matters.

Taking into account State practice and other legal developments in this field, the Court is of the view that Article 303, paragraph 2, of UNCLOS reflects customary international law. It follows that Article 5 (3) of Presidential Decree 1946, in so far as it includes the power of control with respect to archaeological and historical objects found within the contiguous zone, does not violate customary international law.

4. Conclusion (paras. 187–194)

In light of the foregoing, the Court finds that the "integral contiguous zone" established by Colombia's Presidential Decree 1946 is not in conformity with customary international law in two respects. First, the geographical extent of the "integral contiguous zone" contravenes the 24-nautical-mile rule for the establishment of the contiguous zone. Secondly, Article 5 (3) of Presidential Decree 1946 confers certain powers on Colombia to exercise control over infringements of its laws and regulations in the "integral contiguous zone" that extend to matters that are not permitted by customary rules as reflected in Article 33, paragraph 1, of UNCLOS.

Having reached this conclusion, the Court will consider the question whether the establishment of the "integral contiguous zone" by enactment of Presidential Decree 1946 constitutes, in and of itself, a breach by Colombia of its international obligations owed to Nicaragua, which engages its international responsibility.

In the absence of a general rule applicable to the question whether a State engages its international responsibility by the enactment of national legislation, the Court examines this question in light of the obligations of which Colombia is allegedly in breach and the specific context of the case. It

notes that Colombia's Presidential Decree 1946 was initially issued not long after the delivery of the 2012 Judgment and that the enactment of Presidential Decree 1946, among other things, contributed to the dispute between the Parties, which eventually led to the institution of the present proceedings by Nicaragua. The Court is mindful that Colombia amended Presidential Decree 1946 in 2014 to provide that the Decree will be applied in compliance with international law. However, it does not consider that this additional provision is sufficient to address the concern raised by Nicaragua in this regard. The Court is of the view that Colombia is under an international obligation to remedy the situation.

On the basis of these considerations, the Court concludes that, in respect of the maritime areas in which Colombia's "integral contiguous zone" overlaps with Nicaragua's exclusive economic zone, Colombia's "integral contiguous zone", which the Court has found to be incompatible with customary international law as reflected in Article 33 of UNCLOS, infringes upon Nicaragua's sovereign rights and jurisdiction in the exclusive economic zone. Colombia's responsibility is thereby engaged. Colombia has the obligation, by means of its own choosing, to bring the provisions of Presidential Decree 1946 into conformity with customary international law in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua.

C. Conclusions and remedies (paras. 195–199)

The Court has concluded that Colombia breached its international obligation to respect Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone thereby engaging its responsibility under international law. Colombia must therefore immediately cease its wrongful conduct. The Court has also found that the "integral contiguous zone" established by Colombia's Presidential Decree 1946 is not in conformity with customary international law and that in the maritime areas where the "integral contiguous zone" overlaps with Nicaragua's exclusive economic zone, the "integral contiguous zone" infringes upon Nicaragua's sovereign rights and jurisdiction in the exclusive economic zone thereby engaging Colombia's responsibility. Colombia therefore has the obligation, by means of its own choosing, to bring the provisions of Presidential Decree 1946 into conformity with customary international law in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua.

The Court notes that, in its final submissions, Nicaragua made a number of requests for additional remedies. Considering the nature of Colombia's internationally wrongful acts, the Court considers that the remedies stated above suffice to redress the injury that Colombia's internationally wrongful acts have inflicted on Nicaragua.

As regards the request by Nicaragua to order Colombia to pay compensation, the Court considers that in the course of the proceedings Nicaragua did not offer evidence demonstrating that Nicaraguan-flagged or Nicaraguan-licensed vessels or their fishermen suffered material damage or were effectively prevented from fishing as a result of Colombia's acts of interference by its naval frigates in Nicaragua's exclusive economic zone. Therefore, Nicaragua's request for compensation must be rejected.

Finally, the Court considers that Nicaragua's request that the Court remain seised of the case until Colombia recognizes and respects Nicaragua's rights in the Caribbean Sea as attributed by the 2012 Judgment has no legal basis and must therefore be rejected.

IV. Counter-claims made by Colombia (paras. 200–260)

A. Nicaragua's alleged infringement of the artisanal fishing rights of the inhabitants of the San Andrés Archipelago to access and exploit the traditional banks (paras. 201–233)

The Court observes that Colombia's counter-claim relating to the artisanal fishing rights said to be enjoyed by the inhabitants of the San Andrés Archipelago, including the Raizales, in the traditional fishing banks located beyond the territorial sea of the islands of the San Andrés Archipelago is premised on two main contentions. First, Colombia asserts that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have for centuries practised traditional or artisanal fishing in locations now falling in Nicaragua's exclusive economic zone. The alleged long-standing practices amongst those communities are said to have given rise to an uncontested "local customary norm" between the Parties or to customary rights of access and exploitation that survived the establishment of Nicaragua's exclusive economic zone. Additionally, Colombia points to statements of President Ortega, the Head of State of Nicaragua, which it characterizes both as accepting or recognizing the existence of those rights and as unilateral statements that are capable of producing legal effects in the sense that they amounted to granting rights to the artisanal fishermen.

The Court begins by recalling that the Parties' relations in respect of the exclusive economic zone are governed by customary international law.

The Court then turns to the question of whether Colombia has proved that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have historically enjoyed "artisanal fishing rights" in areas that now fall within Nicaragua's exclusive economic zone and that those "rights" survived the establishment of Nicaragua's exclusive economic zone. Colombia relies on 11 affidavits to prove the existence of a long-standing practice of artisanal fishing by the inhabitants of the San Andrés Archipelago, in particular the Raizales. The Court observes that those affidavits appear to have been sworn specifically for the purposes of this case and are signed by fishermen who may be considered as particularly interested in the outcome of these proceedings, factors that have a bearing on the weight and probative value of that evidence. The Court must nonetheless analyse the affidavits "for the utility of what is said" and to determine whether they support Colombia's contention.

Having reviewed those affidavits, the Court observes that they contain indications that some fishing activities have in the past taken place in certain areas that had once been part of the high seas but now fall within Nicaragua's exclusive economic zone. However, the Court also notes that the affidavits do not establish with certainty the periods during which such activities took place, or whether there was in fact a constant practice

of artisanal fishing spanning many decades or centuries, as claimed by Colombia. The Court also notes that most of the affiants speak of having conducted their activities in "waters surrounding the Colombian features" or in fishing grounds located "within Colombia's territorial sea", rather than Nicaraguan maritime areas. The Court is of the view that the 11 affidavits submitted by Colombia do not sufficiently establish that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have been engaged in a long-standing practice of artisanal fishing in "traditional fishing banks" located in waters now falling within Nicaragua's exclusive economic zone.

The Court also considers that the positions adopted by Colombia on other occasions are inconsistent with its assertion concerning the existence of such a traditional practice of artisanal fishing in Nicaragua's exclusive economic zone.

The Court then turns to several statements of Nicaragua's Head of State, which, according to Colombia, either illustrate Nicaragua's acceptance or recognition that the artisanal fishermen of the Archipelago have the right to fish in Nicaragua's maritime zones without having to request prior authorization or alternatively create a legal obligation on the part of Nicaragua to respect those fishing rights.

The Court observes that, in several of President Ortega's statements, reference is made to the need for the Raizal community or the inhabitants of the Archipelago to obtain fishing permits or authorizations from Nicaragua to carry on artisanal or industrial fishing. In addition, President Ortega made references to mechanisms that needed to be established between Nicaragua and Colombia before the artisanal fishermen could operate in waters falling in Nicaragua's exclusive economic zone by virtue of the 2012 Judgment. In the Court's view, the statements by President Ortega do not establish that Nicaragua has recognized that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have the right to fish in Nicaragua's maritime zones without having to request prior authorization. It follows that the Court cannot uphold Colombia's contention that Nicaragua, through the statements of its Head of State, accepted or recognized the rights of the Raizales to fish in Nicaragua's exclusive economic zone without requiring authorization from Nicaragua.

The Court then considers whether the statements of President Ortega constitute a legal undertaking granting rights to the artisanal fishermen.

In the Court's view, the statements of Nicaragua's Head of State indicate that the Nicaraguan authorities were aware of the issues that arose in respect of the fishing activities of the inhabitants of the Archipelago and the challenges that Colombia faced in implementing the 2012 Judgment. In that regard, it appears that Nicaragua expressed an openness to concluding an agreement with Colombia regarding appropriate mechanisms and solutions to overcome those challenges. Bearing in mind the above context and adopting a restrictive interpretation, the Court cannot accept Colombia's alternative argument that the statements of President Ortega, referred to above, constitute a legal undertaking on the part of Nicaragua to respect the rights of the artisanal fishermen of the San Andrés Archipelago to fish in Nicaragua's maritime zones without requiring prior authorization from Nicaragua.

For these reasons, the Court concludes that Colombia has failed to establish that the inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy artisanal fishing rights in waters now located in Nicaragua's exclusive economic zone, or that Nicaragua has, through the unilateral statements of its Head of State, accepted or recognized their traditional fishing rights, or legally undertaken to respect them. In light of all the above considerations, the Court dismisses Colombia's third counter-claim.

Notwithstanding the above conclusion, the Court takes note of Nicaragua's willingness, as expressed through statements of its Head of State, to negotiate with Colombia an agreement regarding access by members of the Raizales community to fisheries located within Nicaragua's exclusive economic zone. The Court considers that the most appropriate solution to address the concerns expressed by Colombia and its nationals in respect of access to fisheries located within Nicaragua's exclusive economic zone would be the negotiation of a bilateral agreement between the Parties.

B. Alleged violation of Colombia's sovereign rights and maritime spaces by Nicaragua's use of straight baselines (paras. 234–260)

The Court turns to Colombia's counter-claim relating to Decree 33, through which Nicaragua established a system of straight baselines along its Caribbean coast, from which the breadth of its territorial sea is measured.

Customary international law as reflected in Article 7, paragraph 1, of UNCLOS provides for two geographical preconditions for the establishment of straight baselines. The preconditions are alternative and not cumulative. With respect to the straight baselines drawn from Cabo Gracias a Dios on the mainland to Great Corn Island along the coast (points 1–8), Nicaragua asserts that there is "a fringe of islands along the coast in its immediate vicinity" that entitles it to use straight rather than normal baselines. As to the southernmost part of its mainland coast, Nicaragua claims instead that the indentation of the coast from Monkey Point to the land boundary terminus with Costa Rica justifies Nicaragua's straight baselines drawn from point 8 (Great Corn Island) to point 9 (Barra Indio Maíz).

The Court notes that there appears to be no single test for identifying a coastline that is "deeply indented and cut into". Since Nicaragua concedes that it is only the southernmost portion of its Caribbean coast that falls to be considered under the second geographic option, the Court must determine whether the straight baseline segment between base points 8 and 9 defined by Decree 33, as amended, is justified on the basis that the corresponding coast is "deeply indented and cut into". The Court is of the view that the indentations along the relevant portion of Nicaragua's coast do not penetrate sufficiently inland or present characteristics sufficient for it to consider the said portion as "deeply indented and cut into". Thus, recalling that the straight baselines method "must be applied restrictively", the Court finds that the straight baseline segment between base points 8 and 9 defined by Decree 33, as amended, does not conform with customary international law on the drawing of straight baselines as reflected in Article 7, paragraph 1, of UNCLOS.

The Court then turns to the remainder of Nicaragua's straight baselines running from point 1 to point 8. It notes that the Parties are divided on the question whether Nicaragua's offshore islands constitute a "fringe of islands along the coast in its immediate vicinity" within the meaning of Article 7, paragraph 1, of UNCLOS.

The Court begins by ascertaining whether Nicaragua has demonstrated the presence of "islands" and, if so, whether those islands amount to "a fringe … along the coast in its immediate vicinity" as required by customary international law.

The Court is satisfied in general terms, and noting its findings in its 2012 Judgment according to which "[t]here are a number of Nicaraguan islands located off the mainland coast of Nicaragua", that some of the 95 features listed by Nicaragua are islands. The Court must emphasize, nonetheless, that it does not automatically follow that all the features listed by Nicaragua are "islands" or that they constitute "a fringe" within the meaning of Article 7, paragraph 1, of UNCLOS.

The Parties are divided concerning the insular nature of "Edinburgh Cay" and about whether this feature may be considered an island for the purpose of drawing straight baselines under Article 7 of UNCLOS. In light of the case file, the Court considers that there are serious reasons to question whether such is the case. Thus, significant questions arise as to its appropriateness as the location for a base point for the drawing of straight baselines under the same provision. The Court adopts the view that Nicaragua has not demonstrated the insular nature of this feature.

In respect of the existence of a fringe of islands, the Court notes that there are no specific rules regarding the minimum number of islands, although the phrase "fringe of islands" implies that there should not be too small a number of such islands relative to the length of the coast. Given the uncertainty about which of the 95 features are islands, the Court is not satisfied, on the basis of the maps and figures submitted by the Parties, that the number of Nicaragua's islands relative to the length of the coast is sufficient to constitute "a fringe of islands" along Nicaragua's coast.

In determining whether the features identified by the Applicant can be considered a "fringe of islands", the Court observes that customary international law, as reflected in Article 7, paragraph 1, of UNCLOS, requires this fringe to be located "along the coast" and in its "immediate vicinity". Read together with the additional requirements of Article 7, paragraph 3, according to which the drawing of straight baselines "must not depart to any appreciable extent from the general direction of the coast" and "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters", the specific requirements of Article 7, paragraph 1, indicate that a "fringe of islands" must be sufficiently close to the mainland so as to warrant its consideration as the outer edge or extremity of that coast. It is not sufficient that the concerned maritime features be part, in general terms, of the overall geographical configuration of the State. They need to be an integral part of its coastal configuration.

Bearing in mind these considerations, the Court is of the opinion that the Nicaraguan "islands" are not sufficiently close to each other to form a coherent "cluster" or a "chapelet" along the coast and are not sufficiently linked to the land domain to be considered as the outer edge of the coast. Nicaragua asserts that "there are numerous small cays between the mainland and the Corn Islands and that as a consequence the territorial seas of the two merge and overlap" in order to illustrate the relationship between the "islands" and the mainland. However, the Court notes that Nicaragua's straight baselines enclose large maritime areas where no maritime feature entitled to a territorial sea has been shown to exist. The Court further notes that the features and islands located towards the south of Nicaragua's mainland coast appear to be significantly detached from the islands grouped in the north. Furthermore, a notable break in continuity of over 75 nautical miles can be observed between Ned Thomas Cay, on which Nicaragua has plotted base point 4, and Man of War Cays where base point 5 is located. Nicaragua concedes that the groups of islands along its coast are "separate".

Furthermore, the Court is not convinced that Nicaragua's islands "guard … part of the coast" in such a way that they have a masking effect on a large portion of the mainland coast. The Court notes that the Parties disagree about the approach to be adopted to assess the extent of the masking effect of the islands and propose different methods by way of different projections. Without adopting a view concerning the relevance of the projections suggested by the Parties in assessing the masking effect of islands for the purpose of Article 7, paragraph 1, of UNCLOS, the Court considers that, even if it were to accept Nicaragua's approach, the masking effect of the maritime features that the Applicant identifies as "islands" is not significant enough for them to be considered as masking a large proportion of the coast from the sea.

In light of the above findings, the Court cannot accept Nicaragua's contention that there exists a continuous fringe or an "intricate system of islands, islets and reefs which guard this part of the coast" of Nicaragua. It follows that Nicaragua's straight baselines do not meet the requirements of customary international law reflected in Article 7, paragraph 1, of UNCLOS.

Nicaragua's own evidence establishes that the straight baselines convert into internal waters certain areas which otherwise would have been part of Nicaragua's territorial sea or exclusive economic zone and convert into territorial sea certain areas which would have been part of Nicaragua's exclusive economic zone. Nicaragua's straight baselines thus deny to Colombia the rights to which it is entitled in the exclusive economic zone, including the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, as provided under customary international law as reflected in Article 58, paragraph 1, of UNCLOS.

For the reasons set out above, the Court concludes that the straight baselines established by Decree 33, as amended, do not conform with customary international law. The Court considers that a declaratory judgment to that effect is an appropriate remedy.

V. Operative clause (para. 261)

For these reasons,

The Court,

(1) By ten votes to five,

Finds that its jurisdiction, based on Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute regarding the alleged violations by the Republic of Colombia of the Republic of Nicaragua's rights in the maritime zones which the Court declared in its 2012 Judgment to appertain to the Republic of Nicaragua, covers the claims based on those events referred to by the Republic of Nicaragua that occurred after 27 November 2013, the date on which the Pact of Bogotá ceased to be in force for the Republic of Colombia;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; Judge *ad hoc* Daudet;

Against: Judges Abraham, Bennouna, Yusuf, Nolte; Judge *ad hoc* McRae;

(2) By ten votes to five,

Finds that, by interfering with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in the Republic of Nicaragua's exclusive economic zone and by purporting to enforce conservation measures in that zone, the Republic of Colombia has violated the Republic of Nicaragua's sovereign rights and jurisdiction in this maritime zone;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; Judge *ad hoc* Daudet;

Against: Judges Abraham, Bennouna, Yusuf, Nolte; Judge *ad hoc* McRae;

(3) By nine votes to six,

Finds that, by authorizing fishing activities in the Republic of Nicaragua's exclusive economic zone, the Republic of Colombia has violated the Republic of Nicaragua's sovereign rights and jurisdiction in this maritime zone;

In favour: President Donoghue; Judges Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; Judge *ad hoc* Daudet;

Against: Vice-President Gevorgian; Judges Abraham, Bennouna, Yusuf, Nolte; Judge *ad hoc* McRae;

(4) By nine votes to six,

Finds that the Republic of Colombia must immediately cease the conduct referred to in points (2) and (3) above;

In favour: President Donoghue; Judges Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; Judge *ad hoc* Daudet;

Against: Vice-President Gevorgian; Judges Abraham, Bennouna, Yusuf, Nolte; Judge *ad hoc* McRae;

(5) By thirteen votes to two,

Finds that the "integral contiguous zone" established by the Republic of Colombia by Presidential Decree 1946 of 9 September 2013, as amended by Decree 1119 of 17 June 2014, is not in conformity with customary international law, as set out in paragraphs 170 to 187 above;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; Judge *ad hoc* Daudet;

Against: Judge Abraham; Judge *ad hoc* McRae;

(6) By twelve votes to three,

Finds that the Republic of Colombia must, by means of its own choosing, bring into conformity with customary international law the provisions of Presidential Decree 1946 of 9 September 2013, as amended by Decree 1119 of 17 June 2014, in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to the Republic of Nicaragua;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; Judge *ad hoc* Daudet;

Against: Judges Abraham, Yusuf; Judge *ad hoc* McRae;

(7) By twelve votes to three,

Finds that the Republic of Nicaragua's straight baselines established by Decree No. 33–2013 of 19 August 2013, as amended by Decree No. 17–2018 of 10 October 2018, are not in conformity with customary international law;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; Judge *ad hoc* Daudet;

Against: Judges Bennouna, Xue; Judge *ad hoc* McRae;

(8) By fourteen votes to one,

Rejects all other submissions made by the Parties.

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; Judge *ad hoc* Daudet;

Against: Judge *ad hoc* McRae.

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Vice-President Gevorgian appends a declaration to the Judgment of the Court; Judge Tomka appends a separate opinion to the Judgment of the Court; Judge Abraham appends a dissenting opinion to the Judgment of the Court; Judge Bennouna appends a declaration to the Judgment of the Court; Judge Yusuf appends a separate opinion to the Judgment of the Court; Judge Xue appends a declaration to the Judgment of the Court; Judge Robinson appends a separate opinion to the Judgment of the Court; Judge Iwasawa appends a declaration to the Judgment of the Court; Judge Nolte appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* McRae appends a dissenting opinion to the Judgment of the Court.

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Declaration of Vice-President Gevorgian

Vice-President Gevorgian voted against the majority's finding that Colombia has violated Nicaragua's sovereign rights in its EEZ by authorizing fishing in this maritime zone.

In his view, Nicaragua did not substantiate its claim that Colombia issued permits to Colombian and foreign-flagged vessels authorizing them to fish in areas appertaining to Nicaragua's EEZ. In particular, the Vice-President questions whether the alleged acts of Colombian vessels are supported by sufficient evidence. Moreover, even if conclusively proven, he expresses doubts that these acts can be relied on to support the

conclusion that fishing in the relevant areas had been authorized by the Colombian authorities. Finally, the Vice-President remains unconvinced that the resolutions issued by the General Maritime Directorate of the Ministry of National Defence of Colombia (DIMAR) constitute fishing permits and even if so, that they extend to maritime areas appertaining to Nicaragua.

For these reasons, the Vice-President was also unable to vote in favour of the Court's call upon Colombia to cease the relevant actions.

Separate opinion of Judge Tomka

Although Judge Tomka voted in favour of all the conclusions reached by the Court, he offers some observations on two issues in his separate opinion.

The first issue concerns the Court's jurisdiction under Article XXXI of the Pact of Bogotá. Colombia argued that the Court lacked jurisdiction *ratione temporis* to consider any claims made by Nicaragua based on facts that were alleged to have occurred after the Pact ceased to be in force for Colombia. Colombia interpreted Article XXXI of the Pact as containing a temporal limitation on the Court's jurisdiction. Under this interpretation, the Court would have had no jurisdiction to deal with various incidents referred to by Nicaragua that occurred after the Pact ceased to be in force for Colombia. Judge Tomka explains why, in his view, Colombia's argument cannot be accepted.

He considers that Article XXXI, interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the Pact's object and purpose, does not contain any temporal condition or limitation.

He also notes that it is common practice for States to present additional facts after having filed an application before the Court. The limit of States' freedom to present such new facts is that the dispute brought before the Court by the application is not transformed into another dispute which is different in character. Judge Tomka considers that Nicaragua has not, in the present case, transformed the dispute into another dispute which is different in character by relying on incidents that were not mentioned in its Application.

Judge Tomka recalls the well-established principle that once the Court has established jurisdiction to entertain a case, the subsequent lapse of the title of jurisdiction cannot deprive the Court of its jurisdiction. Since the incidents which occurred after the date on which the Pact of Bogotá ceased to be in force for Colombia do not transform the dispute brought before the Court into another dispute which is different in character, they may be considered by the Court when adjudicating on Nicaragua's claim.

Judge Tomka, however, does not share the Court's view that the phrase "so long as the present Treaty is in force" in Article XXXI of the Pact of Bogotá limits the period within which such a dispute must have arisen. In his view, that phrase does not suggest any temporal condition or limitation as to the disputes over which the Court has jurisdiction. Rather, in his view, this phrase concerns the validity in time of the title of jurisdiction provided for in Article XXXI of the Pact. An applicant may initiate proceedings against another State party to the Pact only during the period in which the title of jurisdiction is in force.

Judge Tomka then turns to a second issue, namely the Court's finding on Nicaragua's straight baselines and the legal consequences of this finding. He notes that the Court draws no legal consequences from its finding that Nicaragua's straight baselines are not in conformity with customary international law, but that, by contrast, the Court draws such consequences with respect to its finding that Colombia's "integral contiguous zone" is not in conformity with customary international law. He notes that this discrepancy can only be explained by the fact that Colombia, in contrast with Nicaragua, did not formally request the Court to draw any legal consequences from its finding on Nicaragua's straight baselines.

In his view, there is no doubt that Nicaragua must bring its straight baselines in the Caribbean Sea into conformity with the provisions of the United Nations Convention on the Law of the Sea. These baselines, after all, also affect the interests and rights of other States.

Dissenting opinion of Judge Abraham

Judge Abraham disagrees with the parts of the Judgment relating to jurisdiction *ratione temporis* and the "integral contiguous zone". It is as a result of that disagreement that he voted against most of the paragraphs of the operative clause.

Regarding the Court's jurisdiction over facts that occurred after 27 November 2013, Judge Abraham first observes that the matter was resolved neither explicitly nor implicitly by the 2016 Judgment. He then notes that the precedents invoked by the Parties are irrelevant given the novel character of the question that arises in the present case. In Judge Abraham's view, it is hard to reconcile Article XXXI of the Pact of Bogotá with the idea that the Court can exercise its jurisdiction over facts that occurred after the denunciation of the Pact took effect. That those facts were invoked in the context of a case which was already pending before the Court does not alter that finding. Judge Abraham observes that the precedents referred to by the Court concern the admissibility of new claims introduced in the course of proceedings, rather than its jurisdiction. In his view, the relative flexibility shown in the jurisprudence on the admissibility of such new claims is not justified when the Court has to examine a question of jurisdiction, an area in which a certain rigour is called for. Although the Court examined this issue from the standpoint of jurisdiction in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, in that instance it was a matter of interpreting the material scope of France's consent to the jurisdiction of the Court, and not a question of jurisdiction *ratione temporis*. Judge Abraham acknowledges that the Court may be required to examine facts occurring after the lapse of the jurisdictional title in a situation where the facts form an indivisible whole. In the present case, the facts subsequent and prior to the critical date are entirely separable, even though they are more or less of a similar nature.

With respect to the question of the "integral contiguous zone", Judge Abraham is of the view that the approach adopted by the majority is too abstract. He emphasizes that Nicaragua's

claim was limited to alleged violations of its own rights in its exclusive economic zone, a fact of which the Judgment tends to lose sight. In this instance, the question of the conformity of the "integral contiguous zone" with international law does not fully coincide with the question of respect for the rights invoked by Nicaragua as a coastal State. For Judge Abraham, it is the "sovereign rights" and "jurisdiction" of the coastal State as they derive from the customary rule reflected in Article 56, paragraph 1 (*a*) and (*b*), of UNCLOS that should have served as reference points for the examination of Decree 1946 establishing the contiguous zone. The question of the breadth of the "integral contiguous zone" was of little relevance in this regard. With respect to the provisions of Decree 1946 relating to security, Judge Abraham considers that the Judgment does not demonstrate that there has been a violation of the "sovereign rights" and "jurisdiction" of Nicaragua, but merely examines *in abstracto* whether those provisions are in conformity with customary international law. Finally, Judge Abraham is of the view that the mere promulgation by Colombia of the Decree in question, without any concrete measures to implement the provisions at issue, cannot in itself be regarded as constituting an internationally wrongful act, since the Decree could be interpreted, at the implementation stage, in a manner which reconciles it with Nicaragua's rights.

Declaration of Judge Bennouna

Judge Bennouna voted against the decision of the Court, which found that it had jurisdiction *ratione temporis* to entertain facts and events alleged by Nicaragua to have occurred after 27 November 2013 (paragraph 261, subparagraph 1). He considers the Court should have interpreted the Pact of Bogotá, and in particular the compromissory clause contained in its Article XXXI, using the means of interpretation provided for in the 1969 Vienna Convention on the Law of Treaties. In order to comply with Article XXXI of the Pact of Bogotá, the Court should thus have declared that it lacked jurisdiction to rule on all incidents alleged by the Applicant to have occurred after the critical date of 27 November 2013.

Judge Bennouna points out that none of the cases to which the Court refers (paragraph 44) concerns facts or events that occurred after the jurisdictional title was no longer in force between the parties. It is clear, therefore, that the present case cannot be treated in the same way as the precedents mentioned by the Court, since the situation concerned is not comparable to them.

In view of the foregoing, Judge Bennouna also voted against subparagraph 2 of the operative clause relating to Colombia's violations of Nicaragua's sovereign rights and jurisdiction (paragraph 250, subparagraph 2) and subparagraph 3, relating to the granting of fishing permits by Colombia (paragraph 250, subparagraph 3).

Finally, Judge Bennouna voted against subparagraph 7 of the operative clause, which states that Nicaragua's straight baselines are not in conformity with customary international law (paragraph 250, subparagraph 7). He underlines that this is a counter-claim relating to alleged violations of Colombia's sovereign rights and maritime spaces resulting from the use of straight baselines by Nicaragua. In his view, the Court would only be able to assess whether Nicaragua's straight baselines were consistent with international law if Colombia could prove that the drawing of such baselines by Nicaragua specially affected its own rights in its exclusive economic zone.

Separate opinion of Judge Yusuf

In his separate opinion, Judge Yusuf explains his disagreement with the conclusion in subparagraph (1) of the *dispositif* of the Judgment concerning the jurisdiction of the Court *ratione temporis*. According to Judge Yusuf, the Judgment should have undertaken a detailed analysis of the interpretation of Article XXXI of the Pact of Bogotá, which sets out the limits and conditions of the Court's jurisdiction. In his view, an interpretation of the text of Article XXXI would have led to the conclusion that the Court's jurisdiction *ratione temporis* does not extend to claims by Nicaragua based on incidents that occurred after 27 November 2013, the date on which the Pact of Bogotá ceased to be in force for Colombia. According to Judge Yusuf, the text of Article XXXI makes it abundantly clear that the Court's jurisdiction *ratione temporis* is limited to claims based on facts which occurred before the treaty ceased to be in force between the parties.

Judge Yusuf also notes that the Court has never been confronted with a similar situation. It is therefore his view that, contrary to what is stated in paragraph 45 of the Judgment, there is nothing in the 2016 Judgment to suggest that the Court's jurisdiction extends to facts subsequent to the termination of the Pact of Bogotá with respect to Colombia. The "dispute" found by the Court to exist in its 2016 Judgment was limited to the facts "at the date on which the Application was filed", *i.e.* before the lapse of the jurisdictional title. Additionally, Judge Yusuf is of the view that the Court's jurisprudence on the admissibility of new facts or claims that occurred after the filing of the Application, but while the title of jurisdiction still existed, is inapposite to the question of whether the lapse of the jurisdictional title had an effect on the Court's jurisdiction to examine incidents that allegedly occurred after the Pact of Bogotá ceased to be in force between the Parties. In his view, this jurisprudence presupposes the continued existence of a valid jurisdictional title, which is not the case here. Finally, Judge Yusuf points out that the incidents that allegedly occurred before and after 27 November 2013 cannot be considered as being in all instances of "the same nature", since some of them are neither uniform in character nor do they always relate to identical facts or possess common legal bases.

Judge Yusuf also disagrees with the Court's conclusion in subparagraph (6) of the *dispositif* concerning the conformity with customary international law of the provisions of the Colombian Presidential Decree 1946 of 9 September 2013 as amended by Decree No. 1119 of 17 June 2014. It is not solely by enacting the provisions of the Decree as such, but through their implementation in establishing the "integral contiguous zone" and enforcing its powers therein that Colombia has breached the rights of Nicaragua in the latter's EEZ. The Judgment itself does not say anywhere that Colombia has breached its obligations under customary international law by merely enacting the Decree or that it is the Decree, in and of itself, which is not in conformity with international law.

It rather finds that it is the "integral contiguous zone" established by Colombia that is not in conformity with customary international law. This finding is afterwards reflected in subparagraph (5) of the *dispositif*, with which subparagraph (6) is not consistent. Therefore, according to Judge Yusuf, the obligation to bring the situation into conformity with customary international law should, by logical necessity, relate to the "integral contiguous zone" itself, rather than the provisions of the Presidential Decree as such, as formulated in subparagraph (6) of the *dispositif*.

Declaration of Judge Xue

Judge Xue agrees with the Court's conclusion on Colombia's third counter-claim relating to the artisanal fishing rights of the inhabitants of the San Andrés Archipelago. In regard to traditional or historic fishing rights, however, she makes a few observations.

Judge Xue considers that traditional fishing rights, which primarily concern artisanal fishing that may have existed for centuries, are recognized and protected under customary international law. She notes that, at the Second and Third United Nations Conferences on the Law of the Sea, States held divergent views as to whether a coastal State should enjoy exclusive rights to exploit living resources in the exclusive economic zone and to what extent traditional fishing may be maintained. In this regard, both traditional artisanal fishing and distant-water industrial fishing were mentioned.

Contrary to Nicaragua's assertion that developing countries "strenuously objected" to the protection of traditional fishing rights, Judge Xue observes that those countries were actually very critical of foreign industrial and commercial fishing practices, particularly of those "prescriptive rights" acquired under colonialism. At the same time, they were sympathetic to the fishing interests of the developing countries whose economy depended on fisheries.

Judge Xue notes that the establishment of the exclusive economic zone régime is one of the major achievements of the Third United Nations Conference on the Law of the Sea, largely responding to concerns of the coastal States over the exploitation of living resources by industrial and commercial fishing of foreign fleets in their coastal waters and the need to ensure optimum utilization of natural resources of the sea. This new régime has fundamentally changed the fishery limits in the sea and put an end to the freedom of fishing in the areas that fall within the exclusive economic zone of the coastal States.

With regard to Article 51, paragraph 1, of UNCLOS, she considers that the drafting history does not support Nicaragua's interpretation that this provision is the only exception that preserves traditional fishing rights under UNCLOS. She points out that the *travaux préparatoires* show that Article 51, paragraph 1, was intended to maintain a balance of rights and interests between the archipelagic States and their regional neighbours, whose fishing interests would be substantially jeopardized by the enclosure of the archipelagic waters. Confined to a special régime, Article 51, paragraph 1, concerns solely traditional fishing rights in the archipelagic waters. There is no legal basis in international law to preclude the existence of traditional fishing rights under other circumstances.

Commenting on Nicaragua's contention that, by virtue of Article 62, paragraph 3, on habitual fishing, the Convention has settled the relationship between the exclusive economic zone and traditional fishing rights, Judge Xue considers that such conclusion is over-sweeping. Habitual fishing may include certain types of traditional fishing activities carried out by individual fishermen of other States, but in the context of the Article, that factor alone cannot be taken to presume that all situations relating to traditional fishing rights are encompassed by that Article.

In Judge Xue's view, the advent of the régime of the exclusive economic zone as set forth in UNCLOS does not, in and of itself, extinguish traditional fishing rights that may be found to exist under customary international law. On the relationship between UNCLOS and customary international law, Judge Xue refers to the settled jurisprudence of the Court and states that, unless and until traditional fishing rights are explicitly negated by treaty law or new customary rules, they will continue to exist under customary international law. As the Preamble of UNCLOS affirms, "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

Judge Xue observes that traditional fishing rights are recognized and protected by State practice, judicial jurisprudence and arbitral awards. In order to establish traditional fishing rights, two conditions are often applied: first, traditional fishing rights have to be borne out by "artisanal fishing" and, secondly, such fishing activities must have continued consistently for a lengthy period of time. The first element is applied primarily to distinguish traditional fishing from industrial fishing, while the second element has to be assessed under the circumstances of each case. In the present case, Judge Xue considers that, although the evidence adduced by Colombia is not considered sufficient to prove its claim, the statements of the Nicaraguan President do not deny the existence of traditional fishing of the inhabitants of the San Andrés Archipelago, particularly of the Raizales. In order to preserve the local tradition and custom of the San Andrés Archipelago, she takes the view that an agreement on fisheries for the benefit of the Raizales community between the Parties would contribute to a stable and co-operative relationship in the region.

Separate opinion of Judge Robinson

1. Having voted in favour of the Court's finding that Colombia has breached Nicaragua's sovereign rights in its exclusive economic zone ("EEZ"), in his opinion, Judge Robinson makes observations on the Court's treatment of a coastal State's sovereign rights in its EEZ.

2. First, Judge Robinson notes that the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention") provides a set of interlocking rights and duties to govern the relationship between the coastal State and other States in relation to the EEZ. In his view, by the due regard obligations provided for in Articles 56 (2) and 58 (3) of UNCLOS, the Convention attempts to strike a

balance between the rights and duties of the coastal State in its EEZ and the rights and duties of other States in that zone. Judge Robinson expresses disagreement with commentators who maintain that Article 56 is a "relevant provision" for the purposes of Article 58 (1) of the Convention. In his view, the effect of such a reading of the Convention would subordinate the freedoms enjoyed by other States in the EEZ to the coastal State's sovereign rights in that zone. This result, he concludes, was not intended in the negotiations of the Convention.

3. Judge Robinson considers that the issues raised by Nicaragua's claim and Colombia's response call for an examination of the rights, duties and jurisdiction of the coastal State in its EEZ, as well as the nature of the rights and freedoms of other States in the zone, particularly the freedom of navigation. In this regard, he is of the view that the Judgment of the Court would have been significantly strengthened by a discussion of the nature of the coastal State's sovereign rights in its EEZ to show that those rights are exclusive to the coastal State, and a discussion of the nature and scope of the freedom of navigation on which Colombia relied.

4. Concerning the nature and scope of the freedom of navigation, Judge Robinson opines that, in the context of Part V of the Convention, that freedom encompasses the free passage or movement of ships of third States in the EEZ of a coastal State without any entitlement on the part of the coastal State to restrict that passage or movement in any way, unless there is carried out on the ship an activity that is not directly related with that passage or movement and interferes with the enjoyment by the coastal State of its sovereign rights. In this regard, he notes, the freedom of navigation under Article 58 (1) is more limited than freedom of navigation on the high seas under Article 87 since the sovereign rights—of the coastal State in its EEZ—to explore, exploit, conserve and manage its living and non-living resources will impact on a third State's freedom of navigation in that zone. As such, the activities carried out by Colombian naval vessels of harassing Nicaraguan fishermen and stopping Nicaraguan fishing vessels or other Nicaraguan-licensed vessels in order to apply what Colombia considers to be proper conservation methods, are not directly related to the passage of the ship and do not fall within the scope of the freedom of navigation under Article 58. Those activities, therefore, constitute a breach of Nicaragua's sovereign rights to explore, exploit, conserve and manage its natural resources, including fishing. In any event, by carrying out those activities in Nicaragua's EEZ, Colombia would have failed to satisfy the substantive due regard requirement of Article 58 (3).

5. Judge Robinson next considers the nature and scope of Nicaragua's sovereign rights in its EEZ. In his view, it is not merely, as the Court holds, that rights relating to the exploration, exploitation, conservation and management of the natural resources of the EEZ, as well as the power to design conservation policies for the zone, are "specifically reserved for the coastal State"; rather, it is that they are exclusively reserved for the coastal State. This conclusion follows from the history of the development of the concept of an EEZ, the negotiations preceding the adoption of UNCLOS, and the text of the Convention itself. Judge Robinson further notes that the design of the Convention does not admit of States other than the coastal State exercising any of the sovereign rights attributed to that State in its EEZ for the purpose of conserving and managing the fisheries resources. The only exception to this exclusivity, Judge Robinson opines, is the obligation under Article 62 (2) to give other States access to the surplus of the allowable catch through agreements or other arrangements, and in doing so to have particular regard to the provisions of Articles 69 and 70.

6. Judge Robinson further notes that the obligations of the coastal State relating to the conservation and management of the resources of its EEZ are as exclusive to that State as are its sovereign rights to exploit, explore, conserve and manage those resources. As such, a State's perception that a coastal State is not discharging its obligation to conserve and manage its living resources, even if it is well founded, does not give the former State the right to assume the responsibility of discharging those obligations.

7. An important indicator of the exclusivity of the coastal State's sovereign rights to conserve and manage the living resources of its EEZ, in Judge Robinson's estimation, is the extensive and far-reaching power given to the coastal State pursuant to Article 73 (1) of the Convention. If the coastal State has exclusive sovereign rights for the purpose of exploring, exploiting, conserving and managing its living and non-living resources, it is to be expected that it would also have the power to adopt measures within the zone that would enable it to enjoy those rights. This conclusion, Judge Robinson states, is supported by the decision of the International Tribunal for the Law of the Sea in *M/V Virginia G*.

8. Finally, Judge Robinson considers whether the jurisdiction of a State over vessels flying its flag is an exception to the exclusive sovereign rights of the coastal State in its EEZ. Judge Robinson concludes that while the power of the flag State over its vessels under Articles 92 and 94 of UNCLOS is exclusive, the exercise of that power within the EEZ of a coastal State is governed by Article 58 (2) of the Convention, which provides that "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part". Thus, while a flag State has exclusive jurisdiction over its ships on the high seas, and may therefore set conservation standards for those ships while they are on the high seas, in the EEZ it is the coastal State that has the exclusive right and duty to set the applicable conservation standards for the zone.

Declaration of Judge Iwasawa

Judge Iwasawa offers his views on Colombia's integral contiguous zone and the Court's reasoning in that regard.

The Court finds that Article 33, paragraph 1, of UNCLOS reflects customary international law on the contiguous zone in respect of the powers that a coastal State may exercise in that zone, and that, in its contiguous zone, a coastal State may not exercise control with respect to security matters. Judge Iwasawa considers it significant that, at the Third United Nations Conference on the Law of the Sea, there were no proposals to add other matters to the list in Article 33, paragraph 1.

Article 56, paragraph 1, of UNCLOS provides that, in the exclusive economic zone, the coastal State has

(*a*) sovereign rights over natural resources and (*b*) jurisdiction with regard to the protection of the marine environment. Paragraph 1 (*c*) further indicates that the coastal State also has "other rights" provided for in the Convention. Judge Iwasawa explains that the coastal State has freedom of navigation in its exclusive economic zone.

Judge Iwasawa considers that the power to prevent and control infringements relating to the "integral security of the State", including drug trafficking and "conduct contrary to security in the sea" in Article 5 (3) of Colombia's Presidential Decree 1946 does not, in itself, affect Nicaragua's sovereign rights and jurisdiction, but it unquestionably encroaches on Nicaragua's freedom of navigation in its exclusive economic zone.

The Court concludes that Colombia's integral contiguous zone is not in conformity with customary international law and infringes upon Nicaragua's "sovereign rights and jurisdiction" in its exclusive economic zone. Judge Iwasawa is of the view that Colombia's integral contiguous zone also infringes on Nicaragua's freedom of navigation in its exclusive economic zone.

As regards appropriate remedies, the Court finds that Colombia must, by means of its own choosing, bring into conformity with customary international law the provisions of Presidential Decree 1946, "in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua". Judge Iwasawa points out that the Court indicates a remedy in this form in response to Nicaragua's request in its final submissions.

Dissenting opinion of Judge Nolte

In his dissenting opinion, Judge Nolte explains the reasons for his disagreement with the Court's decision to recognize and exercise jurisdiction with regard to facts or events which took place after 27 November 2013, the date on which the Pact of Bogotá ceased to be in force with respect to Colombia.

Judge Nolte believes that the reasoning underlying this decision is not convincing. According to Judge Nolte, all but one of the cases cited in support of the Court's exercise of jurisdiction *ratione temporis* concern the admissibility of late claims, not the jurisdiction of the Court *ratione temporis*. In his view, the one remaining decision, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, offers an *obiter dictum* which only nominally addresses jurisdiction *ratione temporis*.

Judge Nolte is of the view that the question is whether the parties to the Pact of Bogotá intended to limit the temporal scope of the jurisdiction conferred on the Court. According to Judge Nolte, this question should be answered by way of an interpretation of Articles XXXI and LVI of the Pact of Bogotá in accordance with the customary rules on the interpretation of treaties, and not by applying certain elements of the Court's jurisprudence which concern other legal questions. In his view, the parties cannot be presumed to have intended to extend the jurisdiction of the Court to what are severable factual elements which could not have been submitted independently after the expiration of the Court's jurisdictional basis. While acknowledging that this may be different for acts, or a series of acts, which together constitute a "composite act" in the sense of Article 15 of the ILC Articles on State Responsibility, he is of the view that the legal significance of the incidents alleged by Nicaragua to have taken place before 27 November 2013 is not affected by alleged subsequent incidents. These considerations, according to Judge Nolte, indicate that a termination under Article XXXI has the effect of precluding the Court's consideration of facts or events which occur after the treaty has expired for a party.

Finally, Judge Nolte notes that by drawing only a very limited conclusion from the evidence presented by the Parties with respect to the alleged Miss Sofia incident, the Court in effect acknowledges that Nicaragua has not proven any of the incidents which allegedly took place before 27 November 2013.

Dissenting opinion of Judge *ad hoc* McRae

Judge *ad hoc* McRae dissents in respect of all of the Court's findings in the case although, as a preliminary matter, he notes that he does agree with the Court's conclusion that Colombia's Integral Contiguous Zone should not exceed 24 nautical miles.

Judge *ad hoc* McRae considers that the Court's conclusion that it has jurisdiction *ratione temporis* in respect of events that allegedly took place after the lapse of the jurisdictional title is crucial, because Colombia's responsibility in respect of alleged incidents in Nicaragua's EEZ is almost exclusively founded on post-jurisdiction events. Judge *ad hoc* McRae argues that the Court provides no explanation why the rule for the admissibility of events subsequent to the date of application should be applied to events subsequent to the lapse of jurisdictional title. For Judge *ad hoc* McRae, considerations of efficiency, which warrant the assumption of jurisdiction over events subsequent to the date of the application, are not present where the jurisdictional title has lapsed. Judge *ad hoc* McRae explains that, while the Court may take account of events after the lapse of the jurisdictional title, it may not establish responsibility on their basis. In Judge *ad hoc* McRae's view, both the Court's jurisprudence and its 2016 Judgment are silent on the point now decided by the Court, and policy considerations in favour of the position taken by the Court are outweighed by the principle that jurisdiction must be based on consent.

Judge *ad hoc* McRae then turns to Colombia's contested actions in Nicaragua's EEZ, noting from the outset that Colombia's responsibility could not have been established if it were not for events outside the Court's jurisdiction *ratione temporis*. With respect to the incidents involving interaction between the Nicaraguan coast guard and Colombian naval vessels, and a marine scientific research vessel, Judge *ad hoc* McRae points out that the Court should have focused on the conduct alleged to have occurred, rather than on the mere presence of vessels in Nicaragua's EEZ. Judge *ad hoc* McRae then turns to the incidents involving Colombian naval vessels confronting Nicaraguan-flagged or -authorized fishing vessels, observing that these incidents did not involve enforcement action on the part of Colombia. In those few incidents where specific action is alleged, the facts are disputed. In Judge *ad hoc* McRae's view, the Court concluded that Colombia asserted control based on Colombia's statements, whereas it

should have instead examined Colombia's conduct. Judge *ad hoc* McRae argues that the Court should have focused on the fact that Colombia's activities in Nicaragua's EEZ were simply those of monitoring and informing. However, Judge *ad hoc* McRae considers that by failing to inform Nicaragua of those activities, Colombia had not exercised its rights in Nicaragua's EEZ with due regard to Nicaragua's rights as a coastal State.

Judge *ad hoc* McRae further considers that the evidence on which the Court relies for its finding that Colombia authorized fishing in Nicaragua's EEZ is at best problematic. According to Judge *ad hoc* McRae, the incidents invoked by the Court do not constitute proof of licences being issued by Colombia and, even if the facts were established, they would show at most that when exercising its rights, Colombia failed to have due regard to Nicaragua's rights as a coastal State.

Turning to the question of Colombia's ICZ, Judge *ad hoc* McRae notes his agreement with the Court's conclusion that Colombia's ICZ may overlap with Nicaragua's EEZ and that it may not exceed 24 nautical miles. However, Judge *ad hoc* McRae considers that the powers claimed by Colombia are in conformity with international law. Judge *ad hoc* McRae argues that the rule reflected in Article 33 of UNCLOS should be interpreted in an evolutionary manner, so that it meets contemporary concerns with respect to security and health, including the protection of the environment. Judge *ad hoc* McRae further emphasizes that, in its ICZ, Colombia claims the power to prevent and punish acts committed on its territory or in its territorial sea, but not in the ICZ itself. Therefore, there is no basis for the Court's conclusion that Colombia was asserting a power to conserve, protect and preserve the marine environment in Nicaragua's EEZ.

Judge *ad hoc* McRae then addresses Colombia's counter-claims. With respect to the counter-claim about traditional fishing rights, Judge *ad hoc* McRae notes that Colombia identifies the Raizales as a group that is distinct from other inhabitants of the San Andrés Archipelago and describes them in a way that suggests that they are akin to indigenous peoples. According to Judge *ad hoc* McRae, the Nicaraguan President has consistently used language indicating that the claim of the Raizales to fishing is analogous to an indigenous right, namely, a right that is an inherent consequence of the status of the Raizales as a particular group often described as original or indigenous peoples. Judge *ad hoc* McRae stresses that the Court failed to appreciate the real nature of the claim relating to the Raizales. Thus, the agreement proposed by the Court between the Parties should be to ensure the implementation of existing rights, rather than the establishment of new fishing rights for the Raizales.

Lastly, Judge *ad hoc* McRae argues that the Court's approach to the counter-claim concerning Nicaragua's use of straight baselines constituted a decontextualized application of the law relating to drawing straight baselines in disregard of relevant State practice. Judge *ad hoc* McRae explains that the terms of Article 7 of UNCLOS reflect the Court's findings in the 1951 *Fisheries* case, which however cannot easily be applied to coasts different from those of Norway. In Judge *ad hoc* McRae's view, the Court failed to clarify the imprecise terms of Article 7. Judge *ad hoc* McRae argues that the Court should have instead considered how States have interpreted and applied those terms in practice. According to Judge *ad hoc* McRae, Nicaragua's straight baselines do not seem to be out of line with the practice of States, which, as Judge *ad hoc* McRae observes, is rarely objected to by other States. Judge *ad hoc* McRae concludes by noting that this was not the case for the Court to provide a definitive interpretation of Article 7 of UNCLOS and that, in doing so, the Court has increased uncertainty in this area.

250. APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (THE GAMBIA *v.* MYANMAR) [PRELIMINARY OBJECTIONS]

Judgment of 22 July 2022

On 22 July 2022, the International Court of Justice delivered its Judgment on the preliminary objections raised by Myanmar in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar).* The Court found that it had jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to entertain the Application filed by the Republic of The Gambia on 11 November 2019, and that the Application was admissible.

The Court was composed as follows: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; Judges *ad hoc* Pillay, Kress; Registrar Gautier.

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History of the proceedings (paras. 1–27)

The Court begins by recalling that, on 11 November 2019, the Republic of The Gambia (hereinafter "The Gambia") filed in the Registry of the Court an Application instituting proceedings against the Republic of the Union of Myanmar (hereinafter "Myanmar") concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter the "Genocide Convention" or the "Convention"). In its Application, The Gambia seeks to found the Court's jurisdiction on Article IX of the Genocide Convention, in conjunction with Article 36, paragraph 1, of the Statute of the Court.

The Application contained a Request for the indication of provisional measures. By an Order dated 23 January 2020, the Court indicated certain provisional measures.

On 20 January 2021, Myanmar raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application.

I. Introduction (paras. 28–33)

The Court notes that The Gambia and Myanmar are parties to the Genocide Convention and that they did not enter any reservation to Article IX, which reads as follows:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

After setting out the four preliminary objections to the jurisdiction of the Court and the admissibility of the Application raised by Myanmar, the Court notes that, when deciding on preliminary objections, it is not bound to follow the order in which they are presented by the respondent. In the present case, the Court starts by addressing the preliminary objection relating to the "real applicant" in the case (first preliminary objection), before turning to the existence of a dispute (fourth preliminary objection) and Myanmar's reservation to Article VIII of the Genocide Convention (third preliminary objection). Finally, the Court deals with the preliminary objection pertaining to the standing of The Gambia (second preliminary objection), which presents a question of admissibility only.

II. Whether The Gambia is the "real applicant" in this case (first preliminary objection) (paras. 34–50)

The Court notes that, in its first preliminary objection, Myanmar argues that the Court lacks jurisdiction, or alternatively that the Application is inadmissible, because the "real applicant" in the proceedings is the Organisation of Islamic Cooperation (hereinafter the "OIC"), an international organization, which cannot be a party to proceedings before the Court pursuant to Article 34, paragraph 1, of the Statute of the Court. The Court first examines the question of its jurisdiction.

A. Jurisdiction ratione personae (paras. 35–46)

The Court explains that it establishes its jurisdiction *ratione personae* on the basis of the requirements laid down in the relevant provisions of its Statute and of the Charter of the United Nations. It is incumbent upon it to examine first of all the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute and whether the Court is thus open to it. Pursuant to Article 34, paragraph 1, of the Statute, "[o]nly States may be parties in cases before the Court". According to Article 35, paragraph 1, of the Statute, "[t]he Court shall be open to the States parties to the present Statute". Article 93, paragraph 1, of the Charter of the United Nations provides that "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice". The Gambia has been a Member of the United Nations since 21 September 1965 and is *ipso facto* a party to the Statute of the Court. The Court therefore considers that The Gambia meets the above-mentioned requirements.

Myanmar submits, however, that in bringing its claims before the Court, The Gambia has in fact acted as an "organ, agent or proxy" of the OIC, which is the "true applicant" in these proceedings. Its main contention is that a third party, namely the OIC, which is not a State and cannot therefore have a reciprocal acceptance of jurisdiction with the respondent State, has used The Gambia as a "proxy" in order to circumvent the limits of the Court's jurisdiction *ratione personae* and invoke the compromissory clause of the Genocide Convention on its behalf.

The Court notes that The Gambia instituted the present proceedings in its own name, as a State party to the Statute of the Court and to the Genocide Convention. It also notes The Gambia's assertion that it has a dispute with Myanmar regarding its own rights as a State party to that Convention. The Court observes that the fact that a State may have accepted the

proposal of an intergovernmental organization of which it is a member to bring a case before the Court, or that it may have sought and obtained financial and political support from such an organization or its members in instituting these proceedings, does not detract from its status as the applicant before the Court. Moreover, the question of what may have motivated a State such as The Gambia to commence proceedings is not relevant for establishing the jurisdiction of the Court.

The Court then responds to Myanmar's argument that the approach taken by the Court to establish the existence of a dispute should be followed in cases where the identity of the "real applicant" is at issue. According to Myanmar, the Court should look beyond the narrow question of who is named in the proceedings as the applicant and make an objective determination as to the identity of the "real applicant", based on an examination of the relevant facts and circumstances as a whole. The Court states that it is of the view that these are distinct legal questions. In the present case, the Court sees no reason why it should look beyond the fact that The Gambia has instituted proceedings against Myanmar in its own name. The Court is therefore satisfied that the Applicant in this case is The Gambia.

The Court concludes that, in light of the above, the first preliminary objection raised by Myanmar, in so far as it concerns the jurisdiction of the Court, must be rejected.

B. Admissibility (paras. 47–49)

The Court recalls that it has already found that the Applicant in these proceedings is The Gambia, a State party to the Statute of the Court and a party to the Genocide Convention, which confers on the Court jurisdiction over disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention. The Court notes that, as it has held previously, it is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process. The Court observes that no evidence has been presented to it showing that the conduct of The Gambia amounts to an abuse of process. Nor is the Court confronted in the present case with other grounds of inadmissibility which would require it to decline the exercise of its jurisdiction. Thus, the first preliminary objection of Myanmar, in so far as it concerns the admissibility of The Gambia's Application, must be rejected.

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In light of the foregoing, the Court concludes that the first preliminary objection of Myanmar must be rejected.

III. Existence of a dispute between the Parties (fourth preliminary objection) (paras. 51–77)

The Court notes that, in its fourth preliminary objection, Myanmar argues that the Court lacks jurisdiction, or alternatively that the Application is inadmissible, because there was no dispute between the Parties on the date of filing of the Application instituting proceedings.

The Court recalls that the existence of a dispute between the Parties is a requirement for its jurisdiction under Article IX of the Genocide Convention. According to its established case law, a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between parties. In order for a dispute to exist, it must be shown that the claim of one party is positively opposed by the other. The two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations. The Court's determination of the existence of a dispute is a matter of substance and not a question of form or procedure. In principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court. However, conduct of the parties subsequent to the application may be relevant for various purposes, in particular to confirm the existence of a dispute. In making such a determination, the Court takes into account in particular any statements or documents exchanged between the parties, as well as any exchanges made in multilateral settings. In so doing, it pays special attention to the author of the statement or document, their intended or actual addressee, and their content.

In this regard, the Court notes that in the present case there are four relevant statements made by representatives of the Parties before the United Nations General Assembly in September 2018 and September 2019. These statements were made during the 2018 and 2019 general debates of the Assembly, which took place in the weeks following the publication of two reports by the Fact-Finding Mission on Myanmar established by the Human Rights Council of the United Nations (hereinafter the "Fact-Finding Mission"), on 12 September 2018 and on 8 August 2019, respectively. Also relevant to the determination of the existence of a dispute is the Note Verbale that The Gambia sent to the Permanent Mission of Myanmar to the United Nations on 11 October 2019.

After examining the content and context of the Parties' statements before the United Nations General Assembly in September 2018 and September 2019, the Court notes that Myanmar contests the existence of a dispute between the Parties on two grounds. First, Myanmar argues that the statements made in the General Assembly and the Note Verbale sent by The Gambia on 11 October 2019 lacked sufficient particularity, in the sense that The Gambia did not specifically articulate its legal claims. Secondly, Myanmar maintains that the requirement of "mutual awareness" is not satisfied because it has never rejected specific claims by The Gambia. The Court examines these two grounds advanced by Myanmar to contest the existence of a dispute between the Parties.

With regard to Myanmar's argument that the existence of a dispute requires what Myanmar refers to as "mutual awareness" by both parties of their respective positively opposed positions, the Court is of the opinion that the conclusion that the parties hold clearly opposite views concerning the performance or non-performance of legal obligations does not require that the respondent must expressly oppose the claims of the applicant. If that were the case, a respondent could prevent a finding that a dispute exists by remaining silent in the face of an applicant's legal claims. Such a consequence would be unacceptable. It is for this reason that the Court considers that, in case the respondent has failed to reply to the applicant's claims, it may be inferred from this silence, in certain circumstances, that it rejects those claims and that, therefore, a dispute exists at the time of the application. Consequently, the Court is of the view that the requirement of "mutual

awareness" based on two explicitly opposed positions, as put forward by Myanmar, has no basis in law.

Turning to Myanmar's argument that the statements made by The Gambia before the United Nations General Assembly lacked sufficient particularity, the Court notes that those statements did not specifically mention the Genocide Convention. The Court, however, does not consider that a specific reference to a treaty or to its provisions is required in this regard. As the Court has affirmed in the past, while it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court, the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. In this context, the Court notes that the statements of The Gambia in September 2018 and in September 2019 were made shortly after the publication of the Fact-Finding Mission's reports. The 2018 report specifically alleged the perpetration of crimes in Rakhine State that were similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts, while the 2019 report specifically referred to Myanmar's responsibility under the Genocide Convention. The Gambia was undoubtedly referring in its statement to the findings of these reports, which were the key United Nations reports on the situation of the Rohingya population in Myanmar and which had been referred to in various reports that were before the General Assembly. In particular, the second report of the Fact-Finding Mission identified The Gambia as one of those States making efforts to pursue a case against Myanmar before the Court under the Convention. Myanmar could not have been unaware of this fact. Similarly, Myanmar's rejection of the findings of these reports demonstrates that it was positively opposed to any allegations of genocide being committed by its security forces against the Rohingya communities in Myanmar, as well as to the allegations of its responsibility under the Genocide Convention for carrying out acts of genocide. Such allegations were contained in the two reports and publicly taken up by The Gambia.

The Court considers that the statements made by the Parties before the United Nations General Assembly in 2018 and 2019 indicate the opposition of their views on the question whether the treatment of the Rohingya group was consistent with Myanmar's obligations under the Genocide Convention. Myanmar could not have been unaware of the fact that The Gambia had expressed the view that it would champion an accountability mechanism for the alleged crimes against the Rohingya, following the release of the Fact-Finding Mission's report of 2018. More importantly, Myanmar could not have failed to know of the announcement by the Vice-President of The Gambia before the General Assembly during the general debate in September 2019 that her Government intended to lead concerted efforts to take the Rohingya issue to the Court. It was The Gambia, and The Gambia alone, that had expressed such an intention before the General Assembly in 2019. The statements made in both 2018 and 2019 before the General Assembly by Myanmar's Union Minister for the Office of the State Counsellor express views of his Government which are opposed to those of The Gambia's and clearly reject the reports and findings of the Fact-Finding Mission.

Moreover, the Note Verbale sent by The Gambia to the Permanent Mission of Myanmar to the United Nations on 11 October 2019 brought clearly into focus the positive opposition of views between the Parties, by expressing specifically and in legal terms The Gambia's position concerning Myanmar's alleged violations of its obligations under the Genocide Convention. In its Note Verbale, The Gambia referred to the findings of the Fact-Finding Mission, especially those regarding the "ongoing genocide against the Rohingya people of the Republic of the Union of Myanmar in violation of Myanmar's obligations under the Convention on the Prevention and Punishment of the Crime of Genocide", which it considered to be "well-supported by the evidence and highly credible". It also "emphatically reject[ed] Myanmar's denial of its responsibility for the ongoing genocide against Myanmar's Rohingya population, and its refusal to fulfill its obligations under the Genocide Convention", and it asked Myanmar to comply with those obligations.

The Court further notes that Myanmar never responded to this Note Verbale. As was previously held by the Court, the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*; the position or the attitude of a party can be established by inference, whatever the professed view of that party. In particular, the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.

The Court recalls that Myanmar was informed, through the reports of the Fact-Finding Mission of 2018 and 2019, of the allegations made against it concerning violations of the Genocide Convention. It also had an indication of The Gambia's opposition to its views on this matter, as reflected in statements by the representatives of The Gambia and Myanmar before the United Nations General Assembly. Thus, the Note Verbale did not constitute the first time that these allegations were made known to Myanmar. In light of the nature and gravity of the allegations made in The Gambia's Note Verbale and Myanmar's prior knowledge of their existence, the Court is of the view that Myanmar's rejection of the allegations made by The Gambia can also be inferred from its failure to respond to the Note Verbale within the one-month period preceding the filing of the Application.

In light of the foregoing, the Court concludes that a dispute relating to the interpretation, application and fulfilment of the Genocide Convention existed between the Parties at the time of the filing of the Application by The Gambia on 11 November 2019, and that the fourth preliminary objection of Myanmar must therefore be rejected.

IV. Myanmar's reservation to Article VIII of the Genocide Convention (third preliminary objection) (paras. 78–92)

The Court notes that, in its third preliminary objection, Myanmar submits that the Court lacks jurisdiction, or that The Gambia's Application is inadmissible, because The Gambia cannot validly seise the Court under the Genocide Convention. In Myanmar's view, this is the effect of its reservation to Article VIII of the Genocide Convention. Myanmar

argues that the seisin of the Court is governed by Article VIII of the Genocide Convention, which provides:

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

Myanmar, then the Union of Burma, deposited its instrument of ratification of the Convention on 14 March 1956. That instrument of ratification contained the following reservation: "With reference to Article VIII, the Union of Burma makes the reservation that the said Article shall not apply to the Union." Myanmar submits that the reference in Article VIII to the "competent organs of the United Nations" includes the Court, and that, because that provision governs the seisin of the Court, Myanmar's reservation to it precludes the valid seisin of the Court by The Gambia in the present case.

For the purpose of ascertaining whether Article VIII governs the seisin of the Court, the Court has recourse to the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969 (hereinafter the "Vienna Convention").

The Court observes that the ordinary meaning of the expression "competent organs of the United Nations", viewed in isolation, could appear to encompass the Court, the principal judicial organ of the United Nations. However, reading Article VIII as a whole leads to a different interpretation. In particular, Article VIII provides that the competent organs of the United Nations may "take such action … as they consider appropriate", which suggests that these organs exercise discretion in determining the action that should be taken with a view to "the prevention and suppression of acts of genocide or any of the other acts enumerated in article III". The function of the competent organs envisaged in this provision is thus different from that of the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it" pursuant to Article 38, paragraph 1, of its Statute and to give advisory opinions on any legal question pursuant to Article 65, paragraph 1, of its Statute. In this sense, Article VIII may be seen as addressing the prevention and suppression of genocide at the political level rather than as a matter of legal responsibility.

Furthermore, pursuant to customary international law, as reflected in Article 31 of the Vienna Convention, the terms of Article VIII must be interpreted in their context and, in particular, in light of other provisions of the Genocide Convention. In this regard, the Court pays specific attention to Article IX of the Genocide Convention, which constitutes the basis of its jurisdiction under the Convention. In the Court's view, Articles VIII and IX of the Genocide Convention have distinct areas of application. Article IX provides the conditions for recourse to the principal judicial organ of the United Nations in the context of a dispute between Contracting Parties, whereas Article VIII allows any Contracting Party to appeal to other competent organs of the United Nations, even in the absence of a dispute with another Contracting Party.

It thus follows from the ordinary meaning of the terms of Article VIII considered in their context that that provision does not govern the seisin of the Court. In light of this finding, the Court is of the view that there is no need to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the Genocide Convention.

Given that Article VIII does not pertain to the seisin of the Court, Myanmar's reservation to that provision is irrelevant for the purposes of determining whether the Court is properly seised of the case before it. Consequently, it is not necessary for the Court to examine the content of Myanmar's reservation to Article VIII.

The Court therefore concludes that Myanmar's third preliminary objection must be rejected.

V. The Gambia's standing to bring the case before the Court (second preliminary objection) (paras. 93–114)

The Court notes that, in its second preliminary objection, Myanmar submits that The Gambia's Application is inadmissible because The Gambia lacks standing to bring this case before the Court. First, Myanmar considers that only "injured States", which Myanmar defines as States "adversely affected by an internationally wrongful act", have standing to present a claim before the Court. In Myanmar's view, The Gambia is not an "injured State" and has failed to demonstrate an individual legal interest. Therefore, according to Myanmar, The Gambia lacks standing under Article IX of the Genocide Convention. Secondly, Myanmar submits that The Gambia's claims are inadmissible in so far as they are not brought before the Court in accordance with the rule concerning the nationality of claims which, according to Myanmar, is reflected in Article 44 (*a*) of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. Myanmar asserts that the rule concerning the nationality of claims applies to the invocation of responsibility by both "injured" and "non-injured" States and irrespective of whether the obligation breached is an *erga omnes partes* or *erga omnes* obligation. Consequently, in Myanmar's view, The Gambia lacks standing to invoke Myanmar's responsibility in the interest of members of the Rohingya group, who are not nationals of The Gambia. Thirdly, Myanmar maintains that, even if Contracting Parties that are not "specially affected" by an alleged violation of the Convention are assumed to have standing to submit a dispute to the Court under Article IX, this standing is subsidiary to and dependent upon the standing of States that are "specially affected". Myanmar argues that Bangladesh would be "the most natural State" to institute proceedings in the present case, because it borders Myanmar and has received a significant number of the alleged victims of genocide. In Myanmar's view, the reservation by Bangladesh to Article IX of the Genocide Convention not only precludes Bangladesh from bringing a case against Myanmar, but it also bars any "non-injured" State, such as The Gambia, from doing so.

The Court considers that the question to be answered by it is whether The Gambia is entitled to invoke Myanmar's responsibility before the Court for alleged breaches of Myanmar's obligations under the Genocide Convention. The Court recalls the Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of*

Genocide, in which it explained the legal relationship established among States parties under the Genocide Convention:

> "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."

All the States parties to the Genocide Convention thus have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. Such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case.

The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*. Responsibility for an alleged breach of obligations *erga omnes partes* under the Genocide Convention may be invoked through the institution of proceedings before the Court, regardless of whether a special interest can be demonstrated. If a special interest were required for that purpose, in many situations no State would be in a position to make a claim.

For the purpose of the institution of proceedings before the Court, a State does not need to demonstrate that any victims of an alleged breach of obligations *erga omnes partes* under the Genocide Convention are its nationals. The Court recalls that, where a State causes injury to a natural or legal person by an internationally wrongful act, that person's State of nationality may be entitled to exercise diplomatic protection, which consists of the invocation of State responsibility for such injury. However, the entitlement to invoke the responsibility of a State party to the Genocide Convention before the Court for alleged breaches of obligations *erga omnes partes* is distinct from any right that a State may have to exercise diplomatic protection in favour of its nationals. The aforementioned entitlement derives from the common interest of all States parties in compliance with these obligations, and it is therefore not limited to the State of nationality of the alleged victims. In this connection, the Court observes that victims of genocide are often nationals of the State allegedly in breach of its obligations *erga omnes partes*.

In the opinion of the Court, the Genocide Convention does not attach additional conditions to the invocation of responsibility or the admissibility of claims submitted to the Court. The use of the expression "the Contracting Parties" in Article IX is explained by the fact that the Court's jurisdiction under Article IX requires the existence of a dispute between two or more Contracting Parties. By contrast, "[a]ny Contracting Party" may seek recourse before the competent organs of the United Nations under Article VIII, even in the absence of a dispute with another Contracting Party. Besides, the use of the word "[d]isputes", as opposed to "any dispute" or "all disputes", in Article IX of the Genocide Convention, is not uncommon in compromissory clauses contained in multilateral treaties. Similarly, the terms of Article IX providing that disputes are to be submitted to the Court "at the request of any of the parties to the dispute", as opposed to any of the Contracting Parties, do not limit the category of Contracting Parties entitled to bring claims for alleged breaches of obligations *erga omnes partes* under the Convention. This phrase clarifies that only a party to the dispute may bring it before the Court, but it does not indicate that such a dispute may only arise between a State party allegedly violating the Convention and a State "specially affected" by such an alleged violation.

It follows that any State party to the Genocide Convention may invoke the responsibility of another State party, including through the institution of proceedings before the Court, with a view to determining the alleged failure to comply with its obligations *erga omnes partes* under the Convention and to bringing that failure to an end.

The Court acknowledges that Bangladesh, which borders Myanmar, has faced a large influx of members of the Rohingya group who have fled Myanmar. However, this fact does not affect the right of all other Contracting Parties to assert the common interest in compliance with the obligations *erga omnes partes* under the Convention and therefore does not preclude The Gambia's standing in the present case. Accordingly, the Court does not need to address the arguments of Myanmar relating to Bangladesh's reservation to Article IX of the Genocide Convention.

For these reasons, the Court concludes that The Gambia, as a State party to the Genocide Convention, has standing to invoke the responsibility of Myanmar for the alleged breaches of its obligations under Articles I, III, IV and V of the Convention, and that, therefore, Myanmar's second preliminary objection must be rejected.

Operative clause (para. 115)

The Court,

(1) Unanimously,

Rejects the first preliminary objection raised by the Republic of the Union of Myanmar;

(2) Unanimously,

Rejects the fourth preliminary objection raised by the Republic of the Union of Myanmar;

(3) Unanimously,

Rejects the third preliminary objection raised by the Republic of the Union of Myanmar;

(4) By fifteen votes to one,

Rejects the second preliminary objection raised by the Republic of the Union of Myanmar;

In favour: President *D*onoghue; Vice-President Gevorgian; Judges *T*omka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; Judges *ad hoc* Pillay, Kress;

Against: Judge Xue;

(5) By fifteen votes to one,

Finds that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to entertain the Application filed by the Republic of The Gambia on 11 November 2019, and that the said Application is admissible.

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; Judges *ad hoc* Pillay, Kress;

Against: Judge Xue.

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Judge Xue appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Kress appends a declaration to the Judgment of the Court.

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Dissenting opinion of Judge Xue

1. In her dissenting opinion, Judge Xue regrets to be unable to concur with the Court's decision on The Gambia's standing and gives the following reasons for her vote on paragraph 115 (4) and (5) of the Judgment.

2. First of all, Judge Xue considers that Myanmar's first preliminary objection raises a substantive issue, namely whether the Court is competent under the Statute to entertain a case which is in fact initiated by an international organization and entrusted to one of its members to act on its behalf. According to Judge Xue, the evidence adduced by the Respondent sufficiently proves that The Gambia was tasked and appointed by the Organisation of Islamic Cooperation (hereinafter the "OIC") to institute the proceedings against Myanmar in the Court. In this regard, Judge Xue refers, among other things, to resolutions adopted by the OIC and the public acknowledgment by its Member States, in particular The Gambia itself. She states that, being the chair of the Ad Hoc Ministerial Committee on Accountability for Human Rights Violations against the Rohingyas, The Gambia was specifically instructed and directed by the OIC to take legal action in the Court and that the decision of the OIC to file a case in the Court was negotiated and agreed upon among its Members, particularly with regard to the representation and funding of the envisaged legal action. Judge Xue points out that The Gambia does not deny the relevant facts but maintains that it instituted the proceedings in its own name and has a dispute with Myanmar regarding "its own rights". At the same time, The Gambia does not claim any link with the alleged acts in Myanmar and asserts that it has no individual interest in the case but acts for the common interest of the States parties to the Genocide Convention. Given its character, Judge Xue considers that The Gambia's legal action is arguably tantamount to a public-interest litigation.

3. In Judge Xue's view, the reasoning of the Court on the Respondent's first preliminary objection avoids the real hard issue before the Court. By virtue of Article 34, paragraph 1, of the Statute, international organizations do not enjoy access to the Court. According to Judge Xue, the issue in the present case is not about in whose name the proceedings are instituted, what motive the Applicant may pursue, or who has arranged the litigation team, but to determine whether The Gambia is acting on behalf of the OIC for the common interest of its Member States, some of which are parties to the Genocide Convention, while others are not. In her view, the evidence shows that it was the OIC, not The Gambia, that took the decision to submit the issue of the Rohingyas to the Court and that The Gambia was entrusted to implement this decision. Moreover, the issue of the Rohingyas was never considered as a bilateral dispute between The Gambia and Myanmar in the OIC. Although The Gambia independently made its decision to institute proceedings in the Court, Judge Xue considers that the fact remains that The Gambia's legal action is initiated by the OIC and that The Gambia is acting under the mandate and with the financial support of the OIC. In her view, to establish the existence of a bilateral dispute between the parties, there must exist some link between the applicant and the alleged acts of the respondent. This linkage requirement has a substantive bearing on the merits phase. Allegations of genocide require serious investigation and proof. When the applicant has no link whatsoever with the alleged acts, it is apparently difficult, if not impossible, for it to collect evidence and conduct investigation on its own. Relying entirely on the evidence and material sources collected by third parties only reinforces the argument that the case is a public-interest action, *actio popularis*. Such action, even in the form of a bilateral dispute, may in fact allow international organizations to have access to the Court in the future.

4. While Judge Xue agrees with the Court's finding that the conduct of The Gambia to institute proceedings before the Court does not amount to an abuse of process, she doubts very much the Court's conclusion that there are no other grounds of inadmissibility which would require it to decline the exercise of its jurisdiction.

5. Judge Xue explains that under the Statute, the Court's function in contentious cases is confined to dispute settlement between two or more States, not suitable for entertaining public-interest actions. When the applicant is in fact acting on behalf of an international organization, albeit in its own name, the respondent may be placed in a disadvantageous position before the Court. This is particularly true, in her view, if several judges on the bench are nationals of member States of the international organization concerned. In the present case, with the organization in the shadow, inequality of the Parties may be hidden in the composition of the Court, thereby undermining the principle of equality of the parties. Judge Xue emphasizes that however desirable it is to provide judicial protection to the victims of the alleged acts, the respondent, as a party, is entitled to a fair legal process in accordance with the provisions of the Statute and the Rules of Court.

6. Moreover, Judge Xue observes that The Gambia's legal action may challenge the principle of finality in the adjudication of the dispute. In accordance with Articles 59 and 60 of the Statute, the Court's decision is only binding on the parties to the dispute and shall be final and without appeal. She wonders, if The Gambia is acting for the common interest of

the States parties to the Genocide Convention, whether the Court's decision would have binding force on all other States parties as well. She notes that by the Court's reasoning, those other States parties will not be prevented from exercising their right to institute separate proceedings for the same cause against the same State before the Court, which, in her view, is not consistent with the rules of State responsibility.

7. For Judge Xue, these concerns give rise to the issue of judicial propriety for the Court to consider whether it is appropriate to exercise jurisdiction in the present case. Ultimately, they boil down to the very question whether the "dispute" over the alleged acts of Myanmar could be settled by the Court as wished by The Gambia or the OIC.

8. With regard to Myanmar's second preliminary objection on The Gambia's standing, Judge Xue points out that, due to the character of The Gambia's legal action, in the present case the question of jurisdiction *ratione personae* and the issue of standing are delicately interlinked. Whether Article IX of the Genocide Convention provides jurisdiction *ratione personae* to a case instituted by a non-injured State party also bears on the standing of the Applicant. Judge Xue notes that the Court, in determining whether it has jurisdiction *ratione personae*, only examines whether The Gambia meets the conditions laid down in Articles 34 and 35 of the Statute, without examining the terms of the compromissory clause of the Genocide Convention. Articles 34 and 35, however, basically concern the right or "the legal capacity" of a party to appear before the Court, a question concerning statutory requirements for access to the Court, not a matter of consent for jurisdiction. Judge Xue is of the view that the issue before the Court is not about The Gambia's legal capacity to institute the proceedings, but whether the Court has jurisdiction *ratione personae* to entertain the case instituted by a non-injured State. In her view, the matter relates, first and foremost, to the interpretation of Article IX of the Genocide Convention, namely, whether the States parties have agreed to grant a general standing to all the States parties for the invocation of responsibility of any other State party solely on the basis of their common interest in compliance with the obligations under the Convention.

9. Judge Xue indicates that the Genocide Convention provides several means and mechanisms for the implementation of the obligations under the Convention, which take into account the situation where a non-injured State party may raise the issue of genocide against another State party. The United Nations organs to which such a non-injured State party may resort, however, do not include the International Court of Justice, an interpretation which, according to Judge Xue, can be confirmed by the *travaux préparatoires* of the Genocide Convention.

10. Judge Xue notes that the treaty was drafted at a time when the notions of obligations *erga omnes partes* or *erga omnes* were not established in general international law and that the ordinary meaning of the term "disputes" was presumed to refer to bilateral disputes. She observes that, although at the time of the negotiations of the Genocide Convention the contracting parties primarily focused on the meaning and scope of the phrase "responsibility of a State for genocide" and whether to include it in the clause, records show that they did not intend to provide standing to any of the States parties for the invocation of State responsibility of any other State party. In their understanding, the principle that no action could be instituted save by a party concerned in a case should apply and responsibility would arise whenever genocide was committed by a State in the territory of another State. In Judge Xue's view, the *travaux préparatoires* do not support the proposition that any State party is entitled to invoke the responsibility of any other State party merely on the basis of the *raison d'être* of the Genocide Convention.

11. Judge Xue agrees with the Court that in the present case The Gambia is not exercising diplomatic protection but, in her view, this does not mean there need not be a link between the applicant and the alleged acts of the respondent. Although the word "[d]isputes" in Article IX is without any qualification, opposition of views between the two parties must relate to a legal interest that the applicant may claim for itself under international law. Unless otherwise expressly provided for in a treaty, general standing of the States parties cannot be presumed. In this regard, she refers to Article 33 of the European Convention on Human Rights as a provision in contrast.

12. In cases concerning alleged violations of the Genocide Convention, Judge Xue notes, the Court has affirmed that Article IX includes all forms of State responsibility, including the responsibility of a State for an act of genocide perpetrated by the State itself through the acts of its organs, which reflects the development of international law on State responsibility. She points out, however, that in none of those cases did the Court consider or even imply that a State party may invoke international responsibility of another State party solely on the basis of the *raison d'être* of the Genocide Convention; the applicant must have a territorial, national or some other form of connection with the alleged acts. In her view, the Court's interpretation is not conducive to the security and stability of treaty relations between the States parties.

13. Further, Judge Xue considers that the Court's reliance on the pronouncement of the Court in the Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter the "Advisory Opinion") for upholding The Gambia's standing does not seem consistent with the established practice of the States parties. Notwithstanding the common interest identified in the Advisory Opinion, the Court did not consider that reservations to the Genocide Convention should be categorically prohibited. Instead, it took the view that the compatibility of a reservation with the object and purpose of the Convention should furnish a criterion for assessing a particular reservation made by a State on accession and appraising an objection lodged by another State to the reservation. Pursuant to that criterion, in the subsequent treaty practice reservations to Article IX of the Genocide Convention have generally been accepted as permissible by the States parties, a position which the Court's jurisprudence has confirmed.

14. Judge Xue notes that while reservations to Article IX could also lead to many situations where no State party would be in a position to make a claim before the Court against another State party who has made a reservation to the Court's jurisdiction, no State party has ever complained that

the Court's decisions upholding the effect of the relevant reservations prejudiced the common interest of the States parties to the Convention. Logically, the reason given by the Court in the present case for discarding the requirement of a special interest cannot be established; just as in the situation of a reservation to the Court's jurisdiction, dismissal of an application for lack of standing of a non-injured State is also just to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, and does not affect substantive obligations relating to acts of genocide themselves under that Convention.

15. Judge Xue observes that the Court's decision in the second phase of the *South West Africa* cases stands as a constant reminder that in cases where the common interest of the international community is purportedly at stake, the issue of standing of the applicant must be handled with great care. While endorsing the notions of obligations *erga omnes* or *erga omnes partes* as a positive development of international law, Judge Xue notes that, in the *South West Africa* cases, an adjudication clause was inserted into the Mandate for South West Africa among the guarantees provided to ensure its success and that standing of the member States before the Court was based on the statutory provisions of the mandate rather than merely on a common interest; it was granted in advance to the individual member States of the League, and subsequently to the Member States of the United Nations, on the basis of the consent of the member States. Judge Xue states that this unique system cannot be generalized to all other conventions, where a common interest of the States parties may exist.

16. Judge Xue indicates that, largely as a rectification of its position taken in the *South West Africa* cases, the Court in the *Barcelona Traction* case made its first pronouncement on the concept of obligation *erga omnes*, recognizing the common interest of the international community as a whole in the protection of certain important rights. The Court, however, stopped short of indicating whether such obligations, either on the basis of treaty provisions or customary international law, would by themselves provide standing for any State to institute proceedings against any other State before the Court for the protection of the common interest. Judge Xue observes that, since *Barcelona Traction*, the Court has referred to obligations *erga omnes* in a number of other cases, in none of which, however, it dealt with the relationship between such obligations and the question of standing.

17. Judge Xue indicates that the only case in which the Court explicitly affirms the entitlement of a State party to make a claim against another State party on the basis of the common interest in compliance with the obligations *erga omnes partes* is the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* case. On the issue of standing, she does not wish to repeat her dissenting opinion appended to that Judgment but highlights three points.

18. First, Judge Xue points out that the issue raised by the applicant in *Belgium* v. *Senegal* essentially concerns the interpretation and application of the principle of extradition or prosecution under Article 7, paragraph 1, of the Convention against Torture. As its national courts were seised of cases against Mr. Hissène Habré for alleged torture offences, Belgium was a specially affected State in that case. Belgium claimed that the respondent, having failed to prosecute Mr. Habré and refused to extradite him to Belgium, had breached its obligation under Article 7, paragraph 1, of the Convention against Torture. Logically, the question before the Court whether Senegal had fulfilled its obligation under Article 6, paragraph 2, to conduct a preliminary inquiry into the facts of the alleged offences constituted part of the legal issues relating to the principle of extradition or prosecution.

19. Secondly, Judge Xue notes that the Court has consistently maintained a clear distinction between substantive norms and procedural rules. It has firmly held that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things". According to Judge Xue, the inference drawn from the common interest in the *Belgium* v. *Senegal* case and in the present case confuses the legal interest of the States parties in compliance with the substantive obligations of the Genocide Convention and the procedure for dispute settlement.

20. Thirdly, Judge Xue observes that the common interest enunciated by the Court in the Advisory Opinion exists not solely in the Genocide Convention. By analogy, such common interest could equally be identified in many other conventions relating to, for example, human rights, disarmament and the environment. If obligations under those conventions are therefore regarded as obligations *erga omnes partes*, by virtue of the Court's reasoning in the present case, it means that any of the States parties, specially affected or not by an alleged breach of the relevant obligations, would have standing to institute proceedings in the Court against the alleged State party, provided no reservation to the jurisdiction of the Court is entered by either of the parties. In Judge Xue's view, this approach has two potential consequences: one is that more States would make reservations to the jurisdiction of the Court and the second is that vague and insubstantial allegations may arise.

21. Judge Xue states that the situation of the Rohingyas in Myanmar deserves serious responses from the international community. She notes that various organs of the United Nations possess powers which can be exercised for the prevention and suppression of acts of genocide pursuant to the initiative of one or more United Nations Member States, even without the exercise of the right under Article VIII of the Genocide Convention. The fact is that the situation of Myanmar and the Rohingya refugees has been on the agenda of various United Nations organs for years, with the human rights situation of the Rohingyas having been under the investigation of a UN Fact-Finding Mission and the Special Rapporteur for Myanmar. Above all, Myanmar remains bound by its obligations under the Genocide Convention.

22. Finally, Judge Xue observes that the situation in Myanmar, as is found in the 2017 Final Report of the Advisory Commission on Rakhine State, represents a development crisis, a human rights crisis and a security crisis; while all communities have suffered from violence and abuse, protracted statelessness and profound discrimination have made the Muslim community particularly vulnerable to human rights violations. She reiterates Kofi Annan's words that "the challenges facing Rakhine State and its peoples are complex and the search for lasting solutions will require determination, perseverance and trust".

Declaration of Judge *ad hoc* Kress

While expressing his general agreement with the Judgment, Judge *ad hoc* Kress comments on two distinct sets of questions. First, he makes some remarks on the change in the representation of Myanmar that occurred during the proceedings, and on the way this issue was addressed by the Court. Second, he elaborates on the reasoning of the Court with regard to the issue of the standing of The Gambia.

Concerning the issue of the change in representation of Myanmar, Judge *ad hoc* Kress observes that it resulted from events that took place after the declaration of the state of emergency by the armed forces of Myanmar and that were a cause for grave concern for the international community, as attested by statements of the General Assembly and the Security Council of the United Nations. He expresses the view that the Judgment's failure to state the reasons leading the Court to act upon such replacement is less than satisfactory.

On the issue of the standing of The Gambia, Judge *ad hoc* Kress welcomes that the Court refrained from adopting the terms "injured State" and "State other than an injured State" used by the International Law Commission in connection with the entitlement to invoke responsibility, and that the Court, in keeping with its previous jurisprudence, rather referred to a broad notion of "legal interest". Judge *ad hoc* Kress notes that the use of the term "legal interest" in a broader sense conveys the community dimension of the concept of obligation *erga omnes (partes)*, and that it does so in essentially the same way as the concept of *préjudice juridique*.

Judge *ad hoc* Kress then offers a few additional reflections on the concept of obligation *erga omnes (partes)* and its application in the present case.

Regarding the rejection by the Court of Myanmar's argument based on Bangladesh's reservation to Article IX of the Genocide Convention and the fact that Bangladesh had to face a large influx of refugees, Judge *ad hoc* Kress is very reluctant to accept that such circumstances could have the effect of turning Bangladesh into a "specially affected State" with regard to the alleged breaches of the Genocide Convention. Judge *ad hoc* Kress expresses the view that, even if Bangladesh could be considered a "specially affected State", it would not be able to dispose entirely of the collective interest enshrined in the *erga omnes (partes)* obligations of the Genocide Convention.

In response to Myanmar's concerns regarding possible wider ramifications of admitting The Gambia's standing in the present case, Judge *ad hoc* Kress observes that it would have been wrong had the Court, impressed by the concern about an increase in litigation, left the fundamental community interest at issue in the present case without the judicial protection which is due to it under the applicable law. At the same time, he acknowledges that there might be a need to find a balance between the protection of community interests and the risk of proliferation of disputes.

Finally, Judge *ad hoc* Kress stresses that it is important to show particular sensitivity with a view to ensuring procedural fairness for all parties to proceedings instituted for the protection of community interests. He notes that, while it is certainly important to provide collective interests and, in particular, the core interests of the international community as a whole with international judicial protection, it is also necessary never to lose sight of the fact that the respondent State whose responsibility for the violation of an obligation *erga omnes (partes)* has been invoked through proceedings before the Court may not be responsible for the alleged violation.

251. APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ARMENIA *v.* AZERBAIJAN) [PROVISIONAL MEASURES]

Order of 12 October 2022

On 12 October 2022, the International Court of Justice delivered its Order on Armenia's request for the modification of the Court's Order of 7 December 2021 indicating provisional measures in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan).* The Court the Court concluded that the hostilities which erupted between the Parties in September 2022 and the detention of Armenian military personnel do not constitute a change in the situation justifying modification of the Order of 7 December 2021 within the meaning of Article 76 of the Rules of Court.

The Court was composed as follows: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; Judges *ad hoc* Keith, Daudet; Acting Registrar Punzhin.

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The Court recalls that Armenia's request for the modification of the Order of 7 December 2021 concerns the first provisional measure indicated therein, namely that Azerbaijan shall "[p]rotect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law". Armenia requests the Court

> "to explicitly require Azerbaijan to protect from violence and bodily harm all persons captured in relation to the 2020 Conflict, *or any armed conflict between the Parties since that time, upon capture or thereafter, including* those who remain in detention, and ensure their security and equality before the law" (emphasis in the original).

In particular, Armenia refers to hostilities that erupted between the Parties in September 2022.

The Court observes that, in order to rule on the request of Armenia for the modification of the Order of 7 December 2021, it must determine whether the conditions set forth in Article 76, paragraph 1, of the Rules of Court have been fulfilled. The Court must therefore first ascertain whether, taking account of the information that the Parties have provided with respect to the current situation, there is reason to conclude that the situation which warranted the indication of certain provisional measures in December 2021 has changed since that time. In considering the request for the modification of the Order of 7 December 2021, the Court will take account both of the circumstances that existed when it issued that Order and of the changes which are alleged to have taken place in the situation that gave rise to the indication of provisional measures. If the Court finds that there was a change in the situation since the delivery of its Order, it will then have to consider whether such a change justifies a modification of the measures previously indicated. Any such modification would only be appropriate if the new situation were, in turn, to require the indication of provisional measures, that is to say, if the general conditions laid down in Article 41 of the Statute of the Court were also to be met in this instance. The Court therefore begins by determining whether there has been a change in the situation which warranted the measures indicated in its Order of 7 December 2021.

The Court recalls that hostilities erupted between the Parties in September 2020, in what Armenia calls "the Second Nagorno-Karabakh War" and Azerbaijan calls "the Second Garabagh War" (hereinafter the "2020 Conflict"). The Court further recalls that, on 9 November 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia, and the President of the Russian Federation signed a statement referred to by the Parties as the "Trilateral Statement". Under the terms of this statement, as of 10 November 2020, "[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared".

The Court observes that, notwithstanding the ceasefire declared in the "Trilateral Statement", the situation between the Parties remained unstable and hostilities again erupted in the week of 12 September 2022, leading to the detention of persons whom Armenia describes as its servicemembers. Armenia's allegations about the treatment of these persons are of the same character as the allegations that were presented to the Court in Armenia's request for the indication of provisional measures in 2021. The renewed hostilities and the detention of these persons indicate that the situation between the Parties remains tenuous. For the purposes of determining whether modification of the measures indicated in the Order of 7 December 2021 is warranted, the Court considers that the situation that existed when it issued the Order of 7 December 2021 is ongoing and is no different from the present situation. The Court affirms that treatment in accordance with point (1) (*a*) of paragraph 98 of its Order of 7 December 2021 is to be afforded to any person who has been or may come to be detained during any hostilities that constitute a renewed flare-up of the 2020 Conflict.

In light of the above, the Court concludes that the hostilities which erupted between the Parties in September 2022 and the detention of Armenian military personnel do not constitute a change in the situation justifying modification of the Order of 7 December 2021 within the meaning of Article 76 of the Rules of Court.

The Court takes note of Azerbaijan's "commitment to treat any detained Armenians in accordance with paragraph 98 (1) (*a*) of th[e Order of 7 December 2021]", which it expressed in a letter dated 7 October 2022.

The Court further considers that the tenuous situation between the Parties confirms the need for effective implementation of the measures indicated in its Order of 7 December 2021.

In these circumstances, the Court finds it necessary to reaffirm the measures indicated in its Order of 7 December 2021, in particular the requirement that both Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve". It reminds the Parties that provisional measures have binding effect.

The Court finally underlines that the present Order is without prejudice as to any finding on the merits concerning the Parties' compliance with its Order of 7 December 2021.

For these reasons,

The Court,

(1) By thirteen votes to three,

Finds that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 7 December 2021;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Salam, Iwasawa, Nolte, Charlesworth; Judges *ad hoc* Keith, Daudet;

Against: Judges Sebutinde, Bhandari, Robinson;

(2) Unanimously,

Reaffirms the provisional measures indicated in its Order of 7 December 2021, in particular the requirement that both Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve".

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Judge Tomka appends a declaration to the Order of the Court; Judge Sebutinde appends a separate opinion to the Order of the Court; Judge Bhandari appends a dissenting opinion to the Order of the Court; Judge Robinson appends a separate opinion to the Order of the Court; Judge *ad hoc* Daudet appends a declaration to the Order of the Court.

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Declaration of Judge Tomka

In his declaration, Judge Tomka wishes to explain why he decided to vote in favour of the Court's Order finding that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 7 December 2021.

Judge Tomka notes that the Court has been requested by Armenia to modify the Order of 7 December 2021, in particular the first provisional measure indicated in paragraph 98 (1) (*a*) therein, according to which Azerbaijan shall "[p]rotect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law". The reason for this request by Armenia lies in the resumption of hostilities between the Parties in September 2022. He points out that the 2020 Conflict ended on 9 November 2020 with the signing of the "Trilateral Statement" by the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and the President of the Russian Federation.

To decide whether the circumstances are such as to require the exercise of its power to modify the measures indicated in the Order of 7 December 2021, the Court had to interpret the first measure of protection indicated in paragraph 98 (1) (*a*) of the 2021 Order.

For Judge Tomka, the question is how to interpret the first measure. He notes that the words used in paragraph 98 (1) (*a*), as well as the reasoning preceding it, in particular paragraph 67 of the 2021 Order, suggest that the measure applies to all prisoners of war and detained persons captured during the 2020 Conflict, which lasted between September and 9 November 2020, or in its aftermath. In the authoritative French text, the word "aftermath" is rendered as "*immédiatement* après le conflit" (emphasis added).

In his view, it is difficult to consider that the resumption of hostilities in September 2022, some 22 months after the ceasefire and end of the 2020 Conflict was declared on 9 November 2020, occurred "*immédiatement* après le conflit".

Judge Tomka emphasizes how the Court, in its Order of today, "affirms that treatment in accordance with point 1 (*a*) of paragraph 98 of its Order of 7 December 2021 is to be afforded to any person who has been or *may come to be detained* during any hostilities that constitute a renewed flare-up of the 2020 Conflict" (emphasis added). In his view, this affirmation by the Court expands the scope of the applicability of the first provisional measure of protection indicated in December 2021 to any person who may be detained in the course of any further hostilities during the pendency of the proceedings in the present case. It was this creative interpretation which allowed Judge Tomka not to vote against the finding made by the Court in today's Order.

Separate opinion of Judge Sebutinde

Judge Sebutinde respectfully disagrees with the finding of the majority of the Court that the circumstances do not require the Court to modify its Order of 7 December 2021. In her opinion, that finding, together with the underlying reasoning, are inconsistent with the first provisional measure indicated in the 2021 Order which, in her opinion, protects specific individuals detained immediately following the 2020 conflict and does not extend to future detainees captured during subsequent hostilities. Judge Sebutinde takes the view that the resumption of hostilities between the Parties in September 2022, which resulted in the capture and detention by Azerbaijan of additional Armenian prisoners, constitutes a major change in the circumstances, warranting a modification of the earlier provisional measure, within the meaning of Article 76, paragraph (1) of the Rules of Court. She also takes the view that the evidence before the Court provides sufficient reason to suspect that acts susceptible of causing irreparable prejudice to new and future detainees in Azerbaijani custody could occur before the Court renders a final decision. She therefore proposes that the original Order be modified to explicitly refer to hostilities between the Parties subsequent to the 2020 Conflict.

Dissenting opinion of Judge Bhandari

In his dissenting opinion, Judge Bhandari disagrees with the Court's finding that the circumstances do not require the exercise of its power to modify the Order of 7 December 2021. According to the Court, the situation that existed when it issued the 2021 Order is ongoing and is no different from the present situation, meaning that the requirements for modification under Article 76 (1) of the Rules of Court are not met.

Judge Bhandari disagrees with this conclusion for three reasons. First, according to the Court's original definition of the 2020 Conflict in the 2021 Order, that conflict has ceased. The September 2022 incidents are new events and created the relevant "situation" currently in existence. Second, it would be artificial to suggest that the situation present when the Court issued the 2021 Order can be characterized as ongoing. Third, there could in any event be a change in the *situation* within the *same* conflict, even an ongoing one. Article 76 (1) does not require a drastic or substantial change in the situation, but rather only "*some* change".

Further, Judge Bhandari explains that he would also have had little difficulty concluding that this change in the situation justified modifying the 2021 Order.

Finally, Judge Bhandari cautions against setting the bar for the modification of a provisional measures Order too high. He also questions the Court's interpretation of the relevant operative paragraph of the 2021 Order, which makes specific reference to the "2020 Conflict", in a way that extends it to the September 2022 hostilities.

Separate opinion of Judge Robinson

In his separate opinion, Judge Robinson explains his disagreement with the finding of the majority in paragraph 23 of the Order that the present circumstances do not warrant a modification of the Court's provisional measures Order of 7 December 2021 ("2021 Order").

First, Judge Robinson notes that the majority's substantive analysis of the Court's 2021 Order does not include a thorough examination of paragraph 98 (1) (*a*)—which is the very object of Armenia's request for modification. Rather, he observes that the majority's reasoning focuses on the Trilateral Statement signed on 9 November 2020 by Azerbaijan, Armenia and Russia.

Second, he recalls that the Court's 2021 Order, in paragraph 13, defined the temporal scope of the hostilities which erupted in September 2020 ("2020 Conflict") as having a duration of 44 days. Therefore, he believes that any hostilities that ensued between Armenia and Azerbaijan after the 2020 Conflict are not part of the 2020 Conflict nor, as the majority maintains, are they a continuation of that conflict. Accordingly, in Judge Robinson's view, the hostilities that occurred on 12 September 2022 constitute a change in the situation within the meaning of Article 76(1) of the Rules of the Court.

Third, Judge Robinson comments on the majority's conclusion that treatment in accordance with paragraph 98 (1) (*a*) of its 2021 Order is to be afforded to any person who has been or may come to be detained during any hostilities that constitute a renewed flare-up of the 2020 Conflict. Judge Robinson considers that this is a strained interpretation and application of paragraph 98 (1) (*a*) of the Court's 2021 Order as that paragraph referred to persons who remained in detention in relation to the 2020 Conflict, as defined by the Court.

In conclusion, Judge Robinson believes that the Court should have granted the request of Armenia for a modification of paragraph 98 (1) (*a*) of its 2021 Order.

Declaration of Judge *ad hoc* Daudet

In a short declaration, Judge *ad hoc* Daudet expresses the view that, in deciding to leave unchanged the text of the Order indicating provisional measures of 7 December 2021, which it considers applicable to the present circumstances, the Court has fully addressed Armenia's concern to protect the victims of the armed actions carried out by Azerbaijan in the week of 12 September 2022.

He emphasizes the importance of the notion of continuity in the circumstances in 2022 and 2021, and considers that decisions indicating provisional measures are inherently forward-looking.

252. DISPUTE OVER THE STATUS AND USE OF THE WATERS OF THE SILALA (CHILE *v.* BOLIVIA)

Judgment of 1 December 2022

On 1 December 2022, the International Court of Justice delivered its Judgment in the case concerning the *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia)*. In its Judgment, the Court found that the claims made by the Republic of Chile in its final submissions (*a*) to (*d*) and the counter-claims made by the Plurinational State of Bolivia in its final submissions (*a*) and (*b*) no longer had any object and that, therefore, the Court was not called upon to give a decision thereon. It also rejected the claim made by the Republic of Chile in its final submission (*e*) and the counter-claim made by the Plurinational State of Bolivia in its final submission (*c*).

The Court was composed as follows: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; Judges *ad hoc* Daudet, Simma; Registrar Gautier.

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I. General background (paras. 28–38)

The Court begins by setting out the general background of the case by recalling that the Silala River has its source in the territory of Bolivia. It originates from groundwater springs in the Southern (Orientales) and Northern (Cajones) wetlands, located in the Potosí Department of Bolivia, approximately 0.5 to 3 kilometres north-east of the common boundary with Chile at an altitude of around 4,300 metres. Following the natural topographic gradient which slopes from Bolivia towards Chile, the flow of the Silala, comprised of surface water and groundwater, traverses the boundary between Bolivia and Chile. In Chilean territory, the Silala River continues to flow south-west in the Antofagasta region of Chile until its waters discharge into the San Pedro River at about 6 kilometres from the boundary.

The Court further recalls that over the years, both Parties have granted concessions for the use of the Silala waters. This use of the waters of the Silala started in 1906, when the "Antofagasta (Chili) and Bolivia Railway Company Limited" (known as the "FCAB") acquired a concession from the Chilean Government for the purpose of increasing the flow of drinking water serving the Chilean port city Antofagasta. Two years later, in 1908, the FCAB also obtained a right of use from the Bolivian Government for the purpose of supplying the steam engines of the locomotives that operated the Antofagasta-La Paz railway. The FCAB built an intake (Intake No. 1) in 1909 on Bolivian territory, at approximately 600 metres from the boundary. In 1910, the pipeline from Intake No. 1 to the FCAB's water reservoirs in Chile was officially put into operation. In 1928, the FCAB constructed channels in Bolivia. Chile claims that this was done for sanitary reasons, to inhibit breeding of insects and avoid contamination of potable water. According to Bolivia, the channelization had the purpose of artificially drawing the water from the surrounding springs and *bofedales*, which enhanced the surface flow of the Silala into Chile. In 1942, a second intake and pipeline were built in Chilean territory at approximately 40 metres from the international boundary. The Court notes that on 7 May 1996, the Minister for Foreign Affairs of Bolivia issued a press release in response to certain articles in the Bolivian press referring to an alleged diversion by Chile of the waters of the "boundary Silala river". He indicated that there was "no water diversion" as confirmed during the field work carried out by the Mixed Boundary Commission in 1992, 1993 and 1994. The Minister noted, however, that he would include the issue on the bilateral agenda "given that the waters of the Silala river have been used since more than a century by Chile" at a cost to Bolivia.

On 14 May 1997, Bolivian local authorities revoked and annulled the concession granted to the FCAB in 1908 to exploit the spring waters of the Silala. A Supreme Decree, endorsing this decision, makes reference to "evidence of the improper use" of the Silala waters "outside the granting of their use, with prejudice to the interests of the State and in clear violation … of the State Political Constitution". The Court further notes that by 1999, the question of the status of the Silala and the character of its waters had become a point of contention between the Parties. The two Parties attempted to reach a bilateral agreement but did not succeed. Chile indicates that it decided to request a judgment from the Court on "the nature of the Silala River as an international watercourse and of Chile's rights as a riparian State", following several statements made by the President of Bolivia, Mr. Evo Morales, in 2016, in which he accused Chile of illegally exploiting the waters of the Silala without compensating Bolivia, stated that the Silala was "not an international river" and expressed an intention to bring the dispute before the Court. Chile accordingly instituted proceedings against Bolivia before the Court on 6 June 2016.

II. Existence and scope of the dispute: general considerations (paras. 39–49)

Before examining the submissions of the Parties, the Court notes that it must, at the outset, determine whether it has jurisdiction to entertain the claims and the counter-claims of the Parties and, if so, whether there are reasons that prevent the Court from exercising its jurisdiction in whole or in part. Chile seeks to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá. Pursuant to that provision, the existence of a dispute between the Parties is a condition of the Court's jurisdiction. The Court observes in this regard that, in accordance with this established jurisprudence, "a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interest", and that the "dispute must in principle exist at the time the Application is submitted to the Court". The Court further observes that the Parties have not contested the Court's jurisdiction, with the exception of one objection raised by Chile regarding Bolivia's first counter-claim, which the Court addresses below. Thus, the Court is satisfied that it has jurisdiction to adjudicate the dispute between the Parties. In light of the evolution of some positions of the Parties in the

course of the proceedings and considering that each Party now contends that certain claims or counter-claims are without object, or present hypothetical questions, the Court makes some general observations with respect to these assertions.

The Court recalls that, even if it finds that it has jurisdiction, "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore". The Court has emphasized that "[t]he dispute brought before it must … continue to exist at the time when the Court makes its decision" and that "there is nothing on which to give judgment" in situations where the object of a claim has clearly disappeared. It "has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object". Such a situation may cause the Court to "deci[de] not to proceed to judgment on the merits".

The Court has held "that it cannot adjudicate upon the merits of the claim" when it considers that "any adjudication [would be] devoid of purpose". The Court observes that its task is not limited to determining whether a dispute has disappeared in its entirety. The scope of a dispute brought before the Court is circumscribed by the claims submitted to it by the parties. Therefore, the Court also has to ascertain whether specific claims have become without object as a consequence of a convergence of positions or agreement between the Parties, or for some other reason. To this end, the Court carefully assesses whether and to what extent the final submissions of the Parties continue to reflect a dispute between them. The Court recalls that it has no power to "substitute itself for [the parties] and formulate new submissions simply on the basis of arguments and facts advanced". However, it is "entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions". In undertaking this task, the Court will take into account not only the submissions, but also, *inter alia*, the Application as well as all the arguments put forward by the Parties in the course of the written and oral proceedings. The Court will thus interpret the submissions, in order to identify their substance and to determine whether they reflect a dispute between the Parties.

The Court observes that each Party maintains that certain submissions of the other Party, while reflecting points of convergence between the Parties, remain vague, ambiguous or conditional, and therefore cannot be taken to express agreement between them. Each has therefore requested the Court to render a declaratory judgment with respect to certain submissions, pointing to the need for legal certainty in their mutual relations. The Applicant emphasized the need for a declaratory judgment to prevent the Respondent from changing its position in the future on the law applicable to international watercourses and to the Silala. The Court notes that "[i]t is clear in the jurisprudence of the Court and its predecessor that 'the Court may, in an appropriate case, make a declaratory judgment'".

Given that the Court's role in a contentious case is to resolve existing disputes, the operative paragraph of a judgment should not, in principle, record points on which the Court finds the parties to be in agreement. Statements made by the parties before the Court must be presumed to be made in good faith and the Court carefully assesses such statements. If the Court finds that the parties have come to agree in substance regarding a claim or a counter-claim, it will take note of that agreement in its judgment and conclude that such a claim or counter-claim has become without object. In such a case, there is no call for a declaratory judgment.

The Court notes that, in the present case, many submissions are closely interrelated. A conclusion that a particular claim or counter-claim is without object does not preclude the Court from addressing certain questions that are relevant to such a claim or counter-claim in the course of examining other claims or counter-claims that remain to be decided. The Court further recalls that its function is "to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties". The Court reaffirms that "it is not for the Court to determine the applicable law with regard to a hypothetical situation". In particular, it has held that it does not pronounce "on any hypothetical situation which might arise in the future".

III. Claims of Chile (paras. 50–129)

1. Submission (a): the Silala River system as an international watercourse governed by customary international law (paras. 50–59)

The Court observes at the outset that neither Chile nor Bolivia is party to the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter referred to as the "1997 Convention") or to any treaty governing the non-navigational uses of the Silala River. Accordingly, in the present case, the respective rights and obligations of the Parties are governed by customary international law. The Court notes that Chile's submission (*a*) contains the legal propositions that the Silala waters are an international watercourse under customary international law, and that the customary international law rules relating to international watercourses apply to the Silala waters in their entirety. The Court observes that the legal position originally taken by Bolivia in its Counter-Memorial positively opposed both legal propositions advanced by Chile. In particular, Bolivia contested that the rules on the non-navigational uses of international watercourses under customary international law apply to the "artificially enhanced" surface flow of the Silala.

The Court observes that the positions of the Parties with respect to the legal status of the Silala waters and the rules applicable under customary international law have converged in the course of the proceedings. During the oral proceedings, Bolivia has on several occasions expressed its agreement with Chile's claim that—despite the "artificial enhancement" of the surface flow of the Silala River—the Silala waters qualify in their entirety as an international watercourse under customary international law, and stated that, therefore, customary international law applies both to the "naturally flowing" waters and the "artificially enhanced" surface flow of the Silala.

The Court notes that Bolivia, while recognizing that the Silala waters qualify as an international watercourse, does not consider Article 2 of the 1997 Convention to reflect customary international law. The Court also notes that Bolivia maintains that the "unique characteristics" of the Silala, including the

fact that parts of its surface flow are "artificially enhanced", have to be taken into account when applying the customary rules on international watercourses to the Silala waters. In its final submissions Bolivia thus asks the Court to reject Chile's submissions and, if it does not do so, to find that the surface flow of the Silala has been "artificially enhanced".

For the purpose of determining whether Bolivia agrees with the position of Chile regarding the legal status of the Silala as an international watercourse under customary international law, the Court does not consider it necessary for Bolivia to have recognized that the definition contained in Article 2 of the 1997 Convention reflects customary international law. Furthermore, Bolivia's insistence on the relevance of the "unique characteristics" of the Silala waters in the application of the rules of customary international law does not change the fact that it has expressed its unequivocal agreement with the proposition that the customary international law on non-navigational uses of international watercourses applies to all of the Silala waters. In this regard, the Court takes note of Bolivia's response to a question put by one of its Judges during the oral proceedings in which Bolivia confirmed "the Silala's nature as an international watercourse independent of its undisputable special characteristics, which have no bearing on the existing customary rules" and emphasized that it "has not attached any conditions or restrictions to its acceptance of the application of customary law". The Court takes note of Bolivia's acceptance of the substance of Chile's submission (*a*).

Given that the Parties agree with respect to the legal status of the Silala River system as an international watercourse and on the applicability of the customary international law on non-navigational uses of international watercourses to all the waters of the Silala, the Court finds that the claim made by Chile in its final submission (*a*) no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

2. Submission (b): Chile's entitlement to the equitable and reasonable utilization of the waters of the Silala River system (paras. 60–65)

The Court observes that, when these proceedings were instituted, Chile's claim regarding its entitlement to the equitable and reasonable use of the waters of the Silala, which includes both the "naturally flowing" and "artificially enhanced" parts, was positively opposed by Bolivia. During the course of the proceedings, however, it became apparent that the Parties agree that the principle of equitable and reasonable utilization applies to the entirety of the waters of the Silala, irrespective of their "natural" or "artificial" character. The Parties also agree that they are both entitled to the equitable and reasonable utilization of the Silala waters under customary international law. It is not for the Court to address a possible difference of opinion regarding a future use of these waters that is entirely hypothetical. For these reasons, the Court finds that the Parties agree with respect to Chile's submission (*b*). Accordingly, the Court concludes that the claim made by Chile in its final submission (*b*) no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

3. Submission (c): Chile's entitlement to its current use of the waters of the Silala River system (paras. 66–76)

The Court notes that, when these proceedings were instituted, Chile's claim to be entitled to its current use of the waters of the Silala was positively opposed by Bolivia as far as it concerned those parts of the flow which Bolivia describes as "artificially enhanced". Considering the statements made by Bolivia during the oral proceedings, the Court also notes that the Parties agree that Chile has a right to the use of an equitable and reasonable share of the waters of the Silala irrespective of the "natural" or "artificial" character or origin of the water flow. Furthermore, Bolivia does not claim in these proceedings that Chile owes compensation to Bolivia for past uses of the waters of the Silala.

The Court observes that the formulation of submission (*c*) does not, by itself, clearly indicate whether Chile asks the Court only to declare that its current use of the waters of the Silala is in conformity with the principle of equitable and reasonable utilization, or whether Chile requests the Court to declare, in addition, that it has a right to receive the same rate of flow and volume of the waters in the future. In this respect, the Court takes note of several statements made by Chile during the later stages of the proceedings in which it emphasized that submission (*c*) only seeks a declaration to the effect that the present use of the waters of the Silala is in conformity with the principle of equitable and reasonable utilization and that its entitlement to any future use is without prejudice to that of Bolivia. Moreover, Chile has underlined, on several occasions, that its right to equitable and reasonable use would not *per se* be infringed by the reduction of the flow subsequent to a dismantling of the channels and installations.

The Court considers that the clarification brought about by these statements is not called into question by references, in Chile's written and oral pleadings, to the general duty of Bolivia not to breach its obligations under customary international law, should it decide to proceed to a dismantling of the channels. In the Court's view, these references do not qualify the substance of Chile's statements but simply recall the general duty of States to act in compliance with their obligations under international law.

Regarding Bolivia's contention that Chile's use is without prejudice to Bolivia's future uses of the Silala, the Court reaffirms that there is no opposition of views regarding a corresponding right of Bolivia to the equitable and reasonable use of the Silala waters, as Chile does not deny Bolivia's proposition in this regard. For these reasons, the Court finds that the Parties have, in the course of the proceedings, come to agree with respect to Chile's submission (*c*). In this connection, the Court takes note of statements by Chile according to which it is no longer contested that it is entirely within Bolivia's sovereign powers to dismantle the channels and to restore the wetlands in its territory in conformity with international law. Since the Parties agree regarding Chile's submission (*c*), the Court concludes that the claim made by Chile in its final submission (*c*) no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

4. Submission (d): Bolivia's obligation to prevent and control harm resulting from its activities in the vicinity of the Silala River system (paras. 77–86)

The Court notes that when these proceedings were instituted, Bolivia positively opposed the claim contained in Chile's submission (*d*) with respect to the applicability of the obligation to prevent transboundary harm to the "artificially enhanced" flow of the Silala. The Court observes that the Parties agree that they are bound by the customary obligation to prevent transboundary harm. Furthermore, the Parties now agree that this obligation applies to the Silala waters irrespective of whether they flow naturally or are "artificially enhanced". The Parties also agree that the obligation to prevent transboundary harm is an obligation of conduct and not an obligation of result, and that it may require the notification of, and exchange of information with, other riparian States and the conduct of an environmental impact assessment.

It is less clear whether the Parties agree on the threshold for the application of the customary obligation to prevent transboundary harm. Bolivia insists that the obligation to take all appropriate measures to prevent transboundary harm only applies to the causing of "significant" harm. Certain statements by Chile might be understood as suggesting a lower threshold. For example, in its Application Chile argued that Bolivia is under an "obligation to co-operate and prevent transboundary harm". Moreover, Chile has repeatedly claimed that Bolivia is under an obligation "to prevent and control pollution and other forms of harm", including in its final submission (*d*).

When assessing whether and to what extent the final submissions of the Parties continue to reflect the dispute between them, the Court may interpret the submissions of the Parties, taking into account the Application as a whole and the arguments of the Parties before it. The Court notes that Chile has sometimes referred to the obligation to prevent transboundary harm, without specifying that such an obligation is limited to significant transboundary harm. However, Chile has also repeatedly used the term "significant harm" as the threshold for the application of the obligation of prevention, both in its written pleadings and during the oral proceedings. The Court further notes that neither in its written nor in its oral pleadings did Chile ask the Court to apply a lower threshold than that of "significant harm". The Court is of the view that Chile's varying terminology cannot be interpreted, in the absence of more specific indications to the contrary, as expressing a disagreement in substance with the threshold of "significant transboundary harm" put forward by Bolivia and repeatedly used by Chile itself, including with reference to Article 7 of the 1997 Convention.

For these reasons, the Court finds that the Parties have, in the course of the proceedings, come to agree regarding the substance of Chile's submission (*d*). Accordingly, the Court concludes that the claim made by Chile in its final submission (*d*) no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

5. Submission (e): Bolivia's obligation to notify and consult with respect to measures that may have an adverse effect on the Silala River system (paras. 87–129)

The Court notes that there is a disagreement, in law and in fact, between the Parties regarding Chile's submission (*e*). This disagreement concerns, first, the scope of the obligation to notify and consult in the customary international law governing the non-navigational uses of international watercourses and the threshold for the application of this obligation. Secondly, it relates to the question whether Bolivia has complied with this obligation when planning and carrying out certain activities.

In support of their positions with respect to the relevant rules of customary international law, both Parties refer to the 1997 Convention. They also refer to the draft articles on the law of the non-navigational uses of international watercourses adopted by the International Law Commission (hereinafter the "ILC" or the "Commission") in 1994 (hereinafter the "ILC Draft Articles"), which served as the basis for the 1997 Convention, as well as to the commentaries of the ILC to those Draft Articles. The Court notes in this regard that both Parties consider that a number of provisions of the 1997 Convention reflect customary international law. They disagree, however, about whether this is true as regards certain other provisions, including those relating to procedural obligations, in particular the obligation to notify and consult.

Before examining the question of compliance with the obligation to notify and consult in the specific context of the present case, the Court first recalls the legal framework within which this obligation arises and the rules and principles of customary international law that guide the determination of the procedural obligations incumbent on the Parties to the present proceedings as riparian States of the Silala.

A. Applicable legal framework (paras. 92–102)

The Court notes that the customary obligations relating to international watercourses are incumbent on the riparian States of the Silala only if the Silala is in fact an international watercourse. It recalls in this regard that, even though both Parties agree that the Silala is an international watercourse, Bolivia has not explicitly recognized that the definition of "international watercourse" set out in Article 2 of the 1997 Convention reflects customary international law, contrary to what Chile, for its part, asserts. The Court considers that modifications that increase the surface flow of a watercourse have no bearing on its characterization as an international watercourse.

The Court notes in this regard that the experts appointed by each Party agree that the waters of the Silala, whether surface or groundwater, constitute a whole flowing from Bolivia into Chile and into a common terminus. There is no doubt that the Silala is an international watercourse and, as such, subject in its entirety to customary international law, as both Parties now agree.

The Court further emphasizes that the concept of an international watercourse in customary international law does not prevent the particular characteristics of each international watercourse being taken into consideration when applying customary principles. The particular characteristics of each watercourse, such as those which appear in the non-exhaustive list

contained in Article 6 of the 1997 Convention, form part of the "relevant factors and circumstances" that must be taken into account in determining and assessing what constitutes equitable and reasonable use of an international watercourse under customary international law. As stated above, the Parties agree that under customary international law, they are both equally entitled to the equitable and reasonable use of the Silala's waters.

According to the jurisprudence of the Court and that of its predecessor, an international watercourse constitutes a shared resource over which riparian States have a common right. As early as 1929, the Permanent Court of International Justice declared, with regard to navigation on the River Oder, that there is a community of interest in an international watercourse which provides "the basis of a common legal right". More recently, the Court applied this principle to the non-navigational uses of international watercourses and observed that it has been strengthened by the modern development of international law, as evidenced by the adoption of the 1997 Convention.

Under customary international law, every riparian State has a basic right to an equitable and reasonable sharing of the resources of an international watercourse. This implies both a right and an obligation for all riparian States of international watercourses: every such State is both entitled to an equitable and reasonable use and share, and obliged not to exceed that entitlement by depriving other riparian States of their equivalent right to a reasonable use and share. This reflects "the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource". In the present case, under customary international law, the Parties are both entitled to an equitable and reasonable use of the waters of the Silala as an international watercourse and obliged, in utilizing the international watercourse, to take all appropriate measures to prevent the causing of significant harm to the other Party.

The Court further observes that the principle of equitable and reasonable use of an international watercourse must not be applied in an abstract or static way, but by comparing the situations of the States concerned and their utilization of the watercourse at a given time. The Court recalls that in general international law it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". "A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" in a transboundary context, and in particular as regards a shared resource.

The Court has also emphasized that the above-mentioned obligations are accompanied and complemented by narrower and more specific procedural obligations, which facilitate the implementation of the substantive obligations incumbent on riparian States under customary international law. As the Court has already had occasion to state, it is in fact only "by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations".

This is why the Court considers that the obligations to co-operate, notify and consult are an important complement to the substantive obligations of every riparian State. In the Court's view, "[t]hese obligations are all the more vital" when, as in the case of the Silala in the present proceedings, the shared resource at issue "can only be protected through close and continuous co-operation between the riparian States".

The Court reaffirms that the Parties do not disagree about the customary nature of the above-mentioned substantive obligations or their application to the Silala. Their disagreement relates to the scope of the procedural obligations and their applicability in the circumstances of the present case. In particular, the Parties disagree about the threshold for the application of the obligation to notify and consult and whether Bolivia has breached this obligation.

B. Threshold for the application of the obligation to notify and consult under customary international law (paras. 103–118)

The Parties disagree about the interpretation to be given to Article 11 of the 1997 Convention and whether that provision reflects customary international law. Article 11 reads as follows: "Watercourse States shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse."

The Court recalls that the law applicable in the present case is customary international law. Therefore, the obligation to exchange information on planned measures contained in Article 11 of the 1997 Convention applies to the Parties only in so far as it reflects customary international law. Unlike the commentaries to certain other provisions of the ILC Draft Articles, the commentary to Article 11 (which was to become Article 11 of the 1997 Convention) does not refer to any State practice or judicial authority that could suggest the customary nature of this provision. The Commission merely states that illustrations of instruments and decisions "which lay down a requirement similar to that contained in article 11" are provided in the commentary to Article 12. Thus, the Commission did not appear to consider that Article 11 of the ILC Draft Articles reflected an obligation under customary international law. In the absence of any general practice or *opinio juris* to support this contention, the Court cannot conclude that Article 11 of the 1997 Convention reflects customary international law. There is therefore no need for the Court to address the interpretation of Article 11 that applies as between the State parties to the 1997 Convention.

In view of the foregoing, the Court cannot accept Chile's contention that Article 11 of the 1997 Convention reflects a general obligation in customary international law to exchange information with other riparian States about any planned measure that may have an effect, whether adverse or beneficial, on the condition of an international watercourse.

Turning to Article 12 of the 1997 Convention, the Court notes that, while both Parties consider that this provision reflects customary international law, they disagree about its interpretation. Article 12 reads as follows:

> "Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures."

The Court observes that the content of this Article corresponds to a large extent to its own jurisprudence on the procedural obligations incumbent on States under customary international law as regards transboundary harm, including in the context of the management of shared resources. Indeed, in its jurisprudence the Court has confirmed the existence, in certain circumstances, of an obligation to notify and consult other riparian States concerned. It has emphasized that this customary obligation applies when "there is a risk of significant transboundary harm". The Court recalls that, in that judgment, it specified the steps and the approach to be taken by a State planning to undertake an activity on or around a shared resource or generally capable of having a significant transboundary effect. The State in question

> "must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.
>
> …
>
> If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk."

The Court is aware of the differences between the formulations used in Article 12 of the 1997 Convention and those used in its own jurisprudence regarding the threshold for the application of the customary obligation to notify and consult, and on the duty to conduct a prior environmental impact assessment. In particular, the Convention refers to "planned measures which may have a significant adverse effect upon other watercourse States", whereas the Court has referred to "a risk of significant transboundary harm". The Court also notes that the ILC's commentary does not specify the degree of harm that meets the threshold for the application of the obligation of notification contained in Article 12 of the Draft Articles.

The Court notes that even though the requirements of notification and consultation established in its jurisprudence and in Article 12 of the 1997 Convention are not worded in identical terms, both formulations suggest that the threshold for the application of the obligation to notify and consult is reached when the measures planned or carried out are capable of producing harmful effects of a certain magnitude.

The Court considers that Article 12 of the 1997 Convention does not reflect a rule of customary international law relating to international watercourses that is more rigorous than the general obligation to notify and consult contained in its own jurisprudence. It therefore concludes that each riparian State is required, under customary international law, to notify and consult the other riparian State with regard to any planned activity that poses a risk of significant harm to that State.

C. Question of Bolivia's compliance with the customary obligation to notify and consult (paras. 119–129)

Having found that customary international law imposes on each Party an obligation to notify and consult with regard to any planned activity that carries a risk of significant harm to the other Party, the Court then ascertains whether Bolivia's conduct has been in accordance with customary international law, in view of Chile's claims in that regard.

In the following part, the Court evaluates Bolivia's compliance with the procedural obligation to notify and consult in light of the foregoing conclusions on the content of that customary obligation and the threshold for its application. As established above, a riparian State is obliged to notify and consult the other riparian States about any planned measures that pose a risk of significant transboundary harm.

Consequently, the Court would only need to consider the question whether Bolivia has conducted an objective assessment of the circumstances and of the risk of significant transboundary harm in accordance with customary law, if it were established that any of the activities undertaken by Bolivia in the vicinity of the Silala posed a risk of significant harm to Chile. This could be the case if, by their nature or by their magnitude and in view of the context in which they are to be carried out, certain planned measures pose a risk of significant transboundary harm. However, this cannot be said of the measures taken by the Respondent about which Chile complains. Chile has not demonstrated or even alleged any risk of harm, let alone significant harm, linked to the measures planned or carried out by Bolivia. The Court notes that Bolivia has provided a number of factual details about the planned measures, which have not been disputed by Chile. Thus, no steps were taken to implement the plans to allow a Bolivian company to use the waters. No action was taken in respect of the projects to build a fish farm, a weir and a mineral water bottling plant. As for the ten small houses that were built, Bolivia has asserted, without contradiction from Chile, that these have never been inhabited. Only the military post was in fact built and put into operation. Bolivia has stated in this regard that the post in question is modest and that it took all necessary measures to prevent the contamination of the Silala and its waters. Chile has not claimed otherwise, nor alleged that any of the measures planned or carried out were capable of causing the slightest risk of harm to Chile.

For these reasons, the Court finds that Bolivia has not breached the obligation to notify and consult incumbent on it under customary international law, and the claim made by Chile in its final submission (*e*) must therefore be rejected.

Notwithstanding the above conclusion, the Court takes note of Bolivia's willingness to continue to co-operate with Chile with a view to guaranteeing each Party an equitable and reasonable use of the Silala and its waters. The Court thus invites the Parties to bear in mind the need to conduct consultations on an ongoing basis in a spirit of co-operation, in order to ensure respect for their respective rights and the protection and preservation of the Silala and its environment.

IV. Counter-claims of Bolivia (paras. 130–162)

1. Admissibility of the counter-claims (paras. 130–137)

The Court recalls that Bolivia, in its Counter-Memorial, made three counter-claims. The Court, in its Order of 15 November 2018, did not consider that it was required to rule definitively, at that stage of the proceedings, on the question of whether Bolivia's counter-claims met the conditions set forth in the Rules of Court and deferred the matter to a later stage. Before considering the merits of the counter-claims, the Court determines whether they fulfil the conditions set forth in its Rules. Article 80, paragraph 1, of its Rules provides that "[t]he Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party". The Court has previously characterized these two requirements as relating to "the admissibility of a counter-claim as such" and has explained that the term "admissibility" must be understood "to encompass both the jurisdictional requirement and the direct connection requirement".

Bolivia maintains that its counter-claims fulfil the requirements of Article 80, paragraph 1, of the Rules of Court. It contends that the counter-claims come within the jurisdiction of the Court and are connected with the principal claims within the meaning of the Rules and the jurisprudence of the Court.

The Court recalls that Chile stated, in a letter to the Registry and then through its representative at a meeting between the President of the Court and the Agents of the Parties, that it did not intend to contest the admissibility of Bolivia's counter-claims.

The Court notes that Chile does not contest that the counter-claims come within the Court's jurisdiction. It also notes that Bolivia, like Chile, founds the Court's jurisdiction over the counter-claims on Article XXXI of the Pact of Bogotá. The Court observes that the counter-claims concern rights claimed by Bolivia under the customary international law applicable to international watercourses and therefore fall within "[a]ny question of international law" in respect of which the Court has jurisdiction under Article XXXI of the Pact of Bogotá.

The Court considers that, in this case, the counter-claims are directly connected with the subject-matter of the principal claims, both in fact and in law. It is indeed clear from the Parties' submissions that their claims form part of the same factual complex. Similarly, the respective claims of both Parties concern the determination and application of customary rules in the legal relations between the two States with regard to the Silala. The Court is also of the view that Bolivia's counter-claims are not offered merely as defences to Chile's submissions but set out separate claims. The Court thus concludes that the requirements of Article 80, paragraph 1, of its Rules are met and that it may examine Bolivia's counter-claims on the merits.

2. First counter-claim: Bolivia's alleged sovereignty over the artificial channels and drainage mechanisms installed in its territory (paras. 138–147)

In its first counter-claim, Bolivia requested the Court to adjudge and declare that it has sovereignty over the artificial channels and drainage mechanisms in the Silala located in its territory and that it has the right to decide whether and how to maintain them.

The Court has previously stated that, as is the case with principal claims, it "must establish the existence of a dispute between the parties with regard to the subject-matter of the counter-claims". Given that the Parties' positions have changed considerably throughout the present proceedings, as already noted, the Court must satisfy itself that the first counter-claim has not become without object.

The Court observes in respect of this counter-claim that the Parties agree that the artificial channels and drainage mechanisms are located in territory under Bolivia's sovereignty. Both States also agree that, under international law, Bolivia has the sovereign right to decide what becomes of the infrastructure in its territory in the future, and whether to maintain or dismantle it.

In this regard, Bolivia contends that, in invoking the right to equitable and reasonable utilization in relation to this counter-claim, Chile seems to consider that the effect of dismantling infrastructure on the flow of the river should be regarded as a potential breach of its right to use the waters of the Silala. In Bolivia's view, this amounts to claiming an "acquired right", meaning that Chile's use of these waters, or any use it might make of them in the future, could be set against Bolivia's right to dismantle the artificial installations. The Court notes in this regard that Chile clearly stated in its written pleadings, and repeated in the oral proceedings, that any reduction in the transboundary surface flow resulting from the dismantling of channels in Bolivia would not be considered a violation of customary international law unless the obligations acknowledged by Bolivia were somehow engaged.

Moreover, Chile has accepted the following points presented by Bolivia: Bolivia's sovereignty over the channels and drainage mechanisms; Bolivia's sovereign right to maintain or dismantle those channels and drainage mechanisms; Bolivia's sovereign right to restore the wetlands; and the fact that these rights must be exercised in compliance with the customary obligations applicable with regard to significant transboundary harm. The Court concludes that, in respect of these points, there is no longer any disagreement between the Parties.

As noted above, the Parties agree that Bolivia's right to construct, maintain or dismantle the infrastructure in its territory must be exercised in accordance with the applicable rules of customary international law. In particular, Bolivia clearly stated during the oral proceedings that its sovereign right over this infrastructure, including the right to dismantle it, must be exercised in compliance with the customary obligations applicable with regard to significant transboundary harm. The Parties also agree that the rules applicable to the Silala include, in particular, the right to equitable and reasonable utilization by riparian States, the exercise of due diligence to avoid causing significant harm to other watercourse States, and compliance with the general obligation to co-operate as well as with all procedural obligations. It is possible that the Parties may, in the future, express divergent views on the implementation of these obligations in the event of infrastructure installed on the Silala being dismantled. This possibility, however, does not

alter the fact that Chile does not contest the right which is the subject-matter of the first counter-claim, namely Bolivia's right to maintain or dismantle the channels located in its territory. The Court considers that Bolivia may rely on Chile's acceptance of Bolivia's right to dismantle the channels.

In light of the foregoing, the Court concludes that there is no disagreement in this respect between the Parties. In accordance with its judicial function, the Court may pronounce only on a dispute that continues to exist at the time of adjudication. Consequently, the Court finds that the counter-claim made by Bolivia in its final submission (*a*) no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

3. Second counter-claim: Bolivia's alleged sovereignty over the "artificial" flow of Silala waters engineered, enhanced or produced in its territory (paras. 148–155)

In its second counter-claim as presented in its final submissions, Bolivia requested the Court to adjudge and declare that it has sovereignty over the artificial flow of Silala waters engineered, enhanced or produced in its territory, and that Chile has no acquired right to that artificial flow.

The Court notes that the wording of this counter-claim and Bolivia's position thereon have changed considerably throughout the proceedings, in particular as a result of its evolving positions and submissions on the nature of the Silala. Bolivia no longer contests the nature of the Silala as an international watercourse and now acknowledges that customary international law applies to the entirety of its waters. The Court further notes that Bolivia no longer claims, as it did in its written pleadings, that it has the right to determine the conditions and modalities for the delivery of the "artificially flowing" waters of the Silala and that any use of such waters by Chile is subject to Bolivia's consent. Bolivia now argues that Chile may continue to benefit in an equitable and reasonable manner from the flow resulting from the installations and the channelization of the Silala springs, so long as the flow continues. What Bolivia now seeks in this counter-claim is a declaration that Chile does not have an acquired right to the maintenance of the current situation, and that Chile's right to the equitable and reasonable utilization of the surface flow generated by the channels is not a "right for the future" that would allow it to oppose either the dismantling of those installations or any equitable and reasonable utilization of the waters that Bolivia may claim under customary international law.

The Court observes that the meaning ascribed by Bolivia to the term "sovereignty" is no different in substance from the "sovereign right" that Chile recognizes Bolivia to have over the infrastructure installed in Bolivian territory. Bolivia stated that when it refers to its "sovereignty" over the "enhanced flow", it means that its right over the channel works and its right to dismantle them, which Chile does not dispute, allow it to decide whether the flow generated by those works will be maintained or whether it will cease as a result of the works being dismantled. According to Bolivia, the right that it claims is not an autonomous one but rather stems from its recognized right to maintain or dismantle all the installations in its territory. In this regard, the Court notes Chile's statement that Bolivia's right over the infrastructure was "wholly uncontroversial" and that Chile did not object to it.

The Court also observes that the second counter-claim, as presented in Bolivia's final submissions, rests on the premise that Chile is claiming an "acquired right" over the current flow of the Silala. As the Court noted earlier, Chile has clearly stated, first, that it is not claiming any such "acquired right" and, second, that it recognizes that Bolivia has a sovereign right to dismantle the infrastructure and that any resulting reduction in the flow of the waters of the Silala into Chile would not in itself constitute a violation by Bolivia of its obligations under customary international law. Consequently, the Court concludes that there is no longer any disagreement between the Parties on this point.

In light of the foregoing, the Court finds that, as a consequence of the convergence of views between the Parties on the second counter-claim made by Bolivia in its final submission (*b*), this counter-claim no longer has any object, and that, therefore, the Court is not called upon to give a decision thereon.

4. Third counter-claim: the alleged need to conclude an agreement for any future delivery to Chile of the "enhanced flow" of the Silala (paras. 156–162)

In its third counter-claim as presented in its final submissions, Bolivia requests the Court to adjudge and declare that any request addressed by Chile to Bolivia for the delivery of the enhanced flow of the Silala, and the conditions and modalities thereof, including the compensation to be paid for any such delivery, are subject to the conclusion of an agreement with Bolivia. In that regard, the Court recalls that it is not for the Court to pronounce on hypothetical situations. It may rule only in connection with concrete cases where there exists, at the time of the adjudication, an actual dispute between the parties. This is, however, not the case with Bolivia's third counter-claim, which does not concern an actual dispute between the Parties. Rather, it seeks an opinion from the Court on a future, hypothetical situation.

For these reasons, the counter-claim made by Bolivia in its final submission (*c*) must be rejected.

V. Operative clause (para. 163)

For these reasons,

The Court,

(1) By fifteen votes to one,

Finds that the claim made by the Republic of Chile in its final submission (*a*) no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Judges *ad hoc* Daudet, Simma;

Against: Judge Charlesworth;

(2) By fifteen votes to one,

Finds that the claim made by the Republic of Chile in its final submission (*b*) no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Judges *ad hoc* Daudet, Simma;

Against: Judge Charlesworth;

(3) By fifteen votes to one,

Finds that the claim made by the Republic of Chile in its final submission (*c*) no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Judges *ad hoc* Daudet, Simma;

Against: Judge Charlesworth;

(4) By fourteen votes to two,

Finds that the claim made by the Republic of Chile in its final submission (*d*) no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Salam, Iwasawa, Nolte, Judges *ad hoc* Daudet, Simma;

Against: Judges Robinson, Charlesworth;

(5) Unanimously,

Rejects the claim made by the Republic of Chile in its final submission (*e*);

(6) By fifteen votes to one,

Finds that the counter-claim made by the Plurinational State of Bolivia in its final submission (*a*) no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Judges *ad hoc* Daudet, Simma;

Against: Judge Charlesworth;

(7) By fifteen votes to one,

Finds that the counter-claim made by the Plurinational State of Bolivia in its final submission (*b*) no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

In favour: President Donoghue; Vice-President Gevorgian; Judges Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Judges *ad hoc* Daudet, Simma;

Against: Judge Charlesworth;

(8) Unanimously,

Rejects the counter-claim made by the Plurinational State of Bolivia in its final submission (*c*).

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Judges Tomka and Charlesworth append declarations to the Judgment of the Court; Judge *ad hoc* Simma appends a separate opinion to the Judgment of the Court.

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Declaration of Judge Tomka

Judge Tomka notes that the Judgment most likely comes as a surprise to the Parties. Indeed, it decides almost nothing. Most of the final submissions of the Parties are found to no longer have any object such that the Court is not called upon to give a decision thereon. This outcome has been made possible by the Court's reliance on and recourse to the pronouncement made in its 1974 Judgment in the *Nuclear Tests (Australia* v. *France)* case. According to that pronouncement, the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so, as this is one of the attributes of its judicial functions. The Judgment was criticized by several Members of the Court at the time who vigorously dissented. These Members took issue with the 1974 Judgment's basic premise which led the Court to modify the scope of the submissions rather than interpret them.

Judge Tomka accepts that the Court may be entitled to interpret the final submissions of a party. He recalls that the Court is also entitled to seek clarification from the party who has formulated the submissions when they lack clarity. He considers, however, that the Court should avoid an interpretation of the submissions which is at odds with the ordinary meaning of the words and legal concepts used therein. The decisive weight shall be put on the final submissions read out by the agent and subsequently submitted to the Registry.

Declaration of Judge Charlesworth

Judge Charlesworth concurs with the Court's rejection of one of Chile's claims and one of Bolivia's counter claims. She observes that the Court neither upholds nor rejects the remaining claims and counter claims, but that it has instead shifted its attention to ascertaining whether the Parties' positions have converged, a solution with which she disagrees.

Judge Charlesworth notes that the requirement for the existence of a dispute, like other elements on which the Court's jurisdiction depends, must be fulfilled at the time of the institution of proceedings. In her view, the Court has never identified the grounds on which a dispute might disappear in the course of the proceedings or the legal consequences of such disappearance. Judge Charlesworth considers that the Judgment separates the dispute requirement from all other jurisdictional elements, in so far as fulfilment of this requirement is a necessary but not a sufficient condition for the Court to adjudicate. She points out that the Judgment does not explain whether the disappearance of a dispute deprives the Court of its jurisdiction, or whether it renders the application inadmissible.

Judge Charlesworth argues that an appeal to the Court's function of deciding disputes does not assist in clarifying the Court's role in ascertaining the continued existence of a dispute and that adjudication of persisting, albeit reduced, disputes does not run counter to the Court's function. For her, the Court's analysis adds complexity and uncertainty to the jurisprudence on the concept of a dispute, and it is inconsistent with the jurisprudence concerning the relevance of events taking place in the course of the proceedings for the purpose of ascertaining the existence of a dispute.

Judge Charlesworth thinks that the Court's analysis merges two distinct issues: the first concerns the circumstances under which a claim is deprived of its object, while the second concerns the legal effects of a convergence of positions between the parties to a dispute. In her view, the Court's jurisprudence provides no support for the proposition that the convergence of positions between the parties may deprive a claim of its object. After discussing other relevant judgments, Judge Charlesworth focuses on the *Nuclear Tests* cases, which, in her view, are distinct from the situation here. She argues that the Court's reasoning in those cases unfolded in three steps: first, the Court identified the "true object" of the applicants' claims as being the termination of nuclear testing by the respondent; second, the Court found that the respondent had made a legally binding undertaking to that effect; third, the Court concluded that the dispute between the parties had disappeared "because the object of the claim ha[d] been achieved by other means". According to Judge Charlesworth, the respondent's legally binding undertaking was a substitute for the legally binding judgment that the applicants had sought to obtain.

Judge Charlesworth considers that the situation in the present case is different from *Nuclear Tests* to the extent that there is no indication in the Judgment that the object of any claim or counter claim has been achieved by other means. In particular, she finds that the Court stops short of explaining the legal effect of a Party's reliance in its counterpart's representations, or indeed of a subsequent shift in the Parties' positions. In her view, unless parties commit to legally binding obligations, a pronouncement by the Court on the rights and duties of the parties is not incompatible with the Court's judicial function.

For Judge Charlesworth, the Parties' oral proceedings revealed that there remains some ambiguity about the extent of the agreement between the Parties on particular issues. In the circumstances, she states that the Court should have issued a declaratory judgment, which could assist in stabilizing the legal relations between the Parties.

Judge Charlesworth suggests that, even assuming a convergence of positions between the Parties, the Court should have issued a declaratory judgment recording the Parties' agreement. In her view, such judgments are in line with the spirit of the Statute of the Court and its predecessor. Judge Charlesworth thinks that, while the Court may refrain from recording agreements taking place prior to its seisin, it is understandable for the Court to note an agreement arrived at between the Parties during the proceedings. She proposes that such a judgment is in the interest of legal certainty between the parties because it ensures that the parties commit to their positions.

Judge Charlesworth concludes by arguing that States asserting rights for themselves or obligations for other States have an interest in having those rights or obligations definitively affirmed or rejected in a legally binding judgment by the Court possessing jurisdiction. In her view, the Court has not responded to this interest in the present case.

Separate opinion of Judge *ad hoc* Simma

Although Judge Simma voted in favour of the operative part of the Judgment, he did so with reluctance. He accepts that the Court, being a court of justice, cannot exceed the inherent limitations incumbent upon it in the exercise of its judicial function. He wonders, however, if justice is served when the Court renders a judgment of the kind it rendered today. The Judgment decides almost nothing and does not settle, with binding force, the points which were in dispute between the Parties when Chile instituted the proceedings in 2016. Most of the points in dispute are found to have disappeared in the course of the proceedings. Judge Simma wishes to make three sets of observations.

The first set of observations concerns the disappearance of certain points in dispute in the course of the proceedings. Judge Simma notes that the Respondent abandoned most of its case and most of its submissions in the course of the proceedings. This led the Parties to ask the Court to reject some or all of the other Party's submissions on the ground that they no longer had any object. Yet the Parties had difficulty in explaining what exactly they were agreed on.

Judge Simma considers that the test employed in the Judgment to determine whether a point in dispute has disappeared sets too low a bar. He notes that, in the Judgment, the Court sought to ascertain "whether specific claims ha[d] become without object as a consequence of a convergence of positions or agreement between the Parties, or for some other reason". In this regard, he notes that the Court has never used the "convergence of positions" standard before. This standard is too low. A convergence of positions is not the same as an agreement. Parties before the Court may converge but still disagree about their submissions.

Judge Simma then turns to the second set of observations which concerns the interpretation of the Respondent's submissions and counter claims. In his view, the Court did not abide by its stated interpretative methodology when it interpreted Bolivia's counter claim (*b*). The interpretation adopted in the Judgment goes against the ordinary meaning of the terms used in that submission and disregards the origin of that claim. The interpretation adopted in the Judgment, Judge Simma adds, also makes counter claim (*b*) entirely redundant with counter claim (*a*). For him, this interpretation is open to question.

Judge Simma further notes that the Court rejects the theory of sovereignty over the "artificial flow" of the Silala waters which was advanced by the Respondent.

Judge Simma then turns to his third set of observations. He considers that States appearing before the Court have a legitimate interest in seeking declaratory judgments that may ensure recognition of a situation at law, once and for all and with binding force. In his view, the present Judgment casts doubt on this interest. He is troubled that the Judgment might be read as sending the signal that any position may be held, however untenable, so long as this position is abandoned at the end of the judicial proceedings. In this regard, Judge Simma sees a difference between a dispute which has disappeared

because the parties genuinely agree, and a dispute which has artificially been hollowed out by one party.

In addition, Judge Simma wonders why the Judgment does not record in its operative part the agreement of the Parties reached in the course of the proceedings. In his view, this would have been consistent with the Court's practice. It would have been appropriate and helpful to the Parties in the circumstances of this case. Judge Simma regrets that the Court has rendered a judgment which is unhelpful to the Parties.

Table of cases by date of introduction

1. Contentious cases

Frontier Dispute (Burkina Faso/Republic of Mali)

Order of 10 January 1986 (Provisional measures)	ST/LEG/SER.F/1, p. 160
Judgment of 22 December 1986	ST/LEG/SER.F/1, p. 171

Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America)

Order of 10 May 1984 (Provisional measures)	ST/LEG/SER.F/1, p. 125
Order of 4 October 1984 (Declaration of Intervention)	ST/LEG/SER.F/1, p. 128
Judgment of 26 November 1984 (Jurisdiction and Admissibility)	ST/LEG/SER.F/1, p. 141
Judgment of 27 June 1986 (Merits)	ST/LEG/SER.F/1, p. 160

Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Tunisia *v.* Libyan Arab Jamahiriya)

Judgment of 10 December 1985	ST/LEG/SER.F/1, p. 153

Border and Transborder Armed Actions (Nicaragua *v.* Honduras)

Judgment of 20 December 1988 (Jurisdiction and Admissibility)	ST/LEG/SER.F/1, p. 192

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)

Judgment of 13 September 1990 (Intervention)	ST/LEG/SER.F/1, p. 212
Judgment of 11 September 1992	ST/LEG/SER.F/1/Add.1, p. 16

Elettronica Sicula S.p. A. (ELSI) (United States of America *v.* Italy)

Judgment of 20 July 1989	ST/LEG/SER.F/1, p. 197

Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark *v.* Norway)

Judgment of 14 June 1993	ST/LEG/SER.F/1/Add.1, p. 50

Certain Phosphate Lands in Nauru (Nauru *v.* Australia)

Judgment of 26 June 1992 (Preliminary Objections)	ST/LEG/SER.F/1/Add.1, p. 11

Arbitral Award of 31 July 1989 (Guinea-Bissau *v.* Senegal)

Order of 2 March 1990 (Provisional measures)	ST/LEG/SER.F/1, p. 210
Judgment of 12 November 1991	ST/LEG/SER.F/1, p. 220

Territorial Dispute (Libyan Arab Jamahiriya/Chad)

Judgment of 3 February 1994	ST/LEG/SER.F/1/Add.1, p. 63

East Timor (Portugal *v.* Australia)

Judgment of 30 June 1995	ST/LEG/SER.F/1/Add.1, p. 77

2. Advisory Opinions