



INTERNATIONAL LAW FELLOWSHIP PROGRAMME

Peace Palace – The Hague, the Netherlands
4 July – 12 August 2011



STUDY MATERIALS PART I

Codification Division of the United Nations Office of Legal Affairs

Acknowledgement

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INTERNATIONAL LAW
FELLOWSHIP PROGRAMME

Peace Palace – The Hague, the Netherlands
4 July 2011

INTRODUCTION TO INTERNATIONAL LAW
PROF. OLIVIER CORTEN

Codification Division of the United Nations Office of Legal Affairs

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Introduction to International Law (I)

4 July 2011

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General Method

Every session is conceived as an interactive process, rather than a classical *ex cathedra* lesson. This implies that, after a general presentation of some important points, a discussion will develop with all the participants. In order to be properly prepared to debate, every participant should read some texts and prepare answers to some questions prior to the session. The general structure of every lesson, as well as the corresponding texts and questions, are set out below.

General Introduction to International Law (Monday 4 July)

General Structure

1. The emergence and evolution of an International Legal Order
2. The tension between the 'horizontal' and 'vertical' dimensions of General International Law
3. Is International Law really 'Law'?
4. International Law as a political discourse

Readings

1. *South West Africa, Second Phase, Judgement, I.C.J. Reports 1966*, p. 6
2. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226
3. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6
4. Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (S/2003/351)

Questions

1. Is the ICJ using (or referring to) morals or politics in those three cases?
2. What are the respective places of law and politics in the US official justification to wage war against Iraq?

**Declaration on Principles of International Law
concerning Friendly Relations and Cooperation
among States in accordance with the
Charter of the United Nations**

RESOLUTIONS ADOPTED ON THE REPORTS OF THE SIXTH COMMITTEE

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<i>Resolution No.</i>	<i>Title</i>	<i>Item</i>	<i>Date of adoption</i>	<i>Page</i>
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2635 (XXV)	Report of the United Nations Commission on International Trade Law (A/8146)	86	12 November 1970	125
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	Progressive development and codification of the rules of international law relating to international watercourses	91	8 December 1970	129
	Review of the role of the International Court of Justice	96	15 December 1970	129
	Aerial hijacking or interference with civil air travel	99	25 November 1970	129

2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

The General Assembly,

Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XXIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States,

Having considered the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,¹ which met in Geneva from 31 March to 1 May 1970,

Emphasizing the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of friendly relations and co-operation among States,

Deeply convinced that the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations on the occasion of the twenty-fifth anniversary of the United Nations would contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter,

Considering the desirability of the wide dissemination of the text of the Declaration,

1. Approves the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the text of which is annexed to the present resolution;

2. Expresses its appreciation to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States for its work resulting in the elaboration of the Declaration;

3. Recommends that all efforts be made so that the Declaration becomes generally known.

1883rd plenary meeting,
24 October 1970.

¹ Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18 (A/8018).

ANNEX

DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS

PREAMBLE

The General Assembly,

Reaffirming in the terms of the Charter of the United Nations that the maintenance of international peace and security and the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations,

Recalling that the peoples of the United Nations are determined to practise tolerance and live together in peace with one another as good neighbours,

Bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development,

Bearing in mind also the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,

Considering that the faithful observance of the principles of international law concerning friendly relations and co-operation among States and the fulfilment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations,

Noting that the great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on,

Recalling the established principle that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means, and mindful of the fact that consideration is being given in the United Nations to the question of establishing other appropriate provisions similarly inspired,

Convinced that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security,

Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State,

Considering it essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Considering it equally essential that all States shall settle their international disputes by peaceful means in accordance with the Charter,

Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,

Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,

Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to

contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter,

Considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles,

Considering that the progressive development and codification of the following principles:

(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

(b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,

(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,

(d) The duty of States to co-operate with one another in accordance with the Charter,

(e) The principle of equal rights and self-determination of peoples,

(f) The principle of sovereign equality of States,

(g) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter, so as to secure their more effective application within the international community, would promote the realization of the purposes of the United Nations,

Having considered the principles of international law relating to friendly relations and co-operation among States,

1. *Solemnly proclaims* the following principles:

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations

Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

(a) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or

(b) The powers of the Security Council under the Charter.

All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States.

All States shall comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.

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

The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered

Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in

particular those relating to the pacific settlement of international disputes.

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

The duty of States to co-operate with one another in accordance with the Charter

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

(a) States shall co-operate with other States in the maintenance of international peace and security;

(b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;

(c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;

(d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights

and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

The principle of sovereign equality of States

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

(a) States are juridically equal;

(b) Each State enjoys the rights inherent in full sovereignty;

(c) Each State has the duty to respect the personality of other States;

(d) The territorial integrity and political independence of the State are inviolable;

(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

GENERAL PART

2. *Declares that:*

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.

Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration.

3. *Declares further that:*

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

2634 (XXV). Report of the International Law Commission

The General Assembly,

Having considered the report of the International Law Commission on the work of its twenty-second session,²

Emphasizing the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and to give increased importance to its role in relations among nations,

Noting with satisfaction that at its twenty-second session the International Law Commission completed its provisional draft articles on relations between States and international organizations, continued the consideration of matters concerning the codification and progressive development of the international law relating to succession of States in respect of treaties and State responsibility and included in its programme of work the question of treaties concluded between States and international organizations or between two or more international organizations, as recommended by the General Assembly in resolution 2501 (XXIV) of 12 November 1969,

Noting further that the International Law Commission has proposed to hold a fourteen-week session in 1971 in order to enable it to complete the second reading of the draft articles on relations between States

² *Ibid.*, Supplement No. 10 (A/8010/Rev.1).

**Letter dated 20 March 2003 from the Permanent
Representative of the United States of America to the
United Nations addressed to the President of the
Security Council (S/2003/351)**



Security Council

Distr.: General
21 March 2003

Original: English

Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council

Coalition forces have commenced military operations in Iraq. These operations are necessary in view of Iraq's continued material breaches of its disarmament obligations under relevant Security Council resolutions, including resolution 1441 (2002). The operations are substantial and will secure compliance with those obligations. In carrying out these operations, our forces will take all reasonable precautions to avoid civilian casualties.

The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991). Resolution 687 (1991) imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the ceasefire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary-General's public announcement in January 1993 following Iraq's material breach of resolution 687 (1991) that coalition forces had received a mandate from the Council to use force according to resolution 678 (1990).

Iraq continues to be in material breach of its disarmament obligations under resolution 687 (1991), as the Council affirmed in its resolution 1441 (2002). Acting under the authority of Chapter VII of the Charter of the United Nations, the Council unanimously decided that Iraq has been and remained in material breach of its obligations and recalled its repeated warnings to Iraq that it will face serious consequences as a result of its continued violations of its obligations. The resolution then provided Iraq a "final opportunity" to comply, but stated specifically that violations by Iraq of its obligations under resolution 1441 (2002) to present a currently accurate, full and complete declaration of all aspects of its weapons of mass destruction programmes and to comply with and cooperate fully in the implementation of the resolution would constitute a further material breach.

The Government of Iraq decided not to avail itself of its final opportunity under resolution 1441 (2002) and has clearly committed additional violations. In view of Iraq's material breaches, the basis for the ceasefire has been removed and use of force is authorized under resolution 678 (1990).

Iraq repeatedly has refused, over a protracted period of time, to respond to diplomatic overtures, economic sanctions and other peaceful means, designed to help bring about Iraqi compliance with its obligations to disarm and to permit full inspection of its weapons of mass destruction and related programmes. The actions that coalition forces are undertaking are an appropriate response. They are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area. Further delay would simply allow Iraq to continue its unlawful and threatening conduct.

It is the Government of Iraq that bears full responsibility for the serious consequences of its defiance of the Council's decisions.

I would be grateful if you could circulate the text of the present letter as a document of the Security Council.

(Signed) John D. Negroponte

**South West Africa, Second Phase, Judgement,
I.C.J. Reports 1966**

INTERNATIONAL COURT OF JUSTICE

YEAR 1966

18 July 1966

SOUTH WEST AFRICA CASES

(ETHIOPIA v. SOUTH AFRICA;
LIBERIA v. SOUTH AFRICA)

SECOND PHASE

Official citation:

South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, p. 6.

Mode officiel de citation:

Sud-Ouest africain, deuxième phase, arrêt, C.I.J. Recueil 1966, p. 6.

Alleged contraventions of League of Nations Mandate for South West Africa—Question of the legal status of the Applicants—Status governed by their position as former members of the League—Antecedent question arising on the merits of the case whether Applicants, as individual States former members of the League, have any legal right or interest in the subject-matter of their claim—Character of the mandates system within the framework of the League—Effect of Article 22 of the League Covenant instituting the system generally—Obligations of each mandatory defined in particular instruments of mandate—Structure of these instruments—Clauses conferring in respect of the mandated territory direct commercial or other special rights on League members in their capacity as separate States—Clauses providing for the carrying out of the mandate as a “sacred trust of civilization” in regard to the inhabitants of the territory—Mandatory’s obligations under latter class of clauses owed to League as an entity, not to member States individually—Lack of any legal right for member States individually to claim performance of these obligations—Additional rights not acquired by reason of dissolution of the League.

Political, moral and humanitarian considerations not in themselves generative of legal rights and obligations.

Jurisdictional clause of the mandates—Effect of decision given by the Court in 1962 on the question of its competence—Relationship between decisions on a preliminary objection and any question of merits—Inability in principle of jurisdictional clauses to confer substantive rights—Capacity to invoke a jurisdictional clause does not imply existence of any legal right or interest relative to the merits

<p>Sales number No de vente: 299</p>

of the claim—Interpretation of jurisdictional clause of the mandates—Jurisdictional clauses of the minorities treaties not comparable—Analysis of League practice in respect of mandates—Inconsistency with existence of rights now claimed by the Applicants.

Functions of a court of law—Limits of the teleological principle of interpretation—Court not entitled by way of interpretation to revise, rectify or supplement.

JUDGMENT

Present: President Sir Percy SPENDER; Vice-President WELLINGTON KOO; Judges WINIARSKI, SPIROPOULOS, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS; Judges ad hoc Sir Louis MBANEFO, VAN WYK; Registrar AQUARONE.

In the South West Africa cases,

between

the Empire of Ethiopia,

represented by

H.E. Dr. Tesfaye Gebre-Egzy,

Hon. Ernest A. Gross, Member of the New York Bar,

as Agents,

assisted by

Hon. Edward R. Moore, Under-Secretary of State of Liberia,

Mr. Keith Hightet, Member of the New York Bar,

Mr. Frank G. Dawson, Member of the New York Bar,

Mr. Richard A. Falk, Professor of International Law, Princeton University and Member of the New York Bar,

Mr. Arthur W. Rovine, Member of the Bar of the District of Columbia,

as Counsel,

and by

Mr. Neville N. Rubin, Lecturer in African Law at the School of Oriental and

African Studies of the University of London and Advocate of the Supreme

Court of South Africa,

as Adviser;

the Republic of Liberia,

represented by

H.E. Mr. Nathan Barnes,

Hon. Ernest A. Gross,

as Agents,

Hon. Edward R. Moore,

as Agent and Counsel,

assisted by

Mr. Keith Hightet,

Mr. Frank G. Dawson,

Mr. Richard A. Falk,

Mr. Arthur W. Rovine,

as Counsel,

and by

Mr. Neville N. Rubin,

as Adviser,

and

the Republic of South Africa,

represented by

Dr. J. P. verLoren van Themaat, S.C., Professor of International Law at the University of South Africa and Consultant to the Department of Foreign Affairs,

Mr. R. G. McGregor, Deputy Chief State Attorney,

as Agents,

and by

Mr. R. F. Botha, Department of Foreign Affairs and Advocate of the Supreme Court of South Africa,

as Agent and Adviser,

assisted by

Mr. D. P. de Villiers, S.C., Member of the South African Bar,

Mr. G. van R. Muller, S.C., Member of the South African Bar,

Dr. P. J. Rabie, S.C., Member of the South African Bar,

Mr. E. M. Grosskopf, Member of the South African Bar,

Dr. H. J. O. van Heerden, Member of the South African Bar,

Mr. A. S. Botha, Member of the South African Bar,

Mr. P. R. van Rooyen, Member of the South African Bar,

as Counsel,

and by

Mr. H. J. Allen, Department of Bantu Administration and Development,

Mr. H. Heese, Department of Foreign Affairs and Advocate of the Supreme Court of South Africa,

as Advisers,

THE COURT,

composed as above,

delivers the following Judgment:

By its Judgment of 21 December 1962, the Court rejected the four preliminary objections raised by the Government of South Africa and found that it had jurisdiction to adjudicate upon the merits of the dispute submitted to it on 4 November 1960 by the Applications of the Governments of Ethiopia and Liberia. Time-limits for the filing of the further pleadings on the merits were fixed or, at the request of the Parties, extended, by Orders of 5 February 1963, 18 September 1963, 20 January 1964 and 20 October 1964; and the second

phase of the cases became ready for hearing on 23 December 1964, when the Rejoinder of the Government of South Africa was filed.

Pursuant to Article 31, paragraph 3, of the Statute, and the Order of the Court of 20 May 1961, the Governments of Ethiopia and Liberia, acting in concert, chose Sir Louis Mbanefo, Chief Justice of the Eastern Region of Nigeria, to sit as Judge *ad hoc*. In accordance with the same Article, the Government of South Africa chose the Honourable J. T. van Wyk, Judge of the Appellate Division of the Supreme Court of South Africa, to sit as Judge *ad hoc*. Both judges had sat in the first phase of the proceedings.

On 14 March 1965, the Government of South Africa notified the Court of its intention to make an application to the Court relating to the composition of the Court for the purposes of these cases. The said notification was duly communicated to the Agents for the Applicants. The Court heard the contentions of the Parties with regard to the application at closed hearings held on 15 and 16 March 1965 and decided not to accede to the application. This decision was embodied in an Order of 18 March 1965.

Public sittings of the Court were held during the periods 15 March to 14 July and 20 September to 29 November 1965.

During these public sittings the Court heard the oral arguments and replies to H.E. Mr. Nathan Barnes, Hon. Ernest A. Gross, Agents, and Hon. Edward R. Moore, Agent and Counsel, on behalf of the Governments of Ethiopia and Liberia and of Dr. J. P. verLoren van Themaat, S.C., Mr. R. F. Botha, Agents, Mr. D. P. de Villiers, S.C., Mr. E. M. Grosskopf, Mr. G. van R. Müller, S.C., Mr. P. R. van Rooyen, Dr. H. J. O. van Heerden and Dr. P. J. Rabié, S.C., Counsel, on behalf of the Government of South Africa.

At the hearings from 27 April to 4 May 1965, the Court heard the views of the Parties on a proposal made by counsel for South Africa at the hearing on 30 March 1965 to the effect that the Court should carry out an inspection *in loco* in the Territory of South West Africa and also that the Court should visit South Africa, Ethiopia and Liberia, and one or two countries of the Court's own choosing south of the Sahara. At the hearing on 24 May 1965 the President announced that this request would not be deliberated on by the Court until after all the evidence had been called and the addresses of the Parties concluded. At the public sitting on 29 November 1965 the President announced that the Court had decided not to accede to this request. This decision was embodied in an Order of the same date.

At the hearing on 14 May 1965, the President announced that the Court was unable to accede to a proposal made on behalf of Ethiopia and Liberia that the Court should decide that South Africa, in lieu of calling witnesses or experts to testify personally, should embody the evidence in depositions or written statements. In the view of the Court, the Statute and Rules of Court contemplated a right in a party to produce evidence by calling witnesses and experts, and it must be left to exercise the right as it saw fit, subject to the provisions of the Statute and Rules of Court.

At the hearings from 18 June to 14 July and from 20 September to 21 October 1965, the Court heard the evidence of the witnesses and experts called by the Government of South Africa in reply to questions put to them in examination, cross-examination and re-examination on behalf of the Parties, and by Members of the Court. The following persons gave evidence: Dr. W. W. M. Eiselen, Commissioner-General for the Northern Sotho; Professor E. van den Haag, Professor of Social Philosophy at New York University; Professor J. P. van S. Bruwer, Professor of Social and Cultural Anthropology at the University

of Port Elizabeth; Professor R. F. Logan, Professor of Geography at the University of California, Los Angeles; Mr. P. J. Cillie, Editor of *Die Burger*, Cape Town; The Rev. J. S. Gericke, Vice-Chairman of the Synod of the Dutch Reformed Church of South Africa and Vice-Chancellor of the University of Stellenbosch; Professor D. C. Krogh, Head of the Department of Economics, University of South Africa; Mr. L. A. Pepler, Director of Bantu Development in South Africa; Dr. H. J. van Zyl, Deputy Secretary, Department of Bantu Education; Dr. C. H. Rautenbach, Rector of the University of Pretoria; Mr. K. Dahlmann, Editor of the *Allgemeine Zeitung*, Windhoek; Brigadier-General S. L. A. Marshall, Chief Historian of the United States Army in various theatres; Professor C. A. W. Manning, formerly Professor of International Relations, University of London; Professor S. T. Possony, Director of International Political Studies Programme, Hoover Institute, Stanford University.

In the course of the written proceedings, the following Submissions were presented by the Parties:

On behalf of the Governments of Ethiopia and Liberia,
in the Applications:

"Wherefore, may it please the Court, to adjudge and declare, whether the Government of the Union of South Africa is present or absent and after such time limitations as the Court may see fit to fix, that:

A. South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by His Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on December 17, 1920; and that the aforesaid Mandate is a treaty in force, within the meaning of Article 37 of the Statute of the International Court of Justice.

B. The Union of South Africa remains subject to the international obligations set forth in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa, and that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory; and that the Union is under an obligation to submit to the supervision and control of the General Assembly with regard to the exercise of the Mandate.

C. The Union of South Africa remains subject to the obligations to transmit to the United Nations petitions from the inhabitants of the Territory, as well as to submit an annual report to the satisfaction of the United Nations in accordance with Article 6 of the Mandate.

D. The Union has substantially modified the terms of the Mandate without the consent of the United Nations; that such modification is a violation of Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate.

E. The Union has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; its failure to do so is a violation of Article 2 of the Mandate and Article 22

of the Covenant; and that the Union has the duty forthwith to take all practicable action to fulfil its duties under such Articles.

F. The Union, in administering the Territory, has practised *apartheid*, i.e. has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory.

G. The Union, in administering the Territory, has adopted and applied legislation, regulations, proclamations, and administrative decrees which are by their terms and in their application, arbitrary, unreasonable, unjust and detrimental to human dignity; that the foregoing actions by the Union violate Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to repeal and not to apply such legislation, regulations, proclamations, and administrative decrees.

H. The Union has adopted and applied legislation, administrative regulations, and official actions which suppress the rights and liberties of inhabitants of the Territory essential to their orderly evolution toward self-government, the right to which is implicit in the Covenant of the League of Nations, the terms of the Mandate, and currently accepted international standards, as embodied in the Charter of the United Nations and the Declaration of Human Rights; that the foregoing actions by the Union violate Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease and desist from any action which thwarts the orderly development of self government in the Territory.

I. The Union has exercised powers of administration and legislation over the Territory inconsistent with the international status of the Territory; that the foregoing action by the Union is in violation of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty to refrain from acts of administration and legislation which are inconsistent with the international status of the Territory.

J. The Union has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of Article 6 of the Mandate; and that the Union has the duty forthwith to render such annual reports to the General Assembly.

K. The Union has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of the League of Nations rules; and that the Union has the duty to transmit such petitions to the General Assembly.

The Applicant reserves the right to request the Court to declare and adjudge with respect to such other and further matters as the Applicant may deem appropriate to present to the Court.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to this Application, and to make all necessary

awards and orders, including an award of costs, to effectuate its determinations";

in the Memorials:

"Upon the basis of the foregoing allegations of fact, supplemented by such facts as may be adduced in further testimony before this Court, and the foregoing statements of law, supplemented by such other statements of law as may be hereinafter made, may it please the Court to adjudge and declare, whether the Government of the Union of South Africa is present or absent, that:

1. South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by his Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on December 17, 1920;

2. the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted;

3. the Union, in the respects set forth in Chapter V of this Memorial and summarized in Paragraphs 189 and 190 thereof, has practised *apartheid*, i.e., has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory;

4. the Union, by virtue of the economic, political, social and educational policies applied within the Territory, which are described in detail in Chapter V of this Memorial and summarized at Paragraph 190 thereof, has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in the second paragraph of Article 2 of the Mandate and Article 22 of the Covenant; and that the Union has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfill its duties under such Articles;

5. the Union, by word and by action, in the respects set forth in Chapter VIII of this Memorial, has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of the Union's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to cease the actions summarized in Section C of Chapter VIII herein, and to refrain from similar actions in the future; and that the Union has the duty to accord full faith and respect to the international status of the Territory;

6. the Union, by virtue of the acts described in Chapter VII herein, has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that the Union has the duty forthwith to remove all such military bases from within the Territory; and that the Union has the duty to refrain from the establishment of military bases within the Territory;

7. the Union has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of its obligations as stated in Article 6 of the Mandate; and that the Union has the duty forthwith to render such annual reports to the General Assembly;

8. the Union has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of its obligations as Mandatory; and that the Union has the duty to transmit such petitions to the General Assembly;

9. the Union, by virtue of the acts described in Chapters V, VI, VII and VIII of this Memorial coupled with its intent as recounted herein, has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of the Union directly or indirectly to modify the terms of the Mandate.

The Applicant reserves the right to request the Court to declare and adjudge in respect to events which may occur subsequent to the date this Memorial is filed, including any event by which the Union's juridical and constitutional relationship to Her Britannic Majesty undergoes any substantial modification.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to this Memorial, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations";

in the Reply:

"Upon the basis of the allegations of fact in the Memorials, supplemented by those set forth herein or which may subsequently be adduced before this Honourable Court, and the statements of law pertaining thereto, as set forth in the Memorials and in this Reply, or by such other statements as hereafter may be made, Applicants respectfully reiterate their prayer that the Court adjudge and declare in accordance with, and on the basis of, the Submissions set forth in the Memorials, which Submissions are hereby reaffirmed and incorporated by reference herein.

Applicants further reserve the right to request the Court to declare and adjudge in respect of events which may occur subsequent to the date of filing of this Reply.

Applicants further reiterate and reaffirm their prayer that it may please the Court to adjudge and declare whatever else it may deem fit and proper in regard to the Memorials or to this Reply, and to make all necessary

awards and orders, including an award of costs, to effectuate its determinations."

On behalf of the Government of South Africa,
in the Counter-Memorial:

"Upon the basis of the statements of fact and law as set forth in the several Volumes of this Counter-Memorial, may it please the Court to adjudge and declare that the Submissions of the Governments of Ethiopia and Liberia as recorded at pages 168 to 169 of their Memorials are unfounded and that no declaration be made as claimed by them.

In particular Respondent submits:

1. That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations, and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder.

2. In the alternative to (1) above, and in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations:

(a) Relative to Applicants' Submissions Nos. 2, 7 and 8, that Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision of, the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body. Respondent is therefore under no obligation to submit reports concerning its administration of South West Africa, or to transmit petitions from the inhabitants of that Territory, to the United Nations or any other body;

(b) Relative to Applicants' Submissions Nos. 3, 4, 5, 6 and 9, that Respondent has not, in any of the respects alleged, violated its obligations as stated in the Mandate or in Article 22 of the Covenant of the League of Nations";

in the Rejoinder:

"1. Upon the basis of the statements of law and fact set forth in the Counter-Memorial, as supplemented in this Rejoinder and as may hereafter be adduced in further proceedings, Respondent reaffirms the Submissions made in the Counter-Memorial and respectfully asks that such Submissions be regarded as incorporated herein by reference.

2. Respondent further repeats its prayer that it may please the Court to adjudge and declare that the Submissions of the Governments of Ethiopia and Liberia, as recorded in the Memorials and as reaffirmed in the Reply, are unfounded, and that no declaration be made as claimed by them."

In the oral proceedings the following Submissions were presented by the Parties:

On behalf of the Governments of Ethiopia and Liberia,
at the hearing on 19 May 1965:

"Upon the basis of allegations of fact, and statements of law set forth in the written pleadings and oral proceedings herein, may it please the Court to adjudge and declare, whether the Government of the Republic of South Africa is present or absent, that:

(1) South West Africa is a territory under the Mandate conferred upon His Britannic Majesty by the Principal Allied and Associated Powers, to be exercised on his behalf by the Government of the Union of South Africa, accepted by His Britannic Majesty for and on behalf of the Government of the Union of South Africa, and confirmed by the Council of the League of Nations on 17 December 1920;

(2) Respondent continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted;

(3) Respondent, by laws and regulations, and official methods and measures, which are set out in the pleadings herein, has practised apartheid, i.e., has distinguished as to race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that Respondent has the duty forthwith to cease the practice of apartheid in the Territory;

(4) Respondent, by virtue of economic, political, social and educational policies applied within the Territory, by means of laws and regulations, and official methods and measures, which are set out in the pleadings herein, has, in the light of applicable international standards or international legal norm, or both, failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory; that its failure to do so is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant; and that Respondent has the duty forthwith to cease its violations as aforesaid and to take all practicable action to fulfil its duties under such Articles;

(5) Respondent, by word and by action, has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory; that such treatment is in violation of Respondent's obligations as stated in the first paragraph of Article 2 of the Mandate and Article 22 of the Covenant; that Respondent has the duty forthwith to cease such actions, and to refrain from similar actions in the future; and that Respondent has the duty to accord full faith and respect to the international status of the Territory;

(6) Respondent has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant; that Respondent has the duty forthwith to remove all such military bases from within the Territory; and that Respondent has the duty to refrain from the establishment of military bases within the Territory;

(7) Respondent has failed to render to the General Assembly of the United Nations annual reports containing information with regard to the Territory and indicating the measures it has taken to carry out its obligations under the Mandate; that such failure is a violation of its obligations as stated in Article 6 of the Mandate; and that Respondent has the duty forthwith to render such annual reports to the General Assembly;

(8) Respondent has failed to transmit to the General Assembly of the United Nations petitions from the Territory's inhabitants addressed to the General Assembly; that such failure is a violation of its obligations as Mandatory; and that Respondent has the duty to transmit such petitions to the General Assembly;

(9) Respondent has attempted to modify substantially the terms of the Mandate, without the consent of the United Nations; that such attempt is in violation of its duties as stated in Article 7 of the Mandate and Article 22 of the Covenant; and that the consent of the United Nations is a necessary prerequisite and condition precedent to attempts on the part of Respondent directly or indirectly to modify the terms of the Mandate.

May it also please the Court to adjudge and declare whatever else it may deem fit and proper in regard to these submissions, and to make all necessary awards and orders, including an award of costs, to effectuate its determinations."

On behalf of the Government of South Africa,
at the hearing on 5 November 1965:

"We repeat and re-affirm our submissions, as set forth in Volume I, page 6, of the Counter-Memorial and confirmed in Volume II, page 483, of the Rejoinder. These submissions can be brought up-to-date without any amendments of substance and then they read as follows:

Upon the basis of the statements of fact and law as set forth in Respondent's pleadings and the oral proceedings, may it please the Court to adjudge and declare that the submissions of the Governments of Ethiopia and Liberia, as recorded at pages 69-72 of the verbatim record of 19 May 1965, C.R. 65/35, are unfounded and that no declaration be made as claimed by them.

In particular, Respondent submits—

(1) That the whole Mandate for South West Africa lapsed on the dissolution of the League of Nations and that Respondent is, in consequence thereof, no longer subject to any legal obligations thereunder.

(2) In the alternative to (1) above, and in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations:

(a) Relative to Applicants' submissions numbers 2, 7 and 8, that the Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision, of the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body. Respondent is therefore under no obligation to submit

reports concerning its administration of South West Africa, or to transmit petitions from the inhabitants of that Territory, to the United Nations or any other body;

(b) Relative to Applicants' submissions numbers 3, 4, 5, 6 and 9, that the Respondent has not, in any of the respects alleged, violated its obligations as stated in the Mandate or in Article 22 of the Covenant of the League of Nations."

* * *

1. In the present proceedings the two applicant States, the Empire of Ethiopia and the Republic of Liberia (whose cases are identical and will for present purposes be treated as one case), acting in the capacity of States which were members of the former League of Nations, put forward various allegations of contraventions of the League of Nations Mandate for South West Africa, said to have been committed by the respondent State, the Republic of South Africa, as the administering authority.

2. In an earlier phase of the case, which took place before the Court in 1962, four preliminary objections were advanced, based on Article 37 of the Court's Statute and the jurisdictional clause (Article 7, paragraph 2) of the Mandate for South West Africa, which were all of them argued by the Respondent and treated by the Court as objections to its jurisdiction. The Court, by its Judgment of 21 December 1962, rejected each of these objections, and thereupon found that it had "jurisdiction to adjudicate upon the merits of the dispute".

3. In the course of the proceedings on the merits, comprising the exchange of written pleadings, the oral arguments of the Parties and the hearing of a considerable number of witnesses, the Parties put forward various contentions on such matters as whether the Mandate for South West Africa was still in force,—and if so, whether the Mandatory's obligation under Article 6 of the Mandate to furnish annual reports to the Council of the former League of Nations concerning its administration of the mandated territory had become transformed by one means or another into an obligation to furnish such reports to the General Assembly of the United Nations, or had, on the other hand, lapsed entirely;—whether there had been any contravention by the Respondent of the second paragraph of Article 2 of the Mandate which required the Mandatory to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory",—whether there had been any contravention of Article 4 of the Mandate, prohibiting (except for police and local defence purposes) the "military training of the natives", and forbidding the establishment of military or naval bases, or the erection of fortifications in the territory. The Applicants also alleged that the Respondent had contravened paragraph 1 of Article 7 of the Mandate (which provides that the Mandate can only be modified with the consent of the Council of the League

of Nations) by attempting to modify the Mandate without the consent of the General Assembly of the United Nations which, so it was contended, had replaced the Council of the League for this and other purposes. There were other allegations also, which it is not necessary to set out here.

4. On all these matters, the Court has studied the written pleadings and oral arguments of the Parties, and has also given consideration to the question of the order in which the various issues would fall to be dealt with. In this connection, there was one matter that appertained to the merits of the case but which had an antecedent character, namely the question of the Applicants' standing in the present phase of the proceedings,—not, that is to say, of their standing before the Court itself, which was the subject of the Court's decision in 1962, but the question, as a matter of the merits of the case, of their legal right or interest regarding the subject-matter of their claim, as set out in their final submissions.

5. Despite the antecedent character of this question, the Court was unable to go into it until the Parties had presented their arguments on the other questions of merits involved. The same instruments are relevant to the existence and character of the Respondent's obligations concerning the Mandate as are also relevant to the existence and character of the Applicants' legal right or interest in that regard. Certain humanitarian principles alleged to affect the nature of the Mandatory's obligations in respect of the inhabitants of the mandated territory were also pleaded as a foundation for the right of the Applicants to claim in their own individual capacities the performance of those same obligations. The implications of Article 7, paragraph 1, of the Mandate, referred to above, require to be considered not only in connection with paragraph (9) and certain aspects of paragraph (2) of the Applicants' final submissions, but also, as will be seen in due course, in connection with that of the Applicants' standing relative to the merits of the case. The question of the position following upon the dissolution of the League of Nations in 1946 has the same kind of double aspect, and so do other matters.

6. The Parties having dealt with all the elements involved, it became the Court's duty to begin by considering those questions which had such a character that a decision respecting any of them might render unnecessary an enquiry into other aspects of the matter. There are two questions in the present case which have this character. One is whether the Mandate still subsists at all, as the Applicants maintain that it does in paragraph (1) of their final submissions; for if it does not, then clearly the various allegations of contraventions of the Mandate by the Respondent fall automatically to the ground. But this contention, namely as to the continued subsistence of the Mandate, is itself part of the Applicants' whole claim as put forward in their final submissions, being so put forward solely in connection with the remaining parts of the claim, and as the necessary foundation for these. For this reason the other question, which (as already mentioned) is that of the Appli-

cants' legal right or interest in the subject-matter of their claim, is even more fundamental.

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7. It is accordingly to this last question that the Court must now turn. Before doing so however, it should be made clear that when, in the present Judgment, the Court considers what provisions of the Mandate for South West Africa involve a legal right or interest for the Applicants, and what not, it does so without pronouncing upon, and wholly without prejudice to, the question of whether that Mandate is still in force. The Court moreover thinks it necessary to state that its 1962 decision on the question of competence was equally given without prejudice to that of the survival of the Mandate, which is a question appertaining to the merits of the case. It was not in issue in 1962, except in the sense that survival had to be assumed for the purpose of determining the purely jurisdictional issue which was all that was then before the Court. It was made clear in the course of the 1962 proceedings that it was upon this assumption that the Respondent was arguing the jurisdictional issue; and the same view is reflected in the Applicants' final submissions (1) and (2) in the present proceedings, the effect of which is to ask the Court to declare (*inter alia*) that the Mandate still subsists, and that the Respondent is still subject to the obligations it provides for. It is, correspondingly, a principal part of the Respondent's case on the merits that since (as it contends) the Mandate no longer exists, the Respondent has no obligations under it, and therefore cannot be in breach of the Mandate. This is a matter which, for reasons to be given later in another connection, but equally applicable here, could not have been the subject of any final determination by a decision on a purely preliminary point of jurisdiction.

8. The Respondent's final submissions in the present proceedings ask simply for a rejection of those of the Applicants, both generally and in detail. But quite apart from the recognized right of the Court, implicit in paragraph 2 of Article 53 of its Statute, to select *proprio motu* the basis of its decision, the Respondent did in the present phase of the case, particularly in its written pleadings, deny that the Applicants had any legal right or interest in the subject-matter of their claim,—a denial which, at this stage of the case, clearly cannot have been intended merely as an argument against the applicability of the jurisdictional clause of the Mandate. In its final submissions the Respondent asks the Court, upon the basis, *inter alia*, of "the statements of fact and law as set forth in [its] pleadings and the oral proceedings", to make no declaration as claimed by the Applicants in their final submissions.

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9. The Court now comes to the basis of its decision in the present proceedings. In order to lead up to this, something must first be said about the structure characterizing the Mandate for South West Africa,

in common with the other various mandates; and here it is necessary to stress that no true appreciation of the legal situation regarding any particular mandate, such as that for South West Africa, can be arrived at unless it is borne in mind that this Mandate was only one amongst a number of mandates, the Respondent only one amongst a number of mandatories, and that the salient features of the mandates system as a whole were, with exceptions to be noted where material, applicable indifferently to all the mandates. The Mandate for South West Africa was not a special case.

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10. The mandates system, as is well known, was formally instituted by Article 22 of the Covenant of the League of Nations. As there indicated, there were to be three categories of mandates, designated as 'A', 'B' and 'C' mandates respectively, the Mandate for South West Africa being one of the 'C' category. The differences between these categories lay in the nature and geographical situation of the territories concerned, in the state of development of their peoples, and the powers accordingly to be vested in the administering authority, or mandatory, for each territory placed under mandate. But although it was by Article 22 of the League Covenant that the system as such was established, the precise terms of each mandate, covering the rights and obligations of the mandatory, of the League and its organs, and of the individual members of the League, in relation to each mandated territory, were set out in separate instruments of mandate which, with one exception to be noted later, took the form of resolutions of the Council of the League.

11. These instruments, whatever the differences between certain of their terms, had various features in common as regards their structure. For present purposes, their substantive provisions may be regarded as falling into two main categories. On the one hand, and of course as the principal element of each instrument, there were the articles defining the mandatory's powers, and its obligations in respect of the inhabitants of the territory and towards the League and its organs. These provisions, relating to the carrying out of the mandates as mandates, will hereinafter be referred to as "conduct of the mandate", or simply "conduct" provisions. On the other hand, there were articles conferring in different degrees, according to the particular mandate or category of mandate, certain rights relative to the mandated territory, directly upon the members of the League as individual States, or in favour of their nationals. Many of these rights were of the same kind as are to be found in certain provisions of ordinary treaties of commerce, establishment and navigation concluded between States. Rights of this kind will hereinafter be referred to as "special interests" rights, embodied in the "special interests" provisions of the mandates. As regards the 'A' and 'B' mandates (particularly the latter) these rights were numerous and figured prominently—a fact which, as will be seen later, is significant for the case of the 'C' mandates also, even though, in the latter case,

they were confined to provisions for freedom for missionaries ("nationals of any State Member of the League of Nations") to "enter into, travel and reside in the territory for the purpose of prosecuting their calling" (Mandate for South West Africa, Article 5). In the present case, the dispute between the Parties relates exclusively to the former of these two categories of provisions, and not to the latter.

12. The broad distinction just noticed was a genuine, indeed an obvious one. Even if it may be the case that certain provisions of some of the mandates (such as for instance the "open door" provisions of the 'A' and 'B' mandates) can be regarded as having a double aspect, this does not affect the validity or relevance of the distinction. Such provisions would, in their "conduct of the mandate" aspect, fall under that head; and in their aspect of affording commercial opportunities for members of the League and their nationals, they would come under the head of "special interests" clauses. It is natural that commercial provisions of this kind could redound to the benefit of a mandated territory and its inhabitants in so far as the use made of them by States members of the League had the effect of promoting the economic or industrial development of the territory. In that sense and to that extent these provisions could no doubt contribute to furthering the aims of the mandate; and their due implementation by the mandatories was in consequence a matter of concern to the League and its appropriate organs dealing with mandates questions. But this was incidental, and was never their primary object. Their primary object was to benefit the individual members of the League and their nationals. Any action or intervention on the part of member States in this regard would be for that purpose—not in furtherance of the mandate as such.

13. In addition to the classes of provisions so far noticed, every instrument of mandate contained a jurisdictional clause which, with a single exception to be noticed in due course, was in identical terms for each mandate, whether belonging to the 'A', 'B' or 'C' category. The language and effect of this clause will be considered later; but it provided for a reference of disputes to the Permanent Court of International Justice and, so the Court found in the first phase of the case, as already mentioned, this reference was now, by virtue of Article 37 of the Court's Statute, to be construed as a reference to the present Court. Another feature of the mandates generally, was a provision according to which their terms could not be modified without the consent of the Council of the League. A further element, though peculiar to the 'C' mandates, may be noted: it was provided both by Article 22 of the Covenant of the League and by a provision of the instruments of 'C' mandates that, subject to certain conditions not here material, a 'C' mandatory was to administer the mandated territory "as an integral portion of its own territory".

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14. Having regard to the situation thus outlined, and in particular to the distinction to be drawn between the "conduct" and the "special interests" provisions of the various instruments of mandate, the question which now arises for decision by the Court is whether any legal right or interest exists for the Applicants relative to the Mandate, apart from such as they may have in respect of the latter category of provisions;—a matter on which the Court expresses no opinion, since this category is not in issue in the present case. In respect of the former category—the "conduct" provisions—the question which has to be decided is whether, according to the scheme of the mandates and of the mandates system as a whole, any legal right or interest (which is a different thing from a political interest) was vested in the members of the League of Nations, including the present Applicants, individually and each in its own separate right to call for the carrying out of the mandates as regards their "conduct" clauses;—or whether this function must, rather, be regarded as having appertained exclusively to the League itself, and not to each and every member State, separately and independently. In other words, the question is whether the various mandatories had any direct obligation towards the other members of the League individually, as regards the carrying out of the "conduct" provisions of the mandates.

15. If the answer to be given to this question should have the effect that the Applicants cannot be regarded as possessing the legal right or interest claimed, it would follow that even if the various allegations of contraventions of the Mandate for South West Africa on the part of the Respondent were established, the Applicants would still not be entitled to the pronouncements and declarations which, in their final submissions, they ask the Court to make. This is no less true in respect of their final submissions (1) and (2) than of the others. In these two submissions, the Applicants in substance affirm, and ask the Court to declare, the continued existence of the Mandate and of the Respondent's obligations thereunder. In the present proceedings however, the Court is concerned with the final submissions of the Applicants solely in the context of the "conduct" provisions of the Mandate. It has not to pronounce upon any of the Applicants' final submissions as these might relate to any question of "special interests" if a claim in respect of these had been made. The object of the Applicants' submissions (1) and (2) is to provide the basis for their remaining submissions, which are made exclusively in the context of a claim about provisions concerning which the question immediately arises whether they are provisions in respect of which the Applicants have any legal right or interest. If the Court finds that the Applicants do have such a right or interest, it would then be called upon to pronounce upon the first of the Applicants' final submissions—(continued existence of the Mandate), since if that one should be rejected, the rest would automatically fall to the ground. If on the other hand the Court should find that such a right or interest does not exist, it would obviously be inappropriate and misplaced to make any pronouncement on this first submission of the Applicants, or

on the second, since in the context of the present case the question of the continued existence of the Mandate, and of the Respondent's obligations thereunder, would arise solely in connection with provisions concerning which the Court had found that the Applicants lacked any legal right or interest.

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16. It is in their capacity as former members of the League of Nations that the Applicants appear before the Court; and the rights they claim are those that the members of the League are said to have been invested with in the time of the League. Accordingly, in order to determine what the rights and obligations of the Parties relative to the Mandate were and are (supposing it still to be in force, but without prejudice to that question); and in particular whether (as regards the Applicants) these include any right individually to call for the due execution of the "conduct" provisions, and (for the Respondent) an obligation to be answerable to the Applicants in respect of its administration of the Mandate, the Court must place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate were being framed. The Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation. Intentions that might have been formed if the Mandate had been framed at a much later date, and in the knowledge of circumstances, such as the eventual dissolution of the League and its aftermath, that could never originally have been foreseen, are not relevant. Only on this basis can a correct appreciation of the legal rights of the Parties be arrived at. This view is supported by a previous finding of the Court (*Rights of United States Nationals in Morocco, I.C.J. Reports 1952*, at p. 189), the effect of which is that the meaning of a juridical notion in a historical context, must be sought by reference to the way in which that notion was understood in that context.

17. It follows that any enquiry into the rights and obligations of the Parties in the present case must proceed principally on the basis of considering, in the setting of their period, the texts of the instruments and particular provisions intended to give juridical expression to the notion of the "sacred trust of civilization" by instituting a mandates system.

18. The enquiry must pay no less attention to the juridical character and structure of the institution, the League of Nations, within the framework of which the mandates system was organized, and which inevitably determined how this system was to operate,—by what methods, —through what channels,—and by means of what recourses. One fundamental element of this juridical character and structure, which in a sense governed everything else, was that Article 2 of the Covenant provided that the "action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council,

with a permanent Secretariat". If the action of the League as a whole was thus governed, it followed naturally that the individual member States could not themselves act differently relative to League matters, unless it was otherwise specially so provided by some article of the Covenant.

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19. As is well known, the mandates system originated in the decision taken at the Peace Conference following upon the world war of 1914-1918, that the colonial territories over which, by Article 119 of the Treaty of Versailles, Germany renounced "all her rights and titles" in favour of the then Principal Allied and Associated Powers, should not be annexed by those Powers or by any country affiliated to them, but should be placed under an international régime, in the application to the peoples of those territories, deemed "not yet able to stand by themselves", of the principle, declared by Article 22 of the League Covenant, that their "well-being and development" should form "a sacred trust of civilization".

20. The type of régime specified by Article 22 of the Covenant as constituting the "best method of giving practical effect to this principle" was that "the tutelage of such peoples should be entrusted to advanced nations ... who are willing to accept it",—and here it was specifically added that it was to be "on behalf of the League" that "this tutelage should be exercised by those nations as Mandatories". It was not provided that the mandates should, either additionally or in the alternative, be exercised on behalf of the members of the League in their individual capacities. The mandatories were to be the agents of, or trustees for the League,—and not of, or for, each and every member of it individually.

21. The same basic idea was expressed again in the third paragraph of the preamble to the instrument of mandate for South West Africa, where it was recited that the Mandatory, in agreeing to accept the Mandate, had undertaken "to exercise it on behalf of the League of Nations". No other behalf was specified in which the Mandatory had undertaken, either actually or potentially, to exercise the Mandate. The effect of this recital, as the Court sees it, was to register an implied recognition (a) on the part of the Mandatory of the right of the League, acting as an entity through its appropriate organs, to require the due execution of the Mandate in respect of its "conduct" provisions; and (b) on the part of both the Mandatory and the Council of the League, of the character of the Mandate as a juridical régime set within the framework of the League as an institution. There was no similar recognition of any right as being additionally and independently vested in any other entity, such as a State, or as existing outside or independently of the League as an institution; nor was any undertaking at all given by the Mandatory in that regard.

22. It was provided by paragraph 1 of Article 22 of the Covenant that "securities for the performance" of the sacred trust were to be "embodied

in this Covenant". This important reference to the "performance" of the trust contemplated, as it said, securities to be afforded by the Covenant itself. By paragraphs 7 and 9 respectively of Article 22, every mandatory was to "render to the Council [of the League—not to any other entity] an annual report in reference to the territory committed to its charge"; and a permanent commission, which came to be known as the Permanent Mandates Commission, was to be constituted "to receive and examine" these annual reports and "to advise the Council on all matters relating to the observance of the mandates". The Permanent Mandates Commission alone had this advisory role, just as the Council alone had the supervisory function. The Commission consisted of independent experts in their own right, appointed in their personal capacity as such, not as representing any individual member of the League or the member States generally.

23. The obligation to furnish annual reports was reproduced in the instruments of mandate themselves, where it was stated that they were to be rendered "to the satisfaction of the Council". Neither by the Covenant nor by the instruments of mandate, was any role reserved to individual League members in respect of these reports, furnishable to the Council, and referred by it to the Permanent Mandates Commission. It was the Council that had to be satisfied, not the individual League members. The part played by the latter, other than such as were members of the Council, was exclusively through their participation in the work of the Assembly of the League when, acting under Article 3 of the Covenant, that organ exercised in respect of mandates questions its power to deal with "any matter within the sphere of action of the League". It was as being within the sphere of the League as an institution that mandates questions were dealt with by its Assembly.

24. These then were the methods, and the only methods, contemplated by the Covenant as "securities" for the performance of the sacred trust, and it was in the Covenant that they were to be embodied. No security taking the form of a right for every member of the League separately and individually to require from the mandates the due performance of their mandates, or creating a liability for each mandatory to be answerable to them individually,—still less conferring a right of recourse to the Court in these regards,—was provided by the Covenant.

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25. This result is precisely what was to be expected from the fact that the mandates system was an activity of the League of Nations, that is to say of an entity functioning as an institution. In such a setting, rights cannot be derived from the mere fact of membership of the organization in itself: the rights that member States can legitimately claim must be derived from and depend on the particular terms of the instrument constitutive of the organization, and of the other instruments relevant

in the context. This principle is necessarily applicable as regards the question of what rights member States can claim in respect of a régime such as results from the mandates system, functioning within the framework of the organization. For this reason, and in this setting, there could, as regards the carrying out of the "conduct" provisions of the various mandates, be no question of any legal tie between the mandatories and other individual members. The sphere of authority assigned to the mandatories by decisions of the organization could give rise to legal ties only between them severally, as mandatories, and the organization itself. The individual member States of the organization could take part in the administrative process only through their participation in the activities of the organs by means of which the League was entitled to function. Such participation did not give rise to any right of direct intervention relative to the mandatories: this was, and remained, the prerogative of the League organs.

26. On the other hand, this did not mean that the member States were mere helpless or impotent spectators of what went on, or that they lacked all means of recourse. On the contrary, as members of the League Assembly, or as members of the League Council, or both, as the case might be, they could raise any question relating to mandates generally, or to some one mandate in particular, for consideration by those organs, and could, by their participation, influence the outcome. The records both of the Assembly and of other League organs show that the members of the League in fact made considerable use of this faculty. But again, its exercise—always through the League—did not confer on them any separate right of direct intervention. Rather did it bear witness to the absence of it.

27. Such is the background against which must be viewed the provisions by which the authority of the various mandatories was defined, and which the Court will now proceed to consider.

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28. By paragraph 8 of Article 22 of the Covenant, it was provided that the "degree of authority, control or administration" which the various mandatories were to exercise, was to be "explicitly defined in each case by the Council", if these matters had not been "previously agreed upon by the Members of the League". The language of this paragraph was reproduced, in effect textually, in the fourth paragraph of the preamble to the Mandate for South West Africa, which the League Council itself inserted, thus stating the basis on which it was acting in adopting the resolution of 17 December 1920, in which the terms of mandate were set out. Taken by itself this necessarily implied that these terms had not been "previously agreed upon by the Members of the League". There is however some evidence in the record to indicate that in the context of the mandates, the allusion to agreement on the part of "the Members of the League" was regarded at the time as referring only to the five Principal Allied and Associated Powers engaged in the drafting; but this

of course could only lend emphasis to the view that the members of the League generally were not considered as having any direct concern with the setting up of the various mandates; and the record indicates that they were given virtually no information on the subject until a very late stage.

29. There is also evidence that the delays were due to difficulties over certain of the commercial aspects of the mandates, but that the Principal Powers had already decided that the mandates should in any event be issued by the Council of the League, thereby giving them a definitely institutional basis. Preliminary and private negotiations and consideration of drafts by member States, or certain of them, is a normal way of leading up to the resolutions adopted by an international organ, and in no way affects their character as eventually adopted. Accordingly the League Council proceeded to issue the Mandate which, being in the form of a resolution, did not admit of those processes of separate signature and ratification generally utilized at the time in all cases where participation on a "party" basis was intended. This method was common to all the mandates, except the 'A' mandate for Iraq which, significantly, was embodied in a series of treaties between the United Kingdom, as Mandatory, and Iraq. No other member of the League was a party to these treaties. It was to the League Council alone that the United Kingdom Government reported concerning the conclusion of these treaties, and to which it gave assurances that the general pattern of their contents would be the same as for the other mandates.

30. Nor did even the Principal Allied and Associated Powers as a group have the last word on the drafting of the Mandate. This was the Council's. In addition to the insertion as already mentioned, of the fourth paragraph of the preamble, the Council made a number of alterations in the draft before finally adopting it. One of these is significant in the present context. Unlike the final version of the jurisdictional clause of the Mandate as issued by the Council and adopted for all the mandates, by which the Mandatory alone undertook to submit to adjudication in the event of a dispute with another member of the League, the original version would have extended the competence of the Court equally to disputes referred to it by the Mandatory as plaintiff, as well as to disputes arising between other members of the League *inter se*. The reason for the change effected by the Council is directly relevant to what was regarded as being the status of the individual members of the League in relation to the Mandate. This reason was that, as was soon perceived, an obligation to submit to adjudication could not be imposed upon them without their consent. But of course, had they been regarded as "parties" to the instrument of Mandate, as if to a treaty, they would thereby have been held to have given consent to all that it contained, including the jurisdictional clause. Clearly they were not so regarded.

31. Another circumstance calling for notice is that, as mentioned earlier, the Mandate contained a clause—paragraph 1 of Article 7 (and similarly in the other mandates)—providing that the consent of the Council of the League was required for any modification of the terms of the Mandate; but it was not stated that the consent of individual members of the League was additionally required. There is no need to enquire whether, in particular cases—for instance for the modification of any of their "special interests" under the mandate—the consent of the member States would have been necessary, since what is now in question is the "conduct" provisions. As to these, the special position given to the Council of the League by paragraph 1 of Article 7 confirms the view that individual member States were not regarded as having a separate legal right or interest of their own respecting the administration of the Mandate. It is certainly inconsistent with the view that they were considered as separate parties to the instrument of mandate.

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32. The real position of the individual members of the League relative to the various instruments of mandate was a different one. They were not parties to them; but they were, to a limited extent, and in certain respects only, in the position of deriving rights from these instruments. Not being parties to the instruments of mandate, they could draw from them only such rights as these unequivocally conferred, directly or by a clearly necessary implication. The existence of such rights could not be presumed or merely inferred or postulated. But in Article 22 of the League Covenant, only the mandates are mentioned in connection with the carrying out of the mandates in respect of the inhabitants of the mandated territories and as regards the League organs. Except in the procedural provisions of paragraph 8 (the "if not previously agreed upon" clause) the only mention of the members of the League in Article 22 is in quite another context, namely at the end of paragraph 5, where it is provided that the mandates shall "also secure equal opportunities for the trade and commerce of other Members of the League". It is the same in the instruments of mandate. Apart from the jurisdictional clause, which will be considered later, mention of the members of the League is made only in the "special interests" provisions of these instruments. It is in respect of these interests alone that any direct link is established between the mandates and the members of the League individually. In the case of the "conduct" provisions, mention is made only of the mandatory and, where required, of the appropriate organ of the League. The link in respect of these provisions is with the League or League organs alone.

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33. Accordingly, viewing the matter in the light of the relevant texts and instruments, and having regard to the structure of the League,

within the framework of which the mandates system functioned, the Court considers that even in the time of the League, even as members of the League when that organization still existed, the Applicants did not, in their individual capacity as States, possess any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the "sacred trust". This right was vested exclusively in the League, and was exercised through its competent organs. Each member of the League could share in its collective, institutional exercise by the League, through their participation in the work of its organs, and to the extent that these organs themselves were empowered under the mandates system to act. By their right to activate these organs (of which they made full use), they could procure consideration of mandates questions as of other matters within the sphere of action of the League. But no right was reserved to them, individually as States, and independently of their participation in the institutional activities of the League, as component parts of it, to claim in their own name,—still less as agents authorized to represent the League,—the right to invigilate the sacred trust,—to set themselves up as separate custodians of the various mandates. This was the role of the League organs.

34. To put this conclusion in another way, the position was that under the mandates system, and within the general framework of the League system, the various mandatories were responsible for their conduct of the mandates solely to the League—in particular to its Council—and were not additionally and separately responsible to each and every individual State member of the League. If the latter had been given a legal right or interest on an individual "State" basis, this would have meant that each member of the League, independently of the Council or other competent League organ, could have addressed itself directly to every mandatory, for the purpose of calling for explanations or justifications of its administration, and generally to exact from the mandatory the due performance of its mandate, according to the view which that State might individually take as to what was required for the purpose.

35. Clearly no such right existed under the mandates system as contemplated by any of the relevant instruments. It would have involved a position of accountability by the mandatories to each and every member of the League separately, for otherwise there would have been nothing additional to the normal faculty of participating in the collective work of the League respecting mandates. The existence of such an additional right could not however be reconciled with the way in which the obligation of the mandatories, both under Article 22 of the League Covenant, and (in the case of South West Africa) Article 6 of the instrument of Mandate, was limited to reporting to the League Council,

and to its satisfaction alone. Such a situation would have been particularly unimaginable in relation to a system which, within certain limits, allowed the mandatories to determine for themselves by what means they would carry out their mandates: and *a fortiori* would this have been so in the case of a 'C' mandate, having regard to the special power of administration as "an integral portion of its own territory" which, as already noted, was conferred upon the mandatory respecting this category of mandate.

36. The foregoing conclusions hold good whether the League is regarded as having possessed the kind of corporate juridical personality that the Court, in its Advisory Opinion in the case of *Reparation for Injuries Suffered in the Service of the United Nations (I.C.J. Reports 1949, p. 174)*, found the United Nations to be invested with,—or whether the League is regarded as a collectivity of States functioning on an institutional basis, whose collective rights in respect of League matters were, as Article 2 of the Covenant implied, exercisable only through the appropriate League organs, and not independently of these.

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37. In order to test the conclusions thus reached, it is legitimate to have regard to the probable consequences of the view contended for by the Applicants,—or at any rate to the possibilities that would have been opened up if each member of the League had individually possessed the standing and rights now claimed. One question which arises is that of how far the individual members of the League would have been in a position to play the role ascribed to them. The Applicants, as part of their argument in favour of deeming the functions previously discharged by the Council of the League to have passed now to the General Assembly of the United Nations, insisted on the need for "informed" dealings with the Mandatory: only a body sufficiently endowed with the necessary knowledge, experience and expertise could, it was said, adequately discharge the supervisory role. Yet at the same time it was contended that individual members of the League,—not directly advised by the Permanent Mandates Commission,—not (unless members of the Council) in touch with the mandates questions except through their participation in the work of the League Assembly,—nevertheless possessed a right independently to confront the various mandatories over their administration of the mandates, and a faculty to call upon them to alter their policies and adjust their courses accordingly. The two contentions are inconsistent, and the second affronts all the probabilities.

38. No less difficult than the position of a mandatory caught between a number of possible different expressions of view, would have been

that of the League Council whose authority must have been undermined, and its action often frustrated, by the existence of some 40 or 50 independent centres of invigilatory rights.

39. Equally inconsistent would the position claimed for individual League members have been with that of the mandatory as a member of the Council on mandates questions. As such, the mandatory, on the basis of the normal League voting rule, and by virtue of Article 4, paragraphs 5 and 6, and Article 5, paragraph 1, of the Covenant, possessed a vote necessary to the taking of any formal Council decision on a question of substance relative to its mandate (at least in the sense that, if cast, it must not be adversely cast); so that, in the last resort, the assent, or non-dissent, of the mandatory had to be negotiated.

40. In the opinion of the Court, those who intended the one system cannot simultaneously have intended the other: and if in the time of the League,—if as members of the League,—the Applicants did not possess the rights contended for,—evidently they do not possess them now. There is no principle of law which, following upon the dissolution of the League, would operate to invest the Applicants with rights they did not have even when the League was still in being.

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41. The Court will now turn to the various contentions that have been or might be advanced in opposition to the view it takes; and will first deal with a number of points which have a certain general affinity.

42. Firstly, it may be represented that the consequences described above as being rendered possible if individual members of the League had had the rights now contended for by the Applicants, are unreal,—because the true position under the mandates system was that, even if in all normal circumstances the mandates were responsible to the Council of the League alone, nevertheless the individual members of the League possessed a right of last resort to activate the Court under the jurisdictional clause if any mandate was being contravened. The Court will consider the effect of the jurisdictional clause later; but quite apart from that, the argument is misconceived. It is evident that any such right would have availed nothing unless the members of the League had individually possessed substantive rights regarding the carrying out of the mandates which they could make good before the Court, if and when they did activate it. If, however, they possessed such rights then, as already noted, irrespective of whether they went to the Court or not, they were entitled at all times, outside League channels, to confront the mandates over the administration of their mandates, just as much as in respect of their “special interests” under the mandate. The theory that the members of

the League possessed such rights, but were precluded from exercising them unless by means of recourse to adjudication, constitutes an essentially improbable supposition for which the relevant texts afford no warrant. These texts did not need to impose any such limitation, for the simple reason that they did not create the alleged rights.

43. Again, it has been pointed out that there is nothing unprecedented in a situation in which the supervision of a certain matter is, on the political plane, entrusted to a given body or organ, but where certain individual States—not all of them necessarily actual parties to the instruments concerned—have parallel legal rights in regard to the same matter, which they can assert in specified ways. This is true but irrelevant, since for the present purposes the question is not whether such rights could be, but whether they were in fact conferred. In various instances cited by way of example, not only was the intention to confer the right and its special purpose quite clear,—it was also restricted to a small group of States, members, either permanent or elected, of the supervisory organ concerned. In such a case, the right granted was, in effect, part of the institutional or conventional machinery of control, and its existence could occasion no difficulty or confusion. This type of case, which will be further discussed later, in connection with the jurisdictional clause of the mandates, is not the same as the present one.

44. Next, it may be said that a legal right or interest need not necessarily relate to anything material or “tangible”, and can be infringed even though no prejudice of a material kind has been suffered. In this connection, the provisions of certain treaties and other international instruments of a humanitarian character, and the terms of various arbitral and judicial decisions, are cited as indicating that, for instance, States may be entitled to uphold some general principle even though the particular contravention of it alleged has not affected their own material interests;—that again, States may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice, or ask only for token damages. Without attempting to discuss how far, and in what particular circumstances, these things might be true, it suffices to point out that, in holding that the Applicants in the present case could only have had a legal right or interest in the “special interests” provisions of the Mandate, the Court does not in any way do so merely because these relate to a material or tangible object. Nor, in holding that no legal right or interest exists for the Applicants, individually as States, in respect of the “conduct” provisions, does the Court do so because any such right or interest would not have a material or tangible object. The Court simply holds that such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law;—and that in the present case, none were ever vested in individual members of the League under any of the relevant instruments, or as a

constituent part of the mandates system as a whole, or otherwise.

45. Various miscellaneous propositions are also advanced: the Mandate is more deserving of protection than the "special interests" of any particular State;—there would be nothing extraordinary in a State having a legal right to vindicate a purely altruistic interest;—and so forth. But these are not really legal propositions: they do not eliminate the need to find the particular provisions or rules of law the existence of which they assume, but do not of themselves demonstrate.

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46. It is also asked whether, even supposing that the Applicants only had an interest on the political level respecting the conduct of the Mandate, this would not have sufficed to enable them to seek a declaration from the Court as to what the legal position was under the Mandate, so that, for instance, they could know whether they would be on good ground in bringing before the appropriate political organs, acts of the mandatory thought to involve a threat to peace or good international relations.

47. The Court is concerned in the present proceedings only with the rights which the Applicants had as former members of the League of Nations—for it is in that capacity alone that they are now appearing. If the contention above described is intended to mean that because, for example, the Applicants would, under paragraph 2 of Article 11 of the League Covenant, have had "the friendly right . . . to bring to the attention of the Assembly or of the Council any circumstance . . . which threatens to disturb international peace or the good understanding . . . upon which peace depends", they would therefore also—and on that account—have had the right to obtain a declaration from the Court as to what the mandatory's obligations were, and whether a violation of these had occurred;—if this is the contention, the Court can only reply to it in the negative. A provision such as Article 11 of the Covenant could at most furnish a motive why the Applicants (or other members of the League) might wish to know what the legal position was. It could not of itself give them any right to procure this knowledge from the Court which they would not otherwise have had under the Mandate itself.

48. On the other hand, an appropriate organ of the League such as the Council could of course have sought an advisory opinion from the Court on any such matter. It is in this connection that the chief objection to the theory under discussion arises. Under the Court's Statute as it is at present framed, States cannot obtain mere "opinions" from the Court. This faculty is reserved to certain international organs empowered to exercise it by way of the process of requesting the Court for an advisory opinion. It was open to the Council of the League to make use of this process in case of any doubt as to the rights of the League or its

members relative to mandates. But in their individual capacity, States can appear before the Court only as litigants in a dispute with another State, even if their object in so doing is only to obtain a declaratory judgment. The moment they so appear however, it is necessary for them, even for that limited purpose, to establish, in relation to the defendant party in the case, the existence of a legal right or interest in the subject-matter of their claim, such as to entitle them to the declarations or pronouncements they seek: or in other words that they are parties to whom the defendant State is answerable under the relevant instrument or rule of law.

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49. The Court must now turn to certain questions of a wider character. Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.

50. Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law. All States are interested—have an interest—in such matters. But the existence of an "interest" does not of itself entail that this interest is specifically juridical in character.

51. It is in the light of these considerations that the Court must examine what is perhaps the most important contention of a general character that has been advanced in connection with this aspect of the case, namely the contention by which it is sought to derive a legal right or interest in the conduct of the mandate from the simple existence, or principle, of the "sacred trust". The sacred trust, it is said, is a "sacred trust of civilization". Hence all civilized nations have an interest in seeing that it is carried out. An interest, no doubt;—but in order that this interest may take on a specifically legal character, the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form. One such form might be the United Nations trusteeship system,—another, as contained in Chapter XI of the Charter concerning non-self-governing territories, which makes express reference to "a sacred trust". In each case the legal rights and obligations are those, and only those, provided for by the relevant texts, whatever these may be.

52. In the present case, the principle of the sacred trust has as its sole

juridical expression the mandates system. As such, it constitutes a moral ideal given form as a juridical régime in the shape of that system. But it is necessary not to confuse the moral ideal with the legal rules intended to give it effect. For the purpose of realizing the aims of the trust in the particular form of any given mandate, its legal rights and obligations were those, and those alone, which resulted from the relevant instruments creating the system, and the mandate itself, within the framework of the League of Nations.

53. Thus it is that paragraph 2 of Article 22 of the Covenant, in the same breath that it postulates the principle of the sacred trust, specifies in terms that, in order to give "effect to this principle", the tutelage of the peoples of the mandated territories should be entrusted to certain nations, "and that this tutelage should be exercised by them" as mandates "on behalf of the League". It was from this that flowed all the legal consequences already noticed.

54. To sum up, the principle of the sacred trust has no residual juridical content which could, so far as any particular mandate is concerned, operate *per se* to give rise to legal rights and obligations outside the system as a whole; and, within the system equally, such rights and obligations exist only in so far as there is actual provision for them. Once the expression to be given to an idea has been accepted in the form of a particular régime or system, its legal incidents are those of the régime or system. It is not permissible to import new ones by a process of appeal to the originating idea—a process that would, *ex hypothesi*, have no natural limit. Hence, although, as has constantly been reiterated, the members of the League had an interest in seeing that the obligations entailed by the mandates system were respected, this was an interest which, according to the very nature of the system itself, they could exercise only through the appropriate League organs, and not individually.

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55. Next, it may be suggested that even if the legal position of the Applicants and of other individual members of the League of Nations was as the Court holds it to be, this was so only during the lifetime of the League, and that when the latter was dissolved, the rights previously resident in the League itself, or in its competent organs, devolved, so to speak, upon the individual States which were members of it at the date of its dissolution. There is, however, no principle of law which would warrant such a conclusion. Although the Court held in the earlier 1962 phase of the present case that the members of a dissolved international organization can be deemed, though no longer members of it, to retain rights which, as members, they individually possessed when the organization was in being, this could not extend to ascribing to them, upon and by reason of the dissolution, rights which, even previously as members, they never did individually possess. Nor of

course could anything that occurred subsequent to the dissolution of the League operate to invest its members with rights they did not, in that capacity, previously have,—and it is the rights which they had as members of the League that are now in question.

56. The Court can equally not read the unilateral declarations, or statements of intention as they have been called, which were made by the various mandataries on the occasion of the dissolution of the League, expressing their willingness to continue to be guided by the mandates in their administration of the territories concerned, as conferring on the members of the League individually any new legal rights or interests of a kind they did not previously possess.

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57. Another argument which requires consideration is that in so far as the Court's view leads to the conclusion that there is now no entity entitled to claim the due performance of the Mandate, it must be unacceptable. Without attempting in any way to pronounce on the various implications involved in this argument, the Court thinks the inference sought to be drawn from it is inadmissible. If, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences. This would be to engage in an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law.

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58. The Court comes now to a more specific category of contention arising out of the existence and terms of the jurisdictional clause of the Mandate, and of the effect of the Court's Judgment of 21 December 1962 in that regard. The Court's present Judgment is founded on the relevant provisions of the Covenant of the League of Nations, the character of the League as an organization, and the substantive provisions of the instrument of Mandate for South West Africa. The question now to be considered is whether there is anything arising out of its previous Judgment, or the terms of the jurisdictional clause of the Mandate, which should lead the Court to modify the conclusions arrived at on those foundations.

59. In the first place, it is contended that the question of the Applicants' legal right or interest was settled by that Judgment and cannot now be reopened. As regards the issue of preclusion, the Court finds it unnecessary to pronounce on various issues which have been raised in this connection, such as whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term,—whether it ranks as a "decision" for the purposes of Article 59 of the Court's

Statute, or as "final" within the meaning of Article 60. The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connection with the preliminary objection. When preliminary objections are entered by the defendant party in a case, the proceedings on the merits are, by virtue of Article 62, paragraph 3, of the Court's Rules, suspended. Thereafter, and until the proceedings on the merits are resumed, the preliminary objections having been rejected, there can be no decision finally determining or pre-judging any issue of merits. It may occur that a judgment on a preliminary objection touches on a point of merits, but this it can do only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection. Any finding on the point of merits therefore, ranks simply as part of the motivation of the decision on the preliminary objection, and not as the object of that decision. It cannot rank as a final decision on the point of merits involved.

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60. It is however contended that, even if the Judgment of 1962 was, for the above-mentioned reasons, not preclusive of the issue of the Applicants' legal right or interest, it did in essence determine that issue because it decided that the Applicants were entitled to invoke the jurisdictional clause of the Mandate, and that if they had a sufficient interest to do that, they must also have a sufficient interest in the subject-matter of their claim. This view is not well-founded. The faculty of invoking a jurisdictional clause depends upon what tests or conditions of the right to do so are laid down by the clause itself. To hold that the parties in any given case belong to the category of State specified in the clause,—that the dispute has the specified character,—and that the forum is the one specified,—is not the same thing as finding the existence of a legal right or interest relative to the merits of the claim. The jurisdictional clause of the Mandate for South West Africa (Article 7, paragraph 2), which appeared in all the mandates, reads as follows:

"The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

Looking at this provision; assuming the existence of a dispute; assuming that negotiations had taken place; that these had not settled the dispute; and that the Court was, by the operation of Article 37 of its Statute, duly substituted for the Permanent Court as the competent forum (all of which assumptions would be in accordance with the Court's

Judgment of 1962);—then all that the Applicants had to do in order to bring themselves under this clause and establish their capacity to invoke it, was to show (a) *ratione personae*, that they were members of the League, constructively if not actually, or must be deemed still so to be for the purposes of this provision, notwithstanding the dissolution of the League; and (b) *ratione materiae*, that the dispute did relate to the interpretation or application of one or more provisions of the Mandate. If the Court considered that these requirements were satisfied, it could assume jurisdiction to hear and determine the merits without going into the question of the Applicants' legal right or interest relative to the subject-matter of their claim; for the jurisdictional clause did not, according to its terms, require them to establish the existence of such a right or interest for the purpose of founding the competence of the Court.

61. Hence, whatever observations the Court may have made on that matter, it remained for the Applicants, on the merits, to establish that they had this right or interest in the carrying out of the provisions which they invoked, such as to entitle them to the pronouncements and declarations they were seeking from the Court. Since decisions of an interlocutory character cannot pre-judge questions of merits, there can be no contradiction between a decision allowing that the Applicants had the capacity to invoke the jurisdictional clause—this being the only question which, so far as this point goes, the Court was then called upon to decide, or could decide,—and a decision that the Applicants have not established the legal basis of their claim on the merits.

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62. It is next contended that this particular jurisdictional clause has an effect which is more extensive than if it is considered as a simple jurisdictional clause: that it is a clause conferring a substantive right,—that the substantive right it confers is precisely the right to claim from the Mandatory the carrying out of the "conduct of the Mandate" provisions of the instrument of mandate,—and that in consequence, even if the right is derivable from no other source, it is derivable from and implicit in this clause.

63. Let it be observed first of all that it would be remarkable if this were the case,—that is to say if so important a right, having such potentially far-reaching consequences,—intended, so the Applicants contend, to play such an essential role in the scheme of the Mandate—of all the mandates, and of the system generally—had been created indirectly, and in so casual and almost incidental a fashion, by an ordinary jurisdictional clause, lacking as will shortly be seen in any of the special features that might give it the effect claimed,—and which would certainly be requisite in order to achieve that effect. The Court considers it highly unlikely that, given the far-reaching consequences involved and, according to the Applicants, intended, the framers of the mandates system, had

they had any such intention, would have chosen this particular type of jurisdictional clause as the method of carrying it out.

64. In truth however, there is nothing about this particular jurisdictional clause to differentiate it from many others, or to make it an exception to the rule that, in principle, jurisdictional clauses are adjectival not substantive in their nature and effect. It is of course possible to introduce into such a clause extra paragraphs or phrases specifically conveying substantive rights or imposing substantive obligations; but the particular section of any clause which provides for recourse to an indicated forum, on the part of a specified category of litigant, in relation to a certain kind of dispute—or those words in it which provide this—cannot simultaneously and *per se* invest the parties with the substantive rights the existence of which is exactly what they will have to demonstrate in the forum concerned, and which it is the whole object of the latter to determine. It is a universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between, on the one hand, the right to activate a court and the right of the court to examine the merits of the claim,—and, on the other, the plaintiff party's legal right in respect of the subject-matter of that which it claims, which would have to be established to the satisfaction of the Court.

65. In the present case, that subject-matter includes the question whether the Applicants possess any legal right to require the performance of the "conduct" provisions of the Mandate. This is something which cannot be predetermined by the language of a common-form jurisdictional clause such as Article 7, paragraph 2, of the Mandate for South West Africa. This provision, with slight differences of wording and emphasis, is in the same form as that of many other jurisdictional clauses. The Court can see nothing in it that would take the clause outside the normal rule that, in a dispute causing the activation of a jurisdictional clause, the substantive rights themselves which the dispute is about, must be sought for elsewhere than in this clause, or in some element apart from it,—and must therefore be established *aliunde vel aliter*. Jurisdictional clauses do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal.

66. Such rights may be derived from participation in an international instrument by a State which has signed and ratified, or has acceded, or has in some other manner become a party to it; and which in consequence, and subject to any exceptions expressly indicated, is entitled to enjoy rights under all the provisions of the instrument concerned. Since the Applicants cannot bring themselves under this head, they must show that the "conduct" provisions of the mandates conferred rights in terms on members of the League as individual States, in the same way that the "special interests" provisions did. It is however contended that there is a third possibility, and that on the basis of the jurisdictional clause alone, the Applicants, as members of the League, were part of the institutional machinery of control relative to the man-

dates, and that in this capacity they had a right of action of the same kind as, for instance, members of the League Council had under the jurisdictional clauses of the minorities treaties of that period, for the protection of minority rights. On this footing the essence of the contention is that the Applicants do not need to show the existence of any substantive rights outside the jurisdictional clause, and that they had—that all members of the League had—what was in effect a policing function under the mandates and by virtue of the jurisdictional clause.

67. The Court has examined this contention, but does not think that the two cases are in any way comparable. When States intend to create a right of action of this kind they adopt a different method. Such a right has, in special circumstances, been conferred on States belonging to a body of compact size such as the Council of the League of Nations, invested with special supervisory functions and even a power of intervention in the matter, as provided by the jurisdictional clause of the minorities treaties—see for instance Article 12 of the minorities treaty with Poland, signed at Versailles on 28 June 1919, which was typical. Even so the right, as exercisable by members of the League Council, in effect as part of the Council's work, with which they would *ex hypothesi* have been fully familiar, was characterized at the time by an eminent Judge and former President of the Permanent Court as being "in every respect very particular in character" and as going "beyond the province of general international law". The intention to confer it must be quite clear; and the Court holds that for the reasons which have already been given, and for others to be considered later, there was never any intention to confer an invigilatory function of this kind on each and every member of the League.

68. It has to be asked why, if anything of the sort was thought necessary in the case of the mandates, it was not done in the same way as under the minorities clauses (which, in general, were drafted contemporaneously by the same authors)—namely by conferring a right of action on members of the League Council as such, seeing that it was the Council which had the supervisory function under the mandates? This would have been the obvious, and indeed the only workable method of procedure. Alternatively, it must be asked why, if it was indeed thought necessary in the case of mandates to invest all the members of the League with this function, for the protection of the mandates, it was apparently considered sufficient in the minorities case to bring in only the members of the League Council?

69. The Court finds itself unable to reconcile the two types of case except upon the assumption, strongly supported by every other factor involved, that, as regards the mandates, the jurisdictional clause was intended to serve a different purpose, namely to give the individual members of the League the means, which might not otherwise be available to them through League channels, of protecting their "special interests" relative to the mandated territories. In the minorities case, the right of action of the members of the Council under the jurisdictional clause

was only intended for the protection of minority populations. No other purpose in conferring a right of action on members of the League Council would have been possible in that case. This was not so in regard to the mandates, the provisions of which afforded another and perfectly natural explanation of the jurisdictional clause and of its purpose; whereas, if a policing function had been intended, it is obviously to the members of the Council that it would have been given, and in the same sort of terms as in the minorities case.

70. In this last connection it is of capital importance that the right as conferred in the minorities case was subjected to certain characterizations which were wholly absent in the case of the jurisdictional clause of the mandates. Any "difference of opinion" was characterized in advance as being justiciable, because it was to be "held to be a dispute of an international character" within the meaning of Article 14 of the Covenant (this was the well-known "deeming" clause), so that no question of any lack of legal right or interest could arise. The decisions of the Court were moreover, to be final and, by means of a reference to Article 13 of the Covenant, were given an effect *erga omnes* as a general judicial settlement binding on all concerned. The jurisdictional clause of the mandates on the other hand, was essentially an ordinary jurisdictional clause, having none of the special characteristics or effects of those of the minorities treaties.

71. That the League Council had functions in respect of mandates, just as it did in respect of minorities, can only serve to underline the fact that in the former case no right of recourse to the Court was conferred on the members of the Council in their capacity as such, although the mandates were drafted in full knowledge of what the minorities treaties contained. The true significance of the minorities case is that it shows that those who framed the mandates were perfectly capable of doing what the Applicants claim was done, when they intended to. The conclusion must be that in the case of the mandates they did not intend to.

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72. Since the course adopted in the minorities case does not constitute any parallel to that of the mandates, the Applicants' contention is seen to depend in the last analysis almost entirely on what has been called the broad and unambiguous language of the jurisdictional clause—or in other words its literal meaning taken in isolation and without reference to any other consideration. The combination of certain phrases in this clause, namely the reference to "any dispute whatever", coupled with the further words "between the Mandatory and another Member of the League of Nations" and the phrase "relating ... to the provisions of the Mandate", is said to permit of a reference to the Court of a dispute about any provision of the Mandate, and thus to imply, reflect or bear witness to the existence of a legal right or interest for every member of the League in the due execution of every such provision. The Court does not however consider

that the word "whatever" in Article 7, paragraph 2, does anything more than lend emphasis to a phrase that would have meant exactly the same without it; or that the phrase "any dispute" (whatever) means anything intrinsically different from "a dispute"; or that the reference to the "provisions" of the Mandate, in the plural, has any different effect from what would have resulted from saying "a provision". Thus reduced to its basic meaning, it can be seen that the clause is not capable of carrying the load the Applicants seek to put upon it, and which would result in giving such clauses an effect that States accepting the Court's jurisdiction by reason of them, could never suppose them to have.

73. In this connection the Court thinks it desirable to draw attention to the fact that a considerable proportion of the acceptances of its compulsory jurisdiction which have been given under paragraph 2 of Article 36 of the Statute of the Court, are couched in language similarly broad and unambiguous and even wider, covering all disputes between the accepting State and any other State (and thus "any dispute whatever")—subject only to the one condition of reciprocity or, in some cases, to certain additional conditions such as that the dispute must have arisen after a specified date. It could never be supposed however that on the basis of this wide language the accepting State, by invoking this clause, was absolved from establishing a legal right or interest in the subject-matter of its claim. Otherwise, the conclusion would have to be that by accepting the compulsory jurisdiction of the Court in the widest terms possible, States could additionally create a legal right or interest for themselves in the subject-matter of any claim they chose to bring, and a corresponding answerability on the part of the other accepting State concerned. The underlying proposition that by conferring competence on the Court, a jurisdictional clause can thereby and of itself confer a substantive right, is one which the Court must decline to entertain.

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74. The Court must now, though only as a digression, glance at another aspect of the matter. The present Judgment is based on the view that the question of what rights, as separate members of the League, the Applicants had in relation to the performance of the Mandate, is a question appertaining to the merits of their claim. It has however been suggested that the question is really one of the admissibility of the claim, and that as such it was disposed of by the Court's 1962 Judgment.

75. In the "dispositif" of the 1962 Judgment, however, the Court, after considering the four preliminary objections advanced—which were objections to the competence of the Court—simply found that it had "jurisdiction to adjudicate upon the merits". It thus appears that the Court in 1962 did not think that any question of the admissibility of

the claim, as distinct from that of its own jurisdiction arose, or that the Respondent had put forward any plea of inadmissibility as such: nor had it,—for in arguing that the dispute was not of the kind contemplated by the jurisdictional clause of the Mandate, the purpose of the Respondent was to show that the case was not covered by that clause, and that it did not in consequence fall within the scope of the competence conferred on the Court by that provision.

76. If therefore any question of admissibility were involved, it would fall to be decided now, as occurred in the merits phase of the *Nottebohm* case (*J.C.J. Reports 1955*, p. 4); and all that the Court need say is that if this were so, it would determine the question in exactly the same way, and for the same reasons, as in the present Judgment. In other words, looking at the matter from the point of view of the capacity of the Applicants to advance their present claim, the Court would hold that they had not got such capacity, and hence that the claim was inadmissible.

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77. Resuming the main thread of its reasoning, the Court will now refer to a supplementary element that furnishes indications in opposition to the interpretation of the jurisdictional clause advanced by the Applicants. This contra-indication is afforded by the genesis of the jurisdictional clause appearing in all the instruments of mandate. The original drafts contained no jurisdictional clause. Such a clause was first introduced in connection with the 'B' mandates by one of the States participating in the drafting, and concurrently with proposals made by that same State for a number of detailed provisions about commercial and other "special interests" rights (including missionary rights) for member States of the League. It was little discussed but, so far as it is possible to judge from what is only a summary record, what discussion there was centred mainly on the commercial aspects of the mandates and the possibility of disputes arising in that regard over the interests of nationals of members of the League. This appears very clearly from the statements summarized on pages 348, 349 and 350 of Part VI A. of the *Recueil des Actes* of the Paris Peace Conference, 1919-1920, if these statements are read as a whole. No corresponding clear connection emerges between the clause and possible disputes between mandataries and individual members of the League over the conduct of the mandates as mandates. That such disputes could arise does not seem to have been envisaged. In the same way, the original drafts of the 'C' mandates which, in a different form, contained broadly all that now appears in the first four articles of the Mandate for South West Africa, had no jurisdictional clause and no "missionary clause" either. The one appeared when the other did.

78. The inference to be drawn from this drafting history is confirmed by the very fact that the question of a right of recourse to the Court arose

only at the stage of the drafting of the instruments of mandate, and that as already mentioned, no such right figured among the "securities" for the performance of the sacred trust embodied in the League Covenant.

79. After going through various stages, the jurisdictional clause finally appeared in the same form in all the mandates, except that in the case of the Mandate for Tanganyika (as it then was) a drafting caprice caused the retention of an additional paragraph which did not appear, or had been dropped in all the other cases. Once the principle of a jurisdictional clause had been accepted, the clause was then introduced as a matter of course into all the mandates. This furnishes the answer to the contention that, in the case of the 'C' mandates, it must have been intended to relate to something more than the single "missionary clause" (Article 5 in the Mandate for South West Africa). Also, it must not be forgotten that it was simultaneously with the missionary clause that the jurisdictional clause was introduced; and that at the time much importance was attached to missionary rights. In any event, whatever the purpose of the jurisdictional clause, it was the same for all the mandates, and for the three categories of mandate. It is in the light of the mandates system generally that this purpose must be assessed, —and, so considered, the purpose is clear.

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80. The Court will now consider a final contention which has been advanced in support of the Applicants' claim of right, namely the so-called "necessity" argument.

81. In order to do this, and at the risk of some unavoidable repetition, it is necessary to review a little more closely the functioning of the mandates system. This system, within the larger setting of the League, was an entirely logical one. The various mandataries did not deal with the individual members of the League over the "conduct" provisions of their mandates, but with the appropriate League organs. If any difficulty should arise over the interpretation of any mandate, or the character of the mandatory's obligations, which could not be cleared up by discussion or reference to an *ad hoc* committee of jurists—a frequent practice in the League—the Council could in the last resort request the Permanent Court for an advisory opinion. Such an opinion would not of course be binding on the mandatory—it was not intended that it should be—but it would assist the work of the Council.

82. In the Council, which the mandatory was entitled to attend as a member for the purposes of any mandate entrusted to it, if not otherwise a member—(Article 4, paragraph 5, of the Covenant), the vote of the mandatory, if present at the meeting, was necessary for any actual "decision" of the Council, since unanimity of those attending was the basic voting rule on matters of substance in the main League organs—(Article 5, paragraph 1, of the Covenant). Thus there could never be any formal clash between the mandatory and the Council as such. In practice, the unanimity rule was frequently not insisted upon, or its

impact was mitigated by a process of give-and-take, and by various procedural devices to which both the Council and the mandatories lent themselves. So far as the Court's information goes, there never occurred any case in which a mandatory "vetoed" what would otherwise have been a Council decision. Equally, however, much trouble was taken to avoid situations in which the mandatory would have been forced to acquiesce in the views of the rest of the Council short of casting an adverse vote. The occasional deliberate absence of the mandatory from a meeting, enabled decisions to be taken that the mandatory might have felt obliged to vote against if it had been present. This was part of the above-mentioned process for arriving at generally acceptable conclusions.

83. Such were the methods, broadly speaking, adopted in the relations between the various mandatories and the League over the conduct of the mandates, and it can be seen how out of place in the context would have been the existence of substantive rights for individual members of the League in the conduct of the mandates (particularly if backed up by a right of recourse to the Court) exercisable independently of the Council at the will of the member State. On the other hand—and here again the concept was entirely logical—by the combined effect of the "special interests" provisions and the jurisdictional clause—(the latter alone could not have sufficed)—a right of recourse was given to the individual League members in respect of such interests, since the League Council could not be expected to act in defence of a purely national, not "League", interest.

84. Under this system, viewed as a whole, the possibility of any serious complication was remote; nor did any arise. That possibility would have been introduced only if the individual members of the League had been held to have the rights the Applicants now contend for. In actual fact, in the 27 years of the League, all questions were, by one means or another, resolved in the Council; no request was made to the Court for an advisory opinion; so far as is known, no member of the League attempted to settle direct with the mandatory any question that did not affect its own interests as a State or those of its nationals, and no cases were referred to the Permanent Court under the adjudication clause except the various phases of one single case (that of the *Mavrommatis Concessions*) coming under the head of "special interests". These facts may not be conclusive in themselves; but they have a significance which the Court cannot overlook, as suggesting that any divergences of view concerning the conduct of a mandate were regarded as being matters that had their place in the political field, the settlement of which lay between the mandatory and the competent organs of the League,—not between the mandatory and individual members of the League.

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85. Such then is the background against which the "necessity" argument has to be viewed. The gist of the argument is that since the Council had no means of imposing its views on the mandatory, and since no advisory opinion it might obtain from the Court would be binding on the latter, the mandate could have been flouted at will. Hence, so the contention goes, it was essential, as an ultimate safeguard or security for the performance of the sacred trust, that each member of the League should be deemed to have a legal right or interest in that matter and, in the last resort, be able to take direct action relative to it.

86. It is evident on the face of it how misconceived such an argument must be in the context of a system which was expressly designed to include all those elements which, according to the "necessity" argument, it was essential to guard or provide securities against. The Court will leave on one side the obvious improbability that had the framers of the mandates system really intended that it should be possible in the last resort to impose a given course or policy on a mandatory, in the performance of the sacred trust, they would have left this to the haphazard and uncertain action of the individual members of the League, when other much more immediate and effective methods were to hand—for instance, by providing that mandatories should not be members of the Council for mandates purposes, though entitled to attend, or should not be entitled to exercise a vote on mandates questions; or again by investing members of the Council itself with a right of action before the Court, as in the minorities case. The plain fact is that, in relation to the "conduct" provisions of the mandates, it was never the intention that the Council should be able to impose its views on the various mandatories—the system adopted was one which deliberately rendered this impossible. It was never intended that the views of the Court should be ascertained in a manner binding on mandatories, or that mandatories should be answerable to individual League members as such in respect of the "conduct" provisions of the mandates. It is scarcely likely that a system which, of set purpose, created a position such that, if a mandatory made use of its veto, it would thereby block what would otherwise be a decision of the Council, should simultaneously invest individual members of the League with, in effect, a legal right of complaint if this veto, to which the mandatory was entitled, was made use of. In this situation there was nothing at all unusual. In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception,—and this was even more the case in 1920 than today.

87. As regards the possibility that a mandatory might be acting contrary not only to the views of the rest of the Council but to the mandate itself, the risk of this was evidently taken with open eyes; and that the risk was remote, the event proved. Acceptance of the Applicants' contention on the other hand, would involve acceptance of the proposition that even if the Council of the League should be perfectly satisfied with the way in which a mandatory was carrying out its mandate, any individual

member of the League could independently invoke the jurisdiction of the Court in order to have the same conduct declared illegal, although, as mentioned earlier, no provision for recourse to the Court was included amongst the "securities" provided for by the Covenant itself. Here again the difference is evident between this case and that of the minorities, where it was the members of the Council itself who had that right. The potential existence of such a situation as would have arisen from investing all the members of the League with the right in question is not reconcilable with the processes described above for the supervision of the mandates. According to the methods and procedures of the League as applied to the operation of the mandates system, it was by argument, discussion, negotiation and co-operative effort that matters were to be, and were, carried forward.

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88. For these reasons the Court, bearing in mind that the rights of the Applicants must be determined by reference to the character of the system said to give rise to them, considers that the "necessity" argument falls to the ground for lack of verisimilitude in the context of the economy and philosophy of that system. Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an "*actio popularis*", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (c), of its Statute.

* * *

89. The Court feels obliged in conclusion to point out that the whole "necessity" argument appears, in the final analysis, to be based on considerations of an extra-legal character, the product of a process of after-knowledge. Such a theory was never officially advanced during the period of the League, and probably never would have been but for the dissolution of that organization and the fact that it was then considered preferable to rely on the anticipation that mandated territories would be brought within the United Nations trusteeship system. It is these subsequent events alone, not anything inherent in the mandates system as it was originally conceived, and is correctly to be interpreted, that give rise to the alleged "necessity". But that necessity, if it exists, lies in the political field. It does not constitute necessity in the eyes of the law. If the Court, in order to parry the consequences of these events, were now to read into the mandates system, by way of, so to speak, remedial action, an element wholly foreign to its real character and structure as originally contemplated when the system was instituted, it

would be engaging in an *ex post facto* process, exceeding its functions as a court of law. As is implied by the opening phrase of Article 38, paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it.

90. It is always open to parties to a dispute, if they wish the Court to give a decision on a basis of *ex aequo et bono*, and are so agreed, to invoke the power which, in those circumstances, paragraph 2 of this same Article 38 confers on the Court to give a decision on that basis, notwithstanding the provisions of paragraph 1. Failing that, the duty of the Court is plain.

91. It may be urged that the Court is entitled to engage in a process of "filling in the gaps", in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should. On a previous occasion, which had certain affinities with the present one, the Court declined to find that an intended three-member commission could properly be constituted with two members only, despite the (as the Court had held) illegal refusal of one of the parties to the jurisdictional clause to appoint its arbitrator—and although the whole purpose of the jurisdictional clause was thereby frustrated. In so doing, the Court (*I.C.J. Reports 1950*, p. 229) said that it was its duty "to interpret the Treaties, not to revise them". It continued:

"The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit."

In other words, the Court cannot remedy a deficiency if, in order to do so, it has to exceed the bounds of normal judicial action.

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92. It may also be urged that the Court would be entitled to make good an omission resulting from the failure of those concerned to foresee what might happen, and to have regard to what it may be presumed the framers of the Mandate would have wished, or would even have made express provision for, had they had advance knowledge of what was to occur. The Court cannot however presume what the wishes and intentions of those concerned would have been in anticipation of events

that were neither foreseen nor foreseeable; and even if it could, it would certainly not be possible to make the assumptions in effect contended for by the Applicants as to what those intentions were.

93. In this last connection, it so happens that there is in fact one test that can be applied, namely by enquiring what the States who were members of the League when the mandates system was instituted did when, as Members of the United Nations, they joined in setting up the trusteeship system that was to replace the mandates system. In effect, as regards structure, they did exactly the same as had been done before, with only one though significant difference. There were of course marked divergences, as regards for instance composition, powers, and voting rules, between the organs of the United Nations and those of the League. Subject to that however, the Trusteeship Council was to play the same sort of role as the Permanent Mandates Commission had done, and the General Assembly (or Security Council in the case of strategic trusteeships) was to play the role of the League Council; and it was to these bodies that the various administering authorities became answerable. No right of supervision or of calling the administering authority to account was given to individual Members of the United Nations, whose sphere of action, as in the case of the League members, is to be found in their participation in the work of the competent organs.

94. The significant difference referred to lies in the distribution of the jurisdictional clause amongst the various trusteeship agreements. The clause itself is almost identical in its terms with that which figured in the mandates, and was clearly taken straight from these ("any dispute whatever", "between the Administering Authority and another Member of the United Nations", "relating to . . . the provisions of this Agreement"). But whereas the jurisdictional clause appeared in all the mandates, each of which contained "special interests" provisions, it figures only in those trusteeship agreements which contain provisions of this type, and not in agreements whose provisions are confined entirely to the performance of the trust in accordance with the basic objectives of the system as set out in Article 76 of the Charter.

95. If therefore, the contention put forward by the Applicants in the present case were correct in principle (and this contention is in a major degree founded on the existence and wording of the jurisdictional clause, and also involves the erroneous assumption that it can *per se* confer substantive rights), it would follow that, in the case of some of the trusteeships, individual members of the United Nations would be held to have a legal right or interest in the conduct and administration of the trust, but in relation to others they would not, although these were no less trusteeships,—no less an expression of the "sacred trust of civilization". The implications become even more striking when it is realized that the trusteeships to which no jurisdictional clause attaches are three previous Pacific 'C' mandates—that is to say the class of

territory inhabited by precisely the most undeveloped categories of peoples, the least "able to stand by themselves".

96. It has been sought to explain this apparent anomaly by reference to the strong negotiating position in which the various mandatories found themselves, inasmuch as they were not legally obliged to place their mandated territories under trusteeship at all, and could therefore, within limits, make their own terms. But this would in no way explain why they seem to have been willing to accept a jurisdictional clause in the case of trusteeships that contained "special interests" provisions, including one Pacific 'C' mandate of this kind, but were not willing to do so in the case of trusteeships whose terms provided only for the performance of the trust in accordance with the basic objectives of the system.

97. No doubt, as has been pointed out, even where no jurisdictional clause figures in a trusteeship agreement, it would be possible, in those cases where the administering authority had made an appropriately worded declaration in acceptance of the Court's compulsory jurisdiction under the optional clause provision of Article 36 of the Court's Statute, for another member of the United Nations having made a similar and interlocking declaration, to seize the Court of a dispute regarding the performance of the trust. The number of cases in which this could occur has, however, always been very limited, and the process is rendered precarious and uncertain, not only by the conditions contained in, and the nature of the disputes covered by certain of these declarations, but also by their liability to amendment, withdrawal, or non-renewal. The optional clause system could therefore in no way have afforded a substitute for a general obligation to adjudicate, if such an obligation had really been regarded as essential;—moreover, even in those cases where an optional clause declaration could be invoked, it would still be necessary for the invoking State—as here—to establish the existence of a legal right or interest in the subject-matter of its claim.

98. It has also been sought to explain why certain trusteeship agreements do not contain the jurisdictional clause by a further appeal to the "necessity" argument. This clause was no longer necessary, so it was contended, because the United Nations voting rule was different. In the League Council, decisions could not be arrived at without the concurrence of the mandatory, whereas in the United Nations the majority voting rule ensured that a resolution could not be blocked by any single vote. This contention would not in any event explain why the clause was accepted for some trusteeships and not for others. But the whole argument is misconceived. If decisions of the League Council could not be arrived at without the concurrence, express or tacit, of the mandatory, they were, when arrived at, binding; and if resolutions of the United Nations General Assembly (which on this hypothesis would be the relevant organ) can be arrived at without the concurrence of the administering authority, yet when so arrived at—and subject to certain exceptions not here material—they are not binding, but only recommendatory in character. The persuasive force of Assembly resolutions

can indeed be very considerable,—but this is a different thing. It operates on the political not the legal level: it does not make these resolutions binding in law. If the “necessity” argument were valid therefore, it would be applicable as much to trusteeships as it is said to be to mandates, because in neither case could the administering authority be coerced by means of the ordinary procedures of the organization. The conclusion to be drawn is obvious.

* * *

99. In the light of these various considerations, the Court finds that the Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims, and that, accordingly, the Court must decline to give effect to them.

100. For these reasons,

THE COURT,

by the President's casting vote—the votes being equally divided,

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decides to reject the claims of the Empire of Ethiopia and the Republic of Liberia.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighteenth day of July, one thousand nine hundred and sixty-six, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Empire of Ethiopia, the Government of the Republic of Liberia and the Government of the Republic of South Africa, respectively.

(Signed) Percy C. SPENDER,
President.

(Signed) S. AQUARONE,
Registrar.

President Sir Percy SPENDER makes the following declaration:

1. The judgment of the Court, which consists of its decision and the reasons upon which it is based (Article 56 (1) of the Statute), is that the Applicants cannot be considered to have established that they have any legal right or interest in the subject-matter of the present claims, and that accordingly their claims are rejected.

2. Having so decided, the Court's task was completed. It was not necessary for it to determine whether the Applicants' claims should or could be rejected on any other grounds. Specifically it was not called upon to consider or pronounce upon the complex of issues and questions involved in Article 2 of the mandate instrument (“The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate”); or Article 6 thereof (“The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5”); or to enter into a legal enquiry as to what it would or might have decided in respect to these and related matters had it not reached the decision it did. To have done so would, in my view, have been an excess of the judicial function.

3. The Judgment of the Court does not represent the unanimous opinion of the judges and, in consequence, Article 57 of the Statute of the Court, which provides that in that case “any judge shall be entitled to deliver a separate opinion”, comes into operation.

4. It follows that any judge, whether he concurs in or dissents from the Court's judgment, is entitled, if he wishes, to deliver a separate opinion.

5. Since in my view there are grounds other than as stated in the Judgment upon which the Applicants' claims or certain of them could have been rejected, and since I agree with the Court's Judgment, there arises for me the question whether, and if so to what extent, it is permissible or appropriate to express by way of separate opinion my views on these additional grounds for rejecting the Applicants' claims or certain of them.

6. In order to answer this question, it is necessary to consider not merely the text of Article 57 but the general purpose it was intended to serve, and its intended application.

7. I would not wish to say anything which would unreasonably restrict the right accorded to a judge by Article 57. It is an important right which must be safeguarded. Can it be, however, that there are no limits to the scope and extent of the exercise of this right by any individual judge? I cannot think so. There must, it seems to me, be some limits, to proceed beyond which could not be claimed to be a proper exercise of the right the Statute confers.

8. The right of a judge to express a dissenting opinion in whole or in part was not easily won.

9. In the Hague Convention of 1899 a right of dissent from arbitral decisions was recognized; it was adopted without discussion. At the Hague Conference of 1907 the question of dissent or no dissent was discussed at considerable length. In the result the right of dissent was suppressed.

10. The Committee of Jurists, in drafting the Statute of the Permanent Court in 1920, after discussion, reached the conclusion that a judge should be allowed to publish his dissent, but not his reasons. This however failed to receive the approval of the Council of the League at its tenth meeting in Brussels in October of that year. There was then introduced into the text the right of a judge who did not concur in all or part of the judgment to deliver a separate opinion.

11. The record reveals clearly that this recognition of the right of a judge not only to publish his dissent but, as well, to express the reasons for the same, was the result of compromise (*League of Nations Documents on Article 14 of the Covenant*, pp. 138 *et seq.*). It was stated by Sir Cecil Hurst, who was at Brussels, and who defended, before the Sub-Committee of the Assembly, the view arrived at at the Brussels meeting of the Council, that the reason for disagreeing with the Committee of Jurists was because it was feared in England that the decisions of the Court might establish rules of law which would be incompatible with the Anglo-Saxon legal system. The agreement reached in the Council of the League in Brussels, it seems clear, aimed at avoiding this apprehended danger by the publication of dissenting opinions.

12. This would strongly suggest that the contemplated purpose of the publication of the dissent, certainly its main purpose, was to enable the view of the dissenting judge or judges on particular questions of law dealt with in the Court's judgment to be seen side by side with the views of the Court on these questions.

13. In the result there was, without dissent, written into the Statute of the Permanent Court Article 57 thereof, which read:

“If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.”

14. There is the considerable authority of President of the Permanent Court Max Huber for the view that the contemplated purpose of the right to publish reasons for a dissent was as stated in paragraph 12 above. In the course of a long discussion in that Court in July of 1926 on the general principle of dissenting opinions (*Series D, Addendum No. 2*, p. 215) he is recorded as having observed (my italics):

“Personally the President had always construed the right conferred on judges by Article 57 as a right to state their reasons and not simply to express their dissent, the object being to enable judges to explain their understanding of international law in order to prevent the creation of a false impression that a particular judgment or opinion expressed the unanimous opinion of the Court, in regard to the interpretation of international law on a particular point.”

15. Further support for Max Huber's view is, I think, to be found in a resolution of the Permanent Court of 17 February 1928 which, in part, read as follows (my italics): “Dissenting opinions are designed solely to set forth the reasons for which judges do not feel able to accept the opinion of the Court . . .”

16. It would appear evident from the record that it would have been quite foreign to the understanding of those who drafted the provision according to the right of a judge to publish the reasons for his dissent, that this right could be one which permitted a judge to express his opinion at large, on matters not directly connected with the nature and subject-matter of the Court's decision.

17. This then was the origin of Article 57 of this Court's Statute, which was evidently based by its framers not only on the text of the corresponding article in the Statute of the Permanent Court, but, as well, upon the commonly understood purpose a dissenting opinion was designed to serve.

18. Article 57 of this Court's Statute extends the right to deliver a separate opinion to any judge, where the judgment does not represent in whole or in part the unanimous opinion of the judges.

19. If a dissenting judge is free to state his opinion on matters which are not directly connected with the Court's judgment, so it would appear is a concurring judge who, for any reason which recommends itself to him, desires to deliver a separate opinion.

20. In other words, if any judge is entitled to give a separate opinion quite outside the range of the Court's decision and on issues upon which the Court has made no findings of any kind, every other judge is so entitled. The inevitable confusion which this could lead to cannot, in my view, be supported by any rational interpretation and application of Article 57. It would, or could, in practice be destructive of the authority of the Court.

21. President Basdevant, a former distinguished President of this Court, in his *Dictionary of the Terminology of International Law* (p. 428) defines an individual concurring opinion as not a mere statement of disagreement as to the reasons given for a decision, the *dispositif* of which the judge accepts, but the formal explanation he gives of the grounds on which he personally does so; whilst a dissenting opinion denotes not a mere statement of dissent relative to a decision but the formal explanation given of the grounds on which the judge bases his dissent.

22. In the light of all these considerations the following conclusions appear justified:

(a) individual opinions, whether dissenting or merely separate, were, when the Court's Statute was drafted, regarded as such as were directly connected with and dependent upon the judgment of the

Court itself (or in the case of advisory opinions (Statute, Article 68, Rules, Article 84 (2)), its opinion), in the sense of either agreeing or disagreeing with it, or its motivation, or as to the sufficiency of the latter;

- (b) the judgment (or opinion) of the Court must be the focal point of the different judicial views expressed on any occasion, since it is the existence and nature of the judgment (or opinion) and their relationship to it that gives individual opinions their judicial character; in principle such opinions should not purport to deal with matters that fall entirely outside the range of the Court's decision, or of the decision's motivation;
- (d) there must exist a close direct link between individual opinions and the judgment of the Court.

23. If these conclusions are, as I think them to be, sound, there still remain wide limits within which an individual judge may quite properly go into questions that the Court has not dealt with, provided he keeps within the ambit of the order of question decided by the Court, and in particular observes the distinction between questions of a preliminary or antecedent character and questions not having that character. I cannot however agree that a separate or dissenting opinion may properly include all that a judge thinks the judgment of the Court should have included.

24. The mere fact that a judgment (or opinion) of the Court has been given does not afford justification for an expression of views at large on matters which entirely exceed the limits and intended scope of the judgment (or opinion). Without the judgment (or opinion) there would, of course, be no relationship and nothing of a judicial character that could be said by any judge. There is equally no relationship imparting judicial character to utterances about questions which the Court has not treated of at all.

25. Suppose that the Court, on a request to give an advisory opinion, refuses to do so, as for example it did in the case of *Eastern Carelia, 1923, Series B, No. 5*, on a specific ground stated; could a judge of the Court, by way of a separate individual or dissenting opinion, proceed to give his views as to what the opinion of the Court should have been if it had decided to express it? I should have thought not.

26. Is there in principle any real distinction between this supposed case and the present cases? I think not. The Court has decided, on what is a preliminary question of the merits, that the Applicants' claims must be rejected; thus further examination of the merits becomes supererogatory. Is any judge in a separate opinion, in disregard of the particular issue or question decided by the Court and the reasoning in support of the decision, entitled to go beyond giving his reasons for disagreeing with that decision, and passing entirely outside it to express his views on what the Court should have decided in relation to other matters of the merits, on which no decision has been arrived at and no

expression of opinion has been given by the Court? To do so, in my view, would be to go outside the proper limits of an individual or separate opinion.

27. It cannot be that the mere *dispositif* itself can enlarge the proper scope of a separate opinion. The *dispositif* cannot be disembowelled from the Court's opinion as expressed in its motivations. It surely cannot be that just because the *dispositif* rejects the claims, it is permissible for a dissenting judge to give his reasons why the claims should be upheld in whole or part. The content of the judgment must be obtained from reading together the decision and the reasons upon which it is based. The claims are dismissed for particular assigned reasons and on a specific ground. It is to these reasons and this ground, it seems to me, that in principle all separate opinions must be directed, not to wholly unconnected issues or matters.

28. It would seem inconceivable that a judge who concurs in the *dispositif* should in a separate opinion be free to go beyond considerations germane to the actual decision made by the Court and its motivations. In the present cases he would, of course, be free to advance another ground of the same order as that on which the Court's decision rests which would separately justify it, or other related reasons which might go to support it. But it would hardly be justifiable for such a judge to proceed further into the merits, expressing his views on how he thinks the Court should or would have pronounced upon the whole complex of questions centering around different provisions of the Mandate, for example Articles 2 and 6 thereof, had the Court not reached the decision it actually did.

29. There is however no warrant to be found in Article 57 of the Court's Statute which would leave it free for a dissenting judge to do this but not a concurring judge. They both stand upon an equal footing. The *dispositif* and a judge's vote thereon, for or against, could not, in itself, affect the proper limits within which any separate opinion under Article 57 may be delivered.

30. In the present cases the questions of merits that arise can themselves be divided into two categories, namely questions of what might be called the ultimate merits and certain other questions which, though appertaining to the merits, have an antecedent or more fundamental character, in the sense that if decided in a certain way they render a decision on the ultimate merits unnecessary and indeed unwarranted. As the Judgment states, there are two questions having that character—that of the Applicants' legal right and interest (which is the basis of the Court's decision) and that of the continued subsistence of the Mandate for South West Africa.

31. It would be entirely proper for a judge who votes in favour of the *dispositif* to base a separate opinion wholly or in part upon the second of those two questions. He would not be going outside the

order of question considered by the Court, namely that of antecedent issues on merits operating as a bar to all the Applicants' claims, he would not have attempted to pronounce on the question of ultimate merits, necessarily excluded and rendered irrelevant by the Court's Judgment.

32. To the extent that any separate opinion, whether concurring or dissenting, goes outside the order of the question considered by the Court, it is my view that the opinion ceases to have any relationship with the judgment of the Court, whatever the means may be by which such a relationship or link is sought to be established—it ceases therefore to be an expression properly in the nature of a judicial expression of opinion, for, as has been already indicated, it is only through their relationship to the judgment that a judicial character is imparted to individual opinions.

33. In my view, such an opinion, to the extent it exceeds these limits, ceases to be a separate opinion as contemplated by the Court's Statute and Rules since it expresses views about matters for which the judgment of the Court does not provide the basis necessary for the process of agreement or disagreement which is the sole legitimate *raison d'être* of a separate opinion.

34. I am not persuaded that the views I have expressed are in any sense invalidated if it be that on one or two occasions this or that judge has, in some manner, not acted in conformity therewith. Action which is impermissible does not become permissible because it may have been overlooked at the time or no objection taken. The correct path to follow remains the correct path even though there may have been occasional straying from it.

35. These views must dictate my own action. However I might agree or disagree with the views expressed by any individual judge in a separate opinion in relation to the complex of questions both of law and fact centering around Articles 2 and 6 of the Mandate and certain other articles thereof, I would not, in my considered view, be entitled to express any opinion thereon. Were I to do so I would be expressing purely personal and extra-judicial views contrary to what I think is the object and purpose of Article 57 of the Statute, and contrary, in my view, to the best interests of the Court.

36. And what it is not permissible or proper to do in a separate opinion, it is certain would be impermissible and improper to do in a declaration.

37. I associate myself unreservedly with the Court's Judgment, and, having regard to the views herein expressed, have nothing to add thereto.

Judge MORELLI and Judge *ad hoc* VAN WYK append Separate Opinions to the Judgment of the Court.

Vice-President WELLINGTON KOO, Judges KORETSKY, TANAKA, JESSUP, PADILLA NERYO, FORSTER and Judge *ad hoc* Sir Louis MBANEFO append Dissenting Opinions to the Judgment of the Court.

(Initialled) P. C. S.

(Initialled) S. A.

**Legality of the Threat or Use of Nuclear Weapons,
Advisory Opinion, I.C.J. Reports 1996**

INTERNATIONAL COURT OF JUSTICE

YEAR 1996

8 July 1996

LEGALITY OF THE THREAT OR USE
OF NUCLEAR WEAPONS

Jurisdiction of the Court to give the advisory opinion requested — Article 65, paragraph 1, of the Statute — Body authorized to request an opinion — Article 96, paragraphs 1 and 2, of the Charter — Activities of the General Assembly — “Legal question” — Political aspects of the question posed — Motives said to have inspired the request and political implications that the opinion might have.

Discretion of the Court as to whether or not it will give an opinion — Article 65, paragraph 1, of the Statute — Compelling reasons — Vague and abstract question — Purposes for which the opinion is sought — Possible effects of the opinion on current negotiations — Duty of the Court not to legislate. Formulation of the question posed — English and French texts — Clear objective — Burden of proof.

Applicable law — International Covenant on Civil and Political Rights — Arbitrary deprivation of life — Convention on the Prevention and Punishment of the Crime of Genocide — Intent against a group as such — Existing norms relating to the safeguarding and protection of the environment — Environmental considerations as an element to be taken into account in the implementation of the law applicable in armed conflict — Application of most directly relevant law: law of the Charter and law applicable in armed conflict.

Unique characteristics of nuclear weapons.

Provisions of the Charter relating to the threat or use of force — Article 2, paragraph 4 — The Charter neither expressly prohibits, nor permits, the use of any specific weapon — Article 51 — Conditions of necessity and proportionality — The notions of “threat” and “use” of force stand together — Possession of nuclear weapons, deterrence and threat.

Specific rules regulating the lawfulness or unlawfulness of the recourse to nuclear weapons as such — Absence of specific prescription authorizing the threat or use of nuclear weapons — Unlawfulness per se: treaty law — Instruments prohibiting the use of poisoned weapons — Instruments expressly prohibiting the use of certain weapons of mass destruction — Treaties concluded in order to limit the acquisition, manufacture and possession of nuclear weapons, the deployment and testing of nuclear weapons — Treaty of Tlatelolco — Treaty of Rarotonga — Declarations made by nuclear-weapon States on the

*occasion of the extension of the Non-Proliferation Treaty — Absence of comprehensive and universal conventional prohibition of the use or the threat of use of nuclear weapons as such — Unlawfulness per se: customary law — Consistent practice of non-utilization of nuclear weapons — Policy of deterrence — General Assembly resolutions affirming the illegality of nuclear weapons — Continuing tensions between the nascent *opinio juris* and the still strong adherence to the practice of deterrence.*

Principles and rules of international humanitarian law — Prohibition of methods and means of warfare precluding any distinction between civilian and military targets or resulting in unnecessary suffering to combatants — Martens Clause — Principle of neutrality — Applicability of these principles and rules to nuclear weapons — Conclusions.

Right of a State to survival and right to resort to self-defence — Policy of deterrence — Reservations to undertakings given by certain nuclear-weapon States not to resort to such weapons.

Current state of international law and elements of fact available to the Court — Use of nuclear weapons in an extreme circumstance of self-defence in which the very survival of a State is at stake.

Article VI of the Non-Proliferation Treaty — Obligation to negotiate in good faith and to achieve nuclear disarmament in all its aspects.

ADVISORY OPINION

Present: President BEDIAOUI; Vice-President SCHWEBEL; Judges ODA, GUILLAUME, SHAHABUDDIN, WEERAMANTRY, RANIEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, FERRARI BRAVO, HIGGINS; Registrar VALENCIA-OSPINA.

On the legality of the threat or use of nuclear weapons,

THE COURT,

composed as above,

gives the following *Advisory Opinion*:

1. The question upon which the advisory opinion of the Court has been requested is set forth in resolution 49/75 K adopted by the General Assembly of the United Nations (hereinafter called the “General Assembly”) on 15 December 1994. By a letter dated 19 December 1994, received in the Registry by facsimile on 20 December 1994 and filed in the original on 6 January 1995, the Secretary-General of the United Nations officially communicated to the Registrar the decision taken by the General Assembly to submit the question to the Court for an advisory opinion. Resolution 49/75 K, the English text of which was enclosed with the letter, reads as follows:

“*The General Assembly,*

Conscious that the continuing existence and development of nuclear weapons pose serious risks to humanity,

Mindful that States have an obligation under the Charter of the United

Nations to refrain from the threat or use of force against the territorial integrity or political independence of any State.

Recalling its resolutions 1653 (XVI) of 24 November 1961, 33/71 B of 14 December 1978, 34/83 G of 11 December 1979, 35/152 D of 12 December 1980, 36/92 I of 9 December 1981, 45/59 B of 4 December 1990 and 46/37 D of 6 December 1991, in which it declared that the use of nuclear weapons would be a violation of the Charter and a crime against humanity,

Welcoming the progress made on the prohibition and elimination of weapons of mass destruction, including the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction¹ and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction²,

Convinced that the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war,

Noting the concerns expressed in the Fourth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons that insufficient progress had been made towards the complete elimination of nuclear weapons at the earliest possible time,

Recalling that, convinced of the need to strengthen the rule of law in international relations, it has declared the period 1990-1999 the United Nations Decade of International Law³,

Noting that Article 96, paragraph 1, of the Charter empowers the General Assembly to request the International Court of Justice to give an advisory opinion on any legal question,

Recalling the recommendation of the Secretary-General, made in his report entitled 'An Agenda for Peace'⁴, that United Nations organs that are authorized to take advantage of the advisory competence of the International Court of Justice turn to the Court more frequently for such opinions,

Welcoming resolution 46/40 of 14 May 1993 of the Assembly of the World Health Organization, in which the organization requested the International Court of Justice to give an advisory opinion on whether the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligations under international law, including the Constitution of the World Health Organization,

Decides, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'

¹ Resolution 2826 (XXVI), annex.

² See *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 27 (A/47/27)*, appendix I.

³ Resolution 44/23.

⁴ A/47/277-S/24111."

2. Pursuant to Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question.

3. By letters dated 21 December 1994, the Registrar, pursuant to Article 66, paragraph 1, of the Statute, gave notice of the request for an advisory opinion to all States entitled to appear before the Court.

4. By an Order dated 1 February 1995 the Court decided that the States entitled to appear before it and the United Nations were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute. By the same Order, the Court fixed, respectively, 20 June 1995 as the time-limit within which written statements might be submitted to it on the question, and 20 September 1995 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute. In the aforesaid Order, it was stated in particular that the General Assembly had requested that the advisory opinion of the Court be rendered "urgently"; reference was also made to the procedural time-limits already fixed for the request for an advisory opinion previously submitted to the Court by the World Health Organization on the question of the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.

On 8 February 1995, the Registrar addressed to the States entitled to appear before the Court and to the United Nations the special and direct communication provided for in Article 66, paragraph 2, of the Statute.

5. Written statements were filed by the following States: Bosnia and Herzegovina, Burundi, Democratic People's Republic of Korea, Ecuador, Egypt, Finland, France, Germany, India, Ireland, Islamic Republic of Iran, Italy, Japan, Lesotho, Malaysia, Marshall Islands, Mexico, Nauru, Netherlands, New Zealand, Qatar, Russian Federation, Samoa, San Marino, Solomon Islands, Sweden, United Kingdom of Great Britain and Northern Ireland, and United States of America. In addition, written comments on those written statements were submitted by the following States: Egypt, Nauru and Solomon Islands. Upon receipt of those statements and comments, the Registrar communicated the text to all States having taken part in the written proceedings.

6. The Court decided to hold public sittings, opening on 30 October 1995, at which oral statements might be submitted to the Court by any State or organization which had been considered likely to be able to furnish information on the question before the Court. By letters dated 23 June 1995, the Registrar requested the States entitled to appear before the Court and the United Nations to inform him whether they intended to take part in the oral proceedings; it was indicated, in those letters, that the Court had decided to hear, during the same public sittings, oral statements relating to the request for an advisory opinion from the General Assembly as well as oral statements concerning the above-mentioned request for an advisory opinion laid before the Court by the World Health Organization, on the understanding that the United Nations would be entitled to speak only in regard to the request submitted by the General Assembly, and it was further specified therein that the participants in the oral proceedings which had not taken part in the written proceedings would receive the text of the statements and comments produced in the course of the latter.

7. By a letter dated 20 October 1995, the Republic of Nauru requested the Court's permission to withdraw the written comments submitted on its behalf

in a document entitled "Response to submissions of other States". The Court granted the request and, by letters dated 30 October 1995, the Deputy-Registrar notified the States to which the document had been communicated, specifying that the document consequently did not form part of the record before the Court.

8. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

9. In the course of public sittings held from 30 October 1995 to 15 November 1995, the Court heard oral statements in the following order by:

- for the Commonwealth of Australia:* Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, Counsel,
The Honourable Gareth Evans, Q.C., Senator,
Minister for Foreign Affairs, Counsel;
- for the Arab Republic of Egypt:* Mr. George Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law;
- for the French Republic:* Mr. Marc Perrin de Brichambaut, Director of Legal Affairs, Ministry of Foreign Affairs,
Mr. Alain Pellet, Professor of International Law, University of Paris X and Institute of Political Studies, Paris;
- for the Federal Republic of Germany:* Mr. Hartmut Hillgenberg, Director-General of Legal Affairs, Ministry of Foreign Affairs;
- for Indonesia:* H.E. Mr. Johannes Berchmans Soedarmanto Kadarisman, Ambassador of Indonesia to the Netherlands;
- for Mexico:* H.E. Mr. Sergio González Gálvez, Ambassador, Under-Secretary of Foreign Relations;
- for the Islamic Republic of Iran:* H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs;
- for Italy:* Mr. Umberto Leanza, Professor of International Law at the Faculty of Law at the University of Rome "Tor Vergata", Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;
- for Japan:* H.E. Mr. Takekazu Kawamura, Ambassador, Director General for Arms Control and Scientific Affairs, Ministry of Foreign Affairs,
Mr. Takashi Hiraoka, Mayor of Hiroshima,
Mr. Iccho Itoh, Mayor of Nagasaki;

for Malaysia: H.E. Mr. Tan Sri Razali Ismail, Ambassador, Permanent Representative of Malaysia to the United Nations,
Dato' Mohhtar Abdullah, Attorney-General;

for New Zealand: The Honourable Paul East, Q.C., Attorney-General of New Zealand,
Mr. Allan Bracegirdle, Deputy Director of Legal Division of the New Zealand Ministry for Foreign Affairs and Trade;

for the Philippines: H.E. Mr. Rodolfo S. Sanchez, Ambassador of the Philippines to the Netherlands,
Professor Merlin N. Magallona, Dean, College of Law, University of the Philippines;

for Qatar: H.E. Mr. Najeeb ibn Mohammed Al-Nauimi, Minister of Justice;

for the Russian Federation: Mr. A. G. Khodakov, Director, Legal Department, Ministry of Foreign Affairs;

for San Marino: Mrs. Federica Bigi, Embassy Counsellor, Official in Charge of Political Directorate, Department of Foreign Affairs;

for Samoa: H.E. Mr. Neroni Slade, Ambassador and Permanent Representative of Samoa to the United Nations,
Miss Laurence Boisson de Chazournes, Assistant Professor, Graduate Institute of International Studies, Geneva,
Mr. Roger S. Clark, Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey;

for the Marshall Islands: The Honourable Theodore G. Kronmiller, Legal Counsel, Embassy of the Marshall Islands to the United States of America,
Mrs. Lijon Eknilang, Council Member, Rongelap Atoll Local Government;

for Solomon Islands: The Honourable Victor Negele, Minister of Police and National Security,
Mr. Jean Salmon, Professor of Law, Université libre de Bruxelles,
Mr. Eric David, Professor of Law, Université libre de Bruxelles,
Mr. Philippe Sands, Lecturer in Law, School of Oriental and African Studies, London University, and Legal Director, Foundation for International Environmental Law and Development,

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge;

for Costa Rica: Mr. Carlos Vargas-Pizarro, Legal Counsel and Special Envoy of the Government of Costa Rica;

for the United Kingdom of Great Britain and Northern Ireland:

for the United States of America: The Rt. Honourable Sir Nicholas Lyell, Q.C., M.P., Her Majesty's Attorney-General;

Mr. Conrad K. Harper, Legal Adviser, United States Department of State;

Mr. Michael J. Matheson, Principal Deputy Legal Adviser, United States Department of State;

Mr. John H. McNeill, Senior Deputy General Counsel, United States Department of Defense;

for Zimbabwe: Mr. Jonathan Wutawunashu, Chargé d'affaires a.i., Embassy of the Republic of Zimbabwe in the Netherlands.

Questions were put by Members of the Court to particular participants in the oral proceedings, who replied in writing, as requested, within the prescribed time-limits; the Court having decided that the other participants could also reply to those questions on the same terms, several of them did so. Other questions put by Members of the Court were addressed, more generally, to any participant in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limits.

* * *

10. The Court must first consider whether it has the jurisdiction to give a reply to the request of the General Assembly for an advisory opinion and whether, should the answer be in the affirmative, there is any reason it should decline to exercise any such jurisdiction.

The Court draws its competence in respect of advisory opinions from Article 65, paragraph 1, of its Statute. Under this Article, the Court

“may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”.

11. For the Court to be competent to give an advisory opinion, it is thus necessary at the outset for the body requesting the opinion to be “authorized by or in accordance with the Charter of the United Nations to make such a request”. The Charter provides in Article 96, paragraph 1, that: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”

Some States which oppose the giving of an opinion by the Court argued that the General Assembly and Security Council are not entitled

to ask for opinions on matters totally unrelated to their work. They suggested that, as in the case of organs and agencies acting under Article 96, paragraph 2, of the Charter, and notwithstanding the difference in wording between that provision and paragraph 1 of the same Article, the General Assembly and Security Council may ask for an advisory opinion on a legal question only within the scope of their activities.

In the view of the Court, it matters little whether this interpretation of Article 96, paragraph 1, is or is not correct; in the present case, the General Assembly has competence in any event to seize the Court. Indeed, Article 10 of the Charter has conferred upon the General Assembly a competence relating to “any questions or any matters” within the scope of the Charter. Article 11 has specifically provided it with a competence to “consider the general principles . . . in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments”. Lastly, according to Article 13, the General Assembly “shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification”.

12. The question put to the Court has a relevance to many aspects of the activities and concerns of the General Assembly including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law. The General Assembly has a long-standing interest in these matters and in their relation to nuclear weapons. This interest has been manifested in the annual First Committee debates, and the Assembly resolutions on nuclear weapons; in the holding of three special sessions on disarmament (1978, 1982 and 1988) by the General Assembly, and the annual meetings of the Disarmament Commission since 1978; and also in the commissioning of studies on the effects of the use of nuclear weapons. In this context, it does not matter that important recent and current activities relating to nuclear disarmament are being pursued in other fora.

Finally, Article 96, paragraph 1, of the Charter cannot be read as limiting the ability of the Assembly to request an opinion only in those circumstances in which it can take binding decisions. The fact that the Assembly's activities in the above-mentioned field have led it only to the making of recommendations thus has no bearing on the issue of whether it had the competence to put to the Court the question of which it is seized.

13. The Court must furthermore satisfy itself that the advisory opinion requested does indeed relate to a “legal question” within the meaning of its Statute and the United Nations Charter.

The Court has already had occasion to indicate that questions

“framed in terms of law and raising problems of international law . . . are by their very nature susceptible of a reply based on law . . .

[and] appear . . . to be questions of a legal character" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law.

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155).

Furthermore, as the Court said in the Opinion it gave in 1980 concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*:

"Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate" (*I.C.J. Reports 1980*, p. 87, para. 33.)

The Court moreover considers that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.

*

14. Article 65, paragraph 1, of the Statute provides: "The Court may give an advisory opinion . . ." (Emphasis added.) This is more than an enabling provision. As the Court has repeatedly emphasized, the Statute

leaves a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so. In this context, the Court has previously noted as follows:

"The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; and *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. 189.)

The Court has constantly been mindful of its responsibilities as "the principal judicial organ of the United Nations" (Charter, Art. 92). When considering each request, it is mindful that it should not, in principle, refuse to give an advisory opinion. In accordance with the consistent jurisprudence of the Court, only "compelling reasons" could lead it to such a refusal (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 183; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 21; and *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). There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court; in the case concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court's lack of jurisdiction in that case. The Permanent Court of International Justice took the view on only one occasion that it could not reply to a question put to it, having regard to the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was

neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way (*Status of Eastern Carelia, P.C.I.J., Series B, No. 5*).

15. Most of the reasons adduced in these proceedings in order to persuade the Court that in the exercise of its discretionary power it should decline to render the opinion requested by General Assembly resolution 49/75 K were summarized in the following statement made by one State in the written proceedings:

“The question presented is vague and abstract, addressing complex issues which are the subject of consideration among interested States and within other bodies of the United Nations which have an express mandate to address these matters. An opinion by the Court in regard to the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the Charter. Such an opinion has the potential of undermining progress already made or being made on this sensitive subject and, therefore, is contrary to the interests of the United Nations Organization.” (United States of America, Written Statement, pp. 1-2; cf. pp. 3-7, II. See also United Kingdom, Written Statement, pp. 9-20, paras. 2.23-2.45; France, Written Statement, pp. 13-20, paras. 5-9; Finland, Written Statement, pp. 1-2; Netherlands, Written Statement, pp. 3-4, paras. 6-13; Germany, Written Statement, pp. 3-6, para. 2 (b).)

In contending that the question put to the Court is vague and abstract, some States appeared to mean by this that there exists no specific dispute on the subject-matter of the question. In order to respond to this argument, it is necessary to distinguish between requirements governing contentious procedure and those applicable to advisory opinions. The purpose of the advisory function is not to settle — at least directly — disputes between States, but to offer legal advice to the organs and institutions requesting the opinion (cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71). The fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested.

Moreover, it is the clear position of the Court that to contend that it should not deal with a question couched in abstract terms is “a mere affirmation devoid of any justification”, and that “the Court may give an advisory opinion on any legal question, abstract or otherwise” (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61; see also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 51; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27, para. 40).

Certain States have however expressed the fear that the abstract nature of the question might lead the Court to make hypothetical or speculative declarations outside the scope of its judicial function. The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write “scenarios”, to study various types of nuclear weapons and to evaluate highly complex and controversial technological strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation.

16. Certain States have observed that the General Assembly has no explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.

Equally, once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution.

17. It has also been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another. That being so, the Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

18. Finally, it has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principle and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.

19. In view of what is stated above, the Court concludes that it has the authority to deliver an opinion on the question posed by the General Assembly, and that there exist no "compelling reasons" which would lead the Court to exercise its discretion not to do so.

An entirely different question is whether the Court, under the constraints placed upon it as a judicial organ, will be able to give a complete answer to the question asked of it. However, that is a different matter from a refusal to answer at all.

* * *

20. The Court must next address certain matters arising in relation to the formulation of the question put to it by the General Assembly. The English text asks: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The French text of the question reads as follows: "Est-il permis en droit international de recourir à la menace ou à l'emploi d'armes nucléaires en toute circonstance?" It was suggested that the Court was being asked by the General Assembly whether it was permitted to have recourse to nuclear weapons in every circumstance, and it was contended that such a question would inevitably invite a simple negative answer.

The Court finds it unnecessary to pronounce on the possible divergences between the English and French texts of the question posed. Its real objective is clear: to determine the legality or illegality of the threat or use of nuclear weapons.

21. The use of the word "permitted" in the question put by the General Assembly was criticized before the Court by certain States on the ground that this implied that the threat or the use of nuclear weapons would only be permissible if authorization could be found in a treaty provision or in customary international law. Such a starting point, those States submitted, was incompatible with the very basis of international law, which rests upon the principles of sovereignty and consent; accordingly, and contrary to what was implied by use of the word "permitted" States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law. Support for this contention was found in dicta of the Permanent Court of International Justice in the "Lotus" case that "restrictions upon the independence of States cannot . . . be presumed" and that international law leaves to States "a wide measure of discretion which is only limited in certain cases by prohibitive rules" (*P.C.I.J., Series A, No. 10*, pp. 18 and 19). Reliance was also placed on the dictum of the present Court in the case concerning *Militar. and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) that:

"in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby

the level of armaments of a sovereign State can be limited" (*I.C.J. Reports 1986*, p. 135, para. 269).

For other States, the invocation of these dicta in the "Lotus" case was inapposite; their status in contemporary international law and applicability in the very different circumstances of the present case were challenged. It was also contended that the above-mentioned dictum of the present Court was directed to the *possession* of armaments and was irrelevant to the threat or use of nuclear weapons.

Finally, it was suggested that, were the Court to answer the question put by the Assembly, the word "permitted" should be replaced by "prohibited".

22. The Court notes that the nuclear-weapon States appearing before it either accepted, or did not dispute, that their independence to act was indeed restricted by the principles and rules of international law, more particularly humanitarian law (see below, paragraph 86), as did the other States which took part in the proceedings.

Hence, the argument concerning the legal conclusions to be drawn from the use of the word "permitted", and the questions of burden of proof to which it was said to give rise, are without particular significance for the disposition of the issues before the Court.

* * *

23. In seeking to answer the question put to it by the General Assembly, the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law.

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24. Some of the proponents of the illegality of the use of nuclear weapons have argued that such use would violate the right to life as guaranteed in Article 6 of the International Covenant on Civil and Political Rights, as well as in certain regional instruments for the protection of human rights. Article 6, paragraph 1, of the International Covenant provides as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

In reply, others contended that the International Covenant on Civil and Political Rights made no mention of war or weapons, and it had never been envisaged that the legality of nuclear weapons was regulated by that instrument. It was suggested that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.

25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

26. Some States also contended that the prohibition against genocide, contained in the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, is a relevant rule of customary international law which the Court must apply. The Court recalls that in Article II of the Convention genocide is defined as

“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.”

It was maintained before the Court that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons.

The Court would point out in that regard that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.

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27. In both their written and oral statements, some States furthermore argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance.

Specific references were made to various existing international treaties and instruments. These included Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, paragraph 3, of which prohibits the employment of “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”; and the Convention of 18 May 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have “widespread, long-lasting or severe effects” on the environment (Art. 1). Also cited were Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992 which express the common conviction of the States concerned that they have a duty

“to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.

These instruments and other provisions relating to the protection and safeguarding of the environment were said to apply at all times, in war as well as in peace, and it was contended that they would be violated by the use of nuclear weapons whose consequences would be widespread and would have transboundary effects.

28. Other States questioned the binding legal quality of these precepts of environmental law; or, in the context of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, denied that it was concerned at all with the use of nuclear weapons in hostilities; or, in the case of Additional Protocol I, denied that they were generally bound by its terms, or recalled that they had reserved their position in respect of Article 35, paragraph 3, thereof.

It was also argued by some States that the principal purpose of environmental treaties and norms was the protection of the environment in time of peace. It was said that those treaties made no mention of nuclear weapons. It was also pointed out that warfare in general, and nuclear warfare in particular, were not mentioned in their texts and that it would be destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons.

29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The

existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

“Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”

31. The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions.

32. General Assembly resolution 47/37 of 25 November 1992 on the “Protection of the Environment in Times of Armed Conflict” is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that “destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law”. Addressing the reality that certain instruments are not yet binding on all States, the General Assembly in this resolution “[a]ppeals to all States that have not yet done so to consider becoming parties to the relevant international conventions”.

In its recent Order in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, the Court stated that its conclusion was “without prejudice to the obligations of States to respect and protect the natural environment” (*Order of 22 September 1995, I.C.J. Reports 1995*, p. 306, para. 64). Although that statement was made in the context of nuclear testing, it naturally also applies to the actual use of nuclear weapons in armed conflict.

33. The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

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34. In the light of the foregoing the Court concludes that the most directly relevant applicable law governing the question of which it was seized, is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.

* * *

35. In applying this law to the present case, the Court cannot however fail to take into account certain unique characteristics of nuclear weapons.

The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area.

Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

36. In consequence, in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.

* * *

37. The Court will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.

38. The Charter contains several provisions relating to the threat and use of force. In Article 2, paragraph 4, the threat or use of force against the territorial integrity or political independence of another State or in any other manner inconsistent with the purposes of the United Nations is prohibited. That paragraph provides:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

This prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs. A further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter.

39. These provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.

40. The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence. Other requirements are specified in Article 51.

41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*: there is a “specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law” (*I.C.J. Reports 1986*, p. 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.

42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.

43. Certain States have in their written and oral pleadings suggested that in the case of nuclear weapons, the condition of proportionality must be evaluated in the light of still further factors. They contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality.

44. Beyond the conditions of necessity and proportionality, Article 51 specifically requires that measures taken by States in the exercise of the right of self-defence shall be immediately reported to the Security Council; this article further provides that these measures shall not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. These requirements of Article 51 apply whatever the means of force used in self-defence.

45. The Court notes that the Security Council adopted on 11 April 1995, in the context of the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, resolution 984 (1995) by the terms of which, on the one hand, it

“[t]akes note with appreciation of the statements made by each of the nuclear-weapon States (S/1995/261, S/1995/262, S/1995/263, S/1995/264, S/1995/265), in which they give security assurances

against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons”,

and, on the other hand, it

“welcomes the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used”.

46. Certain States asserted that the use of nuclear weapons in the context of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality.

47. In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a “threat” within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal — for whatever reason — the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State — whether or not it defended the policy of deterrence — suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

48. Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this

is a “threat” contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.

49. Moreover, the Security Council may take enforcement measures under Chapter VII of the Charter. From the statements presented to it the Court does not consider it necessary to address questions which might, in a given case, arise from the application of Chapter VII.

50. The terms of the question put to the Court by the General Assembly in resolution 49/75 K could in principle also cover a threat or use of nuclear weapons by a State within its own boundaries. However, this particular aspect has not been dealt with by any of the States which addressed the Court orally or in writing in these proceedings. The Court finds that it is not called upon to deal with an internal use of nuclear weapons.

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51. Having dealt with the Charter provisions relating to the threat or use of force, the Court will now turn to the law applicable in situations of armed conflict. It will first address the question whether there are specific rules in international law regulating the legality or illegality of recourse to nuclear weapons *per se*; it will then examine the question put to it in the light of the law applicable in armed conflict proper, i.e. the principles and rules of humanitarian law applicable in armed conflict, and the law of neutrality.

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52. The Court notes by way of introduction that international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defence. Nor, however, is there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization. State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.

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53. The Court must therefore now examine whether there is any prohibition of recourse to nuclear weapons as such; it will first ascertain whether there is a conventional prescription to this effect.

54. In this regard, the argument has been advanced that nuclear weapons should be treated in the same way as poisoned weapons. In that case, they would be prohibited under:

- (a) the Second Hague Declaration of 29 July 1899, which prohibits "the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases";
- (b) Article 23 (a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of 18 October 1907, whereby "it is especially forbidden: . . . to employ poison or poisoned weapons"; and
- (c) the Geneva Protocol of 17 June 1925 which prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices".

55. The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by "poison or poisoned weapons" and that different interpretations exist on the issue. Nor does the 1925 Protocol specify the meaning to be given to the term "analogous materials or devices". The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.

56. In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol (see paragraph 54 above).

57. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. The most recent such instruments are the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction — which prohibits the possession of bacteriological and toxic weapons and reinforces the prohibition of their use — and the Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction — which prohibits all use of chemical weapons and requires the destruction of existing stocks. Each of these instruments has been negotiated and adopted in its own context and for its own reasons. The Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction.

58. In the last two decades, a great many negotiations have been conducted regarding nuclear weapons; they have not resulted in a treaty of

general prohibition of the same kind as for bacteriological and chemical weapons. However, a number of specific treaties have been concluded in order to limit:

- (a) the acquisition, manufacture and possession of nuclear weapons (Peace Treaties of 10 February 1947; State Treaty for the Re-establishment of an Independent and Democratic Austria of 15 May 1955; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 1 July 1968 on the Non-Proliferation of Nuclear Weapons; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols; Treaty of 12 September 1990 on the Final Settlement with respect to Germany);
- (b) the deployment of nuclear weapons (Antarctic Treaty of 1 December 1959; Treaty of 27 January 1967 on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 11 February 1971 on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols); and
- (c) the testing of nuclear weapons (Antarctic Treaty of 1 December 1959; Treaty of 5 August 1963 Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water; Treaty of 27 January 1967 on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols).

59. Recourse to nuclear weapons is directly addressed by two of these Conventions and also in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons of 1968:

- (a) the Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America prohibits, in Article 1, the use of nuclear weapons by the Contracting Parties. It further includes an Additional Protocol II open to nuclear-weapon States outside the region, Article 3 of which provides:

"The Governments represented by the undersigned Plenipotentiaries also undertake not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty for the Prohibition of Nuclear Weapons in Latin America."

The Protocol was signed and ratified by the five nuclear-weapon States. Its ratification was accompanied by a variety of declarations. The United Kingdom Government, for example, stated that "in the event of any act of aggression by a Contracting Party to the Treaty in which that Party was supported by a nuclear-weapon State", the United Kingdom Government would "be free to reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II". The United States made a similar statement. The French Government, for its part, stated that it "interprets the undertaking made in article 3 of the Protocol as being without prejudice to the full exercise of the right of self-defence committed by Article 51 of the Charter". China reaffirmed its commitment not to be the first to make use of nuclear weapons. The Soviet Union reserved "the right to review" the obligations imposed upon it by Additional Protocol II, particularly in the event of an attack by a State party either "in support of a nuclear-weapon State or jointly with that State". None of these statements drew comment or objection from the parties to the Treaty of Tlatelolco.

(b) the Treaty of Rarotonga of 6 August 1985 establishes a South Pacific Nuclear Free Zone in which the Parties undertake not to manufacture, acquire or possess any nuclear explosive device (Art. 3). Unlike the Treaty of Tlatelolco, the Treaty of Rarotonga does not expressly prohibit the use of such weapons. But such a prohibition is for the States parties the necessary consequence of the prohibitions stipulated by the Treaty. The Treaty has a number of protocols. Protocol 2, open to the five nuclear-weapon States, specifies in its Article 1 that:

"Each Party undertakes not to use or threaten to use any nuclear explosive device against:

(a) Parties to the Treaty; or

(b) any territory within the South Pacific Nuclear Free Zone for which a State that has become a Party to Protocol 1 is internationally responsible."

China and Russia are parties to that Protocol. In signing it, China and the Soviet Union each made a declaration by which they reserved the "right to reconsider" their obligations under the said Protocol; the Soviet Union also referred to certain circumstances in which it would consider itself released from those obligations. France, the United Kingdom and the United States, for their part, signed Protocol 2 on 25 March 1996, but have not yet ratified it. On that occasion, France declared, on the one hand, that no provision in that Protocol "shall impair the full exercise of the inherent right of self-defence provided for in Article 51 of the . . . Charter" and, on the other hand, that "the commitment set out in Article 1 of [that] Protocol amounts to the negative security assurances given by France to

non-nuclear-weapon States which are parties to the Treaty on . . . Non-Proliferation", and that "these assurances shall not apply to States which are not parties" to that Treaty. For its part, the United Kingdom made a declaration setting out the precise circumstances in which it "will not be bound by [its] undertaking under Article 1" of the Protocol.

(c) as to the Treaty on the Non-Proliferation of Nuclear Weapons, at the time of its signing in 1968 the United States, the United Kingdom and the USSR gave various security assurances to the non-nuclear-weapon States that were parties to the Treaty. In resolution 255 (1968) the Security Council took note with satisfaction of the intention expressed by those three States to

"provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation . . . that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used".

On the occasion of the extension of the Treaty in 1995, the five nuclear-weapon States gave their non-nuclear-weapon partners, by means of separate unilateral statements on 5 and 6 April 1995, positive and negative security assurances against the use of such weapons. All the five nuclear-weapon States first undertook not to use nuclear weapons against non-nuclear-weapon States that were parties to the Treaty on the Non-Proliferation of Nuclear Weapons. However, these States, apart from China, made an exception in the case of an invasion or any other attack against them, their territories, armed forces or allies, or on a State towards which they had a security commitment, carried out or sustained by a non-nuclear-weapon State party to the Non-Proliferation Treaty in association or alliance with a nuclear-weapon State. Each of the nuclear-weapon States further undertook, as a permanent member of the Security Council, in the event of an attack with the use of nuclear weapons, or threat of such attack, against a non-nuclear-weapon State, to refer the matter to the Security Council without delay and to act within it in order that it might take immediate measures with a view to supplying, pursuant to the Charter, the necessary assistance to the victim State (the commitments assumed comprising minor variations in wording). The Security Council, in unanimously adopting resolution 984 (1995) of 11 April 1995, cited above, took note of those statements with appreciation. It also recognized

"that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim";

and welcomed the fact that

“the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used”.

60. Those States that believe that recourse to nuclear weapons is illegal stress that the conventions that include various rules providing for the limitation or elimination of nuclear weapons in certain areas (such as the Antarctic Treaty of 1959 which prohibits the deployment of nuclear weapons in the Antarctic, or the Treaty of Tlatelolco of 1967 which creates a nuclear-weapon-free zone in Latin America) or the conventions that apply certain measures of control and limitation to the existence of nuclear weapons (such as the 1963 Partial Test-Ban Treaty or the Treaty on the Non-Proliferation of Nuclear Weapons) all set limits to the use of nuclear weapons. In their view, these treaties bear witness, in their own way, to the emergence of a rule of complete legal prohibition of all uses of nuclear weapons.

61. Those States who defend the position that recourse to nuclear weapons is legal in certain circumstances see a logical contradiction in reaching such a conclusion. According to them, those Treaties, such as the Treaty on the Non-Proliferation of Nuclear Weapons, as well as Security Council resolutions 255 (1968) and 984 (1995) which take note of the security assurances given by the nuclear-weapon States to the non-nuclear-weapon States in relation to any nuclear aggression against the latter, cannot be understood as prohibiting the use of nuclear weapons, and such a claim is contrary to the very text of those instruments. For those who support the legality in certain circumstances of recourse to nuclear weapons, there is no absolute prohibition against the use of such weapons. The very logic and construction of the Treaty on the Non-Proliferation of Nuclear Weapons, they assert, confirm this. This Treaty, whereby, they contend, the possession of nuclear weapons by the five nuclear-weapon States has been accepted, cannot be seen as a treaty banning their use by those States; to accept the fact that those States possess nuclear weapons is tantamount to recognizing that such weapons may be used in certain circumstances. Nor, they contend, could the security assurances given by the nuclear-weapon States in 1968, and more recently in connection with the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons in 1995, have been conceived without its being supposed that there were circumstances in which nuclear weapons could be used in a lawful manner. For those who defend the legality of the use, in certain circumstances, of nuclear weapons, the acceptance of those instruments by the different non-nuclear-weapon States confirms and reinforces the evident logic upon which those instruments are based.

62. The Court notes that the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, certainly point to an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves. As to the treaties of Tlatelolco and Rarotonga and their Protocols, and also the declarations made in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons, it emerges from these instruments that:

- (a) a number of States have undertaken not to use nuclear weapons in specific zones (Latin America; the South Pacific) or against certain other States (non-nuclear-weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons);
- (b) nevertheless, even within this framework, the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances; and
- (c) these reservations met with no objection from the parties to the Tlatelolco or Rarotonga Treaties or from the Security Council.

63. These two treaties, the security assurances given in 1995 by the nuclear-weapon States and the fact that the Security Council took note of them with satisfaction, testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons. The Court moreover notes the signing, even more recently, on 15 December 1995, at Bangkok, of a Treaty on the Southeast Asia Nuclear-Weapon-Free Zone, and on 11 April 1996, at Cairo, of a treaty on the creation of a nuclear-weapon-free zone in Africa. It does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such.

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64. The Court will now turn to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law. As the Court has stated, the substance of that law must be “looked for primarily in the actual practice and *opinio juris* of States” (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment*, *I.C.J. Reports 1985*, p. 29, para. 27).

65. States which hold the view that the use of nuclear weapons is illegal have endeavoured to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that prac-

tice the expression of an *opinio juris* on the part of those who possess such weapons.

66. Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

67. The Court does not intend to pronounce here upon the practice known as the "policy of deterrence". It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. According to other States, however, the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these States have also pointed out that this series of resolutions not only did not meet with the approval of all of the nuclear-weapon States but of many other States as well.

69. States which consider that the use of nuclear weapons is illegal indicated that those resolutions did not claim to create any new rules, but were confined to a confirmation of customary law relating to the prohibition of means or methods of warfare which, by their use, overstepped the bounds of what is permissible in the conduct of hostilities. In their view, the resolutions in question did no more than apply to nuclear weapons the existing rules of international law applicable in armed conflict; they were no more than the "envelope" or *instrumentum* containing certain pre-existing customary rules of international law. For those States it is accordingly of little importance that the *instrumentum* should have occasioned negative votes, which cannot have the effect of obliterating those customary rules which have been confirmed by treaty law.

70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the exist-

ence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

71. Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be "a direct violation of the Charter of the United Nations"; and in certain formulations that such use "should be prohibited". The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.

72. The Court further notes that the first of the resolutions of the General Assembly expressly proclaiming the illegality of the use of nuclear weapons, resolution 1653 (XVI) of 24 November 1961 (mentioned in subsequent resolutions), after referring to certain international declarations and binding agreements, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, proceeded to qualify the legal nature of nuclear weapons, determine their effects, and apply general rules of customary international law to nuclear weapons in particular. That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

* * *

74. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.

75. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The "laws and customs of war" — as they were traditionally called — were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

76. Since the turn of the century, the appearance of new means of combat has — without calling into question the longstanding principles and rules of international law — rendered necessary some specific prohibitions of the use of certain weapons, such as explosive projectiles under 400 grammes, dum-dum bullets and asphyxiating gases. Chemical and bacteriological weapons were then prohibited by the 1925 Geneva Protocol. More recently, the use of weapons producing "non-detectable fragments", of other types of "mines, booby traps and other devices", and of "incendiary weapons", was either prohibited or limited, depending on the case, by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. The provisions of the Convention on "mines, booby traps and other devices" have just been amended, on 3 May 1996, and now regulate in greater detail, for example, the use of anti-personnel land mines.

77. All this shows that the conduct of military operations is governed by a body of legal prescriptions. This is so because "the right of belligerents to adopt means of injuring the enemy is not unlimited" as stated in Article 22 of the 1907 Hague Regulations relating to the laws and customs of war on land. The St. Petersburg Declaration had already condemned the use of weapons "which uselessly aggravate the suffering of

disabled men or make their death inevitable". The aforementioned Regulations relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907, prohibit the use of "arms, projectiles, or material calculated to cause unnecessary suffering" (Art. 23).

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

"In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*J.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

80. The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" (*Trial of the Major War Criminals, 14 November 1945-1 October 1946*, Nuremberg, 1947, Vol. 1, p. 254).

81. The Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), with which he introduced the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and which was unanimously approved by the Security Council (resolution 827 (1993)), stated:

"In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law . . .

The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."

82. The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States.

83. It has been maintained in these proceedings that these principles and rules of humanitarian law are part of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969. The question whether a norm is part of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.

84. Nor is there any need for the Court to elaborate on the question of the applicability of Additional Protocol I of 1977 to nuclear weapons. It need only observe that while, at the Diplomatic Conference of 1974-1977, there was no substantive debate on the nuclear issue and no specific solution concerning this question was put forward, Additional Protocol I in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular, the Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I. The fact that certain types of weapons were not specifically dealt with by the 1974-1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise.

85. Turning now to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons, the Court notes that doubts in this respect have sometimes been voiced on the ground that these principles and rules had evolved prior to the invention of nuclear weapons and that the Conferences of Geneva of 1949 and 1974-1977 which respectively adopted the four Geneva Conventions of 1949 and the two Additional Protocols thereto did not deal with nuclear weapons specifically. Such views, however, are only held by a small minority. In the view of the vast majority of States as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons.

86. The Court shares that view. Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings. On the contrary, the newness of nuclear weapons has been expressly rejected as an argument against the application to them of international humanitarian law:

"In general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons.

International humanitarian law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons.” (New Zealand, Written Statement, p. 15, paras. 63-64.)

None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints. Quite the reverse; it has been explicitly stated,

“Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons” (Russian Federation, CR 95/29, p. 52);

“So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *ius in bello*” (United Kingdom, CR 95/34, p. 45);

and

“The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons — just as it governs the use of conventional weapons” (United States of America, CR 95/34, p. 85).

87. Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons.

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88. The Court will now turn to the principle of neutrality which was raised by several States. In the context of the advisory proceedings brought before the Court by the WHO concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the position was put as follows by one State:

“The principle of neutrality, in its classic sense, was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals. Thus: ‘the territory of neutral powers is inviolable’ (Article 1 of the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, concluded on 18 October 1907); ‘belligerents are bound to respect the sovereign rights of neutral powers . . .’ (Article 1 to the Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, concluded on 18 October 1907), ‘neutral states have equal interest in having their rights respected by belligerents . . .’ (Preamble to Convention on Maritime

Neutrality, concluded on 20 February 1928). It is clear, however, that the principle of neutrality applies with equal force to transborder incursions of armed forces and to the transborder damage caused to a neutral State by the use of a weapon in a belligerent State.” (Nauru, Written Statement (I), p. 35, IV E.)

The principle so circumscribed is presented as an established part of the customary international law.

89. The Court finds that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.

*

90. Although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial.

91. According to one point of view, the fact that recourse to nuclear weapons is subject to and regulated by the law of armed conflict does not necessarily mean that such recourse is as such prohibited. As one State put it to the Court:

“Assuming that a State’s use of nuclear weapons meets the requirements of self-defence, it must then be considered whether it conforms to the fundamental principles of the law of armed conflict regulating the conduct of hostilities” (United Kingdom, Written Statement, p. 40, para. 3.44);

“the legality of the use of nuclear weapons must therefore be assessed in the light of the applicable principles of international law regarding the use of force and the conduct of hostilities, as is the case with other methods and means of warfare” (*ibid.*, p. 75, para. 4.2 (3));

and

“The reality . . . is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties.”

(*Ibid.*, p. 53, para. 3.70; see also United States of America, CR 95/34, pp. 89-90.)

92. Another view holds that recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. In the event of their use, nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives, and their effects, largely uncontrollable, could not be restricted, either in time or in space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous. The use of nuclear weapons would therefore be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition. That view lay at the basis of the assertions by certain States before the Court that nuclear weapons are by their nature illegal under customary international law, by virtue of the fundamental principle of humanity.

93. A similar view has been expressed with respect to the effects of the principle of neutrality. Like the principles and rules of humanitarian law, that principle has therefore been considered by some to rule out the use of a weapon the effects of which simply cannot be contained within the territories of the contending States.

94. The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the "clean" use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

95. Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict — at the heart of which is the overriding consideration of humanity — make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it

does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

Nor can it ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

* * *

98. Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context.

In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

99. In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. This provision is worded as follows:

"Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.

100. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community.

Virtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States.

101. Even the very first General Assembly resolution, unanimously adopted on 24 January 1946 at the London session, set up a commission whose terms of reference included making specific proposals for, among other things, “the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction”. In a large number of subsequent resolutions, the General Assembly has reaffirmed the need for nuclear disarmament. Thus, in resolution 808 A (IX) of 4 November 1954, which was likewise unanimously adopted, it concluded

“that a further effort should be made to reach agreement on comprehensive and co-ordinated proposals to be embodied in a draft international disarmament convention providing for: . . . (b) The total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type, together with the conversion of existing stocks of nuclear weapons for peaceful purposes.”

The same conviction has been expressed outside the United Nations context in various instruments.

102. The obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons includes its fulfilment in accordance with the basic principle of good faith. This basic principle is set forth in Article 2, paragraph 2, of the Charter. It was reflected in the Declaration on Friendly Relations between States (resolution 2625 (XXV) of 24 October 1970) and in the Final Act of the Helsinki Conference of 1 August 1975. It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”.

Nor has the Court omitted to draw attention to it, as follows:

“One of the basic principles governing the creation and perform-

ance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.” (*Nuclear Tests (Australia v. France)*, *Judgment*, *I.C.J. Reports 1974*, p. 268, para. 46.)

103. In its resolution 984 (1995) dated 11 April 1995, the Security Council took care to reaffirm “the need for all States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to comply fully with all their obligations” and urged

“all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal”.

The importance of fulfilling the obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons was also reaffirmed in the final document of the Review and Extension Conference of the parties to the Treaty on the Non-Proliferation of Nuclear Weapons, held from 17 April to 12 May 1995.

In the view of the Court, it remains without any doubt an objective of vital importance to the whole of the international community today.

* * *

104. At the end of the present Opinion, the Court emphasizes that its reply to the question put to it by the General Assembly rests on the totality of the legal grounds set forth by the Court above (paragraphs 20 to 103), each of which is to be read in the light of the others. Some of these grounds are not such as to form the object of formal conclusions in the final paragraph of the Opinion; they nevertheless retain, in the view of the Court, all their importance.

* * *

105. For these reasons,

THE COURT,

(1) By thirteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins;
AGAINST: *Judge* Oda;

(2) *Replies* in the following manner to the question put by the General Assembly:

A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

IN FAVOUR: *President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;*

AGAINST: *Judges Shahabuddeen, Weeramantry, Koroma;*

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;

IN FAVOUR: *President Bedjaoui; Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo;*

AGAINST: *Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins;*

**Armed Activities on the Territory of the Congo (New
Application: 2002) (Democratic Republic of the
Congo v. Rwanda), Jurisdiction and Admissibility,
Judgment, I.C.J. Reports 2006**

INTERNATIONAL COURT OF JUSTICE

YEAR 2006

3 February 2006

CASE CONCERNING ARMED ACTIVITIES
ON THE TERRITORY OF THE CONGO
(NEW APPLICATION: 2002)

(DEMOCRATIC REPUBLIC OF THE CONGO v. RWANDA)

JURISDICTION OF THE COURT
AND ADMISSIBILITY OF THE APPLICATION

Present proceedings confined to the questions of the jurisdiction of the Court and the admissibility of the DRC's Application.

* *

Jurisdiction of the Court — Applicant invoking 11 bases of jurisdiction.

*

(1) *Article 30 of the Convention against Torture of 10 December 1984. Rwanda not party to that Convention — DRC cannot invoke that instrument as a basis of jurisdiction.*

(2) *Article 9 of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947.*

Convention not invoked by the DRC in the final version of its argument — Convention not taken into consideration by the Court in its Judgment.

*

(3) *Forum prorogatum. DRC's contention that Rwanda's agreement to plead amounts to acceptance of the Court's jurisdiction — Express and repeated objection by Rwanda to the Court's jurisdiction at every stage of the proceedings — Whether there has been an unequivocal indication of voluntary and indisputable acceptance of the*

Court's jurisdiction — Rwanda's attitude cannot be interpreted as consent to the Court's jurisdiction over the merits of the dispute.

(4) *Order of 10 July 2002 on the indication of provisional measures. Absence of manifest lack of Court's jurisdiction interpreted by the DRC as acknowledgment by the Court of its jurisdiction — Non-removal of DRC's Application from the Court's List — Object of present phase of proceedings is precisely the Court's further examination of the issue of its jurisdiction — Absence of manifest lack of jurisdiction not amounting to acknowledgment by the Court of its jurisdiction.*

*

(5) *Article IX of the Genocide Convention of 9 December 1948 — Reservation by Rwanda.*

Whether Rwanda withdrew its reservation through the adoption of décret-loi No. 014/01 of 15 February 1995 — Question of the validity and effect of the décret-loi in Rwanda's domestic legal order different from that of its effect in the international legal order — Withdrawal by a contracting State of a reservation to a multilateral treaty having effect in relation to other contracting States only when they have received notice thereof — No agreement whereby withdrawal of the reservation could have become operative without notice — No notice by Rwanda of such withdrawal received at international level — Adoption and publication of the décret-loi not entailing, as a matter of international law, Rwanda's withdrawal of its reservation.

DRC's contention that withdrawal of the reservation was corroborated by a statement of 17 March 2005 by Rwanda's Minister of Justice before the United Nations Commission on Human Rights — Claim that this statement constituted a unilateral undertaking having legal effects in regard to withdrawal of the reservation — Capacity of a Minister of Justice to bind the State internationally by statements in respect of matters falling within the Minister's purview cannot be ruled out merely because of the nature of the functions exercised — Examination of the legal effect of the Minister's statement in light of its content and of the circumstances in which it was made — Content of the statement not sufficiently precise — Statement cannot be considered as confirmation by Rwanda of a previous decision to withdraw its reservation or as a unilateral commitment having legal effects in regard to such withdrawal — Statement having nature of a declaration of intent, very general in scope — Whether statement could have effect on the Court's jurisdiction, given that it was made almost three years after the institution of proceedings — Procedural defect which the Applicant could easily remedy: should not be penalized by the Court.

DRC's contention that Rwanda's reservation was invalid because it sought to prevent the Court from safeguarding peremptory norms — Erga omnes nature of the rights and obligations enshrined in the Genocide Convention — Characterization of the prohibition of genocide as a peremptory norm of general international law (ius cogens) — The fact that a norm having such character may be at issue in a dispute cannot in itself provide a basis for the Court's jurisdiction to entertain that dispute — Court's jurisdiction always based on consent of the parties.

DRC's contention that Rwanda's reservation was invalid because incompatible with the object and purpose of the Genocide Convention — Effect of the

fact that Article 120 of the Statute of the International Criminal Court permits no reservations to that Statute — Reservations not prohibited by the Genocide Convention — This legal situation not altered by Article 120 of the Statute of the International Criminal Court — Rwanda's reservation bearing not on substantive obligations under the Genocide Convention but on the Court's jurisdiction — Reservation not incompatible with the object and purpose of the Genocide Convention.

DRC's contention that the reservation conflicts with a peremptory norm of general international law — No such norm requiring a State to consent to the Court's jurisdiction in order to settle a dispute relating to the Genocide Convention — Article IX of the Genocide Convention cannot constitute a basis for the Court's jurisdiction.

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(6) Article 22 of the Convention on Racial Discrimination of 21 December 1965 — Reservation by Rwanda.

Whether Rwanda's reservation withdrawn through the adoption of décret-loi No. 014/01 of 15 February 1995 — DRC's contention that withdrawal of the reservation was corroborated by a statement of 17 March 2005 by Rwanda's Minister of Justice before the United Nations Commission on Human Rights — Claim that this statement constituted a unilateral undertaking having legal effects in regard to withdrawal of the reservation — Applicability mutatis mutandis to this issue of the Court's reasoning and findings regarding the DRC's claim that Rwanda had withdrawn its reservation to the Genocide Convention — Procedures for withdrawal of a reservation to the Convention on Racial Discrimination expressly provided for in Article 20, paragraph 3, thereof — No notification to United Nations Secretary-General by Rwanda of the withdrawal of its reservation — Rwanda having maintained its reservation.

DRC's contention that Rwanda's reservation was invalid because incompatible with the object and purpose of the Convention — Under Article 20, paragraph 2, of the Convention, reservations are to be considered incompatible with the Convention's object and purpose if at least two-thirds of States parties object — Condition of Article 20, paragraph 2, not satisfied in respect of Rwanda's reservation to Article 22 — Applicability mutatis mutandis of the Court's reasoning and conclusions in respect of the DRC's contention that Rwanda's reservation to the Genocide Convention was invalid — Reservation to the Convention on Racial Discrimination not incompatible with the object and purpose of that Convention.

DRC's contention that the reservation conflicts with a peremptory norm of general international law — Court's reference to its reasons for dismissing the DRC's argument in respect of Rwanda's reservation to Article IX of the Genocide Convention — Article 22 of the Convention on Racial Discrimination cannot constitute a basis for the Court's jurisdiction.

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(7) Article 29, paragraph 1, of the Convention on Discrimination against Women of 18 December 1979.

DRC's contention that an objection based on non-compliance with the pre-

conditions provided for in Article 29 is an objection to admissibility of the Application — Examination of the conditions determining the extent of acceptance of the Court's jurisdiction relates to the issue of its jurisdiction and not to the admissibility of the Application — Conclusion applicable mutatis mutandis to all the other compromissory clauses invoked by DRC — Conditions of Article 29 cumulative — Whether preconditions for seisin of the Court satisfied — DRC not having shown that its attempts to negotiate with Rwanda related to settlement of a dispute concerning the interpretation or application of the Convention — DRC having further not shown that it made a proposal to Rwanda for the organization of arbitration proceedings to which the latter failed to respond — Article 29, paragraph 1, of the Convention on Discrimination against Women cannot serve to found the Court's jurisdiction.

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(8) Article 75 of the WHO Constitution of 22 July 1946.

Whether preconditions for seisin of Court satisfied — DRC not having demonstrated the existence of a question or dispute concerning the interpretation or application of the WHO Constitution — DRC having further not proved that it sought to settle the question or dispute by negotiation or that the World Health Assembly could not have settled it — Article 75 of the WHO Constitution cannot serve to found the Court's jurisdiction.

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(9) Article XIV, paragraph 2, of the Unesco Constitution of 16 November 1945.

Whether preconditions for seisin of Court satisfied — DRC's claim not involving a question or dispute concerning interpretation of the Constitution — DRC having further not shown that it followed the prior procedure for seisin of the Court pursuant to Article XIV of the Unesco Constitution and Article 38 of the Rules of Procedure of the Unesco General Conference — Article XIV, paragraph 2, of the Unesco Constitution cannot serve to found the Court's jurisdiction.

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(10) Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971.

Whether preconditions for seisin of Court satisfied — Dispute concerning the interpretation or application of the Convention which could not have been settled by negotiation: DRC not having indicated the specific provisions of the Convention which could apply to its claims on the merits — DRC having further not shown that it made a proposal to Rwanda for the organization of arbitration proceedings to which the latter failed to respond — Article 14,

paragraph 1, of the *Montreal Convention* cannot serve to found the Court's jurisdiction.

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(11) Article 66 of the *Vienna Convention on the Law of Treaties of 23 May 1969*.

Non-retroactivity of the Vienna Convention (Article 4) — Genocide Convention and Convention on Racial Discrimination concluded before the entry into force between the Parties of the Vienna Convention — Rules in Article 66 of the Vienna Convention not declaratory of customary international law — No agreement between the Parties to apply Article 66 between themselves — Article 66 of the Vienna Convention on the Law of Treaties cannot serve to found the Court's jurisdiction.

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Admissibility of the DRC's Application.

No jurisdiction to entertain the Application — Court not required to rule on its admissibility.

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Distinction between acceptance by States of the Court's jurisdiction and the conformity of their acts with international law — States remaining responsible for acts attributable to them which are contrary to international law.

JUDGMENT

Present: President SHI; Vice-President RANJEVA; Judges KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOLJIMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA, ABRAHAM; Judges ad hoc DUGARD, MAVUNGU; Registrar COUVREUR.

In the case concerning armed activities on the territory of the Congo (new Application: 2002),

between

the Democratic Republic of the Congo,

represented by

H.E. Maître Honorius Kisimba Ngoy Ndalewe, Minister of Justice and Keeper of the Seals of the Democratic Republic of the Congo,

as Head of Delegation;

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

Mr. Ntumba Luaba Lumu, Secretary-General to the Government, Professor of Law at the University of Kinshasa,

as Co-Agent and Counsel;

Mr. Lwamba Katansi, Professor at the Law Faculty of the University of Kinshasa, avocat at the Kinshasa/Gombe Court of Appeal,
Mr. Mukadi Bonyi, Professor at the Law Faculty of the University of Kinshasa, avocat at the Supreme Court of Justice,
Mr. Akele Adau, Professor and Honorary Dean of the Law Faculty of the University of Kinshasa, President of the Military High Court,
as Counsel and Advocates;

Maître Crispin Mutumbe Mbuya, Legal Adviser to the Minister of Justice and Keeper of the Seals,

Mr. Victor Musompo Kasongo, Private Secretary to the Minister of Justice and Keeper of the Seals,

Mr. Nsingi-zi-Mayemba, First Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands,

Ms Marceline Masele, Second Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands,

as Advisers;

Mr. Richard Lukunda,

as Assistant to Counsel and Advocates,

and

the Republic of Rwanda,

represented by

Mr. Martin Ngoga, Deputy Prosecutor General of the Republic of Rwanda,

as Agent;

H.E. Mr. Joseph Bonesha, Ambassador of the Republic of Rwanda to the Kingdom of Belgium,

as Deputy Agent;

Mr. Christopher Greenwood, C.M.G., Q. C., Professor of International Law at the London School of Economics and Political Science, member of the English Bar,

Ms Jessica Wells, member of the English Bar,

as Counsel;

Ms Susan Greenwood,

as Secretary,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 28 May 2002 the Government of the Democratic Republic of the

Congo (hereinafter “the DRC”) filed in the Registry of the Court an Application instituting proceedings against the Republic of Rwanda (hereinafter “Rwanda”) in respect of a dispute concerning “massive, serious and flagrant violations of human rights and of international humanitarian law” alleged to have been committed “in breach of the ‘International Bill of Human Rights’, other relevant international instruments and mandatory resolutions of the United Nations Security Council”; in that Application the DRC stated that “[the] flagrant and serious violations [of human rights and of international humanitarian law] of which it complained “result from acts of armed aggression perpetrated by Rwanda on the territory of the Democratic Republic of the Congo in flagrant breach of the sovereignty and territorial integrity of [the latter], as guaranteed by the Charters of the United Nations and the Organization of African Unity”.

In order to found the jurisdiction of the Court, the DRC, referring to Article 36, paragraph 1, of the Statute, invoked in its Application: Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter the “Convention on Racial Discrimination”); Article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (hereinafter the “Convention on Discrimination against Women”); Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter the “Genocide Convention”); Article 75 of the Constitution of the World Health Organization of 22 July 1946 (hereinafter the “WHO Constitution”); Article XIV, paragraph 2, of the Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 November 1945 (hereinafter the “Unesco Constitution”) and Article 9 of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 (hereinafter “the Convention on Privileges and Immunities”); Article 30, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter the “Convention against Torture”); and Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (hereinafter the “Montreal Convention”).

The DRC further contended in its Application that Article 66 of the Vienna Convention on the Law of Treaties of 23 May 1969 established the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms (*ius cogens*) in the area of human rights, as those norms were reflected in a number of international instruments.

2. On 28 May 2002, immediately after filing its Application, the DRC also submitted a request for the indication of provisional measures pursuant to Article 41 of the Statute of the Court and Articles 73 and 74 of its Rules.

3. In accordance with Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules, on 28 May 2002 the Registrar transmitted certified copies of the Application and of the request to the Rwandan Government; in accordance with Article 40, paragraph 3, of the Statute, all States entitled to appear before the Court were notified of the Application.

4. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them availed itself of the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. The DRC

chose Mr. Jean-Pierre Mavungu, and Rwanda Mr. Christopher John Robert Dugard.

5. At the hearings on the request for the indication of provisional measures submitted by the DRC, held on 13 and 14 June 2002, Rwanda asked the Court to remove the case from the List for manifest lack of jurisdiction.

By Order of 10 July 2002 the Court, after hearing the Parties, found that it lacked *prima facie* jurisdiction to indicate the provisional measures requested by the DRC. The Court also rejected Rwanda’s request that the case be removed from the List.

6. At a meeting held on 4 September 2002 by the President of the Court with the Agents of the Parties pursuant to Article 31 of the Rules of Court, Rwanda proposed that the procedure provided for in Article 79, paragraphs 2 and 3, of the Rules of Court be followed, and that the questions of jurisdiction and admissibility in the case therefore be determined separately before any proceedings on the merits; the DRC stated that it would leave the decision in this regard to the Court. At the conclusion of that meeting the Parties agreed that, in the event that this procedure was followed, Rwanda would first present a Memorial dealing exclusively with those questions, to which the DRC would reply in a Counter-Memorial confined to the same questions.

By Order of 18 September 2002 the Court, taking account of the views of the Parties regarding the procedure to be followed and the time-limits to be fixed, decided that the written pleadings would first be addressed to the questions of the jurisdiction of the Court to entertain the Application and of its admissibility and fixed 20 January 2003 and 20 May 2003 as respective time-limits for the filing of a Memorial by Rwanda and of a Counter-Memorial by the DRC. The Memorial and Counter-Memorial were filed within the time-limits so prescribed.

7. In accordance with instructions given by the Court under Article 43 of the Rules of Court, the Registry sent the notification provided for in Article 63, paragraph 1, of the Statute to all the States parties to the Convention on Discrimination against Women, the WHO Constitution, the Unesco Constitution, the Montreal Convention and the Vienna Convention on the Law of Treaties.

In accordance likewise with instructions given by the Court under Article 69, paragraph 3, of the Rules of Court, the Registry sent the notifications provided for in Article 34, paragraph 3, of the Statute and communicated copies of the written pleadings to the Secretary-General of the United Nations in respect of the Convention on Discrimination against Women; to the Director-General of the WHO in respect of the WHO Constitution; to the Director-General of Unesco in respect of the Unesco Constitution and to the Secretary-General of the International Civil Aviation Organization in respect of the Montreal Convention. The organizations concerned were also asked whether they intended to submit observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court. None of them expressed the wish to do so.

8. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

9. Public hearings were held between 4 and 8 July 2005, at which the Court heard the oral arguments and replies of:

For Rwanda: Mr. Martin Ngoga,
Mr. Christopher Greenwood,
Ms. Jessica Wells.

For the DRC: H.E. Mr. Jacques Masangu-a-Mwanza,
Mr. Akele Adau,
Mr. Lwamba Katansi,
Mr. Ntumba Luaba Lumu,
Mr. Mukadi Bonyi.

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10. On the instructions of the Court, on 11 July 2005 the Registrar wrote to the Parties asking them to send him copies of a certain number of documents referred to by them at the hearings. Rwanda furnished the Court with copies of those documents under cover of a letter dated 27 July 2005 received in the Registry on 28 July 2005, to which were appended two notes from, respectively, Rwanda's Minister of Justice and the President of its Chamber of Deputies. The DRC supplied the Court with copies of the requested documents under cover of two letters dated 29 July and 10 August 2005 and received in the Registry on 1 and 12 August respectively.

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11. In its Application the DRC made the following requests:

“Accordingly, while reserving the right to supplement and amplify this claim in the course of the proceedings, the Democratic Republic of the Congo requests the Court to:

Adjudge and declare that:

(a) Rwanda has violated and is violating the United Nations Charter (Article 2, paragraphs 3 and 4) by violating the human rights which are the goal pursued by the United Nations through the maintenance of international peace and security, as well as Articles 3 and 4 of the Charter of the Organization of African Unity;

(b) Rwanda has violated the International Bill of Human Rights, as well as the main instruments protecting human rights, including, *inter alia*, the Convention on the Elimination of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, the Constitution of the WHO, the Constitution of Unesco;

(c) by shooting down a Boeing 727 owned by Congo Airlines on [10] October 1998 in Kindu, thereby causing the death of 40 civilians, Rwanda also violated the United Nations Charter, the Convention on International Civil Aviation of 7 December 1944 signed at Chicago, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 and the Montreal Conven-

tion for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971;

(d) by killing, massacring, raping, throat-cutting, and crucifying, Rwanda is guilty of genocide against more than 3,500,000 Congolese, including the victims of the recent massacres in the city of Kisangani, and has violated the sacred right to life provided for in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of the Crime of Genocide and other relevant international legal instruments.

In consequence, and in accordance with the international legal obligations referred to above, to adjudge and declare that:

(1) all Rwandan armed forces responsible for the aggression shall forthwith quit the territory of the Democratic Republic of the Congo, so as to enable the Congolese people to enjoy in full their rights to peace, to security, to their resources and to development;

(2) Rwanda is under an obligation to procure the immediate, unconditional withdrawal of its armed and other forces from Congolese territory;

(3) the Democratic Republic of the Congo is entitled to compensation from Rwanda for all acts of looting, destruction, massacre, removal of property and persons and other acts of wrongdoing imputable to Rwanda, in respect of which the Democratic Republic of the Congo reserves the right to establish a precise assessment of injury at a later date, in addition to restitution of the property taken.

It also reserves the right in the course of the proceedings to claim other injury suffered by it and its people.”

12. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Rwandan Government,
in the Memorial:

“Accordingly, Rwanda requests the Court to adjudge and declare that: The Court lacks jurisdiction to entertain the claims brought by the Democratic Republic of the Congo. In addition, the claims brought by the Democratic Republic of the Congo are inadmissible.”

On behalf of the Government of the Democratic Republic of the Congo,
in the Counter-Memorial:

“For these reasons, may it please the Court,

To find that the objections to jurisdiction raised by Rwanda are unfounded;

To find that the objections to admissibility raised by Rwanda are unfounded;

And, consequently, to find that the Application of the Democratic Republic of the Congo is admissible as submitted;

To decide to proceed with the case.”

13. At the hearings, the following submissions were presented by the Parties:

On behalf of the Rwandan Government,
at the hearing of 6 July 2005:

“For the reasons given in our written preliminary objection and at the oral hearings, the Republic of Rwanda requests the Court to adjudge and declare that:

1. it lacks jurisdiction over the claims brought against the Republic of Rwanda by the Democratic Republic of the Congo; and
2. in the alternative, that the claims brought against the Republic of Rwanda by the Democratic Republic of the Congo are inadmissible.”

On behalf of the Congolese Government,
at the hearing of 8 July 2005:

“May it please the Court,

1. to find that the objections to jurisdiction and admissibility raised by Rwanda are unfounded;
2. consequently, to find that the Court has jurisdiction to entertain the case on the merits and that the Application of the Democratic Republic of the Congo is admissible as submitted;
3. to decide to proceed with the case on the merits.”

* * *

14. The Court notes first of all that at the present stage of the proceedings it cannot consider any matter relating to the merits of this dispute between the DRC and Rwanda. In accordance with the decision taken in its Order of 18 September 2002 (see paragraph 6 above), the Court is required to address only the questions of whether it is competent to hear the dispute and whether the DRC’s Application is admissible.

* * *

15. In order to found the jurisdiction of the Court in this case, the DRC relies in its Application on a certain number of compromissory clauses in international conventions, namely: Article 22 of the Convention on Racial Discrimination; Article 29, paragraph 1, of the Convention on Discrimination against Women; Article IX of the Genocide Convention; Article 75 of the WHO Constitution; Article XIV, paragraph 2, of the Unesco Constitution and Article 9 of the Convention on Privileges and Immunities; Article 30, paragraph 1, of the Convention against Torture; and Article 14, paragraph 1, of the Montreal Convention. It further contends that Article 66 of the Vienna Convention on the Law of Treaties establishes the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms (*ius cogens*) in the area of

human rights, as those norms are reflected in a number of international instruments (see paragraph 1 above).

For its part Rwanda contends that none of these instruments cited by the DRC “or rules of customary international law can found the jurisdiction of the Court in the present case”. In the alternative, Rwanda argues that, even if one or more of the compromissory clauses invoked by the DRC were to be found by the Court to be titles giving it jurisdiction to entertain the Application, the latter would be “nevertheless inadmissible”.

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16. The Court will begin by recalling that, in its Order of 10 July 2002 (*I.C.J. Reports 2002*, p. 242, para. 61), it noted Rwanda’s statement that it “is not, and never has been, party to the 1984 Convention against Torture”, and found that such was indeed the case. In its Memorial on jurisdiction and admissibility (hereinafter “Memorial”) Rwanda maintained its contention that it was not a party to this Convention and that, accordingly, that Convention manifestly could not provide a basis for the jurisdiction of the Court in these proceedings. The DRC did not raise any argument in response to this contention by Rwanda, either in its Counter-Memorial on jurisdiction and admissibility (hereinafter “Counter-Memorial”) or at the hearings. The Court accordingly concludes that the DRC cannot rely upon the Convention against Torture as a basis of jurisdiction in this case.

17. The Court further recalls that in the above-mentioned Order (*ibid.*, p. 243, para. 62) it also stated that, in the final form of its argument, the DRC did not appear to found the jurisdiction of the Court on the Convention on Privileges and Immunities, and that the Court was accordingly not required to take that instrument into consideration in the context of the request for the indication of provisional measures. Since the DRC has also not sought to invoke that instrument in the present phase of the proceedings, the Court will not take it into consideration in the present Judgment.

* * *

18. The Court notes moreover that, both in its Counter-Memorial and at the hearings, the DRC began by seeking to found the jurisdiction of the Court on two additional bases: respectively, the doctrine of *forum prorogatum* and the Court’s Order of 10 July 2002 on the DRC’s request for the indication of provisional measures. The Court will first examine these two bases of jurisdiction relied on by the DRC before then proceeding to consider the compromissory clauses which the DRC invokes.

In accordance with its established jurisprudence, the Court will examine the issue of the admissibility of the DRC's Application only should it find that it has jurisdiction to entertain that Application.

* * *

19. The DRC argues, first, that the willingness of a State to submit a dispute to the Court may be apparent not only from an express declaration but also from any conclusive act, in particular from the conduct of the respondent State subsequent to seisin of the Court. In particular it contends that "the Respondent's agreement to plead implies that it accepts the Court's jurisdiction". In this regard the DRC cites the fact that Rwanda has "complied with all the procedural steps prescribed or requested by the Court", that it has "fully and properly participated in the different procedures in this case, without having itself represented or failing to appear", and that "it has not refused to appear before the Court or to make submissions".

20. For its part Rwanda contends that the DRC's argument is without foundation, since in this case there has been no "voluntary and indisputable acceptance of the Court's jurisdiction". Rwanda points out that it has, on the contrary, consistently asserted that the Court has no jurisdiction and that it has appeared solely for the purpose of challenging that jurisdiction. Rwanda further observes that "if [the DRC's argument] is right, then there is no way that a State can challenge the jurisdiction of [the] Court without conceding that the Court has jurisdiction", and that therefore "[t]he only safe course . . . is for a respondent State not to appear before the Court at all". It contends that this argument by the DRC flies in the face of the Statute of the Court, its Rules and its jurisprudence.

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21. The Court recalls its jurisprudence, as well as that of its predecessor, the Permanent Court of International Justice, regarding the forms which the parties' expression of their consent to its jurisdiction may take. According to that jurisprudence, "neither the Statute nor the Rules require that this consent should be expressed in any particular form", and "there is nothing to prevent the acceptance of jurisdiction . . . from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement" (*Corfu Channel (United Kingdom v. Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948, pp. 27-28*; see also *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15, p. 23*). The attitude of the respondent State must, however, be capable of being regarded as "an unequivocal indication" of the desire of that State to accept the Court's jurisdiction in a "voluntary and indisputable" manner

(*Corfu Channel (United Kingdom v. Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948, p. 27*); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 342, para. 34*; see also *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15, p. 24*).

22. In the present case the Court will confine itself to noting that Rwanda has expressly and repeatedly objected to its jurisdiction at every stage of the proceedings (see *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, pp. 234, 238*). Rwanda's attitude therefore cannot be regarded as "an unequivocal indication" of its desire to accept the jurisdiction of the Court in a "voluntary and indisputable" manner. The fact, as the DRC has pointed out, that Rwanda has "fully and properly participated in the different procedures in this case, without having itself represented or failing to appear", and that "it has not refused to appear before the Court or make submissions", cannot be interpreted as consent to the Court's jurisdiction over the merits, inasmuch as the very purpose of this participation was to challenge that jurisdiction (*Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952, pp. 113-114*).

* * *

23. To found the jurisdiction of the Court in this case, the DRC also relies on one of the Court's findings in its Order of 10 July 2002, whereby it stated that, "in the absence of a manifest lack of jurisdiction, the Court cannot grant Rwanda's request that the case be removed from the List". In the DRC's view, this finding of an "absence of a manifest lack of jurisdiction" could be interpreted as an acknowledgment by the Court that it has jurisdiction. Thus the DRC has expressed its belief that, "in rejecting Rwanda's request for the removal from the List of the application on the merits, the Court could only have intended that crimes such as those committed by the Respondent must not remain unpunished".

24. On this point, for its part Rwanda recalls that in this same Order the Court clearly stated that the findings reached by it at that stage in the proceedings in no way prejudged the question of its jurisdiction to deal with the merits of the case. Rwanda observes in this regard that a finding by the Court in an Order of this kind that there is no manifest lack of jurisdiction, coupled, moreover, with a finding that there is no prima facie basis for jurisdiction, cannot afford any support to the argument of a State seeking to establish the Court's jurisdiction. Rwanda points out that "[t]he Court does not possess jurisdiction simply because there is an

absence of a manifest lack of jurisdiction; it possesses jurisdiction only if there is a positive presence of jurisdiction”.

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25. The Court observes that, given the urgency which, *ex hypothesi*, characterizes the consideration of requests for the indication of provisional measures, it does not normally at that stage take a definitive decision on its jurisdiction. It does so only if it is apparent from the outset that there is no basis on which jurisdiction could lie, and that it therefore cannot entertain the case. Where the Court finds such a manifest lack of jurisdiction, considerations of the sound administration of justice dictate that it remove the case in question from the List (*Legality of Use of Force (Yugoslavia v. Spain)*, Order of 2 June 1999, I.C.J. Reports 1999 (II), pp. 773-774, para. 40; *Legality of Use of Force (Yugoslavia v. United States of America)*, Order of 2 June 1999, I.C.J. Reports 1999 (II), pp. 925-926, para. 34). Where, on the other hand, the Court is unable to conclude that it manifestly lacks jurisdiction, it retains the case on the List and reserves the right subsequently to consider further the question of jurisdiction, making it clear, as it did in its Order of 10 July 2002, that “the findings reached by [it] in the present proceedings in no way pre-judge the question of [its] jurisdiction . . . to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves” (*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. 249, para. 90; see also *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951, p. 114; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972, p. 34, para. 21; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984, p. 186, para. 40; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990, p. 69, para. 23; *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II), pp. 139-140, para. 46).

The fact that in its Order of 10 July 2002 the Court did not conclude that it manifestly lacked jurisdiction cannot therefore amount to an acknowledgment that it has jurisdiction. On the contrary, from the outset the Court had serious doubts regarding its jurisdiction to entertain the DRC’s Application, for in that same Order it justified its refusal to indicate provisional measures by the lack of *prima facie* jurisdiction. In declining Rwanda’s request to remove the case from the List, the Court simply reserved the right fully to examine further the issue of its jurisdic-

tion at a later stage. It is precisely such a further examination which is the object of the present phase of the proceedings.

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26. Having concluded that the two additional bases of jurisdiction invoked by the DRC cannot be accepted, the Court must now consider the compromissory clauses referred to in the Application, with the exception of those contained in the Convention against Torture and the Convention on Privileges and Immunities (see paragraphs 16 and 17 above).

27. The Court will examine in the following order the compromissory clauses invoked by the DRC: Article IX of the Genocide Convention; Article 22 of the Convention on Racial Discrimination; Article 29, paragraph 1, of the Convention on Discrimination against Women; Article 75 of the WHO Constitution; Article XIV, paragraph 2, of the Unesco Constitution; Article 14, paragraph 1, of the Montreal Convention; Article 66 of the Vienna Convention on the Law of Treaties.

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28. In its Application the DRC contends that Rwanda has violated Articles II and III of the Genocide Convention. Article II of that Convention prohibits:

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

Article III provides:

“The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.”

In order to found the jurisdiction of the Court to entertain its claim, the DRC invokes Article IX of the Convention, which reads as follows:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfillment 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.”

29. Rwanda argued in its Memorial that the jurisdiction of the Court under the Genocide Convention was excluded by its reservation to the entirety of Article IX. In its Counter-Memorial the DRC disputed the validity of that reservation. At the hearings it further contended that Rwanda had withdrawn its reservation; to that end it cited a Rwandan *décret-loi* of 15 February 1995 and a statement of 17 March 2005 by Rwanda’s Minister of Justice at the Sixty-first Session of the United Nations Commission on Human Rights. Rwanda has denied the DRC’s contention that it has withdrawn its reservation to Article IX of the Genocide Convention. The Court will therefore begin by examining whether Rwanda has in fact withdrawn its reservation. Only if it finds that Rwanda has maintained its reservation will the Court need to address the DRC’s arguments concerning the reservation’s validity.

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30. As just stated, the DRC claimed at the hearings that Rwanda had withdrawn its reservation to Article IX of the Genocide Convention. Thus the DRC argued that, in Article 15 of the Protocol of Agreement on Miscellaneous Issues and Final Provisions signed between the Government of Rwanda and the Rwandan Patriotic Front at Arusha on 3 August 1993, Rwanda undertook to withdraw all reservations made by it when it became party to treaty instruments “on human rights”. The DRC contends that Rwanda implemented that undertaking by adopting *décret-loi* No. 014/01 of 15 February 1995, whereby the Broad-Based Transitional Government allegedly withdrew all reservations made by Rwanda at the accession, approval and ratification of international instruments relating to human rights.

31. In this regard the DRC observed that the Arusha Peace Agreement concluded on 4 August 1993 between the Government of Rwanda and the Rwandan Patriotic Front, of which the above-mentioned Protocol forms an integral part, was not a mere internal political agreement, as Rwanda contended, but a text which under Rwandan law, namely Article 1 of the Fundamental Law of the Rwandese Republic adopted by the Transitional National Assembly on 26 May 1995, formed part of the “constitutional ensemble”. The DRC argued, furthermore, that Rwanda’s contention that *décret-loi* No. 014/01 had fallen into desuetude or lapsed because it was not confirmed by the new parliament was unfounded. According to the DRC, “[i]f the Rwandan parliament did not confirm the Order in Council, without, however leaving any trace of this

volte-face, that is neither more nor less than . . . a ‘wrongful act’; and it was a universal principle of law that ‘no one may profit by his own wrongdoing’.” The DRC maintained moreover that the *décret-loi* was not subject to the procedure of approval by parliament, since, under Congolese and Rwandan law, both of which had been influenced by Belgian law, a *décret-loi* was a measure enacted by the executive branch in cases of emergency when parliament is in recess; if these conditions were satisfied, parliamentary approval was not necessary, save in the case of a constitutional *décret-loi*, which was not the case for *décret-loi* No. 014/01.

32. The DRC further argued that the fact that withdrawal of the reservation was not notified to the United Nations Secretary-General could not be relied on against third States, since Rwanda expressed its intention to withdraw the reservation in a legislative text, namely the *décret-loi* of 15 February 1995. According to the DRC, the failure to notify that *décret-loi* to the United Nations Secretary-General has no relevance in this case, since it is not the act of notification to an international organization which gives validity “to a domestic administrative enactment, but rather its promulgation and/or publication by the competent national authority”.

33. Finally, the DRC contended that Rwanda’s withdrawal of its reservation to Article IX of the Genocide Convention was corroborated by a statement by the latter’s Minister of Justice on 17 March 2005 at the Sixty-first Session of the United Nations Commission on Human Rights. The Minister there announced that “the few [human rights] instruments not yet ratified” at that date by Rwanda, as well as reservations “not yet withdrawn”, would “shortly be ratified . . . [or] withdrawn”. In the DRC’s view, this statement meant that there were reservations, including that made by Rwanda in respect of Article IX of the Genocide Convention, which had already been withdrawn by that State in 1995. The DRC added that the statement by the Rwandan Minister of Justice “gave material form at international level to the . . . decision taken by the Rwandan Government [in February 1995] to withdraw all reservations to human rights treaties”, and that this statement, “made within one of the most representative forums of the international community, the United Nations Commission on Human Rights, . . . [did] indeed bind the Rwandan State”.

34. For its part, Rwanda contended at the hearings that it had never taken any measure to withdraw its reservation to Article IX of the Genocide Convention.

As regards the Arusha Peace Agreement of 4 August 1993, Rwanda considered that this was not an international instrument but a series of agreements concluded between the Government of Rwanda and the Rwandan Patriotic Front, that is to say an internal agreement which did not create any obligation on Rwanda’s part to another State or to the international community as a whole.

Rwanda further observed that Article 15 of the Protocol of Agreement

on Miscellaneous Issues and Final Provisions of 3 August 1993 made no express reference to the Genocide Convention and did not specify whether the reservations referred to comprised both those concerning procedural provisions, including provisions relating to the jurisdiction of the Court, and those concerning substantive provisions.

35. In regard to *décret-loi* No. 014/01 of 15 February 1995, Rwanda pointed out that this text, like Article 15 of the Protocol of Agreement, was drawn in very general terms, since it “authorized the withdrawal of all reservations entered into by Rwanda to all international agreements”. Rwanda further stated that, “under the constitutional agreements then in force in Rwanda, a decree of this kind had to be approved by Parliament — at that time called the Transitional National Assembly — at its session immediately following the adoption of the decree”. Rwanda points out that, at the session immediately following the adoption of *décret-loi* No. 014/01, which took place between 12 April and 11 July 1995, the Order was not approved, and therefore lapsed.

36. Rwanda further observed that it had never notified withdrawal of its reservation to Article IX of the Genocide Convention to the United Nations Secretary-General, or taken any measure to withdraw it, and that only such formal action on the international plane could constitute the definitive position of a State in regard to its treaty obligations.

37. Regarding the statement made on 17 March 2005 at the Sixty-first Session of the United Nations Commission on Human Rights by its Minister of Justice, Rwanda contends that in her speech the Minister simply restated Rwanda’s intention to lift “unspecified” reservations to “unspecified” human rights treaties “at some time in the future”. Rwanda notes that the statement was inconsistent with the argument of the DRC that it had already withdrawn those same reservations in 1995. It further observes that the statement could not bind it or oblige it to withdraw “a particular reservation”, since it was made by a Minister of Justice and not by a Foreign Minister or Head of Government, “with automatic authority to bind the State in matters of international relations”. Finally, Rwanda asserts that a statement given in a forum such as the United Nations Commission on Human Rights, almost three years after the institution of the present proceedings before the Court, cannot have any effect on the issue of jurisdiction, which “has to be judged by reference to the situation as it existed at the date the Application was filed”.

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38. The Court notes that both the DRC and Rwanda are parties to the Genocide Convention, the DRC having acceded on 31 May 1962 and

Rwanda on 16 April 1975. The Court observes, however, that Rwanda’s instrument of accession to the Convention, as deposited with the Secretary-General of the United Nations, contains a reservation worded as follows: “The Rwandese Republic does not consider itself as bound by Article IX of the Convention.”

39. The Court also notes that the Parties take opposing views, first on whether, in adopting *décret-loi* No. 014/01 of 15 February 1995, Rwanda effectively withdrew its reservation to Article IX of the Genocide Convention and, secondly, on the question of the legal effect of the statement by Rwanda’s Minister of Justice at the Sixty-first Session of the United Nations Commission on Human Rights. The Court will accordingly address in turn each of these two questions.

40. In regard to the first question, the Court notes that an instrument entitled “*Décret-loi* No. 014/01 of 15 February 1995 withdrawing all reservations entered by the Rwandese Republic at the accession, approval and ratification of international instruments” was adopted on 15 February 1995 by the President of the Rwandese Republic following an Opinion of the Council of Ministers and was countersigned by the Prime Minister and Minister of Justice of the Rwandese Republic. Article 1 of this *décret-loi*, which contains three articles, provides that “[a]ll reservations entered by the Rwandese Republic in respect of the accession, approval and ratification of international instruments are withdrawn”; Article 2 states that “[a]ll prior provisions contrary to the present *décret-loi* are abrogated”; while Article 3 provides that “[t]his *décret-loi* shall enter into force on the day of its publication in the Official Journal of the Rwandese Republic”. The *décret-loi* was published in the Official Journal of the Rwandese Republic, on a date of which the Court has not been apprised, and entered into force.

41. The validity of this *décret-loi* under Rwandan domestic law has been denied by Rwanda. However, in the Court’s view the question of the validity and effect of the *décret-loi* within the domestic legal order of Rwanda is different from that of its effect within the international legal order. Thus a clear distinction has to be drawn between a decision to withdraw a reservation to a treaty taken within a State’s domestic legal order and the implementation of that decision by the competent national authorities within the international legal order, which can be effected only by notification of withdrawal of the reservation to the other States parties to the treaty in question. It is a rule of international law, deriving from the principle of legal security and well established in practice, that, subject to agreement to the contrary, the withdrawal by a contracting State of a reservation to a multilateral treaty takes effect in relation to the other contracting States only when they have received notification thereof. This rule is expressed in Article 22, paragraph 3 (a), of the Vienna Convention on the Law of Treaties, which provides as follows: “3. Unless the Treaty otherwise provides, or it is otherwise agreed: (a) the withdrawal of a reservation becomes operative in relation to another Contracting State only when

notice of it has been received by that State.” Article 23, paragraph 4, of that same Convention further provides that “[t]he withdrawal of a reservation or of an objection to a reservation must be formulated in writing”.

42. The Court observes that in this case it has not been shown that Rwanda notified the withdrawal of its reservations to the other States parties to the “international instruments” referred to in Article 1 of *décret-loi* No. 014/01 of 15 February 1995, and in particular to the States parties to the Genocide Convention. Nor has it been shown that there was any agreement whereby such withdrawal could have become operative without notification. In the Court’s view, the adoption of that *décret-loi* and its publication in the Official Journal of the Rwandese Republic cannot in themselves amount to such notification. In order to have effect in international law, the withdrawal would have had to be the subject of a notice received at the international level.

43. The Court notes that, as regards the Genocide Convention, the Government of Rwanda has taken no action at international level on the basis of the *décret-loi*. It observes that this Convention is a multilateral treaty whose depositary is the Secretary-General of the United Nations, and it considers that it was normally through the latter that Rwanda should have notified withdrawal of its reservation. Thus the Court notes that, although the Convention does not deal with the question of reservations, Article XVII thereof confers particular responsibilities on the United Nations Secretary-General in respect of notifications to States parties to the Convention or entitled to become parties; it is thus in principle through the medium of the Secretary-General that such States must be informed both of the making of a reservation to the Convention and of its withdrawal. Rwanda notified its reservation to Article IX of the Genocide Convention to the Secretary-General. However, the Court does not have any evidence that Rwanda notified the Secretary-General of the withdrawal of this reservation.

44. In light of the foregoing, the Court finds that the adoption and publication of *décret-loi* No. 014/01 of 15 February 1995 by Rwanda did not, as a matter of international law, effect a withdrawal by that State of its reservation to Article IX of the Genocide Convention.

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45. The Court will now turn to the second question, that of the legal effect of the statement made on 17 March 2005 by Ms Mukabagwiza, Minister of Justice of Rwanda, at the Sixty-first Session of the United Nations Commission on Human Rights. At the hearings the DRC cited this statement and contended that it could be interpreted as corroborating Rwanda’s withdrawal of its reservation to Article IX of the Genocide Convention, or as constituting a unilateral commitment having legal effects in regard to the withdrawal of that reservation. In her statement Ms Mukabagwiza said *inter alia* the following:

“Rwanda is one of the countries that has ratified the greatest number of international human rights instruments. In 2004 alone, our Government ratified ten of them, including those concerning the rights of women, the prevention and repression of corruption, the prohibition of weapons of mass destruction, and the environment. The few instruments not yet ratified will shortly be ratified and past reservations not yet withdrawn will shortly be withdrawn.”

46. The Court will begin by examining Rwanda’s argument that it cannot be legally bound by the statement in question inasmuch as a statement made not by a Foreign Minister or a Head of Government “with automatic authority to bind the State in matters of international relations, but by a Minister of Justice, cannot bind the State to lift a particular reservation”. In this connection, the Court observes that, in accordance with its consistent jurisprudence (*Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 269-270, paras. 49-51; *Application of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 622, para. 44; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, pp. 21-22, para. 53; see also *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 1933, P.C.I.J., Series A/B, No. 53, p. 71), it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments. The Court moreover recalls that, in the matter of the conclusion of treaties, this rule of customary law finds expression in Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties, which provides that

“[i]n virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty”.

47. The Court notes, however, that with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials.

48. In this case, the Court notes first that Ms Mukabagwiza spoke before the United Nations Commission on Human Rights in her capacity

as Minister of Justice of Rwanda and that she indicated *inter alia* that she was making her statement “on behalf of the Rwandan people”. The Court further notes that the questions relating to the protection of human rights which were the subject of that statement fall within the purview of a Minister of Justice. It is the Court’s view that the possibility cannot be ruled out in principle that a Minister of Justice may, under certain circumstances, bind the State he or she represents by his or her statements. The Court cannot therefore accept Rwanda’s argument that Ms Mukabagwiza could not, by her statement, bind the Rwandan State internationally, merely because of the nature of the functions that she exercised.

49. In order to determine the legal effect of that statement, the Court must, however, examine its actual content as well as the circumstances in which it was made (*Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 269-270, para. 51; *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, pp. 573-574, paras. 39-40).

50. On the first point, the Court recalls that a statement of this kind can create legal obligations only if it is made in clear and specific terms (see *Nuclear Tests (Australia v. France)* (*New Zealand v. France*), I.C.J. Reports 1974, p. 267, para. 43; p. 269, para. 51; p. 472, para. 46; p. 474, para. 53). In this regard the Court observes that in her statement the Minister of Justice of Rwanda indicated that “past reservations not yet withdrawn [would] shortly be withdrawn”, without referring explicitly to the reservation made by Rwanda to Article IX of the Genocide Convention. The statement merely raises in general terms the question of Rwandan reservations. As such, the expression “past reservations not yet withdrawn” refers without distinction to any reservation made by Rwanda to any international treaty to which it is a party. Viewed in its context, this expression may, it is true, be interpreted as referring solely to the reservations made by Rwanda to “international human rights instruments”, to which reference is made in an earlier passage of the statement. In this connection the Court notes, however, that the international instruments in question must in the circumstances be understood in a broad sense, since, according to the statement itself, they appear to encompass not only instruments “concerning the rights of women” but also those concerning “the prevention and repression of corruption, the prohibition of weapons of mass destruction, and the environment”. The Court is therefore bound to note the indeterminate character of the international treaties referred to by the Rwandan Minister of Justice in her statement.

51. The Court further observes that this statement merely indicates that “past reservations not yet withdrawn will shortly be withdrawn”, without indicating any precise time-frame for such withdrawals.

52. It follows from the foregoing that the statement by the Rwandan

Minister of Justice was not made in sufficiently specific terms in relation to the particular question of the withdrawal of reservations. Given the general nature of its wording, the statement cannot therefore be considered as confirmation by Rwanda of a previous decision to withdraw its reservation to Article IX of the Genocide Convention, or as any sort of unilateral commitment on its part having legal effects in regard to such withdrawal; at most, it can be interpreted as a declaration of intent, very general in scope.

53. This conclusion is corroborated by an examination of the circumstances in which the statement was made. Thus the Court notes that it was in the context of a presentation of general policy on the promotion and protection of human rights that the Minister of Justice of Rwanda made her statement before the United Nations Commission on Human Rights.

54. Finally, the Court will address Rwanda’s argument that the statement by its Minister of Justice could not in any event have any implications for the question of the Court’s jurisdiction in this case, since it was made nearly three years after the institution of the proceedings. In this connection, the Court recalls that it has consistently held that, while its jurisdiction must surely be assessed on the date of the filing of the act instituting proceedings (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 613, para. 26; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 12, para. 26), the Court should not, however, penalize a defect in procedure which the Applicant could easily remedy (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 613, para. 26). In the present case, if the Rwandan Minister’s statement had somehow entailed the withdrawal of Rwanda’s reservation to Article IX of the Genocide Convention in the course of the proceedings, the DRC could on its own initiative have remedied the procedural defect in its original Application by filing a new Application. This argument by Rwanda must accordingly be rejected.

55. Having concluded that the DRC’s contention that Rwanda has withdrawn its reservation to Article IX of the Genocide Convention is unfounded, the Court must now turn to the DRC’s argument that this reservation is invalid.

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56. In order to show that Rwanda’s reservation is invalid, the DRC maintains that the Genocide Convention has “the force of general law with respect to all States” including Rwanda, inasmuch as it contains norms of *ius cogens*. The DRC further stated at the hearings that,

“in keeping with the spirit of Article 53 of the Vienna Convention”, Rwanda’s reservation to Article IX of the Genocide Convention is null and void, because it seeks to “prevent the . . . Court from fulfilling its noble mission of safeguarding peremptory norms”. Hence the fact that the DRC had not objected to that reservation was of no consequence in the present proceedings.

57. The DRC also contends that Rwanda’s reservation is incompatible with the object and purpose of the Convention, since

“its effect is to exclude Rwanda from any mechanism for the monitoring and prosecution of genocide, whereas the object and purpose of the Convention are precisely the elimination of impunity for this serious violation of international law”.

58. The DRC further argues that Rwanda’s reservation is irrelevant in the light of the evolution of the international law relating to genocide since 1948, which testifies to a “will” in the international community “to see full effectiveness given to the . . . Convention” and which is reflected in Article 120 of the Statute of the International Criminal Court, which prohibits reservations, and in the recognition of the *ius cogens* nature of the prohibition of genocide established by recent doctrine and jurisprudence.

59. The DRC argues finally that, even if the Court were to reject its argument based on the peremptory character of the norms contained in the Genocide Convention, it cannot permit Rwanda to behave in a contradictory fashion, that is to say, to call on the United Nations Security Council to set up an international criminal tribunal to try the authors of the genocide committed against the Rwandan people, while at the same time refusing to allow those guilty of genocide to be tried when they are Rwandan nationals or the victims of the genocide are not Rwandans.

60. With respect to its reservation to Article IX of the Genocide Convention, Rwanda first observes that, although, as the DRC contends, the norms codified in the substantive provisions of the Genocide Convention have the status of *ius cogens* and create rights and obligations *erga omnes*, that does not in itself suffice to “confer jurisdiction on the Court with respect to a dispute concerning the application of those rights and obligations”, as, according to Rwanda, the Court had held in the case concerning *East Timor* and in its Order of 10 July 2002 in the present case.

61. Secondly, Rwanda argues that its reservation to Article IX is not incompatible with the object and purpose of the Genocide Convention, inasmuch as the reservation relates not “to the substantive obligations of the parties to the Convention but to a procedural provision”. It claims in this connection that 14 other States maintain similar reservations, and that the majority of the 133 States parties to the Convention have raised no objection to those reservations; the DRC itself did not object to Rwanda’s reservation prior to the hearings of June 2002. Rwanda further

observes that, at the provisional measures stage in the cases concerning *Legality of Use of Force*, the Court, in light of the reservations to Article IX of the Genocide Convention by Spain and the United States — which are in similar terms to Rwanda’s reservation — decided to remove the cases concerning those two States from its List, on the ground of its manifest lack of jurisdiction; it necessarily followed that the Court considered that there was no room for doubt as to the validity and effect of those reservations. The fact that the Court, in its Order of 10 July 2002, did not find that there was a manifest lack of jurisdiction did not in any way support the DRC’s argument, inasmuch as this conclusion was addressed to the totality of the DRC’s alleged bases of jurisdiction; it could be explained only by reference to the other treaties invoked by the DRC, and not to the Genocide Convention.

62. Rwanda observes thirdly that the fact that Article 120 of the Statute of the International Criminal Court — to which Rwanda is not a party and which it has not even signed — prohibits reservations has no bearing whatever on this issue. Thus, according to Rwanda, the fact that the States which drew up the Statute of the International Criminal Court “chose to prohibit all reservations to that treaty in no way affects the right of States to make reservations to other treaties which, like the Genocide Convention, do not contain such a prohibition”.

63. Rwanda contends fourthly that its request to the United Nations Security Council to establish an international criminal tribunal to try individuals accused of participation in the genocide perpetrated on Rwandan territory in 1994 is “an entirely separate matter from the jurisdiction of [the] Court to hear disputes between States”. There can be no question, according to Rwanda, of “an otherwise valid reservation to Article IX being rendered ‘inoperative’, because the reserving State supported the creation by the Security Council of a criminal tribunal with jurisdiction over individuals”.

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64. The Court will begin by reaffirming that “the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation” and that a consequence of that conception is “the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention)” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). It follows that “the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*” (*Application of the Convention on the Prevention and Punishment of the*

Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 616, para. 31).

The Court observes, however, as it has already had occasion to emphasize, that “the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things” (*East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.

The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.

65. As it recalled in its Order of 10 July 2002, the Court has jurisdiction in respect of States only to the extent that they have consented thereto (*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. 241, para. 57). When a compromissory clause in a treaty provides for the Court’s jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and within the limits set out therein (*ibid.*, p. 245, para. 71).

66. The Court notes, however, that it has already found that reservations are not prohibited under the Genocide Convention (Advisory Opinion in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, pp. 22 *et seq.*). This legal situation is not altered by the fact that the Statute of the International Criminal Court, in its Article 120, does not permit reservations to that Statute, including provisions relating to the jurisdiction of the International Criminal Court on the crime of genocide. Thus, in the view of the Court, a reservation under the Genocide Convention would be permissible to the extent that such reservation is not incompatible with the object and purpose of the Convention.

67. Rwanda’s reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.

68. In fact, the Court has already had occasion in the past to give effect to such reservations to Article IX of the Convention (see *Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 772, paras. 32-33; *Legality of*

Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II), p. 924, paras. 24-25). The Court further notes that, as a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it.

69. In so far as the DRC contended further that Rwanda’s reservation is in conflict with a peremptory norm of general international law, it suffices for the Court to note that no such norm presently exists requiring a State to consent to the jurisdiction of the Court in order to settle a dispute relating to the Genocide Convention. Rwanda’s reservation cannot therefore, on such grounds, be regarded as lacking legal effect.

70. The Court concludes from the foregoing that, having regard to Rwanda’s reservation to Article IX of the Genocide Convention, this Article cannot constitute the basis for the jurisdiction of the Court in the present case.

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71. The DRC also seeks to found the jurisdiction of the Court on Article 22 of the Convention on Racial Discrimination, which states:

“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.”

In its Application the DRC alleges that Rwanda has committed numerous acts of racial discrimination within the meaning of Article 1 of that Convention, which provides *inter alia*:

“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.”

72. Rwanda claims that the jurisdiction of the Court under the Convention on Racial Discrimination is precluded by its reservation to the entire Article 22. It contends that, as the Court observed in its Order of 10 July 2002, the said reservation did not attract objections from two-thirds of the States parties and should therefore be regarded as compatible with the object and purpose of the Convention pursuant to

Article 20, paragraph 2, thereof. Rwanda also points out that the DRC itself did not raise any objection to that reservation or to any similar reservations made by other States.

73. For its part, the DRC argues that Rwanda's reservation to Article 22 of the Convention on Racial Discrimination is unacceptable on the ground of its incompatibility with the object and purpose of the treaty, "because it would amount to granting Rwanda the right to commit acts prohibited by the Convention with complete impunity". The DRC further contended at the hearings that the prohibition on racial discrimination was a peremptory norm and that, "in keeping with the spirit of Article 53 of the Vienna Convention" on the Law of Treaties, Rwanda's reservation to Article 22 of the Convention on Racial Discrimination should "be considered as contrary to *jus cogens* and without effect". Hence the fact that the DRC had not objected to that reservation was of no consequence in the present proceedings. In addition, the DRC maintained, as it did in respect of the reservation to Article IX of the Genocide Convention (see paragraph 30 above), that the reservation entered by Rwanda to Article 22 of the Convention on Racial Discrimination has "lapsed or fallen into desuetude as a result of the undertaking, enshrined in the Rwandan Fundamental Law, to 'withdraw all reservations entered by Rwanda when it adhered to . . . international instruments'" relating to human rights.

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74. The Court notes that both the DRC and Rwanda are parties to the Convention on Racial Discrimination, the DRC having acceded thereto on 21 April 1976 and Rwanda on 16 April 1975. Rwanda's instrument of accession to the Convention, as deposited with the United Nations Secretary-General, does however include a reservation reading as follows: "The Rwandese Republic does not consider itself as bound by article 22 of the Convention."

75. The Court will first address the DRC's argument that the reservation has "lapsed or fallen into desuetude as a result of the undertaking, enshrined in the Rwandan Fundamental Law, to 'withdraw all reservations entered by Rwanda when it adhered to . . . international instruments'" relating to human rights. Without prejudice to the applicability of *mutatis mutandis* to the Convention on Racial Discrimination of the Court's reasoning and conclusions in respect of the DRC's claim that Rwanda withdrew its reservation to the Genocide Convention (see paragraphs 38-55 above), the Court observes that the procedures for withdrawing a reservation to the Convention on Racial Discrimination are expressly provided for in Article 20, paragraph 3, of that Convention, which states: "Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received." However, there is no evidence before the Court of any notification by Rwanda to the United

Nations Secretary-General of its intention to withdraw its reservation to Article 22 of the Convention on Racial Discrimination. The Court accordingly concludes that the respondent State has maintained that reservation.

76. The Court must therefore now consider the DRC's argument that the reservation is invalid.

77. The Court notes that the Convention on Racial Discrimination prohibits reservations incompatible with its object and purpose. The Court observes in this connection that, under Article 20, paragraph 2, of the Convention, "[a] reservation shall be considered incompatible . . . if at least two-thirds of the States Parties to [the] Convention object to it". The Court notes, however, that such has not been the case as regards Rwanda's reservation in respect of the Court's jurisdiction. Without prejudice to the applicability *mutatis mutandis* to Rwanda's reservation to Article 22 of the Convention on Racial Discrimination of the Court's reasoning and conclusions in respect of Rwanda's reservation to Article IX of the Genocide Convention (see paragraphs 66-68 above), the Court is of the view that Rwanda's reservation to Article 22 cannot therefore be regarded as incompatible with that Convention's object and purpose. The Court observes, moreover, that the DRC itself raised no objection to the reservation when it acceded to the Convention.

78. In relation to the DRC's argument that the reservation in question is without legal effect because, on the one hand, the prohibition on racial discrimination is a peremptory norm of general international law and, on the other, such a reservation is in conflict with a peremptory norm, the Court refers to its reasoning when dismissing the DRC's similar argument in regard to Rwanda's reservation to Article IX of the Genocide Convention (see paragraphs 64-69 above): the fact that a dispute concerns non-compliance with a peremptory norm of general international law cannot suffice to found the Court's jurisdiction to entertain such a dispute, and there exists no peremptory norm requiring States to consent to such jurisdiction in order to settle disputes relating to the Convention on Racial Discrimination.

79. The Court concludes from the foregoing that, having regard to Rwanda's reservation to Article 22 of the Convention on Racial Discrimination, this Article cannot constitute the basis for the jurisdiction of the Court in the present case.

* * *

80. The DRC further claims to found the jurisdiction of the Court on Article 29, paragraph 1, of the Convention on Discrimination against Women, which provides:

"Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not

settled by negotiation 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 request in conformity with the Statute of the Court.”

The DRC maintains that Rwanda has violated its obligations under Article 1 of the Convention, which reads as follows:

“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

81. Rwanda contends that the Court cannot assume jurisdiction on the basis of Article 29 of the Convention on Discrimination against Women, on the ground that in the present case the preconditions required by that provision for referral to the Court have not been fulfilled. Those preconditions are cumulative according to Rwanda and are as follows: there must be a dispute between the parties concerning the interpretation or application of the Convention; it must have proved impossible to settle that dispute by negotiation; one of the parties must have requested that the dispute be submitted to arbitration, but the parties have been unable to agree on the organization thereof; and, lastly, six months must have elapsed between the request for arbitration and seisin of the Court.

Rwanda further argues that the objections which it has raised in these proceedings bear on the jurisdiction of the Court and not on the admissibility of the Application, as the DRC contends. It states in this connection that the Court’s jurisdiction is based on the consent of the parties and that they are free to attach substantive or procedural conditions to that consent; as those conditions circumscribe the recognition of the Court’s jurisdiction, a contention that they have not been complied with is not an objection as to admissibility but indeed an objection to the jurisdiction of the Court, as, according to Rwanda, the Court made clear in the case concerning the *Aerial Incident at Lockerbie*.

82. In respect of the first of the four conditions laid down by Article 29, that is to say the existence of a dispute concerning the Convention, Rwanda asserts that “there has been no claim by the Congo, prior to its filing of the Application[,]” and that “[a]t no time did the Congo advance any claim that Rwanda was in breach of the Convention or suggest that there was a dispute regarding the interpretation of any provision of the Convention”. It argues in this connection that the practice of human rights tribunals, cited by the DRC, under which an

individual is not required first to identify the precise provision of the treaty relied on, does not relieve the DRC of the duty to specify the nature of the dispute. Rwanda observes that the present proceedings do not involve a claim brought by an individual against a State, but are between two equal States and that in this phase of the case it is no longer just a matter of determining whether the Court has *prima facie* jurisdiction to indicate provisional measures, but of ascertaining whether the preconditions for the seisin of the Court have been satisfied.

83. In respect of the condition of prior negotiation, Rwanda maintains that “the Congo has at no time even raised the question of this Convention with Rwanda in any of the numerous meetings which have taken place between representatives of the two governments over the last few years”, the series of meetings between the two States referred to by the DRC having involved general negotiations to settle the armed conflict, not a dispute concerning the said Convention. The only attempt to negotiate which would be relevant to satisfying the conditions of Article 29 would be one concerning a specific dispute over the interpretation or application of the Convention on Discrimination against Women. Rwanda points out in particular that the Court, in its Order of 10 July 2002, decided that the DRC had not shown that its attempts to enter into negotiations or undertake arbitration proceedings concerned the application of the Convention. In response to the DRC’s argument that the war between the two Parties rendered negotiations impossible over a specific dispute under the Convention, Rwanda has cited a letter of 14 January 2002 from the Minister of Telecommunications of the DRC to the Secretary-General of the International Telecommunication Union concerning a question of telephone prefixes; in Rwanda’s view, this letter shows that, if the DRC was able in the middle of an armed conflict to raise a technical issue of this kind, it would certainly have been capable of entering into negotiations dealing with a dispute over specific provisions of the Convention.

84. Lastly, concerning the arbitration requirement, Rwanda contends that there has been no attempt by the DRC to take any of the steps required to organize arbitration proceedings, despite the holding of “regular and frequent meetings between representatives of the two countries at all levels as part of the Lusaka peace process”; according to Rwanda, the DRC has not offered any evidence in this connection. Rwanda adds that the lack of diplomatic relations between the Parties at the time is beside the point; it notes moreover that in its 2002 Order the Court considered this argument to be insufficient.

85. For its part, the DRC maintains, first, that “the purported objection to jurisdiction on grounds of failure to satisfy the preconditions” provided for in Article 29 of the Convention in reality constitutes an objection to the admissibility of the Application.

Secondly, the DRC denies that the compromissory clause in question contains four preconditions. According to the DRC, the clause contains only two conditions, namely that the dispute must involve the application or interpretation of the Convention and that it must have proved impossible to organize arbitration proceedings, it being understood that such a failure “will not become apparent until six months have elapsed from the request for arbitration”.

86. Concerning the fulfilment of those conditions, the DRC asserts that international law does not prescribe any set form for the filing of complaints by States; negotiation may be bilateral, but it may also be conducted within the framework of an international organization, as the Court stated in the *South West Africa* cases in 1962. The DRC points out that it lodged numerous claims against Rwanda in the form of protests made to the authorities of that State through the intermediary of international institutions or organizations and through individual contacts between the respective authorities of the two States. The DRC further asserts that the protests made through international organizations “were brought to the attention of Rwanda by the United Nations bodies” and that, “since the private meetings between the Congolese and Rwandan Presidents took place mainly under the auspices either of other Heads of States or of international institutions, the official summit proceedings relating thereto are in the public domain”. As instances of negotiations conducted within the framework of international organizations, the DRC cites the complaint referred on 24 February 1999 to the African Commission on Human and Peoples’ Rights, a body which, according to the DRC, plays “a veritable role of arbitrator” between African States in respect of violations of human rights guaranteed not only by the African Charter on Human and Peoples’ Rights but also by other international instruments; in the view of the DRC, the Commission could have ruled on violations of conventions such as the Convention on Discrimination against Women if Rwanda had not obstructed the proceedings by various delaying tactics. The DRC also refers to its complaints to the United Nations Security Council following various human rights violations committed by Rwanda and to the adoption by that body of resolutions, including resolutions 1304 of 16 June 2000 and 1417 of 14 June 2002, in which, according to the DRC, the Council “progressed from mere requests to actual demands”. The DRC contends that there were therefore indeed attempts on its part to negotiate, but no headway could ever be made owing to Rwanda’s bad faith; the DRC further contends that “the impossibility of opening or progressing in negotiations with Rwanda” precluded contemplating “the possibility of moving from negotiations to arbitration”.

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87. The Court notes that both the DRC and Rwanda are parties to the

Convention on Discrimination against Women, the DRC having ratified it on 17 October 1986 and Rwanda on 2 March 1981. It also notes that Article 29 of this Convention gives the Court jurisdiction in respect of any dispute between States parties concerning its interpretation or application, on condition that: it has not been possible to settle the dispute by negotiation; that, following the failure of negotiations, the dispute has, at the request of one such State, been submitted to arbitration; and that, if the parties have been unable to agree on the organization of the arbitration, a period of six months has elapsed from the date of the request for arbitration.

In the view of the Court, it is apparent from the language of Article 29 of the Convention that these conditions are cumulative. The Court must therefore consider whether the preconditions on its seisin set out in the said Article 29 have been satisfied in this case.

88. The Court will however first address the DRC’s argument that the objection based on non-fulfilment of the preconditions set out in the compromissory clauses, and in particular in Article 29 of the Convention, is an objection to the admissibility of its Application rather than to the jurisdiction of the Court. The Court recalls in this regard that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them (see paragraph 65 above). When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application (see *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, pp. 11-15; *Interpretation of the Statute of the Memel Territory, Merits, Judgment, 1932, P.C.I.J., Series A/B, No. 49*, pp. 327-328; *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, pp. 78-80; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 344-346; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 427-429, paras. 81-83; *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 88-90, paras. 42-48; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 16, paras. 16-19; p. 24, paras. 39-40; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 121-122, paras. 15-19; p. 129, paras. 38-39). It follows that in the present case the conditions for seisin of the Court set out in Article 29 of the Convention on Discrimination against Women must be examined in

the context of the issue of the Court's jurisdiction. This conclusion applies *mutatis mutandis* to all of the other compromissory clauses invoked by the DRC.

89. The Court will now examine the conditions laid down by Article 29 of the Convention on Discrimination against Women. It will begin by considering whether in this case there exists a dispute between the Parties "concerning the interpretation or application of [that] Convention" which could not have been settled by negotiation.

90. The Court recalls in this regard that, as long ago as 1924, the Permanent Court of International Justice stated that "a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests" (*Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11).

For its part, the present Court has had occasion a number of times to state the following:

"In order to establish the existence of a dispute, 'it must be shown that the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections*, Judgment, I.C.J. Reports 1962, p. 328); and further, 'Whether there exists an international dispute is a matter for objective determination' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, I.C.J. Reports 1950, p. 74)." (*East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 100, para. 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 122-123, para. 21; *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment, I.C.J. Reports 2005, p. 18, para. 24.)

91. The Court notes that in the present case the DRC made numerous protests against Rwanda's actions in alleged violation of international human rights law, both at the bilateral level through direct contact with Rwanda and at the multilateral level within the framework of international institutions such as the United Nations Security Council and the Commission on Human and Peoples' Rights of the Organization of African Unity. In its Counter-Memorial and at the hearings the DRC presented these protests as proof that "the DRC has satisfied the pre-conditions to the seisin of the Court in the compromissory clauses invoked". Whatever may be the legal characterization of such protests as regards the requirement of the existence of a dispute between the DRC and Rwanda for purposes of Article 29 of the Convention, that Article requires also that any such dispute be the subject of nego-

tations. The evidence has not satisfied the Court that the DRC in fact sought to commence negotiations in respect of the interpretation or application of the Convention.

92. The Court further notes that the DRC has also failed to prove any attempts on its part to initiate arbitration proceedings with Rwanda under Article 29 of the Convention. The Court cannot in this regard accept the DRC's argument that the impossibility of opening or advancing in negotiations with Rwanda prevented it from contemplating having recourse to arbitration; since this is a condition formally set out in Article 29 of the Convention on Discrimination against Women, the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 17, para. 21; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 122, para. 20). In the present case, the Court has found nothing in the file which would enable it to conclude that the DRC made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond thereto.

93. It follows from the foregoing that Article 29, paragraph 1, of the Convention on Discrimination against Women cannot serve to found the jurisdiction of the Court in the present case.

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94. The DRC further seeks to found the jurisdiction of the Court on Article 75 of the WHO Constitution, which provides:

"Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement."

The DRC contends that Rwanda has breached the provisions of Articles 1 and 2 of the Constitution, which respectively concern the Organization's objectives and functions.

95. Rwanda maintains that Article 75 of the WHO Constitution cannot found the Court's jurisdiction in this case. In this regard, it begins by

arguing that the WHO Constitution is inapplicable for two reasons. First, it claims that the DRC has failed to specify which particular obligation laid down by that instrument has allegedly been breached by Rwanda, the only provision to which it ever made reference having been Article 2; that Article does not impose any direct obligation on the Member States themselves, as the Court moreover pointed out in paragraph 82 of its Order of 10 July 2002. Secondly, Rwanda contends that the DRC's allegations "do not appear to give rise to a dispute concerning the interpretation or application of the Constitution", as "[i]t is clear from the Application that the Congo considers this dispute to be founded on the alleged acts of aggression of Rwanda".

96. Rwanda further argues that, in addition to requiring the existence of a dispute concerning the interpretation or application of the Constitution, Article 75 imposes two further preconditions on the seisin of the Court: namely, settlement of the dispute by negotiation must have proved impossible and recourse to the World Health Assembly must also have proved impossible. According to Rwanda, the two requirements of negotiation and recourse to the World Health Assembly are cumulative not alternative, as claimed by the DRC, and they have not been satisfied in the present case. Rwanda adds that, even if the two requirements were not cumulative, the DRC would still be unable to rely on Article 75, because it has not proved that it has satisfied the negotiation requirement. It is not sufficient, in Rwanda's view, for the DRC to argue that Rwanda's refusal to participate rendered negotiation impossible; Rwanda considers that the DRC must show "that it . . . attempted, in good faith, to negotiate a solution to this particular dispute".

97. In reply, the DRC disputes Rwanda's assertion that the obligations set out in the WHO Constitution are binding only on the Organization itself; in the DRC's view, it would be difficult "to accept that Member States, including Rwanda, are not under an obligation to contribute to the accomplishment by the World Health Organization of [its] functions" or, at the very least, to refrain from hindering the fulfilment of its objective and those functions, as they are defined in Articles 1 and 2 of the Constitution. The DRC asserts that the principle that Member States must fulfil in good faith the obligations they have assumed is "a general principle the basis of which is to be found in international customary law and which is confirmed by other constituent instruments of international organizations"; it specifically cites the example of Article 2, paragraph 2, of the United Nations Charter. The DRC alleges that Rwanda, in resorting to the spreading of AIDS as an instrument of war and in engaging in large-scale killings on Congolese territory, has not "in good faith carried out the Constitution of the WHO, which aims at fostering the highest possible level of health for all peoples of the world"; the DRC further claims to have made an ample showing that a number of international organizations, both governmental and other, "have published detailed reports on the serious deterioration of the health situation in the DRC as

a consequence of the war of aggression" waged by Rwanda.

98. The DRC further contends that Article 75 of the WHO Constitution leaves it open to the parties to choose between negotiations and recourse to the World Health Assembly procedure to settle their disputes; according to the DRC, these two conditions are not cumulative, as is shown by "the use of the word 'or'". Members of the World Health Organization are accordingly under no obligation to look first to one and then the other of these modes of settlement before bringing proceedings before the Court. In the present case, the DRC opted for negotiations, but these failed "through the fault of Rwanda".

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99. The Court observes that the DRC has been a party to the WHO Constitution since 24 February 1961 and Rwanda since 7 November 1962 and that both are thus members of that Organization. The Court further notes that Article 75 of the WHO Constitution provides for the Court's jurisdiction, under the conditions laid down therein, over "any question or dispute concerning the interpretation or application" of that instrument. The Article requires that a question or dispute must specifically concern the interpretation or application of the Constitution. In the opinion of the Court, the DRC has not shown that there was a question concerning the interpretation or application of the WHO Constitution on which itself and Rwanda had opposing views, or that it had a dispute with that State in regard to this matter.

100. The Court further notes that, even if the DRC had demonstrated the existence of a question or dispute falling within the scope of Article 75 of the WHO Constitution, it has in any event not proved that the other preconditions for seisin of the Court established by that provision have been satisfied, namely that it attempted to settle the question or dispute by negotiation with Rwanda or that the World Health Assembly had been unable to settle it.

101. The Court concludes from the foregoing that Article 75 of the WHO Constitution cannot serve to found its jurisdiction in the present case.

* * *

102. The DRC further seeks to found the jurisdiction of the Court on Article XIV, paragraph 2, of the Unesco Constitution, which reads as follows:

"Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International

Court of Justice or to an arbitral tribunal, as the General Conference may determine under its rules of procedure.”

In its Application the DRC invokes Article I of the Constitution, which concerns the Organization’s purposes and functions, and maintains that “[o]wing to the war, the Democratic Republic of the Congo today is unable to fulfil its missions within Unesco . . .”

103. Rwanda argues that the Court is precluded for various reasons from finding that it has jurisdiction on the basis of Article XIV of the Unesco Constitution. It first points out that this provision limits the Court’s jurisdiction to disputes concerning the “interpretation” of the Constitution and that in this case there is no hint of any dispute between the Parties regarding interpretation of the Constitution. It contends that the DRC’s allegation that it is unable to fulfil its missions within Unesco owing to the war “[a]t its highest . . . would only amount to a dispute concerning the application of the Constitution” of that Organization. Rwanda adds that the Court itself, in paragraph 85 of its Order of 10 July 2002, stated that the interpretation of the Unesco Constitution did not appear to be the object of the DRC’s Application; Rwanda notes that Unesco, after being invited by the Court to submit written observations on the Application, responded that it concurred entirely with the view expressed in that paragraph of the Court’s Order. Rwanda points out that “[n]o new arguments or evidence have been presented by the Congo since that Order to suggest that its allegations do indeed concern the interpretation of the Constitution”.

104. Rwanda next argues that, even if Article XIV of the Unesco Constitution did not confine the Court’s jurisdiction solely to matters of interpretation of the instrument, the DRC has failed to show the relevance of the Constitution to the present dispute. According to Rwanda, “the essence of the Congo’s case is the alleged acts of aggression” committed by Rwanda and “the Congo has failed to make clear which . . . obligation under the Unesco Constitution has been breached”. It notes in this connection that Article I of the Constitution, cited by the DRC in its Application, “simply outlines the purposes and functions of the organization [and] does not impose any direct obligations on the Member States”.

105. Lastly, Rwanda argues that the procedures laid down in Article XIV of the Unesco Constitution and in the Rules of Procedure of the Unesco General Conference, to which that Article refers, were not followed. According to Rwanda, Article XIV does not empower States unilaterally to refer a dispute to the Court. It notes that Article 38 of the Rules of Procedure

“provides for questions concerning the interpretation of the Constitution to be referred to the Legal Committee [of the General

Conference, which] may then either ‘decide by a simple majority to recommend to the General Conference that any question concerning the interpretation of the Constitution be referred to the International Court of Justice’ . . . or . . . may: ‘In cases where the Organization is party to a dispute . . . decide by a simple majority, to recommend to the General Conference that the case be submitted for final decision to an arbitral tribunal, arrangements for which shall be made by the Executive Board.’”

Rwanda observes in this regard that “[t]he Congo has at no time suggested that these procedures have been adhered to”.

106. The DRC argues in response that Article XIV of the Unesco Constitution leaves it open to the parties, in settling their disputes, to choose between negotiation and referral to the General Conference and imposes no obligation to try each of those modes of settlement in turn; in the present case, the DRC opted for negotiations, which “failed through the fault of Rwanda”. At the hearings, the DRC added: “Rwanda’s assertion that Unesco concurred with the opinion of the Court raises a problem”. It maintained that, if the opinion of the Court with which Unesco concurred was

“[f]ultimately, . . . the decision that the Court’s lack of jurisdiction was not manifest, then Rwanda is unfounded in maintaining that the compromissory clause in the Unesco Constitution cannot serve as a basis for the Court’s jurisdiction”.

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107. The Court notes that both the DRC and Rwanda are parties to the Unesco Constitution and have been since 25 November 1960 in the case of the DRC and 7 November 1962 in the case of Rwanda, and that both are thus members of that Organization. The Court further observes that Article XIV, paragraph 2, of the Unesco Constitution provides for the referral, under the conditions established therein, of questions or disputes concerning the Constitution, but only in respect of its interpretation. The Court considers that such is not the object of the DRC’s Application. It finds that the DRC has in this case invoked the Unesco Constitution and Article I thereof for the sole purpose of maintaining that “[o]wing to the war”, it “today is unable to fulfil its missions within Unesco”. The Court is of the opinion that this is not a question or dispute concerning the interpretation of the Unesco Constitution. Thus the DRC’s Application does not fall within the scope of Article XIV of the Constitution.

108. The Court further considers that, even if the existence of a question or dispute falling within the terms of the above provision were established, the DRC has in any event failed to show that the prior procedure for seisin of the Court pursuant to that provision and to

Article 38 of the Rules of Procedure of the Unesco General Conference was followed.

109. The Court concludes from the foregoing that Article XIV, paragraph 2, of the Unesco Constitution cannot serve to found its jurisdiction in the present case.

* * *

110. The DRC further claims to found the jurisdiction of the Court on Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, which provides as follows:

“Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, 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 request in conformity with the Statute of the Court.”

In its Application the DRC made the following submission *inter alia*:

“by shooting down a Boeing 727 owned by Congo Airlines on [10] October 1998 in Kindu, thereby causing the death of 40 civilians, Rwanda . . . violated . . . the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971”.

111. Rwanda asserts that Article 14, paragraph 1, of the Montreal Convention lays down a series of requirements, each of which must be met before that provision can confer jurisdiction upon the Court, namely: there must be a dispute between the parties concerning the interpretation or application of the Convention; it must have proved impossible to settle the dispute by negotiation; one of the parties must have requested that the dispute be submitted to arbitration and the parties must have been unable to agree upon the organization of the arbitration; and, finally, six months must have elapsed from the date of the request for arbitration.

112. Rwanda first contends that the DRC has failed to establish the existence of a dispute between the Parties falling within the scope of Article 14 of the Montreal Convention. It argues that under this provision “it is not open to a Claimant, . . . incidentally and implicitly, to put in issue the Montreal Convention in the course of proceedings raising a wider dispute or set of allegations”. It asserts that this, however, is precisely what the DRC seeks to do in the present proceedings, inasmuch as the DRC maintains that the dispute concerns “acts of armed aggression” and has submitted a “Statement of Facts” revealing

no allegation which could fall within the scope of the Convention. Rwanda concludes: “It is manifest that the vast majority of issues raised in the Congolese Application have nothing whatever to do with the Montreal Convention . . .” It notes in this regard that the DRC’s only attempt to identify a dispute concerning the Montreal Convention is confined to the allegation, “made not in the ‘Statement of Facts’ but in the prayer for relief at the end of the Application”, concerning the destruction of an aircraft belonging to Congo Airlines on 10 October 1998 above Kindu.

On this point, Rwanda asserts that the DRC has “not adequately defined the dispute said to exist between [the Parties] regarding the interpretation or application of the Montreal Convention”. It contends that the incident alleged to have occurred at Kindu was the subject of a complaint submitted by the DRC to the International Civil Aviation Organization (hereinafter the “ICAO”) and considered by the ICAO Council, but that the DRC failed to provide the Council with any clarification of its allegations. In particular, according to Rwanda, the DRC alleged that the aircraft had been shot down not by Rwanda but by Congolese rebel forces and then made identical allegations against Uganda, without any attempt to reconcile its allegations against those two States. Rwanda further observes that the Declaration adopted by the ICAO Council on 10 March 1999 contains no reference to the incident, “let alone any suggestion that there might have been any violation of the Montreal Convention by Rwanda, or that there might be a dispute between the Congo and Rwanda concerning the interpretation or application of the Convention”. Rwanda accordingly concludes that, despite the opportunity afforded the DRC by the ICAO proceedings, it “has not set out its claim with sufficient particularity for Rwanda to be able to oppose it”.

113. Rwanda next argues that, even if there existed a dispute between the DRC and itself regarding the interpretation or application of the Montreal Convention, the DRC would still have to prove that it has met the procedural requirements set out in Article 14, paragraph 1, of the Convention. Yet, according to Rwanda, the DRC has failed to show that any such dispute could not be settled by negotiation; it argues in this connection that

“[a]lthough the Congo has referred to the alleged impossibility of negotiating a peaceful settlement with Rwanda, the Congo has here confused the settlement of the armed conflict, the nub of the allegation it makes, with the settlement of the specific dispute which it asserts exists under the Montreal Convention”.

Rwanda also observes that the DRC never suggested referring the dispute to arbitration and that it has thus failed to satisfy another essential requirement imposed by Article 14, paragraph 1, of the Montreal Convention.

114. In response, the DRC contends first that “the purported objec-

tion to jurisdiction” on grounds of failure to satisfy the preconditions laid down in Article 14 of the Montreal Convention in reality constitutes an objection to the admissibility of the Application (see paragraphs 85 and 88 above).

The DRC next asserts that only two preconditions are laid down by that Article, namely: the dispute must concern the application or interpretation of the Convention in question; and it must have proved impossible to organize an arbitration, it being understood that the failure of an attempt to do so “will not become apparent until six months have elapsed from the request for arbitration”.

Finally, the DRC maintains that these two preconditions for the seisin of the Court have been satisfied in the present case.

115. As regards the existence of a dispute within the meaning of Article 14 of the Montreal Convention, the DRC observes that Rwanda itself has acknowledged that the only dispute in respect of which that Convention might furnish a basis for the Court’s jurisdiction is the one relating to the incident of 10 October 1998 involving the Congo Airlines aircraft above Kindu.

116. In respect of the requirement of negotiations, the DRC contends that the Rwandan authorities adopted the “empty chair” policy whenever the DRC offered to discuss an issue such as the application of the Montreal Convention to the incident of 10 October 1998. It cites in particular the Syrte (Libya) Summit, “devoted to the settlement of various disputes between the Parties”, to which Rwanda had been invited but which it did not attend, and the Blantyre (Malawi) Summit in 2002, in which Rwanda did not take part either and where, according to the United Nations Secretary-General, “no substantive issues were discussed” because of Rwanda’s absence. At the hearings, the DRC further stated that a Security Council Group of Experts described itself in its report of 25 January 2005 as “gravely concerned about the lack of co-operation received from Rwanda on civil aviation matters”. The DRC also argued

“that negotiation between two States has been initiated either once the dispute has been the subject of an exchange of views, or indeed where it has been raised in a specific forum to which both States are party (this was the case for the ICAO, the United Nations Security Council, and various multilateral or sub-regional conferences), where the Congo consistently evoked Rwanda’s violations of certain international instruments”.

The DRC further contended that “the impossibility of opening or progressing in negotiations with Rwanda” precluded contemplating “the possibility of moving from negotiations to arbitration”.

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117. The Court notes that both the DRC and Rwanda are parties to

the Montreal Convention and have been since 6 July 1977 in the case of the DRC and 3 November 1987 in the case of Rwanda, that both are Members of the ICAO, and that the Montreal Convention was already in force between them at the time when the Congo Airlines aircraft is stated to have been destroyed above Kindu, on 10 October 1998, and when the Application was filed, on 28 May 2002. The Court also notes that Article 14, paragraph 1, of the Montreal Convention gives the Court jurisdiction in respect of any dispute between contracting States concerning the interpretation or application of the Convention, on condition that: it has not been possible to settle the dispute by negotiation; that, following the failure of negotiations, the dispute has, at the request of one such State, been submitted to arbitration; and that, if the parties have been unable to agree on the organization of the arbitration, a period of six months has elapsed from the date of the request for arbitration. In order to determine whether it has jurisdiction under this provision, the Court will therefore first have to ascertain whether there is a dispute between the Parties relating to the interpretation or application of the Montreal Convention which could not have been settled by negotiation.

118. The Court observes in this regard that the DRC has not indicated to it which are the specific provisions of the Montreal Convention which could apply to its claims on the merits. In its Application the DRC confined itself to invoking that Convention in connection with the destruction on 10 October 1998, shortly after take-off from Kindu Airport, of a civil aircraft belonging to Congo Airlines. Even if it could be established that the facts cited by the DRC might, if proved, fall within the terms of the Convention and gave rise to a dispute between the Parties concerning its interpretation or application, and even if it could be considered that the discussions within the Council of the ICAO amounted to negotiations, the Court finds that, in any event, the DRC has failed to show that it satisfied the conditions required by Article 14, paragraph 1, of the Montreal Convention concerning recourse to arbitration: in particular, it has not shown that it made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond thereto (cf. paragraph 92 above).

119. The Court considers that Article 14, paragraph 1, of the Montreal Convention cannot therefore serve to found its jurisdiction in the present case.

* * *

120. To found the jurisdiction of the Court in the present case, the DRC relies finally on Article 66 of the Vienna Convention on the Law of Treaties, which provides *inter alia* that “[a]ny one of the parties to a dispute concerning the application or the interpretation of article 53 or 64”, relating to conflicts between treaties and peremptory norms of general

international law, “may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration”.

121. In its Counter-Memorial the DRC noted that Rwanda’s Memorial invoked *inter alia* “the alleged irrelevance of the Congo’s reference to the Vienna Convention on the Law of Treaties”, and the DRC referred the Court in this regard to the arguments which it had presented at the provisional measures phase. At the hearings, the DRC explained that Article 66 of the Vienna Convention on the Law of Treaties, to which Rwanda is a party, allows the Court to rule on any dispute concerning “the validity of a treaty which is contrary to a norm of *jus cogens*”. In this regard the DRC argued that reservations to a treaty form an integral part thereof, and that they must accordingly “avoid either being in direct contradiction with a norm of *jus cogens*, or preventing the implementation of that norm”. According to the DRC, Rwanda’s reservation to Article IX of the Genocide Convention, as well as to “other similar provisions and compromissory clauses, seeks to prevent the . . . Court from fulfilling its noble mission of safeguarding peremptory norms, including the prohibition of genocide”, and must therefore be regarded as “null and void”.

122. In reply to Rwanda’s reliance at the hearings on Article 4 of the Vienna Convention, which provides that the Convention applies only to treaties which are concluded by States after its entry into force with regard to such States, the DRC contended that “the supremacy and mandatory force of the norms referred to in this Convention (Articles 53 and 64) bind States irrespective of any temporal consideration or any treaty-based link”; according to the DRC, the rule can therefore “have retroactive effect in the overriding interest of humanity”. In this connection, the DRC cited the Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, where the Court held that there was an obligation on the United States to respect the four Geneva Conventions “in all circumstances”, since such an obligation “does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give concrete expression”. The DRC also invoked the “moral and humanitarian principles” to which the Court had referred in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, and it asked the Court “to safeguard [those principles] by finding that it has jurisdiction”.

123. For its part, Rwanda contended in its Memorial that the DRC’s contention that the norms of *jus cogens* are capable of conferring jurisdiction on the Court is without foundation, since it ignores the principle, well established in the Court’s jurisprudence, that jurisdiction is always dependent on the consent of the parties, even when the norm that a State is accused of violating is a *jus cogens* norm. Rwanda added that the same

is true of the Court’s jurisdiction to entertain a dispute concerning violation of a norm creating obligations *erga omnes*. It recalled that, in its *East Timor* Judgment, the Court held that “the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things”. Rwanda further contended that Article 66 of the Vienna Convention on the Law of Treaties did not provide for “any” dispute regarding contravention of a rule of *jus cogens* to be referred to the Court; it was concerned with “a very specific kind of dispute regarding one effect of norms of *jus cogens*”. According to Rwanda, Article 66 “is part and parcel of the machinery for the settlement of disputes regarding the interpretation and application of the Vienna Convention” and confers jurisdiction on the Court “only in respect of disputes regarding the validity of a treaty which is said to contravene a rule of *jus cogens*”, which is not at all the case in this instance.

124. At the hearings, and in response to the DRC’s argument that Rwanda’s reservations to Article IX of the Genocide Convention and to Article 22 of the Convention on Racial Discrimination were void because they conflicted with a peremptory norm of general international law within the meaning of Article 53 of the 1969 Vienna Convention, Rwanda further argued that Article 66 of the latter Convention cannot in any event apply in the present case in view of the Convention’s temporal scope. In this connection, it observed that the Genocide Convention, like the Convention on Racial Discrimination, was concluded prior to the entry into force for the two parties of the Vienna Convention, Article 4 of which provides that it applies “only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States”. Rwanda pointed out that the provisions of Article 66 of the Vienna Convention, “being jurisdictional rather than substantive”, are not declaratory of a rule of customary law and “can therefore bind States only as a matter of treaty and only in accordance with the terms of the treaty”. Rwanda added that, in any event, the application of Article 66 to the present case would serve no purpose, since it could only “give the Court jurisdiction over whether Rwanda’s reservation is valid”; however, Rwanda accepts that the Court “can rule on that question . . . as part of its task of determining whether the Genocide Convention affords a basis of jurisdiction”.

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125. The Court recalls that Article 4 of the Vienna Convention on the Law of Treaties provides for the non-retroactivity of that Convention in the following terms:

“Without prejudice to the application of any rules set forth in

the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.”

In this connection, the Court notes first that the Genocide Convention was adopted on 9 December 1948, the DRC and Rwanda having acceded to it on 31 May 1962 and 16 April 1975 respectively (see paragraph 38 above); and that the Convention on Racial Discrimination was adopted on 21 December 1965, the DRC and Rwanda having acceded on 21 April 1976 and 16 April 1975 respectively (see paragraph 74 above). The Court notes secondly that the Vienna Convention on the Law of Treaties entered into force between the DRC and Rwanda only on 3 February 1980, pursuant to Article 84, paragraph 2, thereof. The Conventions on Genocide and Racial Discrimination were concluded before the latter date. Thus in the present case the rules contained in the Vienna Convention are not applicable, save in so far as they are declaratory of customary international law. The Court considers that the rules contained in Article 66 of the Vienna Convention are not of this character. Nor have the two Parties otherwise agreed to apply Article 66 between themselves.

Finally, the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties (see paragraph 64 above).

* * *

126. The Court concludes from all of the foregoing considerations that it cannot accept any of the bases of jurisdiction put forward by the DRC in the present case. Since it has no jurisdiction to entertain the Application, the Court is not required to rule on its admissibility.

* * *

127. While the Court has come to the conclusion that it cannot accept any of the grounds put forward by the DRC to establish its jurisdiction in the present case, and cannot therefore entertain the latter's Application, it stresses that it has reached this conclusion solely in the context of the preliminary question of whether it has jurisdiction in this case — the issue to be determined at this stage of the proceedings (see paragraph 14 above). The Court is precluded by its Statute from taking any position on the merits of the claims made by the DRC. However, as the Court has stated on numerous previous occasions, there is a fundamental distinction between the question of the acceptance by States of the Court's juris-

dition and the conformity of their acts with international law. Whether or not States have accepted the jurisdiction of the Court, they are required to fulfil their obligations under the United Nations Charter and the other rules of international law, including international humanitarian and human rights law, and they remain responsible for acts attributable to them which are contrary to international law.

* * *

128. For these reasons,

THE COURT,

By fifteen votes to two,

Finds that it has no jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 28 May 2002.

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergethal, Elaraby, Owada, Simma, Tomka, Abraham; *Judge* ad hoc Dugard;

AGAINST: *Judge* Koroma; *Judge* ad hoc Mavungu.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this third day of February, two thousand and six, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of the Congo and the Government of the Republic of Rwanda, respectively.

(*Signed*) SHI Jiuyong,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judge KOROMA appends a dissenting opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS, ELARABY, OWADA and SIMMA append a joint separate opinion to the Judgment of the Court; Judge KOOIJMANS appends a declaration to the Judgment of the Court; Judge AL-KHASAWNEH appends a separate opinion to the Judgment of the Court; Judge ELARABY appends a declaration to the Judgment of the Court;

Judge *ad hoc* DUGARD appends a separate opinion to the Judgment of the Court; Judge *ad hoc* MAVUNGU appends a dissenting opinion to the Judgment of the Court.

(Initialled) J.Y.S.
(Initialled) Ph.C.



INTERNATIONAL LAW
FELLOWSHIP PROGRAMME

Peace Palace – The Hague, the Netherlands
6 to 7 July 2011

THE LAW OF TREATIES
PROF. OLIVIER CORTEN

Codification Division of the United Nations Office of Legal Affairs

LAW OF TREATIES
PROF. OLIVIER CORTEN

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For text, see “*The Work of the International Law Commission*”, 7th ed., vol. II (United Nations publication, Sales No. E.07.V.9), page 187
3. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986
For text, see “*The Work of the International Law Commission*”, 7th ed., vol. II (United Nations publication, Sales No. E.07.V.9), page 228
4. Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 1994 124
5. Peace Treaty and Principles of Interrelation between Russian Federation and Chechen Republic Ichkeria, 1997 130
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7. Records of the 4011th Meeting, Security Council, 10 June 1999 (S/PV.4011) 136
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8. Memorandum of Understanding between the Government of the Republic of Angola and UNITA on the Peace Process, 2002 (S/2002/483) 148

Jurisprudence

1. *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal, Decision of 31 July 1989, Reports of International Arbitral Awards*, vol. XX, pp. 119-213 (English translation in the annex to the application instituting proceedings of the Government of the Republic of Guinea-Bissau, *Case concerning the arbitral award of 31 July 1989 (Guinea-Bissau v. Senegal)*, *I.C.J. Reports 1989*) 164
2. *Case of Loizidou v. Turkey (Preliminary Objections)*, *ECHR 310, Application no. 15318/89, 23 March 1995* 202
3. *Prosecutor v. Dusko Tadic, ICTY, 10 August 1995* 224
4. *Prosecutor v. Dusko Tadic, ICTY, Appeals Chamber, 2 October 1995* 238

Recommended Readings (not reproduced)

1. Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester, M.U.P., 1984), 270 pp.
2. Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (The Hague, Martinus Nijhoff, 2009), pp. xxxiv-1058
3. Olivier Corten and Pierre Klein (Eds.), *The Vienna Conventions on the Law of Treaties. A Commentary*, Foreword by Sir Ian Sinclair (Oxford, O.U.P., 2011), pp. xxxiii-2071
4. Paul Reuter, *Introduction au droit des traités*, 3^{ème} éd. revue et augmentée par Philippe Cahier (Paris, P.U.F., 1995), 251 pp.

The Law of Treaties

6-7 July 2011

Olivier Corten

Professor at the *Université libre de Bruxelles*, Centre of International Law

General Method

Every session is conceived as an interactive process, rather than a classical *ex cathedra* lesson. This implies that, after a general presentation of some important points, a discussion will develop with all the participants. In order to be properly prepared to debate, every participant should read some texts and prepare answers to some questions prior to the session. The general structure of every lesson, as well as the corresponding texts and questions, are set out below.

Bibliography

This bibliography is limited to the law of treaties. For the lesson dedicated to general international law, many manuals of public international law are available.

1. Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester, M.U.P., 1984), 270 pp.
2. Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (The Hague, Martinus Nijhoff, 2009), pp. xxxiv-1058
3. Olivier Corten and Pierre Klein (Eds.), *The Vienna Conventions on the Law of Treaties. A Commentary*, Foreword by Sir Ian Sinclair (Oxford, O.U.P., 2011), pp. xxxiii-2071
4. Paul Reuter, *Introduction au droit des traités*, 3^{ème} éd. revue et augmentée par Philippe Cahier (Paris, P.U.F., 1995), 251 pp.

Law of Treaties: Definition and legal effects of a treaty (Wednesday, 6 July)

General Structure

1. What is a 'Treaty'?
2. Do agreements between States and non-State entities have international legal effects?
3. What are the legal effects of signature?
4. Is duress really a cause of invalidity?

Readings

1. Vienna Convention on the Law of Treaties, 1969 (articles 1-3, 42-53, 65-72)
2. *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal, Decision of 31 July 1989, Reports of International Arbitral Awards, Volume XX, pp. 119-213* (English translation in the annex to the application instituting proceedings of the Government of the Republic of Guinea-Bissau, *Case concerning the arbitral award of 31 July 1989 (Guinea-Bissau v. Senegal), I.C.J. 1989*))
3. Memorandum of Understanding between the Government of the Republic of Angola and UNITA on the Peace Process, 2002 (S/2002/483)
4. Peace Treaty and Principles of Interrelation between Russian Federation and Chechen Republic Ichkeria, 1997
5. Agreement Putting and End to the 1999 Yugoslavia War (Annex to Letter dated 7 June 1999 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council (S/1999/649))

Questions

1. In the Guinea-Bissau/Senegal Case, has the tribunal applied the principles enshrined in the Vienna Convention on the Law of Treaties?
2. Are the 'Memorandum of Understanding between the Government of the Republic of Angola and UNITA on the Peace Process', the 'Peace Treaty and Principles of Interrelation between Russian Federation and Chechen Republic Ichkeria' and the 'Peace Plan' annexed to Security Council resolution 1244 (1999) valid 'treaties'?

Law of Treaties: Relativity and Interpretation of Treaties (Thursday, 7 July)

General Structure

1. Are there exceptions to the general principle of relativity of treaties?
2. Validity and opposability of reservations
3. Approaches and Methods of interpretation in international law
4. Limits of articles 31-33 of the Vienna Convention on the Law of Treaties

Readings

1. Vienna Convention on the Law of Treaties, 1969 (articles 19-23, 26, 30-41, 52 and annexed Declaration), including status of signatures, accessions and ratifications, declarations and reservations
2. Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 1994
3. *Case of Loizidou v. Turkey* (Preliminary Objections), *ECHR 310*, Application no. 15318/89, 23 March 1995, paras. 65-98
4. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, paras. 26-79
5. *Prosecutor v. Dusko Tadic*, *ICTY 10 August 1995*, paras. 15-40
6. *Prosecutor v. Dusko Tadic*, *ICTY Appeals Chamber, 2 October 1995*, paras. 26-40

Questions

1. Does the Syrian Interpretative Declaration of article 52 of the Vienna Convention on the Law of Treaties bind other State parties?
2. Does article 52 of the Vienna Convention on the Law of Treaties extend to economic duress?
3. Do the ICJ, the Human Right Committee, the ECHR and the ICTY apply the Vienna Convention on the Law of Treaties principles of interpretation?

**Vienna Convention on the Law of Treaties (with
declarations and reservations), 1969**

VIENNA CONVENTION¹ ON THE LAW OF TREATIES

The States Parties to the present Convention, Considering the fundamental role of treaties in the history of international relations, Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized, Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

¹ Came into force on 27 January 1980, i.e., on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession with the Secretary-General of the United Nations, in accordance with article 84 (1):

State	Date of deposit of the instrument of ratification or accession (a)	State	Date of deposit of the instrument of ratification or accession (a)
Argentina	5 December 1972	Morocco	26 September 1972
Australia	13 June 1974 a	Nauru	5 May 1978 a
Austria	30 April 1979 a	New Zealand	4 August 1971
Barbados	24 June 1971	Niger	27 October 1971 a
Canada	14 October 1970 a	Nigeria	31 July 1969
Central African Republic	10 December 1971 a	Paraguay	3 February 1972 a
Cyprus	28 December 1976 a	Philippines	15 November 1972
Denmark	1 June 1976	Republic of Korea	27 April 1977
Finland	19 August 1977	Spain	16 May 1972 a
Greece	30 October 1974 a	Sweden	4 February 1975
Holy See	25 February 1977	Syrian Arab Republic	2 October 1970 a
Honduras	20 September 1979	Togo	28 December 1979 a
Italy	25 July 1974	Tunisia	23 June 1971 a
Jamaica	28 July 1970	United Kingdom of Great Britain and Northern Ireland	25 June 1971
Kuwait	11 November 1975 a	United Republic of Tanzania	12 April 1976 a
Lesotho	3 March 1972 a	Yugoslavia	27 August 1970
Mauritius	18 January 1975 a	Zaire	25 July 1977 a
Mexico	25 September 1974		

Subsequently, the Convention came into force for the following State on the thirtieth day following the date of deposit of its instrument of ratification or accession with the Secretary-General of the United Nations, in accordance with article 84 (2):

State	Date of deposit of the instrument of accession (a)
Rwanda	3 January 1980 a

^a For the texts of the reservations and declarations made upon ratification or accession, see p. 501 of this volume.

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention, Have agreed as follows:

PART I. INTRODUCTION

Article 1. SCOPE OF THE PRESENT CONVENTION

The present Convention applies to treaties between States.

Article 2. USE OF TERMS

1. For the purposes of the present Convention:

- (a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
- (b) "Ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;
- (c) "Full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;
- (d) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;
- (e) "Negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty;
- (f) "Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;
- (g) "Party" means a State which has consented to be bound by the treaty and for which the treaty is in force;
- (h) "Third State" means a State not a party to the treaty;
- (i) "International organization" means an intergovernmental organization.
2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3. INTERNATIONAL AGREEMENTS NOT WITHIN THE SCOPE OF THE PRESENT CONVENTION

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) The legal force of such agreements;

(b) The application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(c) The application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Article 4. NON-RETROACTIVITY OF THE PRESENT CONVENTION

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Article 5. TREATIES CONSTITUTING INTERNATIONAL ORGANIZATIONS AND TREATIES ADOPTED WITHIN AN INTERNATIONAL ORGANIZATION

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

Article 6. CAPACITY OF STATES TO CONCLUDE TREATIES

Every State possesses capacity to conclude treaties.

Article 7. FULL POWERS

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) He produces appropriate full powers; or

(b) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Article 8. SUBSEQUENT CONFIRMATION OF AN ACT PERFORMED WITHOUT AUTHORIZATION

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Article 9. ADOPTION OF THE TEXT

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10. AUTHENTICATION OF THE TEXT

The text of a treaty is established as authentic and definitive:

(a) By such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(b) Failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11. MEANS OF EXPRESSING CONSENT TO BE BOUND BY A TREATY

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12. CONSENT TO BE BOUND BY A TREATY EXPRESSED BY SIGNATURE

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) The treaty provides that signature shall have that effect;

(b) It is otherwise established that the negotiating States were agreed that signature should have that effect; or

(c) The intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(a) The initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(b) The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Article 13. CONSENT TO BE BOUND BY A TREATY EXPRESSED BY AN EXCHANGE OF INSTRUMENTS CONSTITUTING A TREATY

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) The instruments provide that their exchange shall have that effect; or

(b) It is otherwise established that those States were agreed that the exchange of instruments shall have that effect.

Article 14. CONSENT TO BE BOUND BY A TREATY EXPRESSED BY RATIFICATION, ACCEPTANCE OR APPROVAL

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) The treaty provides for such consent to be expressed by means of ratification;

(b) It is otherwise established that the negotiating States were agreed that ratification should be required;

- (c) The representative of the State has signed the treaty subject to ratification; or
 (d) The intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.
2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 15. CONSENT TO BE BOUND BY A TREATY EXPRESSED BY ACCESSION

The consent of a State to be bound by a treaty is expressed by accession when:
 (a) The treaty provides that such consent may be expressed by that State by means of accession;

- (b) It is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
 (c) All the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Article 16. EXCHANGE OR DEPOSIT OF INSTRUMENTS OF RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

- (a) Their exchange between the contracting States;
 (b) Their deposit with the depositary; or
 (c) Their notification to the contracting States or to the depositary, if so agreed.

Article 17. CONSENT TO BE BOUND BY PART OF A TREATY AND CHOICE OF DIFFERING PROVISIONS

1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18. OBLIGATION NOT TO DEFEAT THE OBJECT AND PURPOSE OF A TREATY PRIOR TO ITS ENTRY INTO FORCE

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
 (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

Article 19. FORMULATION OF RESERVATIONS

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) The reservation is prohibited by the treaty;

- (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
 (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20. ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) Acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) An act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21. LEGAL EFFECTS OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) Modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

*Article 22. WITHDRAWAL OF RESERVATIONS
AND OF OBJECTIONS TO RESERVATIONS*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.
3. Unless the treaty otherwise provides, or it is otherwise agreed:
 - (a) The withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;
 - (b) The withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23. PROCEDURE REGARDING RESERVATIONS

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.
3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24. ENTRY INTO FORCE

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
 2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
 3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.
 4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.
- Article 25. PROVISIONAL APPLICATION*
1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
 - (a) The treaty itself so provides; or
 - (b) The negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III. OBSERVANCE, APPLICATION AND INTERPRETATION
OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

Article 26. "PACTA SUNT SERVANDA"

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

Article 27. INTERNAL LAW AND OBSERVANCE OF TREATIES

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

SECTION 2. APPLICATION OF TREATIES

Article 28. NON-RETROACTIVITY OF TREATIES

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29. TERRITORIAL SCOPE OF TREATIES

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

*Article 30. APPLICATION OF SUCCESSIVE TREATIES RELATING
TO THE SAME SUBJECT-MATTER*

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) As between States parties to both treaties the same rule applies as in paragraph 3;
 - (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any ques-

tion of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31. GENERAL RULE OF INTERPRETATION

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

Article 33. INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34. GENERAL RULE REGARDING THIRD STATES

A treaty does not create either obligations or rights for a third State without its consent.

Article 35. TREATIES PROVIDING FOR OBLIGATIONS FOR THIRD STATES

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36. TREATIES PROVIDING FOR RIGHTS FOR THIRD STATES

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37. REVOCATION OR MODIFICATION OF OBLIGATIONS OR RIGHTS OF THIRD STATES

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.
2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38. RULES IN A TREATY BECOMING BINDING ON THIRD STATES THROUGH INTERNATIONAL CUSTOM

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

PART IV. AMENDMENT AND MODIFICATION OF TREATIES

Article 39. GENERAL RULE REGARDING THE AMENDMENT OF TREATIES

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Article 40. AMENDMENT OF MULTILATERAL TREATIES

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

- (a) The decision as to the action to be taken in regard to such proposal;
- (b) The negotiation and conclusion of any agreement for the amendment of the treaty.
3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.
5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
- (a) be considered as a party to the treaty as amended; and
- (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41. AGREEMENTS TO MODIFY MULTILATERAL TREATIES
BETWEEN CERTAIN OF THE PARTIES ONLY

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
- (a) The possibility of such a modification is provided for by the treaty; or
- (b) The modification in question is not prohibited by the treaty and:
- (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
- (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V. INVALIDITY, TERMINATION AND SUSPENSION
OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

- Article 42. VALIDITY AND CONTINUANCE IN FORCE OF TREATIES*
1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.
2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

*Article 43. OBLIGATIONS IMPOSED BY INTERNATIONAL LAW
INDEPENDENTLY OF A TREATY*

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 44. SEPARABILITY OF TREATY PROVISIONS

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.
2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.
3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:
- (a) The said clauses are separable from the remainder of the treaty with regard to their application;
- (b) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
- (c) Continued performance of the remainder of the treaty would not be unjust.
4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.
5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

*Article 45. LOSS OF A RIGHT TO INVOKE A GROUND FOR INVALIDATING,
TERMINATING, WITHDRAWING FROM OR SUSPENDING THE OPERATION OF A TREATY*

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

- (a) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
- (b) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

SECTION 2. INVALIDITY OF TREATIES

*Article 46. PROVISIONS OF INTERNAL LAW REGARDING
COMPETENCE TO CONCLUDE TREATIES*

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

*Article 47. SPECIFIC RESTRICTIONS ON AUTHORITY TO EXPRESS
THE CONSENT OF A STATE*

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to

observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 48. ERROR

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

Article 49. FRAUD

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50. CORRUPTION OF A REPRESENTATIVE OF A STATE

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51. COERCION OF A REPRESENTATIVE OF A STATE

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52. COERCION OF A STATE BY THE THREAT OR USE OF FORCE
A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53. TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ('JUS COGENS')
A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54. TERMINATION OF OR WITHDRAWAL FROM A TREATY UNDER ITS PROVISIONS OR BY CONSENT OF THE PARTIES

The termination of a treaty or the withdrawal of a party may take place:

- (a) In conformity with the provisions of the treaty; or

- (b) At any time by consent of all the parties after consultation with the other contracting States.

Article 55. REDUCTION OF THE PARTIES TO A MULTILATERAL TREATY BELOW THE NUMBER NECESSARY FOR ITS ENTRY INTO FORCE

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56. DENUNCIATION OF OR WITHDRAWAL FROM A TREATY CONTAINING NO PROVISION REGARDING TERMINATION, DENUNCIATION OR WITHDRAWAL

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or
(b) A right of denunciation or withdrawal may be implied by the nature of the treaty.
2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57. SUSPENSION OF THE OPERATION OF A TREATY UNDER ITS PROVISIONS OR BY CONSENT OF THE PARTIES

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

- (a) In conformity with the provisions of the treaty; or
(b) At any time by consent of all the parties after consultation with the other contracting States.

Article 58. SUSPENSION OF THE OPERATION OF A MULTILATERAL TREATY BY AGREEMENT BETWEEN CERTAIN OF THE PARTIES ONLY

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

- (a) The possibility of such a suspension is provided for by the treaty; or
(b) The suspension in question is not prohibited by the treaty and:
(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) Is not incompatible with the object and purpose of the treaty.
2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59. TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY IMPLIED BY CONCLUSION OF A LATER TREATY

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

- (a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

- (b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60. TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY AS A CONSEQUENCE OF ITS BREACH

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
- (a) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
- (i) In the relations between themselves and the defaulting State, or
 - (ii) As between all the parties;
- (b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
- (c) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
- (a) A repudiation of the treaty not sanctioned by the present Convention; or
- (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.
4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61. SUPERVENING IMPOSSIBILITY OF PERFORMANCE

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.
2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62. FUNDAMENTAL CHANGE OF CIRCUMSTANCES

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
- (a) If the treaty establishes a boundary; or
- (b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63. SEVERANCE OF DIPLOMATIC OR CONSULAR RELATIONS

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64. EMERGENCE OF A NEW PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65. PROCEDURE TO BE FOLLOWED WITH RESPECT TO INVALIDITY, TERMINATION, WITHDRAWAL FROM OR SUSPENSION OF THE OPERATION OF A TREATY

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66. PROCEDURES FOR JUDICIAL SETTLEMENT, ARBITRATION AND CONCILIATION

If, under paragraph 3 of article 65, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

- (a) Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;
- (b) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67. INSTRUMENTS FOR DECLARING INVALID, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE OPERATION OF A TREATY

1. The notification provided for under article 65, paragraph 1 must be made in writing.
2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 68. REVOCATION OF NOTIFICATIONS AND INSTRUMENTS PROVIDED FOR IN ARTICLES 65 AND 67

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69. CONSEQUENCES OF THE INVALIDITY OF A TREATY

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.
2. If acts have nevertheless been performed in reliance on such a treaty:
 - (a) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;
 - (b) Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 70. CONSEQUENCES OF THE TERMINATION OF A TREATY

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

- (a) Releases the parties from any obligation further to perform the treaty;
 - (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71. CONSEQUENCES OF THE INVALIDITY OF A TREATY WHICH CONFLICTS WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW

1. In the case of a treaty which is void under article 53 the parties shall:

- (a) Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
 - (b) Bring their mutual relations into conformity with the peremptory norm of general international law.
2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

- (a) Releases the parties from any obligation further to perform the treaty;
- (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72. CONSEQUENCES OF THE SUSPENSION OF THE OPERATION OF A TREATY

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

- (a) Releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;
 - (b) Does not otherwise affect the legal relations between the parties established by the treaty.
2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI. MISCELLANEOUS PROVISIONS

Article 73. CASES OF STATE SUCCESSION, STATE RESPONSIBILITY AND OUTBREAK OF HOSTILITIES

The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Article 74. DIPLOMATIC AND CONSULAR RELATIONS AND THE CONCLUSION OF TREATIES

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75. CASE OF AN AGGRESSOR STATE

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 76. DEPOSITARIES OF TREATIES

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77. FUNCTIONS OF DEPOSITARIES

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

- (a) Keeping custody of the original text of the treaty and of any full powers delivered to the depositary;
- (b) Preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;
- (c) Receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;
- (d) Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
- (e) Informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

- (f) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
- (g) Registering the treaty with the Secretariat of the United Nations;
- (h) Performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

Article 78. NOTIFICATIONS AND COMMUNICATIONS

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

- (a) If there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;
- (b) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;
- (c) If transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1(e).

Article 79. CORRECTION OF ERRORS IN TEXTS OR IN CERTIFIED COPIES OF TREATIES

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

- (a) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;
- (b) By executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or
- (c) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

- (a) No objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;
- (b) An objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.
5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.
6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a process-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

Article 80. REGISTRATION AND PUBLICATION OF TREATIES

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.
2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII. FINAL PROVISIONS

Article 81. SIGNATURE

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

Article 82. RATIFICATION

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 83. ACCESSION

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 84. ENTRY INTO FORCE

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 85. AUTHENTIC TEXTS

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this twenty-third day of May, one thousand nine hundred and sixty-nine.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

- (a) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
- (b) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

CHAPTER XXIII
LAW OF TREATIES

I. VIENNA CONVENTION ON THE LAW OF TREATIES

Vienna, 23 May 1969

ENTRY INTO FORCE: 27 January 1980, in accordance with article 84(1).
REGISTRATION: 27 January 1980, No. 18232.
STATUS: Signatories: 45; Parties: 111.
TEXT: United Nations, *Treaty Series*, vol. 1155, p. 331.

Note: The Convention was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties. The Conference was convened pursuant to General Assembly resolutions 2166 (XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967. The Conference held two sessions, both at the Neue Hofburg in Vienna, the first session from 26 March to 24 May 1968 and the second session from 9 April to 22 May 1969. In addition to the Convention, the Conference adopted the Final Act and certain declarations and resolutions, which are annexed to that Act. By unanimous decision of the Conference, the original of the Final Act was deposited in the archives of the Federal Ministry for Foreign Affairs of Austria. The text of the Final Act is included in document A/CONF.39/11/Add.2.

<i>Participant</i>	<i>Signature</i>	<i>Accession(a), Succession(b), Ratification</i>	<i>Participant</i>	<i>Signature</i>	<i>Accession(a), Succession(b), Ratification</i>
Afghanistan	23 May 1969		Côte d'Ivoire	23 Jul 1969	12 Oct 1992 d
Albania		27 Jun 2001 a	Croatia ³		9 Sep 1998 a
Algeria		8 Nov 1988 a	Cuba		28 Dec 1976 a
Andorra		5 Apr 2004 a	Cyprus	4 Sep 1969	22 Feb 1993 d
Argentina	23 May 1969	5 Dec 1972	Czech Republic ⁵	23 May 1969	
Armenia		17 May 2005 a	Democratic Republic of the Congo		25 Jul 1977 a
Australia		13 Jun 1974 a	Denmark	18 Apr 1970	1 Jun 1976
Austria		30 Apr 1979 a	Dominican Republic		1 Apr 2010 a
Barbados	23 May 1969	24 Jun 1971	Ecuador	23 May 1969	11 Feb 2005
Belarus		1 May 1986 a	Egypt		11 Feb 1982 a
Belgium		1 Sep 1992 a	El Salvador	16 Feb 1970	21 Oct 1991 a
Bolivia	23 May 1969		Estonia		19 Aug 1977
Bosnia and Herzegovina ³		1 Sep 1993 d	Ethiopia	30 Apr 1970	5 Nov 2004 a
Brazil	23 May 1969	25 Sep 2009	Finland	23 May 1969	8 Jun 1995 a
Bulgaria		21 Apr 1987 a	Gabon		21 Jul 1987
Burkina Faso		25 May 2006 a	Georgia		30 Apr 1970
Cambodia	23 May 1969		Germany ^{6,7}	30 Apr 1970	30 Oct 1974 a
Cameroon		23 Oct 1991 a	Ghana	23 May 1969	21 Jul 1987
Canada		14 Oct 1970 a	Greece		30 Oct 1974 a
Central African Republic		10 Dec 1971 a	Guatemala	23 May 1969	16 Sep 2005 a
Chile	23 May 1969	9 Apr 1981	Guinea		15 Sep 2005
China ¹		3 Sep 1997 a	Guyana	23 May 1969	25 Aug 1980 a
Colombia	23 May 1969	10 Apr 1985	Haiti		25 Feb 1977
Congo	23 May 1969	12 Apr 1982	Holy See	30 Sep 1969	20 Sep 1979
Costa Rica	23 May 1969	22 Nov 1996	Honduras	23 May 1969	19 Jun 1987 a
			Hungary		

<i>Participant</i>	<i>Signature</i>	<i>Accession(a), Succession(b), Ratification</i>	<i>Participant</i>	<i>Signature</i>	<i>Accession(a), Succession(b), Ratification</i>
Iran (Islamic Republic of)	23 May 1969		Iran (Islamic Republic of)	23 May 1969	
Ireland		7 Aug 2006 a	Ireland		7 Aug 2006 a
Italy	22 Apr 1970	25 Jul 1974	Italy	22 Apr 1970	25 Jul 1974
Jamaica	23 May 1969	28 Jul 1970	Jamaica	23 May 1969	28 Jul 1970
Japan		2 Jul 1981 a	Japan		2 Jul 1981 a
Kazakhstan		5 Jan 1994 a	Kazakhstan		5 Jan 1994 a
Kenya	23 May 1969		Kenya	23 May 1969	
Kiribati		15 Sep 2005 a	Kiribati		15 Sep 2005 a
Kuwait		11 Nov 1975 a	Kuwait		11 Nov 1975 a
Kyrgyzstan		11 May 1999 a	Kyrgyzstan		11 May 1999 a
Lao People's Democratic Republic		31 Mar 1998 a	Lao People's Democratic Republic		31 Mar 1998 a
Latvia		4 May 1993 a	Latvia		4 May 1993 a
Lesotho		3 Mar 1972 a	Lesotho		3 Mar 1972 a
Liberia	23 May 1969	29 Aug 1985	Liberia	23 May 1969	29 Aug 1985
Libyan Arab Jamahiriya		22 Dec 2008 a	Libyan Arab Jamahiriya		22 Dec 2008 a
Liechtenstein		8 Feb 1990 a	Liechtenstein		8 Feb 1990 a
Lithuania		15 Jan 1992 a	Lithuania		15 Jan 1992 a
Luxembourg	4 Sep 1969	23 May 2003	Luxembourg	4 Sep 1969	23 May 2003
Madagascar	23 May 1969		Madagascar	23 May 1969	
Malawi		23 Aug 1983 a	Malawi		23 Aug 1983 a
Malaysia		27 Jul 1994 a	Malaysia		27 Jul 1994 a
Maldives		14 Sep 2005 a	Maldives		14 Sep 2005 a
Mali		31 Aug 1998 a	Mali		31 Aug 1998 a
Mauritius		18 Jan 1973 a	Mauritius		18 Jan 1973 a
Mexico	23 May 1969	25 Sep 1974	Mexico	23 May 1969	25 Sep 1974
Mongolia		16 May 1988 a	Mongolia		16 May 1988 a
Montenegro ⁸		23 Oct 2006 d	Montenegro ⁸		23 Oct 2006 d
Morocco	23 May 1969	8 May 2001 a	Morocco	23 May 1969	8 May 2001 a
Mozambique		16 Sep 1998 a	Mozambique		16 Sep 1998 a
Myanmar		5 May 1978 a	Myanmar		5 May 1978 a
Nauru		9 Apr 1985 a	Nauru		9 Apr 1985 a
Nepal	23 May 1969		Nepal	23 May 1969	
Netherlands ⁹		4 Aug 1971	Netherlands ⁹		4 Aug 1971
New Zealand	29 Apr 1970	27 Oct 1971 a	New Zealand	29 Apr 1970	27 Oct 1971 a
Niger		31 Jul 1969	Niger		31 Jul 1969
Nigeria	23 May 1969	18 Oct 1990 a	Nigeria	23 May 1969	18 Oct 1990 a
Oman		28 Jul 1980 a	Oman		28 Jul 1980 a
Pakistan	29 Apr 1970		Pakistan	29 Apr 1970	
Panama			Panama		

Declarations and Reservations
(Unless otherwise indicated, the declarations and reservations were made upon ratification, accession or succession.)

AFGHANISTAN

Upon signature: "Afghanistan's understanding of article 62 (fundamental change of circumstances) is as follows:
"Sub-paragraph 2 (a) of this article does not cover unequal and illegal treaties, or any treaties which were contrary to the principle of self-determination. This view was also supported by the Expert Consultant in his report dated May 1968 (doc. A/CONF.39/L.40). While article 4, May 1969 (doc. A/CONF.39/L.40) to the Conference."

ALGERIA

Declaration:
The accession of the People's Democratic Republic of Algeria to the present Convention does not in any way mean recognition of Israel.
This accession shall not be interpreted as involving the es-establishment of relations of any kind whatever with Israel.

Reservation:

The Government of the People's Democratic Republic of Algeria considers that the competence of the International Court of Justice cannot be exercised with respect to a dispute such as that envisaged in article 66 (a) at the request of one of the parties, alone.
It declares that, in each case, the prior agreement of all the parties to the dispute is necessary for the dispute to be submitted to the said Court.

ARGENTINA

(a) The Argentine Republic does not regard the rule contained in article 45 (b) as applicable to it inasmuch as the rule in question provides for the renunciation of rights in advance.
(b) The Argentine Republic does not accept the idea that a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty should be invoked for its termination or withdrawal from the treaty, moreover, it objects to the reservations made by Afghanistan, Morocco and Syria with respect to article 62, paragraph 2 (a), and to any reservations to the same effect as those of the States referred to which may be made in the future with respect to article 62.

The application of this Convention to territories whose sovereignty is a subject of dispute between two or more States, whether or not they are parties to it, cannot be deemed to imply a modification, renunciation or abandonment of the position heretofore maintained by each of them.

ARMENIA¹¹

13 July 2006

Reservation

"The Republic of Armenia does not consider itself bound by the provisions of article 66 of the Vienna Convention on the Law of Treaties, and declares that for any dispute among the Contracting Parties concerning the application or the interpretation of any article of part V of the Convention to be submitted to the International Court

CHILE

Reservation:
The Republic of Chile declares its adherence to the general principle of the Vienna Convention on the Law of Treaties, without prejudice to the fact that States may, in accordance with the rules which modify this principle, and for this reason formulate a reservation relating to the provisions of article 62, paragraphs 1 and 3, of the Convention, which it considers inapplicable to Chile.

CHINA

Reservation:
1. The People's Republic of China makes its reservation to article 66 of the said Convention.
Declaration:
2. The signature to the said Convention by the Taiwan authorities, on 27 April 1970 in the name of "China" is illegal and therefore null and void.

COLOMBIA

Reservation:
With regard to article 25, Colombia formulates the reservation that the Political Constitution of Colombia does not recognize the provisional application of treaties, nor does it reserve the power to approve or disapprove any treaties and conventions which the Government concludes with other States or with international legal entities.

COSTA RICA¹⁴

Reservations and declarations made upon signature and confirmed upon ratification:
1. With regard to articles 11 and 12, the delegation of Costa Rica wishes to make a reservation to the effect that the Costa Rican system of constitutional law does not authorize any form of consent which is not subject to ratification by the Legislative Assembly.
2. With regard to article 25, it wishes to make a reservation to the effect that the Political Constitution of Costa Rica does not permit the provisional application of treaties, either.
3. With regard to article 27, it interprets this article as referring to secondary law and not to the provisions of the Political Constitution.
4. With regard to article 38, its interpretation is that no customary rule of general international law shall take precedence over any rule of the Inter-American System to which, in its view, this Convention is supplementary.

CUBA

Reservation:
The Government of the Republic of Cuba enters an explicit reservation to the procedure established under article 66 of the Convention, since it believes that any dispute should be settled by any means adopted by agreement between the parties to the dispute; the Republic of Cuba therefore cannot accept solutions which provide other means for settling disputes, including the consent of the parties to the dispute, to procedures for judicial settlement, arbitration and conciliation.
Declaration:
The Government of the Republic of Cuba declares that the Vienna Convention on the Law of Treaties essentially codified and systematized the norms that had been established by custom and other sources of international law concerning negotiation, signature, ratification, entry into force, termination and other stipulations relating to international treaties; hence, those provisions, owing to their compulsory character, by virtue of having been

established by universally recognized sources of international law, particularly those relating to invalidity, termination and suspension of the application of treaties, are applicable to any treaty negotiated by the Republic of Cuba prior to the foregoing convention, as well as to treaties concluded after its entry into force, in the event of conditions of inequality or which disregard or diminish its sovereignty and territorial integrity.

CZECH REPUBLIC⁵

DENMARK

As between itself and any State which formulates, wholly or in part, a reservation concerning the provisions of article 66 of the Convention concerning the compulsory settlement of certain disputes, Denmark will not consider itself bound by those provisions of part V of the Convention, according to which the procedures for settlement set forth in article 66 are not to apply in the event of reservations formulated by other States.

ECUADOR

Upon signature:

In signing this Convention, Ecuador has not considered it necessary to make any reservation in regard to article 4 of the Convention because it understands that the rules referred to in the first part of article 4 include the principle of the peaceful settlement of disputes, which is set forth in paragraph 2 of the Charter of the United Nations and which, as *ius cogens*, has universal and mandatory force.
Ecuador also considers that the first part of article 4 is applicable to existing treaties.
It wishes to place on record, in this form, its view that the said article 4 incorporates the indisputable principle that, in cases where the Convention codifies rules of *lex lata*, these rules, as pre-existing rules, may be invoked and applied to treaties signed before the entry into force of this Convention, which is the instrument codifying the rules.

Upon ratification:

In ratifying this Convention, Ecuador wishes to place on record its adherence to the principles, norms and methods of peaceful settlement of disputes provided for in the Convention, and to the provisions of the Convention which are expressly included in the Ecuadorian legal system in article 4, paragraph 3, of the Political Constitution of the Republic.

FINLAND¹⁵

"Finland also declares that as to its relation with any State which has made or makes a reservation to the effect that this State will not be bound by some or all of the provisions of article 66, Finland will consider itself bound by those procedural provisions of the Convention, not by the substance provisions, which the procedures provided for in article 66 do not apply as a result of the said reservation."

GERMANY⁷

Upon signature:

"The Federal Republic of Germany reserves the right, upon ratifying the Vienna Convention on the Law of Treaties, to state its views on the declarations made by other States upon signing or ratifying or according to that Convention and to make reservations regarding certain provisions of the said Convention."
Upon ratification:
.....

1. The Mongolian People's Republic declares that it reserves the right to take any measures to safeguard its interests in the case of the non-observance by other States of the provisions of the Vienna Convention on the Law of Treaties.

The Mongolian People's Republic deems it appropriate to draw attention to the discriminatory nature of Articles 81 and 83 of the Vienna Convention on the Law of Treaties and declares that the Convention should be open for accession by all States.

MOROCCO

Reservation made upon signature and confirmed upon ratification:

1. Morocco interprets paragraph 2 (a) of article 62 (Fundamental change of circumstances) as not applying to unlawful or inequitable treaties, or to any treaty contrary to the principle of self-determination. Morocco's views on paragraph 2 (a) were supported by the Expert Consultant in his statements in the Committee of the Whole on 11 May 1968 and before the Conference in plenary on 19 May 1969 (see Document A/CN.4.901/40).

2. It shall be understood that Morocco's signature of this Convention does not in any way imply that it recognizes Israel. Furthermore, no treaty relationships will be established between Morocco and Israel.

NETHERLANDS

Declaration:

"The Kingdom of the Netherlands does not regard the provisions of Article 66 (b) of the Convention as providing "some other method of peaceful settlement" within the meaning of the declaration of the Kingdom of the Netherlands accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on 1 August 1950."

NEW ZEALAND

Declaration:

The Government of New Zealand declares its understanding that nothing in article 66 of the Convention is intended to exclude the jurisdiction of the International Court of Justice where such jurisdiction exists under the provisions of any treaty in force binding the parties with regard to the settlement of disputes. In relations to states parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Justice, the Government of New Zealand declares that it will not regard the provisions of article 66 of the Vienna Convention as providing "some other method of peaceful settlement" within the meaning of this phrase where it is intended to refer to the provisions of the Vienna Convention accepting as compulsory the jurisdiction of the International Court of Justice, which was deposited with the Secretary-General of the League of Nations on 8 April 1940."

OMAN

Declaration:

According to the understanding of the Government of the Sultanate of Oman the implementation of paragraph (2) of article (62) of the said Convention does not include those Treaties which are contrary to the right to self-determination.

PERU¹⁹

Reservation:

2. The Federal Republic of Germany assumes that the jurisdiction of the International Court of Justice brought about by the Law of Treaties outside the Vienna Convention on the Law of Treaties cannot be excluded by Custom.

3. The Federal Republic of Germany interprets "measures taken in conformity with the Charter of the United Nations", as referred to in article 75, to mean future decisions by the Security Council of the United Nations in conformity with Chapter VII of the Charter for the maintenance of international peace and security.

GUATEMALA¹⁶

Upon signature:

Reservations:

I. Guatemala cannot accept any provision of this Convention which would prejudice its rights and its claim to the Territory of Belize.

II. Guatemala will not apply articles [...], 25 and 66 in so far as they are contrary to the provisions of the Constitution of the Republic.

III. Guatemala will apply the provision contained in article 38 of the Constitution where it considers that it is in the national interest to do so.

Upon ratification:

Reservations:

(a) The Republic of Guatemala formally confirms reservations I and II which formulated upon signature and which have the effect, respectively, that the Government of Guatemala could not accept any provision of the Convention which would prejudice its rights and its claim to the territory of Belize and that it would apply the provision contained in article 38 of the Convention only in cases where it considered that it was in the national interest to do so.

(b) With respect to reservation II, which was formulated on the same occasion and which indicated that the Republic of Guatemala would not apply articles [...], 25 and 66 of the [said Convention] insofar as they were contrary to the Constitution, Guatemala states:

(i) That it confirms the reservation with respect to the non-application of articles 25 and 66 of the Convention, insofar as both are incompatible with the provisions of the Political Constitution currently in force;

(ii) That it confirms the reservation with respect to article 38 of the Convention, to the effect that the article is understood to refer to the provisions of the Constitution of Guatemala, which take precedence over any law or treaty.

HUNGARY¹⁷

Reservations:

The participation of Kuwait in this Convention does not constitute a recognition of the State of Kuwait by the Government of the State of Kuwait and that furthermore, no treaty relations will arise between the State of Kuwait and Israel.

MONGOLIA¹⁸

Declarations:

For the Government of Peru, the application of articles 11, 12 and 25 of the Convention must be understood in accordance with, and subject to, the process of treaty signature, approval, ratification, accession and entry into force stipulated by its constitutional provisions.

PORTUGAL

Declaration:

"Article 66" of the Vienna Convention is inextricably linked with the provisions of Part V to which it relates. Therefore, Portugal declares that as to its relation with any State which has made or makes a reservation to the effect that this State will not be bound by some or all of the provisions of article 66, it will consider itself bound neither by those procedural norms nor by the substantive norms of Part V of the Convention to which the procedures provided for in Article 66 do not apply as a result of the said reservation. However, Portugal does not object to the entry into force of the remaining of such Convention between the Portuguese Republic and such States, provided that the Portuguese Republic is not bound by the provisions of the Convention of treaty relations between itself and that State with regard to all or certain norms of Part V, will not in any way impair the latter to fulfil any obligation embodied in those provisions to which it is subject under international law in dependency of the Convention".

RUSSIAN FEDERATION

The Union of Soviet Socialist Republics does not consider itself bound by the provisions of article 66 of the Vienna Convention on the Law of Treaties and declares that it reserves the right to take any measures to safeguard its interests in the case of the non-observance by other States of the provisions of the Vienna Convention on the Law of Treaties. Since they are contrary to established international practice.

Declaration:

The Union of Soviet Socialist Republics declares that it reserves the right to take any measures to safeguard its interests in the event of the non-observance by other States of the provisions of the Vienna Convention on the Law of Treaties.

SAUDI ARABIA

Reservation:

"... with a reservation regarding Article 66 so that the recourse to judgement or to arbitration should be preceded by agreement between the two countries concerned."

SLOVAKIA⁵

SYRIAN ARAB REPUBLIC

A—Acceptance of this Convention by the Syrian Arab Republic and ratification of it by its Government shall in no way signify recognition of Israel and cannot have as result the establishment with the latter of any contact governed by the provisions of this Convention.

B—The Syrian Arab Republic considers that article 81 is not in conformity with the aims and purposes of the

Convention in that it does not allow all States, without distinction or discrimination, to become parties to it.

C—The Government of the Syrian Arab Republic does not in any case accept the non-applicability of the principle of a funde-membris in circumstances such as those in article 62, paragraph 2 (a), inasmuch as it regards this as a flagrant violation of an obligatory norm which forms part of general international law and which recognizes the right of peoples to self-determination.

D—The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

The expression "the threat or use of force" used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests.

E—The Government of the Syrian Arab Republic shall not apply to the Annex to the Convention, which concerns obligatory conciliation.

TUNISIA

The dispute referred to in article 66 (a) requires the consent of all parties thereto in order to be submitted to the International Court of Justice for a decision.

UKRAINE

[Some reservations and declaration, identical in essence, mutatis mutandis, as the one made by the Union of Soviet Socialist Republics.]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND⁹

Upon signature:

In signing the Vienna Convention on the Law of Treaties the Government of the United Kingdom of Great Britain and Northern Ireland declare their understanding that nothing in article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes. In particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Justice, the Government of the United Kingdom declares that they will not regard the provisions of article 66 of the Vienna Convention as providing "some other method of peaceful settlement" within the meaning of sub-paragraph (a) of the Declaration of the Government of the United Kingdom accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on the 1st of January 1969.

The Government of the United Kingdom, while reserving their position for the time being with regard to other declarations and reservations made by various States on signing the Convention, consider it necessary to state that the United Kingdom does not accept that Custom might be of any valid claim in respect of the territory of British Honduras."

Upon ratification:

The United Kingdom's understanding that nothing in Article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes, in particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court, the United Kingdom will not regard the provisions of sub-paragraph (b) of Article 66 of the Vienna Convention on the Law of

Treaties as providing 'some other method of peaceful settlement' within the meaning of sub-paragraph (i) (a) of the Declaration of the Government of the United Kingdom which was deposited with the Secretary-General of the United Nations on the 1st of January 1969.

UNITED REPUBLIC OF TANZANIA

"Article 66 of the Convention shall not be applied to the United Republic of Tanzania by any State which

Objections
(Unless otherwise indicated the objections were made upon ratification, accession or succession.)

ALGERIA

The Government of the People's Democratic Republic of Algeria, dedicated to the principle of the inviolability of the frontiers inherited on accession to independence, expresses an objection to the reservation entered by the Kingdom of Morocco with regard to paragraph 2 (a) of article 62 of the Convention.

AUSTRIA

16 September 1998
With respect to the reservations made by Guatemala upon ratification:

"Austria is of the view that the Guatemalan reservations refer almost exclusively to general rules of [the said Convention] many of which are solidly based on international customary law. The reservations could call into question well-established and universally accepted norms. Austria is of the view that the reservations also raise doubts as to their compatibility with the object and purpose of the [said] Convention. Austria therefore objects to the [said] Convention. This objection does not preclude the entry into force of the [said Convention] between Austria and Guatemala."

CANADA

22 October 1971
"... Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable."

CHILE

The Republic of Chile formulates an objection to the reservation which has been made by Guatemala in the future relating to article 62, paragraph 2, of the Convention.

DENMARK

With regard to reservations made by Guatemala upon ratification:

"These reservations refer to general rules of the said Convention which are solidly based on customary international law. The reservation, if accepted - could call to question well established and universally accepted norms.

It is the opinion of the Government of Denmark that the reservations are not compatible with the object and purpose of [said Convention].

enters a reservation on any provision of part V or the whole of that part of the Convention."

VIET NAM

Reservation:

"According to this Convention, the Socialist Republic of Vietnam makes its reservation to article 66 of the said Convention."

Objections
(Unless otherwise indicated the objections were made upon ratification, accession or succession.)

It is in the common interest of States that treaties to which they have chosen to become Parties are respected, as to their object and purpose, by all Parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. The Government of Denmark therefore objects to the aforesaid reservations made by the Government of Guatemala to [the said Convention]. This objection does not preclude the entry into force of [the said Convention] between Guatemala and Denmark and will thus enter into force between Guatemala and Denmark without Guatemala benefiting from these reservations."

EGYPT

The Arab Republic of Egypt does not consider itself bound by part V of the Convention vis-à-vis States which formulate reservations concerning the procedures for judicial settlement and compulsory arbitration set forth in article 66 and in the annex to the Convention, and it rejects reservations made to the provisions of part V of the Convention.

FINLAND

16 September 1998
With regard to reservations made by Guatemala upon ratification:

"These reservations which consist of general references to national law and which do not clearly specify the extent of the derogation from the provisions of the Convention, may create serious doubts about the Commitment of the reserving State as to the object and purpose of the Convention and may contribute to undermining the basis of international treaty law. In accordance with Article 27 of the Convention, the reservation to article 27 of the Convention particularly problematic as it is a well-established rule of customary international law. The Government of Finland would like to recall that according to article 19 c of the [said] Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted. The Government of Finland therefore objects to these reservations made by the Government of Guatemala to the [said] Convention.

This objection does not preclude the entry into force of the Convention between Guatemala and Finland. The Government will thus become operative between the two States with all Guatemala benefiting from these reservations."

GERMANY

1. The Federal Republic of Germany rejects the reservations made by Tunisia, the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic and the

German Democratic Republic and with regard to article 66 of the Vienna Convention on the Law of Treaties as incompatible with the object and purpose of the said Convention. In this connection it wishes to point out that, as stated in the preamble of the Convention, the Government of the Federal Republic of Germany considers articles 53 and 64 to be inextricably linked to article 66 (a).

Objections, identical in essence, *mutatis mutandis* were also formulated by the Government of the Federal Republic of Germany in regard to reservations made by various states, as follows:

(i) 27 January 1988: in respect of reservations formulated by Bulgaria, the Hungarian People's Republic and the Czechoslovak Socialist Republic.

(ii) 21 September 1988: in respect of the reservation made by Mongolia.

(iii) 30 January 1989: in respect of the reservation made by Algeria.

12 June 2002
With respect to the reservation made by Viet Nam upon accession:

"The Government of the Federal Republic of Germany has examined the reservation to article 66 of the Vienna Convention on the Law of Treaties made by the Government of the Socialist Republic of Vietnam at the time of its accession to the Convention. The Government of the Federal Republic of Germany considers that the dispute settlement procedure provided for by article 66 is inextricably linked with the provisions of Part V of the Convention and was indeed the basis on which the Vienna Conference accepted elements of Part V. The dispute settlement set forth in article 66 therefore is an essential part of the Convention, and the Republic of Germany is thus of the view that the reservation excluding that procedure for judicial settlement, arbitration and conciliation followed in case of a dispute, raises doubts as to the full commitment of the Socialist Republic of Vietnam to the object and purpose of the Vienna Convention on the Law of Treaties.

The Government of the Republic of Germany, therefore, objects to the reservation made by the Government of the Socialist Republic of Vietnam.

This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the Socialist Republic of Vietnam."

ISRAEL

16 March 1970

"The Government of Israel has noted the political character of paragraph 2 in the declaration made by the Government of Morocco on that occasion. In the view of the Government of Israel, this Convention is not the proper place for making such political pronouncements. Moreover, that declaration cannot in any way affect the obligations of Morocco already existing under general international law or under particular treaties. The Government of Israel will, in so far as concerns the substance of the matter, adopt towards the Government of Morocco an attitude of complete reciprocity.

16 November 1970
[With respect of declaration "A" made by the Syrian Arab Republic, same declaration, in essence, as the one above.]

JAPAN

1. "The Government of Japan objects to any reservation in tended to exclude the application, wholly or in part, of the provisions of article 66 and the Annex and concerning the obligatory procedures for settlement of disputes and does not consider Japan to be in treaty relations with any State which has formulated or will formulate such reservation, in respect of those provisions

of Part V of the Convention regarding which the application of the obligatory procedures mentioned above are to be excluded as a result of the said reservation. Accordingly, the treaty relations between Japan and the Syrian Arab Republic do not include those provisions of Part V of the Convention which relate to the dispute settlement procedure in the Annex applies and the treaty relations between Japan and Tunisia will not include articles 53 and 64 of the Convention.

2. The Government of Japan does not accept the interpretation of article 52 put forward by the Government of the Syrian Arab Republic, since that interpretation does not correctly reflect the conclusions reached at the Conference of Vienna on the subject of coercion."

3 April 1987

"[I]n view of its declaration made upon accession] . . . the Government of Japan objects to the reservations made by the Governments of the German Democratic Republic and the Union of Soviet Socialist Republics to article 66 and the Annex to the Convention and regarding the provisions of the Convention that [it] will not be in treaty relations with the above States in respect of the provisions of Part V of the Convention.

2. The Government of Japan objects to the reservation made by the Government of the Union of Soviet Socialist Republics to article 20, paragraph 3.

3. The Government of Japan objects to the declarations made by the Governments of the German Democratic Republic and the Union of Soviet Socialist Republics reserving their right to take any measures to safeguard their interests in the event of the non-observance by other States of the provisions of the Convention."

NETHERLANDS

"The Kingdom of the Netherlands is of the opinion that the provisions regarding the settlement of disputes, as laid down in Article 66 of the Convention, are an important part of the Convention and that they cannot be separated from the substantive rules with which they are connected. Consequently, the Kingdom of the Netherlands considers it necessary to object to any reservation which is made by another State and whose aim is to exclude the application, wholly or in part, of the Convention to the State in question. The Convention, by objecting to the entry into force of the Convention between the Kingdom of the Netherlands and such a State, the Kingdom of the Netherlands considers that their treaty relations will not include the provisions of Part V of the Convention with regard to which the application of the procedures regarding the settlement of disputes, as laid down in Article 66, wholly or in part is excluded.

The Kingdom of the Netherlands considers that the absence of treaty relations between the Kingdom of the Netherlands and such a State with regard to all or certain provisions of Part V will not in any way impair the duty of the latter to fulfil any obligation embodied in those provisions of the Convention under international law independently of the Convention.

For the reasons set out above, the Kingdom of the Netherlands objects to the reservation of the Syrian Arab Republic, according to which its accession to the Convention shall not include the Annex, and to the reservation of Tunisia, according to which the submission to the International Court of Justice of a dispute referred to in Article 66 (a) requires the consent of all parties there to. Accordingly, the treaty relations between the Kingdom of the Netherlands and the Syrian Arab Republic will not include the provisions to which the conciliation procedure in the Annex applies and the treaty relations between the Kingdom of the Netherlands and Tunisia will not include Article 53 and 64 of the Convention."

Objections, identical in essence, *mutatis mutandis*, were also formulated by the Government of the Netherlands in regard to reservations made by various States, as follows:

(i) 14 September 1987: in respect of reservations formulated by the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic and the German Democratic Republic;

(ii) 14 July 1988: in respect of reservations made by the Government of Bulgaria, Czechoslovakia and Hungary;

(iii) 28 July 1988: in respect of one of the reservations made by Mongolia;

(iv) 30 January 1989: in respect of the reservation made by Algeria;

(v) 14 September 1998: in respect of the reservation to article 66 made by Guatemala.

15 November 1999
In regard to the reservation made by Cuba upon accession:

"In conformity with the terms of the objections the Kingdom of the Netherlands must be deemed to have objected to the reservation, excluding wholly or in part the procedures for the settlement of disputes, contained in article 66 of the Convention, as formulated by Cuba. Accordingly, the treaty relations between the Kingdom of the Netherlands and Cuba under the Convention do not include any of the provisions contained in Part V of the Convention. The Government of the Netherlands reiterates that the absence of treaty relations between itself and Cuba in respect of Part V of the Convention will not in any way impair the duty of Cuba to fulfil any obligation embodied in those provisions to which it is subject under international law independent of the Convention."

11 October 2001
In regard to the reservation made by Peru upon ratification:

"The Government of the Kingdom of the Netherlands has examined the reservation made by the Government of Peru at the time of its ratification of the Vienna Convention on the Law of Treaties. The Government of the Kingdom of the Netherlands notes that the articles 11, 12 and 25 of the Convention are being made subject to a general reservation referring to the contents of existing legislation in Peru. The Government of the Kingdom of the Netherlands is of the view that, in the absence of further clarification, this reservation raises doubts as to the commitment of Peru to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose by all Parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservation made by the Government of Peru to the Vienna Convention on the Law of Treaties. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Peru."

4 December 2001
In regard to the reservation made by Viet Nam upon accession:

"The Government of the Kingdom of the Netherlands has examined the reservation with regard to article 66

made by the Government of the Socialist Republic of Viet Nam at the time of its accession to the Vienna Convention on the Law of Treaties, concluded on 23 May 1969, and refers to the objections formulated by the Kingdom of the Netherlands on 19 April 1988, and to the above-mentioned Convention of 19 April 1988.

In conformity with the terms of the objections the Kingdom of the Netherlands must be deemed to have objected to the reservation formulated by the Socialist Republic of Viet Nam, excluding wholly the procedures for the settlement of disputes contained in article 66 of the Convention. Accordingly, the treaty relations between the Kingdom of the Netherlands and the Socialist Republic of Viet Nam under the Convention do not include any of the provisions contained in Part V of the Convention.

The Kingdom of the Netherlands stresses that the above-mentioned objections remain in effect. The Socialist Republic of Viet Nam, in respect of Part V of the Convention will not in any way impair the duty of Viet Nam to fulfil any obligation embodied in those provisions, to which it is bound under international law, independent of the Convention."

NEW ZEALAND

14 October 1971
 "... The New Zealand Government objects to the reservation entered by the Government of Syria to the obligatory conciliation procedures contained in the Annex to the Vienna Convention on the Law of Treaties and does not accept the entry into force of the Convention as between New Zealand and Syria."

10 August 1972
 "... The New Zealand Government objects to the reservation entered by the Government of Tunisia in respect of article 66 of the Convention and does not accept the entry into force of the Convention with Tunisia in respect of those provisions of the Convention to which the dispute settlement procedure provided for in Article 66 (a) is applicable."

SWEDEN

4 February 1975
 "Article 66 of the Convention contains certain provisions regarding procedures for judicial conciliation, arbitration and conciliation. According to these provisions, a dispute concerning the application or the interpretation of articles 53 or 64, which deal with the so-called *ius cogens*, may be submitted to the International Court of Justice. If the dispute concerns the application or the interpretation of any of the other articles in Part V of the Convention, the obligation of conciliation is lifted in the Annex to the Convention may be set in motion."

"The Swedish Government considers that these provisions regarding the settlement of disputes are an important part of the Convention and that they cannot be separated from the substantive rules with which they are connected. Consequently, the Swedish Government considers it necessary to raise objections to any reservation which is made by another State and whose aim is to exclude the application, wholly or in part, of the provisions regarding the settlement of disputes. While not objecting to the entry into force of the Convention between the Kingdom of the Netherlands and the Government of Tunisia, the Swedish Government considers that their treaty relations will not include either the procedural provision in respect of which a reservation has been made or the substantive provisions to which that procedural provision relates.

"For the reasons set out above, the Swedish Government objects to the reservation of the Syrian Arab Republic, according to which its accession to the Convention shall not include the Annex, and to the reservation of Tunisia, according to which the dispute

referred to in article 66 (a) requires the consent of all parties thereto in order to be submitted to the International Court of Justice for a decision. In view of these reservations, the Swedish Government considers, *vis-à-vis*, the Syrian Arab Republic, that the Convention will not be applied in relation to the Kingdom of the Netherlands. In conformity with the terms of the objections the Kingdom of the Netherlands must be deemed to have objected to the reservation formulated by the Syrian Arab Republic, excluding wholly the procedures for the settlement of disputes contained in article 66 of the Convention to which the conciliation procedure in the Annex applies and, *secondarily*, that the treaty relations between Sweden and Tunisia will not include articles 53 and 64 of the Convention."

"The Swedish Government has also taken note of the declaration of the Syrian Arab Republic, according to which it interprets the expression 'the threat or use of force' as used in article 52 of the Convention so as to extend also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty. The Government observes that since article 52 refers to threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations, it should be interpreted in the light of the practice which has developed or will develop on the basis of the Charter."

16 September 1998
With regard to reservations made by Guatemala upon ratification:

"The Government of Sweden is of the view that these reservations raise doubts as to their compatibility with the object and purpose of the Convention. The reservations refer almost exclusively to general rules of the Vienna Convention on the Law of Treaties, many of which are solidly based on customary international law. The reservations are not subject to any question well established and universally accepted under international law."

The Government of Sweden notes in particular that the Government of Guatemala has entered a reservation that it would apply the provisions contained in article 38 of the Convention only in cases where it considered that it was in the national interest to do so; and furthermore a reservation with respect to article 27 of the Convention, to the effect that the article is understood to refer to the provisions of the secondary legislation of Guatemala and not to those of its Political Constitution, which take precedence over any law or treaty.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose by all Parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservations made by the Government of Guatemala to the [said] Convention.

This objection does not preclude the entry into force of the Convention between Guatemala and Sweden. The Convention will thus become operative between the two States, without Guatemala benefiting from this reservation.

17 November 1999
With regard to the reservation made by Cuba upon accession:

"The Government of Sweden wishes to recall its statements of the 4th of February 1975, made in connection with its ratification of the Convention, relating to the accession of the Syrian Arab Republic and the Republic of Tunisia respectively, which reads as follows: 'Article 66 of the Convention contains certain provisions regarding procedures for judicial settlement, arbitration and conciliation. According to these provisions, a dispute concerning the application or the interpretation of articles 53 or 64, which deal with the so-called *ius cogens*, may be submitted to the International Court of Justice. If the dispute concerns the application or the

interpretation of any of the other articles in Part V of the Convention, the conciliation procedure specified in the Annex to the Convention may be set in motion. The Swedish Government considers that these provisions of the Convention will not be applied in relation to the Kingdom of the Netherlands. In conformity with the terms of the objections the Kingdom of the Netherlands must be deemed to have objected to the reservation formulated by the Syrian Arab Republic, excluding wholly the procedures for the settlement of disputes, contained in article 66 of the Convention to which the conciliation procedure in the Annex applies and, *secondarily*, that the treaty relations between Sweden and Tunisia will not include either the procedural provision in respect of which a reservation has been made or the substantive provisions to which that procedural provision relates. The Government observes that since article 52 refers to threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations, it should be interpreted in the light of the practice which has developed or will develop on the basis of the Charter."

"The Swedish Government considers that these provisions of the Convention will not be applied in relation to the Kingdom of the Netherlands. In conformity with the terms of the objections the Kingdom of the Netherlands must be deemed to have objected to the reservation formulated by the Syrian Arab Republic, excluding wholly the procedures for the settlement of disputes, contained in article 66 of the Convention to which the conciliation procedure in the Annex applies and, *secondarily*, that the treaty relations between Sweden and Tunisia will not include either the procedural provision in respect of which a reservation has been made or the substantive provisions to which that procedural provision relates. The Government observes that since article 52 refers to threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations, it should be interpreted in the light of the practice which has developed or will develop on the basis of the Charter."

25 July 2001
With regard to the reservation made by Peru upon ratification:

"The Government of Sweden has examined the reservation made by Peru at the time of its ratification of the Vienna Convention on the Law of Treaties. The Government of Sweden notes that articles 11, 12 and 25 of the Convention are being made subject to a general reservation referring to the contents of existing legislation in Peru. The Government of Sweden is of the view that, in the absence of further clarification, this reservation raises doubts as to the commitment of Peru to the object and purpose of the Convention and would like to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose by all Parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservation by the Government of Peru to the Vienna Convention on the Law of Treaties. This objection shall not preclude the entry into force of the Convention between Peru and Sweden. The Convention enters into force in its entirety between the two States, without Peru benefiting from its reservation."

"The United Kingdom does not accept that the interpretation of Article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act.

"The United Kingdom objects to the reservation entered by the Government of Syria in respect of the Annex to the Convention and does not accept the entry into force of the Convention as between the United Kingdom and Syria.

"The United Kingdom also objects to a reservation in relation to the territory of British Honduras made by Guatemala on signing the Convention, the United Kingdom does not accept that Guatemala has any rights or any valid claim with respect to that territory." The United Kingdom fully

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"The United Kingdom does not accept that the interpretation of Article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act.

"The United Kingdom objects to the reservation entered by the Government of Syria in respect of the Annex to the Convention and does not accept the entry into force of the Convention as between the United Kingdom and Syria.

"The United Kingdom also objects to a reservation in relation to the territory of British Honduras made by Guatemala on signing the Convention, the United Kingdom does not accept that Guatemala has any rights or any valid claim with respect to that territory." The United Kingdom fully

reserves its position in other respects with regard to the declarations made by various States on signature, to some of which the United Kingdom would object, if they were to be confirmed on ratification."

"... The United Kingdom objects to the reservation entered by the Government of Tunisia in respect of Article 66 of the Convention as between the United Kingdom and Tunisia."

"The Government of the United Kingdom of Great Britain and Northern Ireland note that the instrument of ratification of the Government of Finland, which was deposited with the Secretary-General on 19 August 1977, contains a declaration relating to paragraph 2 of article 7 of the Convention. The Government of the United Kingdom wish to inform the Secretary-General that they do not regard that declaration as in any way affecting the interpretation or application of article 7."

"The Government of the United Kingdom of Great Britain and Northern Ireland object to the reservation entered by the Government of the Union of Soviet Socialist Republics by which it rejects the application of article 66 of the Convention. Article 66 provides in substance that the International Court of Justice (in the case of disputes concerning the application or interpretation of articles 53 or 64) or by a conciliation procedure (in the case of the rest of Part V of the Convention). These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference. Accordingly the United Kingdom does not consider that the treaty relations between it and the Soviet Union include Part V of the Convention. In any other reservation the intention of which is to exclude the application, in whole or in part, of the provisions of article 66, to which the United Kingdom has already objected or which is made after the reservation by the Government of the Union of Soviet Socialist Republics, the United Kingdom will not consider its treaty relations with the State which has formulated or will formulate such a reservation as including those provisions of Part V of the Convention as including those which the application of article 66 is rejected by the reservation."

"The instrument of accession deposited by the Union of Soviet Socialist Republics included also a declaration that it would not accept the non-applicability of the principle of a fundamental change of circumstances in the event of the non-observance by other States of the provisions of the Convention. The purpose and scope of this statement is unclear, but, given that the Union of Soviet Socialist Republics has rejected the application of article 66 of the Convention, it would seem to apply rather to acts by Parties to the Convention in respect of treaties where such acts are in breach of the Convention. In such circumstances a State would not be limited in its response to the measures in article 60; under customary international law it would be entitled to take other measures, provided always that they are reasonable and in proportion to the breach."

With regard to the reservation made by Algeria upon accession: 11 October 1989

"The Government of the United Kingdom wish in this context to recall their declaration of 5 June 1987 (in respect of the accession of the Union of Soviet Socialist Republics) which in accordance with its terms applies to the reservations mentioned above, and will similarly

apply to any like reservations which any other State may formulate."

With regard to the reservation made by Cuba upon accession: 19 November 1999

"The Government of the United Kingdom of Great Britain and Northern Ireland objects to the reservation [...] of the Government of the United Kingdom wishes in this context to recall their declaration of 5 June 1987 (in respect of the accession of the Union of Soviet Socialist Republics) which in accordance with its terms applies to the reservation mentioned above, and will apply similarly to any like reservation which any other State may formulate. Accordingly, the United Kingdom does not consider that the instrument of accession deposited by the Republic of Cuba include Part V of the Convention."

With regard to the reservation made by Viet Nam upon accession: 22 July 2002

"The instrument of accession deposited by the Government of the Socialist Republic of Vietnam contains a reservation in respect of article 66 of the Convention. The United Kingdom objects to the reservation entered by the Socialist Republic of Vietnam in respect of article 66 of the Convention as between the United Kingdom and the Socialist Republic of Vietnam."

UNITED STATES OF AMERICA

The Government of the United States of America objects to reservation E of the Syrian instrument of accession: 26 May 1971

"In the view of the United States Government that reservation is incompatible with the object and purpose of the Convention and undermines the principle of impartial settlement of disputes concerning the invalidity, termination, and suspension of the operation of treaties, which was the subject of extensive negotiation at the Vienna Conference."

"The United States Government intends, at such time as it may become a party to the Vienna Convention on the Law of Treaties, to reaffirm its objection to the foregoing reservation and to reject treaty relations with the Syrian Arab Republic under all provisions in Part V of the Convention with regard to which the Syrian Arab Republic has rejected the obligatory conciliation procedures set forth in the Annex to the Convention."

"The United States Government is also concerned about Syrian reservation C declaring that the Syrian Arab Republic does not accept the non-applicability of the principle of a fundamental change of circumstances in the event of the non-observance by other States of the provisions of the Convention. The purpose and scope of this statement is unclear, but, given that the Union of Soviet Socialist Republics has rejected the application of article 66 of the Convention, it would seem to apply rather to acts by Parties to the Convention in respect of treaties where such acts are in breach of the Convention. In such circumstances a State would not be limited in its response to the measures in article 60; under customary international law it would be entitled to take other measures, provided always that they are reasonable and in proportion to the breach."

"The United States Government will consider that the absence of treaty relations between the United States of America and the Syrian Arab Republic with regard to certain provisions in Part V of the Convention which are subject to those provisions to which it is subject under international law independently of the Vienna Convention on the Law of Treaties."

"... The United States of America objects to the reservation by Tunisia to paragraph (c) of Article 66 of

the Vienna Convention on the Law of Treaties regarding a dispute as to the interpretation or application of Article 53 or 64. The right of a party to invoke the provisions of Article 53 or 64 is inextricably linked with the provisions of Article 66, regarding the validity of a reservation. The right of any party to submit to the International Court of Justice for decision any dispute concerning the application or the interpretation of Article 53 or 64."

Notifications made under the Annex (paragraphs 1 and 2) (List of conciliators nominated for the purpose of constituting a conciliation commission) (For the list of conciliators whose nomination was not renewed, see note 21 hereinafter).²¹

Participant	Nominations:	Date of deposit of notification with the Secretary-General:
Austria ²²	Ambassador Helmut Türk	8 Jan 2001
Austria ²²	Professor Karl Zemanek	8 Jan 2001
Croatia	Dr. Stanko Nick	14 Dec 1992
Croatia	Professor Dr. Budislav Vukas	14 Dec 1992
Denmark ²²	Prof. Iis Foighel	7 Mar 1995
Denmark ²²	Ambassador Skjold Gustav Mellbin	7 Mar 1995
Germany	Prof. Dr. Wolff Heintschel von Heinegg	12 Mar 2001
Germany	Dr. Andreas Zimmermann	12 March 2001
Paraguay	Dr. Luis Maria Ramirez Boettner	22 Sep 1994
Paraguay	Dr. Jeronimo Irala Burgos	22 Sept 1994
Slovakia	Dr. Igor Gresa, Director-General for Legal and Consular Affairs, Ministry of Foreign Affairs of Slovakia	9 Jul 2004
Spain	Sr. D. José Antonio Pastor Ridruego	3 Jan 2001
Spain	Sr. D. Aurelio Pérez Giralda	3 Jan 2001
Sweden ²²	Mr. Hans Danelius	17 Feb 1994
Sweden ²²	Mr. Love Gustav-Adolf Kellberg	17 Feb 1994
Switzerland	Mr. Lucius Caflisch, Judge at the European Court of Human Rights	6 March 2008
Switzerland	Mr. Walter Kälin, Professor of Public Law and International Law at the University of Berne	6 March 2008
The former Yugoslav Republic of Macedonia	Mrs. Elena Andreevska, Director of the Directorate on International Law	3 Mar 1999
The former Yugoslav Republic of Macedonia	Mr. Goran Stevceviski, Director of the Directorate on International Law	27 April 2011

Notes:

¹ Official Records of the General Assembly, Twenty-first Session, Supplement No. 16 (A/63/16), p. 95.

² *ibid.*, Twenty-second Session, Supplement No. 16 (A/67/16), p. 80.

³ The former Yugoslavia had signed and ratified the Convention on 23 May 1969 and 27 August 1970, respectively. See also note 1 under "Bosnia and Herzegovina", "Croatia", "former Yugoslavia", "Slovenia", "The Former Yugoslav Republic of Macedonia" and "Yugoslavia" in the "Historical Information" section in the front matter of this volume.

⁴ Signed on behalf of the Republic of China on 27 April

"Accordingly, the United States Government intends, at such time as it becomes a party to the Convention, to reaffirm its objection to the Tunisian reservation and declare that it will not consider that Article 53 or 64 of the Convention is in force between the United States of America and Tunisia."

1970. See note concerning signatures, ratifications, accessions, etc., on behalf of China (note 1 under "China" in the "Historical Information" section in the front matter of this volume).

In a communication addressed to the Secretary-General with reference to the above-mentioned signature, the Permanent Mission of the Union of Soviet Socialist Republics stated that the said signature was irregular since the so-called "Government of China" represented no one and had no right to speak on behalf of China, there being only one Chinese State in the world—the People's Republic of China.

The Permanent Mission of Bulgaria to the United Nations later addressed to the Secretary-General a similar communication.

In two letters addressed to the Secretary-General in regard to the above-mentioned communications, the Permanent Representative of China to the United Nations stated that the Republic of China, a sovereign State and Member of the United Nations, had attended the United Nations Conference on the Law of Treaties in 1968 and 1969, contributed to the formulation of the Convention concerned and signed it, and that "any statements or reservations to the said Convention that are incompatible with or derogatory to the legitimate position of the Government of the Republic of China shall in no way affect the rights and obligations of the Republic of China as a signatory of the said Convention".

⁵ Czechoslovakia had acceded to the Convention on 29 July 1987, with a reservation. By a communication received on 19 October 1990, the Government of Czechoslovakia notified the Secretary-General of its decision to withdraw the reservation made upon accession with respect to article 66 of the Convention, which reads as follows:

The Czechoslovak Socialist Republic does not consider itself bound by the provisions of article 66 of the Convention and declares that, in accordance with the principle of sovereign equality of States, for any dispute to be submitted to the International Court of Justice or to a conciliation procedure, the consent of all the parties to the dispute is required in each separate case.

See also note 1 under "Czech Republic" and note 1 under "Slovakia" in the "Historical Information" section in the front matter of this volume.

⁶ See note 1 under "Germany" in the "Historical Information" section in the front matter of this volume.

⁷ The German Democratic Republic had acceded to the Convention on 20 October 1986 with the following reservation and declarations:

Reservation:

The German Democratic Republic does not consider itself bound by the provisions of article 66 of the Convention.

In order to submit a dispute concerning the application or the interpretation of article 53 or 64 to the International Court of Justice for a decision or to submit a dispute on the application or the interpretation of any of the other articles of Part V of the Convention to the Conciliation Commission for consideration it shall be necessary in every single case to have the consent of all Parties to the dispute. The members of the Conciliation

commission shall be appointed jointly by the Parties to the dispute.

Declarations:

The German Democratic Republic declares that it reserves itself the right to take measures to protect its interests in the case that other States would not comply with the provisions of the Convention.

The German Democratic Republic holds the view that the provisions of articles 81 and 83 of the Convention are in contradiction to the principle according to which any State, the policy of which is guided by the purposes and principles of the United Nations Charter, has the right to become a Party to Conventions affecting the interests of all States.

See also note 2 under "Germany" in the "Historical Information" section in the front matter of this volume.

⁸ See note 1 under "Montenegro" in the "Historical Information" section in the front matter of this volume.

⁹ See note 1 under "Netherlands" regarding Aruba/Netherlands Antilles in the "Historical Information" section in the front matter of this volume.

¹⁰ With reference to this signature, communications have been addressed to the Secretary-General by the Permanent Missions to the United Nations of Bulgaria, Mongolia and the Union of Soviet Socialist Republics, stating that the said signature was illegal inasmuch as the South Korean authorities could not under any circumstances speak on behalf of Korea.

In a communication addressed to the Secretary-General Permanent Observer of the Republic of Korea to the United Nations declared that the above-mentioned statement by the Permanent Mission of the Union of Soviet Socialist Republics was without legal foundation and therefore neither affected the legitimate act of signing the Convention by the Government of the Republic of Korea nor prejudiced the rights and obligations of the Republic of Korea under it. He further stated that "in this connection, it should be noted that the General Assembly of the United Nations declared at its third session and has continuously reaffirmed thereafter that the Government of the Republic of Korea is the only lawful Government in Korea".

Subsequently, in a communication received on 24 October 2002, the Government of Bulgaria informed the Secretary-General of the following:

"... upon signature of the above Convention by the Republic of Korea, in 1971, the Government of the People's Republic of Bulgaria [] in [a] communication addressed to the Secretary-General with reference to the above-mentioned signature, ... stated that its Government considered the said signature was illegal inasmuch as the South Korean authorities could not speak on behalf of Korea.

Now therefore [the Government of the Republic of Bulgaria declares] that the Government of the Republic of Bulgaria, having reviewed the said declaration, hereby withdraws the same."

¹¹ Within a period of one year from the date of the depositary notification transmitting the reservation (i.e. 13 July 2005), none

of the Contracting Parties to the said Convention had notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged. Consequently, the reservation in question was accepted for deposit upon the above-stipulated one year period, that is on 13 July 2006.

¹² On 18 February 1993, the Government of Belgium notified the Secretary-General that its instrument of accession should have specified that the said accession was made subject to the said reservation. None of the Contracting Parties to the Agreement having notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date its circulation (23 March 1993), the reservation is deemed to have been accepted.

¹³ In a notification received on 6 May 1994, the Government of Bulgaria notified the Secretary-General that it had decided to withdraw the reservation made upon accession with regard to article 66 (a), which read as follows:

The People's Republic of Bulgaria does not consider itself bound by the provision of article 66, paragraph a) of the Convention, according to which any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration. The Government of the People's Republic of Bulgaria states that for the submission of such a dispute to the International Court of Justice for a decision, the preliminary consent of all parties to the dispute is needed.

¹⁴ In this regard, on 13 October 1998, the Secretary-General received from the Government of the United Kingdom of Great Britain and Northern Ireland the following communication: "The Government of the United Kingdom object to the reservation entered by Costa Rica in respect of article 27 and reiterate their observation in respect of the similar reservation entered by the Republic of Guatemala."

¹⁵ On 20 April 2001, the Government of Finland informed the Secretary-General that it had decided to withdraw its declaration in respect of article 7 (2) made upon ratification. The text of the declaration reads as follows:

"Finland declares its understanding that nothing in paragraph 2 of article 7 of the Convention is intended to modify any provisions of internal law in force in any Contracting State concerning competence to conclude treaties. Under the Constitution of Finland the competence to conclude treaties is given to the President of the Republic, who also decides on the issuance of full powers to the Head of Government and the Minister for Foreign Affairs.

¹⁶ On 15 March 2007, the Government of Guatemala informed the Secretary-General of that it had decided the following:

"Withdraw in their entirety the reservations formulated by the Republic of Guatemala on 23 May 1969 and confirmed upon 14 May 1997 to Articles 11 and 12 of the Vienna Convention on the Law of Treaties."

The text of the reservations made upon signature and ratification read as follows:

Upon signature:

Reservations:

I. Guatemala cannot accept any provision of this Convention which would prejudice its rights and its claim to the Territory of Belize.

II. Guatemala will not apply articles 11, 12, 25 and 66 in so far as they are contrary to the provisions of the Constitution of the Republic.

III. Guatemala will apply the provision contained in article 38 only in cases where it considers that it is in the national interest to do so.

Upon ratification:

Reservations:

(a) The Republic of Guatemala formally confirms reservations I and III which it formulated upon signing the [said Convention], to the effect, respectively, that Guatemala could not accept any provision of the Convention which would prejudice its rights and its claim to the territory of Belize and that it would apply the provision contained in article 38 of the Convention only in cases where it considered that it was in the national interest to do so; (b) With respect to reservation II, which was formulated on the same occasion and which indicated that the Republic of Guatemala would not apply articles 11, 12, 25 and 66 of the [said Convention] insofar as they were contrary to the Constitution, Guatemala states: (b) (f) That it confirms the reservation with respect to the non-application of articles 25 and 66 of the Convention, insofar as both are incompatible with provisions of the Political Constitution currently in force; (b) (l) That it also confirms the reservation with respect to the non-application of articles 11 and 12 of the Convention.

Guatemala's consent to be bound by a treaty subject to compliance with the requirements and procedures established in its Political Constitution. For Guatemala, the signature or initialing of a treaty by its representative is always understood to be *ad referendum* and subject, in either case, to confirmation by its Government.

(c) A reservation is hereby formulated with respect to article 27 of the Convention, to the effect that the article is understood to refer to the provisions of the secondary legislation of Guatemala and not to those of its Political Constitution, which take precedence over any law or treaty.

In will be recalled that the Secretary-General received communications in regard to the said reservations from the various States on the dates indicated hereinafter:

Germany (21 September 1998):

These reservations refer almost exclusively to general rules of the Convention many of which are solidly based on customary international law. The reservations could call into question well-established and universally-accepted norms of international law, especially insofar as the reservations concern articles 27 and 38 of the Convention. The Government of the Federal Republic of

Germany is of the view that the reservations also raise doubts as to their compatibility with the object and purpose of the Convention. The Government of the Federal Republic of Germany therefore objects to these reservations. This objection does not preclude the entry into force of the Convention between Germany and Guatemala.

Belgium (30 September 1998):

The reservations entered by Guatemala essentially concern general rules laid down in the [said Convention], many of which form part of customary international law. These reservations could call into question firmly established and universally accepted norms. The Kingdom of Belgium therefore raises an objection to the reservations. This objection does not prevent the [said Convention] from taking effect between the Kingdom of Belgium and Guatemala.

United Kingdom of Great Britain and Northern Ireland (13 October 1998):

"The Government of the United Kingdom of Great Britain and Northern Ireland object to the reservation entered by the Republic of Guatemala in respect of article 27, and wish to observe that the customary international law rule set out in that article applies to constitutional as well as to other internal laws. The Government of the United Kingdom object also to the reservation entered by the Republic of Guatemala in respect of article 38, by which the Republic of Guatemala seeks subjective application of the rule of customary international law set out in that article. The Government of the United Kingdom wish to recall their declaration of 5 June 1987 (in respect of the accession of the Union of Soviet Socialist Republics), which, in accordance with its terms, applies to the reservation entered by the Republic of Guatemala in respect of article 66 and will similarly apply to any like reservation which any other State may formulate."

¹⁷ In a communication received on 8 December 1989, the Government of Hungary notified the Secretary-General that it had decided to withdraw as from that date, its reservation regarding article 66 made upon accession which reservation reads as follows:

The Hungarian People's Republic does not consider itself bound by the provisions of article 66 of the Vienna Convention on the Law of Treaties and declares that submission of a dispute concerning the application or the interpretation of article 53 or 64 to the International Court of Justice for a decision or submission of a dispute concerning the application or the interpretation of any articles in Part V of the Convention to a conciliation commission for consideration shall be subject to the consent of all the parties to the dispute and that the conciliators constituting the conciliation commission shall have been nominated exclusively with the common consent of the parties to the dispute.

¹⁸ In a communication received on 19 July 1990, the Government of Mongolia notified the Secretary-General of its decision to withdraw the reservation made upon accession, which reads as follows:

1. The Mongolian People's Republic does not consider itself bound by the provisions of article 66 of the Convention.

The Mongolian People's Republic declares that submission of any dispute concerning the application or the interpretation of articles 53 and 64 to the International Court of Justice for a decision as well as submission of any dispute concerning the application or the interpretation of any other articles in Part V of the Convention to a conciliation commission for consideration shall be subject to the consent of all the parties to the dispute in each separate case, and that the conciliators constituting the conciliation commission shall be appointed by the parties to the dispute by common consent.

2. The Mongolian People's Republic is not obligated by the provisions of article 45 (b) of the Vienna Convention on the Law of Treaties, since they are contrary to established international practice.

¹⁹ On 14 November 2001, the Secretary-General received from the Government of Austria the following communication:

"Austria has examined the reservation made by the Government of Peru at the time of its ratification of the Vienna Convention on the Law of Treaties, regarding the application of articles 11, 12 and 25 of the Convention.

The fact that Peru is making the application of the said articles subject to a general reservation referring to the contents of existing national legislation, in the absence of further clarification raises doubts as to the commitment of Peru to the object and purpose of the Convention. According to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. In Austria's view the reservation in question is therefore inadmissible to the extent that its application could negatively affect the compliance by Peru with its obligations under articles 11, 12 and 25 of the Convention.

For these reasons, Austria objects to the reservation made by the Government of Peru to the Vienna Convention on the Law of Treaties.

This objection shall not preclude the entry into force of the Convention in its entirety between Peru and Austria, without Peru benefiting from its reservation."

In this regard, the Secretary-General received, on 21 January 2002, from the Government of Peru the following communication:

[The Government of Peru refers to the communication made by the Government of Austria relating to the reservation made by Peru upon ratification]. In this document, Member States are informed of a communication from the Government of Austria stating its objection to the reservation entered in respect of the Vienna Convention on the Law of Treaties by the Government of Peru on 14 September 2000 when depositing the corresponding instrument of ratification.

As the [Secretariat] is aware, article 20, paragraph 5, of the Vienna Convention states that "a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation (...)" The ratification and reservation by Peru in respect of the Vienna Convention were communicated to Member States on 9 November 2000.

Since the communication from the Austrian Government was received by the Secretariat on 14 November 2001 and circulated to Member States on 28 November 2001, the Peruvian Mission is of the view that there is tacit acceptance on the part of the Austrian Government of the reservation entered by Peru, the 12-month period referred to in article 20, paragraph 5, of the Vienna Convention having elapsed without any objection being raised. The Peruvian Government considers the communication from the Austrian Government as being without legal effect, since it was not submitted in a timely manner.

²⁰ On 24 February 1998, the Secretary-General received from the Government of Guatemala the following communication:

Guatemala maintains a territorial dispute over the illegal occupation of part of its territory by the Government of the United Kingdom of Great Britain and Northern Ireland, succeeded by the Government of Belize, and Guatemala therefore continues to assert a valid claim based on international law which must be settled by restoring to it the territory which historically and legally belongs to it.

²¹ The nomination of the conciliators listed hereinafter was not renewed after five years. For the date of their nomination and their titles, see the preceding editions of the present publication:

State:	Conciliators:
Australia	Mr. Patrick Brazil
Austria	Professor Stephen Verosta, Dr. Helmut Thierk, Dr. Karl Zemanek
Cyprus	M. Criton Tornaritis, Mr. Michalakis Triantafyllides, Mrs. Stella Soulioti
Denmark	Ambassador Paul Fischer
Finland	Professor Isi Fogheli,
Germany	Professor Erik Castrén Oppermann (German)

State:

Iran (Islamic Republic of)	Conciliators: Democratic Republic, Professor Günther Jaenicke (German Democratic Republic) Mr. Morteza Kalamanian Professor Ricardo Monaco, Professor Luigi Ferrarino Bravo
Japan	Professor Shigejiro Tabata, Judge Masato Fujisaki Mr. John Maximilian Nizareth
Kenya	Mr. S. Amos Wako
Mexico	Mr. Antonio Gomez Robledo, Mr. César Sepúlveda, Ambassador Alfonso de Rosenzweig-Díaz
Morocco	Mr. Abdelaziz Amine Filali, Mr. Ibrahim Keddami, Mr. Abdelaziz Benjelloun
Netherlands	Professor W. Riphagen, Professor A.M. Stuyt
Panama	Mr. Jorge E. Illueca, Mr. Naudar A. Pity Velásquez
Spain	Professor Julio Diego González Campos, Professor Manuel Díez de Velasco Vallejo
Sweden	Mr. Gunnar Lagergren, Mr. Ivan Wallenberg
United Kingdom of Great Britain and Northern Ireland	Professor R.Y. Jennings, Sir Dr. Milan Bulajic, Dr. Milivoj Despot, Dr. Budislav Vukas, Dr. Borut Bohle
Yugoslavia (former)	

²² Designation renewed on that date for a term of five years.

**Human Rights Committee, General Comment No. 24:
Issues relating to reservations made upon ratification
or accession to the Covenant or the Optional
Protocols thereto, or in relation to declarations under
article 41 of the Covenant, 1994**



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE

GENERAL COMMENT ADOPTED BY THE HUMAN RIGHTS COMMITTEE
UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS

Addendum

General Comment No. 24 (52) 1/

General comment on issues relating to reservations made upon
ratification or accession to the Covenant or the Optional
Protocols thereto, or in relation to declarations
under article 41 of the Covenant

1. As of 1 November 1994, 46 of the 127 States parties to the International Covenant on Civil and Political Rights had, between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant. Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. Others are couched in more general terms, often directed to ensuring the continued paramountcy of certain domestic legal provisions. Still others are directed at the competence of the Committee. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties. It is important for States parties to know exactly what obligations they, and other States parties, have in fact undertaken. And the Committee, in the performance of its duties under either article 40 of the Covenant or under the Optional Protocols, must know whether a State is bound by a particular obligation or to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative declaration and a determination of its acceptability and effects.

1/ Adopted by the Committee at its 1382nd meeting (fifty-second session) on 2 November 1994.

2. For these reasons the Committee has deemed it useful to address in a General Comment the issues of international law and human rights policy that arise. The General Comment identifies the principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted. It addresses the role of States parties in relation to the reservations of others. It further addresses the role of the Committee itself in relation to reservations. And it makes certain recommendations to present States parties for a reviewing of reservations and to those States that are not yet parties about legal and human rights policy considerations to be borne in mind should they consider ratifying or acceding with particular reservations.

3. It is not always easy to distinguish a reservation from a declaration as to a State's understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation. 2/ Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation.

4. The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant none the less to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.

5. The Covenant neither prohibits reservations nor mentions any type of permitted reservation. The same is true of the first Optional Protocol. The Second Optional Protocol provides, in article 2, paragraph 1, that "No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime". Paragraphs 2 and 3 provide for certain procedural obligations.

6. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19 (3) of the Vienna Convention on the Law of Treaties provides

2/ Article 2 (1) (d), Vienna Convention on the Law of Treaties 1969.

relevant guidance. ^{3/} It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

7. In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectivity of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve ~~inter se~~ application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and ~~a fortiori~~ when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (article 2 (1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (article 2 (2)).

^{3/} Although the Vienna Convention on the Law of Treaties was concluded in 1969 and entered into force in 1980 - i.e. after the entry into force of the Covenant - its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in The Reservations to the Genocide Convention Case of 1951.

10. The Committee has further examined whether categories of reservations may offend the "object and purpose" test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the prohibition of torture and arbitrary deprivation of life are examples. ^{4/} While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. The Covenant also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

12. The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party's jurisdiction. To this end

^{4/} Reservations have been entered to both article 6 and article 7, but not in terms which reserve a right to torture or to engage in arbitrary deprivation of life.

certain attendant requirements are likely to be necessary. Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

13. The issue arises as to whether reservations are permissible under the first Optional Protocol and, if so, whether any such reservation might be contrary to the object and purpose of the Covenant or of the first Optional Protocol itself. It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognize the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.

14. The Committee considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose. The Committee must control its own procedures as specified by the Optional Protocol and its rules of procedure. Reservations have, however, purported to limit the competence of the Committee to acts and events occurring after entry into force for the State concerned of the first Optional Protocol. In the view of the Committee this is not a reservation but, most usually, a statement consistent with its normal competence *ratione temporis*. At the same time, the Committee has insisted upon its competence, even in the face of such statements or observations, when events

or acts occurring before the date of entry into force of the first Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date. Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure. In so far as the most basic obligation has been to secure independent third party review of the human rights of individuals, the Committee has, where the legal right and the subject-matter are identical under the Covenant and under another international instrument, viewed such a reservation as not violating the object and purpose of the first Optional Protocol.

15. The primary purpose of the Second Optional Protocol is to extend the scope of the substantive obligations undertaken under the Covenant, as they relate to the right to life, by prohibiting execution and abolishing the death penalty. 5/ It has its own provision concerning reservations, which is determinative of what is permitted. Article 2, paragraph 1, provides that only one category of reservation is permitted, namely one that reserves the right to apply the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. Two procedural obligations are incumbent upon States parties wishing to avail themselves of such a reservation. Article 2, paragraph 1, obliges such a State to inform the Secretary-General, at the time of ratification or accession, of the relevant provisions of its national legislation during warfare. This is clearly directed towards the objectives of specificity and transparency and in the view of the Committee a purported reservation unaccompanied by such information is without legal effect. Article 2, paragraph 3, requires a State making such a reservation to notify the Secretary-General of the beginning or ending of a state of war applicable to its territory. In the view of the Committee, no State may seek to avail itself of its reservation (that is, have execution in time of war regarded as lawful) unless it has complied with the procedural requirement of article 2, paragraph 3.

16. The Committee finds it important to address which body has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the Covenant. As for international treaties in general, the International Court of Justice has indicated in the Reservations to the Genocide Convention Case (1951) that a State which objected to a reservation on the grounds of incompatibility with the object and purpose of a treaty could, through objecting, regard the treaty as not in effect as between itself and the reserving State. Article 20, paragraph 4, of the Vienna Convention on the Law of Treaties 1969 contains provisions most relevant to the present case on acceptance of and objection to reservations. This provides for the possibility of a State to object to a reservation made by another State. Article 21 deals with the legal effects of objections by

5/ The competence of the Committee in respect of this extended obligation is provided for under article 5 - which itself is subject to a form of reservation in that the automatic granting of this competence may be reserved through the mechanism of a statement made to the contrary at the moment of ratification or accession.

States to reservations made by other States. Essentially, a reservation precludes the operation, as between the reserving and other States, of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting State only to the extent that it has not been objected to.

17. As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party none the less does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States inter se. However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties

may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law. States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body.

20. States should institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of the Covenant. It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations.

**Peace Treaty and Principles of Interrelation
between Russian Federation and
Chechen Republic Ichkeria, 1997**

Peace Treaty and Principles of Interrelation between Russian Federation and Chechen Republic of Ichkeria

The esteemed parties to the agreement, desiring to end their centuries-long antagonism and striving to establish firm, equal and mutually beneficial relations, hereby agree:

1. To reject forever the use of force or threat of force in resolving all matters of dispute.
2. To develop their relations on generally recognized principles and norms of international law. In doing so, the sides shall interact on the basis of specific concrete agreements.
3. This treaty shall serve as the basis for concluding further agreements and accords on the full range of relations.
4. This treaty is written on two copies and both have equal legal power.
5. This treaty is active from the day of signing.

Moscow, 12 May 1997.

(Signed)

B. Yeltsin
President of the Russian Federation

A. Maskhadov
President of the Chechen Republic of Ichkeria

Governments of the Russian Federation and the Chechen Republic of Ichkeria
12 May 1997

**Letter dated 7 June 1999 from the Permanent
Representative of Germany to the United Nations
addressed to the President of the Security Council,
annex (S/1999/649) (Agreement putting an end to the
1999 Yugoslavia war)**



Security Council

S

Distr.
GENERAL

S/1999/649
7 June 1999

ORIGINAL: ENGLISH

LETTER DATED 7 JUNE 1999 FROM THE PERMANENT REPRESENTATIVE
OF GERMANY TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT
OF THE SECURITY COUNCIL

On behalf of the Presidency of the European Union, I have the honour to bring to your attention the agreement on the principles (peace plan) to move towards a resolution of the Kosovo crisis presented to the leadership of the Federal Republic of Yugoslavia by the President of Finland, Martti Ahtisaari, representing the European Union, and Viktor Chernomyrdin, Special Representative of the President of the Russian Federation. The Government of the Federal Republic of Yugoslavia and the Assembly of the Republic of Serbia accepted this document on 3 June 1999.

I should be grateful if you would have the text of the present letter and its annex circulated as a document of the Security Council.

(Signed) Dieter KASTRUP
Ambassador

Annex

Agreement should be reached on the following principles to move towards a resolution of the Kosovo crisis:

1. An immediate and verifiable end of violence and repression in Kosovo.
2. Verifiable withdrawal from Kosovo of all military police and paramilitary forces according to a rapid timetable.
3. Deployment in Kosovo under United Nations auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.
4. The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.
5. Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations. The interim administration to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo.
6. After withdrawal, an agreed number of Yugoslav and Serbian personnel will be permitted to return to perform the following functions:
 - Liaison with the international civil mission and the international security presence;
 - Marking/clearing minefields;
 - Maintaining a presence at Serb patrimonial sites;
 - Maintaining a presence at key border crossings.
7. Safe and free return of all refugees and displaced persons under the supervision of the Office of the United Nations High Commissioner for Refugees and unimpeded access to Kosovo by humanitarian aid organizations.
8. A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.

9. A comprehensive approach to the economic development and stabilization of the crisis region. This will include the implementation of a stability pact for South-Eastern Europe with broad international participation in order to further promotion of democracy, economic prosperity, stability and regional cooperation.

10. Suspension of military activity will require acceptance of the principles set forth above in addition to agreement to other, previously identified, required elements, which are specified in the footnote below.^a A military-technical agreement will then be rapidly concluded that would, among other things, specify additional modalities, including the roles and functions of Yugoslav/Serb personnel in Kosovo:

Withdrawal

- Procedures for withdrawals, including the phased, detailed schedule and delineation of a buffer area in Serbia beyond which forces will be withdrawn;

Returning personnel

- Equipment associated with returning personnel;
- Terms of reference for their functional responsibilities;
- Timetable for their return;
- Delineation of their geographical areas of operation;
- Rules governing their relationship to the international security presence and the international civil mission.

Notes

- ^a Other required elements:
 - A rapid and precise timetable for withdrawals, meaning, e.g., seven days to complete withdrawal and air defence weapons withdrawn outside a 25 kilometre mutual safety zone within 48 hours;
 - Return of personnel for the four functions specified above will be under the supervision of the international security presence and will be limited to a small agreed number (hundreds, not thousands);
 - Suspension of military activity will occur after the beginning of verifiable withdrawals;
 - The discussion and achievement of a military-technical agreement shall not extend the previously determined time for completion of withdrawals.

**Records of the 4011th Meeting, Security Council,
10 June 1999 (S/PV.4011)
(Debates preceding the adoption of Security Council
resolution 1244 (1999))**



Security Council

Fifty-fourth Year

4011th Meeting

Thursday, 10 June 1999, 12:15 p.m.
New York

Provisional

Expression of thanks to the retiring President

The President: As this is the first meeting of the Security Council for the month of June, I should like to take this opportunity to pay tribute, on behalf of the Council, to His Excellency Mr. Denis Dangué Réwaka, Permanent Representative of Gabon to the United Nations, for his service as President of the Security Council for the month of May 1999. I am sure I speak for all members of the Security Council in expressing deep appreciation to Ambassador Réwaka for the great diplomatic skill with which he conducted the Council's business last month.

Adoption of the agenda

The agenda was adopted.

Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999)

Letter dated 6 May 1999 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council (S/1999/516)

Letter dated 5 June 1999 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General (S/1999/646)

Letter dated 7 June 1999 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council (S/1999/649)

Letter dated 10 June 1999 from the Secretary-General addressed to the President of the Security Council (S/1999/663)

The President: I should like to inform the Council that I have received letters from the representatives of Albania, Belarus, Bulgaria, Costa Rica, Croatia, Cuba, Germany, Hungary, the Islamic Republic of Iran, Italy, Japan, Mexico, Norway, the former Yugoslav Republic of Macedonia and Ukraine, in which they request to be invited to participate in the discussion of the item on the Council's agenda. In accordance with the usual practice, I propose, with the consent of the Council, to invite those representatives to participate in the discussion without the right to vote, in accordance with the relevant provisions of

the Charter and rule 37 of the Council's provisional rules of procedure.

There being no objection, it is so decided.

At the invitation of the President, Mr. Nesho (Albania), Mr. Sychev (Belarus), Mr. Saitrov (Bulgaria), Mr. Niehaus (Costa Rica), Ms. Grčić (Croatia), Mr. Rodríguez Parrilla (Cuba), Mr. Kastrup (Germany), Mr. Erdős (Hungary), Mr. Nejad Hassseinian (Islamic Republic of Iran), Mr. Fulci (Italy), Mr. Satoh (Japan), Mr. Tello (Mexico), Mr. Kolby (Norway), Mr. Čalovski (the former Yugoslav Republic of Macedonia) and Mr. Yel'chenko (Ukraine) took the seats reserved for them at the side of the Council Chamber.

The President: I have received a request dated 9 June 1999 from Mr. Vladislav Jovanović to be allowed to address the Council in the course of its discussion of the item on its agenda. With the consent of the Council, I would propose to invite him to sit at the Council table and to make a statement.

There being no objection, it is so decided.

At the invitation of the President, Mr. Jovanović took a seat at the Council table.

The President: The Security Council will now begin its consideration of the item on its agenda. The Council is meeting in accordance with the understanding reached in its prior consultations.

Members of the Council have before them the following documents: S/1999/516, letter dated 6 May 1999 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council; S/1999/646, letter dated 5 June 1999 from the Charge d'affaires *ad interim* of the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General; S/1999/649, letter dated 7 June 1999 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council; S/1999/663, letter dated 10 June 1999 from the Secretary-General addressed to the President of the Security Council, transmitting a letter of the same date from the Secretary-General of the North Atlantic Treaty Organization.

Members of the Council also have before them document S/1999/661, which contains the text of a draft

President:	Mr. Jagne	(Gambia)
Members:	Argentina	Mr. Petrella
	Bahrain	Mr. Buallay
	Brazil	Mr. Fonseca
	Canada	Mr. Fowler
	China	Mr. Shen Guofang
	France	Mr. Dejammet
	Gabon	Mr. Dangué Réwaka
	Malaysia	Mr. Hasny
	Namibia	Mr. Andjaba
	Netherlands	Mr. van Walsum
	Russian Federation	Mr. Lavrov
	Slovenia	Mr. Türk
	United Kingdom of Great Britain and Northern Ireland	Sir Jeremy Greenstock
	United States of America	Mr. Burtleigh

Agenda

Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999)

Letter dated 6 May 1999 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council (S/1999/516)

Letter dated 5 June 1999 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General (S/1999/646)

Letter dated 7 June 1999 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council (S/1999/649)

Letter dated 10 June 1999 from the Secretary-General addressed to the President of the Security Council (S/1999/663)

99-85444 (E)
This record contains the original text of speeches delivered in English and interpretations of speeches delivered in the other languages. The final text will be printed in the *Official Records of the Security Council*. Corrections should be submitted to original speeches only. They should be incorporated in a copy of the record and be sent under the signature of a member of the delegation concerned, within one week of the date of publication, to the Chief of the Verbatim Reporting Service, room C-178.

resolution submitted by Canada, France, Gabon, Germany, Italy, Japan, the Netherlands, the Russian Federation, Slovenia, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Bahrain has joined as a sponsor of the draft resolution contained in document S/1999/661.

I should like to draw the attention of the members of the Council to the following other documents: S/1999/650, letter dated 2 June 1999 from the Chargé d'affaires *ad interim* of the Permanent Mission of Germany to the United Nations addressed to the Secretary-General; and S/1999/631, S/1999/647 and S/1999/655, letters dated 1, 5 and 7 June 1999, respectively, from the Chargé d'affaires *ad interim* of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council.

Members of the Council have received photocopies of a letter dated 4 June 1999 from the Permanent Representative of France to the President of the Security Council, transmitting the text of the Rambouillet accord, which will be issued as document S/1999/648, and of a letter dated 9 June 1999 from the Secretary-General transmitting a report of the Inter-Agency Needs Assessment Mission to the Federal Republic of Yugoslavia, which will be issued as document S/1999/662.

In accordance with the decision taken earlier in the meeting, I now invite Mr. Jovanović to make a statement.

Mr. Jovanović: The Federal Republic of Yugoslavia, the victim of the unilateral and brutal aggression of the United States of America and other member States of the North Atlantic Treaty Organization (NATO), has had two basic goals: to defend itself from that aggression, which it has done successfully, and to have the resolution of all questions and problems related to Kosovo and Metohija, an integral part of Serbia and the Federal Republic of Yugoslavia, shifted from the track of war and destruction to the track of political decision-making and law.

After the unilateral, unauthorized military action by NATO against the Federal Republic of Yugoslavia — a State Member of the United Nations and a founding Member of the world Organization — which lasted for two and a half months, this question has finally been put on the agenda of the Security Council. Unfortunately, this was done only in the wake of great delays and of many civilian victims, destruction and a humanitarian catastrophe of a size unprecedented in post-war European history.

solution in Kosovo and Metohija to be reached in direct talks between the Government of Serbia and the representatives of the Albanian minority in Kosovo and Metohija.

Also, on 9 May 1999, the Supreme Defence Council took a decision on the beginning of withdrawal of part of the units of the army of Yugoslavia and the special police forces from Kosovo and Metohija, following the elimination of the terrorist Kosovo Liberation Army (KLA). The actions of the Yugoslav security forces in Kosovo and Metohija have been taken within the framework of the legitimate efforts of the Federal Republic of Yugoslavia to stamp out terrorism, aided and abetted from abroad and aimed at causing a sovereign part of the Yugoslav territory to secede. Instead of welcoming that step, NATO intensified the bombing of the Federal Republic of Yugoslavia, thereby causing a mass exodus of the civilian population from Kosovo and Metohija and other parts of the Federal Republic of Yugoslavia.

At the same time, by focusing its raids exclusively on civilian targets, NATO has caused untold suffering to the entire population of the Federal Republic of Yugoslavia. Those who gave and carried out the orders for NATO's aggression against Yugoslavia have over the past 78 days violated all known international conventions in the field of the law of war, human rights and fundamental freedoms. No civilian target was spared by NATO planes. For the first time, NATO designated as legitimate targets hospitals, housing blocks, refugee centres and convoys, media institutions and journalists, prisons, schools, kindergartens, business centres and shopping malls, buses and passenger trains, even foreign diplomatic missions.

Set on intimidating and punishing the entire Yugoslav people, the NATO aggressors have destroyed the economy and the infrastructure, including bridges, roads and railroads, as well as power grids and the country's water supply system. Hundreds of thousands of people are now jobless, and millions are without any income. By destroying pharmaceutical and chemical plants and oil refineries, by bombing national parks and using inhumane weapons, including depleted uranium ammunition, NATO has caused an ecological catastrophe whose consequences will be felt for generations.

On behalf of the Government and people of the Federal Republic of Yugoslavia, I address to you, Mr. President, and to the members of the Security Council the following requests.

First, to point out the responsibility of the NATO member States for flagrantly violating the principles of the Charter of the United Nations and for the unauthorized and brutal bombing of the Federal Republic of Yugoslavia, which resulted in a massive humanitarian catastrophe, the destruction of the civilian infrastructure and the economy of the country, the death of more than 2,000 persons and the wounding of more than 6,000 innocent civilians. Secondly, to stress the moral, political and material obligation of the NATO member States fully to compensate the Federal Republic of Yugoslavia and its citizens within the shortest possible period of time for all the damage caused by the unauthorized and ruthless incessant bombing of the last 78 days. And thirdly, to restore to the Federal Republic of Yugoslavia, a peace-loving and independent country and a founding Member of the United Nations and of many other international organizations, all of its suspended rights in the world Organization, international and financial institutions and in other international organizations and associations, as well as to lift all existing sanctions and unilateral restrictions and all other discriminatory measures. I call on the Council to receive this request with understanding and the necessary urgency.

The Federal Republic of Yugoslavia accepted the G-8 principles of 7 May 1999 and the Ahtisaari-Chernomyrdin plan for the political solution of the crisis. In that context, the National Assembly of the Republic of Serbia made on 3 June 1999 the decision regarding the acceptance of that plan, which confirms the territorial integrity of Yugoslavia and a role for the United Nations in the solution of the crisis. The Ahtisaari-Chernomyrdin plan provided for a conclusion of a military-technical agreement determining the timetable and routes for the withdrawal of military and police forces of the Federal Republic of Yugoslavia from Kosovo and Metohija, including the elements for the return of some of them to Kosovo and Metohija.

Instead, we have faced NATO attempts to deploy its troops in Kosovo and Metohija by way of insisting on some political elements without a decision and a mandate from the Security Council. This provides further proof that the aggressor is trying to marginalize and bypass the world Organization, as well as the G-8 principles, with the aim of achieving its final goal of occupying a sovereign part of the Republic of Serbia and the Federal Republic of Yugoslavia.

In order to achieve lasting and stable peace in the region and to reaffirm the roles of the United Nations and

the Security Council as the highest bodies for the maintenance of international peace and security, it is necessary to deploy the United Nations peacekeeping mission in Kosovo and Metohija on the basis of a decision of the Security Council and of Chapter VI of the Charter of the United Nations and with the prior and full agreement of the Government of the Federal Republic of Yugoslavia.

In that context, the Security Council draft resolution should contain the following positions: a firm and unequivocal reaffirmation of full respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia; a political solution to the situation in Kosovo and Metohija that would be based on broad autonomy, in accordance with the highest international standards, such as the Paris Charter and the Organization for Security and Cooperation in Europe (OSCE) Copenhagen document, ensuring the full equality of all ethnic communities. The solution for Kosovo and Metohija must fall within the legal frameworks of the Republic of Serbia and the Federal Republic of Yugoslavia, which implies that all State and public services in the province, including the organs of law and order, should function according to the Constitutions and laws of the Federal Republic of Yugoslavia and the Republic of Serbia.

The draft resolution should not contain provisions on the International Tribunal, considering that that institution has no jurisdiction over the Federal Republic of Yugoslavia and was not included in the principles of the Ahtisaari-Chernomyrdin plan.

It should contain a condemnation of the NATO aggression against the Federal Republic of Yugoslavia as an act in violation of the Charter of the United Nations and a threat to international peace and security; a reference to the reports of United Nations Under-Secretary-General Sergio Vieira de Mello and United Nations High Commissioner for Human Rights Mary Robinson, which should point to the civilian casualties and material destruction as consequences of the NATO aggression, and a condemnation of the use of inhumane weapons — cluster and graphite bombs and depleted uranium ammunition; a condemnation of the NATO bombing of foreign diplomatic and consular missions in the Federal Republic of Yugoslavia, which represents a violation of international legal norms, especially of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; provisions ensuring unhindered and safe passage of refugees — Yugoslav citizens that left the country because of the NATO aggression — and the procedures and criteria established by

the competent Yugoslav Federal Republican authorities and the Office of the United Nations High Commissioner for Refugees; and respect for the Constitution and laws of the Republic of Serbia and the Federal Republic of Yugoslavia as necessary preconditions for the solution of all questions and a successful evolution of the international presence.

The Federal Republic of Yugoslavia firmly believes that the United Nations mission in Kosovo and Metohija, which would include military and civil components, would have to have the mandate and authority of the United Nations and the Security Council. The mandate of the mission should consist of the supervision of the implementation of the comprehensive agreement on Kosovo and Metohija, the withdrawal of Yugoslav military and police forces, the return of refugees and displaced persons and cooperation with international humanitarian organizations in providing assistance to all in need of it. The mission must guarantee full security and equality to all citizens in Kosovo and Metohija, regardless of their religious and national affiliations, and prevent all violence, especially the resurgence of terrorism and separatism. The mission as a whole must be responsible to and report to the Secretary-General, that is, the Security Council of the United Nations. The Federal Republic of Yugoslavia cannot accept a mission that would take over the role of government in Kosovo and Metohija or any form of open or hidden protectorate.

Considering that the NATO aggressors have carried out brutal crimes against the members of all national communities living in Kosovo and Metohija, the Federal Republic of Yugoslavia is, on principle and for other reasons, against the participation in the United Nations mission by the countries that have taken an active part in the aggression. We consider that the mission must reflect equal, regional and political representation which includes participation by countries such as Russia, China, India and non-aligned and developing countries from various regions of the world.

Yugoslavia requests that the commander of the military part and the head of the civil part of the mission be appointed by the Secretary-General of the United Nations on the basis of consultations with the Security Council and the Federal Republic of Yugoslavia as the host country. Also, the commander of the military part and the head of the civilian part of the mission should be directly responsible to the Secretary-General, that is, the Security Council.

only be instrumental in a de facto dismemberment of a sovereign European State, but would also set a negative precedent with far-reaching consequences for overall international relations, in particular for the position of small and medium-sized developing countries. In that way, the Security Council would in fact support the nefarious theory of limited sovereignty and open the floodgates to the unimpeded intervention and interference of the mighty and powerful in the internal affairs of other States.

By opposing these provisions, the Security Council shall stand up in defence not only of the territorial integrity and sovereignty of the Federal Republic of Yugoslavia, but also of the basic principles of the Charter of the United Nations and international law and, by the same token, of its own authority as the highest organ for the maintenance of international peace and security.

The President: I should like to inform the Council that I have received a letter from the representative of Turkey, in which he requests to be invited to participate in the discussion of the item on the Council's agenda. In conformity with the usual practice, I propose, with the consent of the Council, to invite that representative to participate in the discussion, without the right to vote, in accordance with the relevant provisions of the Charter and rule 37 of the Council's provisional rules of procedure.

There being no objection, it is so decided.

At the invitation of the President, Mr. Voral (Turkey) took the seat reserved for him at the side of the Council Chamber.

The President: It is my understanding that the Council is ready to proceed to the vote on the draft resolution before it (S/1999/691). Unless I hear any objection, I shall put the draft resolution to the vote.

There being no objection, it is so decided.

I shall first give the floor to those members of the Council who wish to make statements before the voting.

Mr. Andjaba (Namibia): On 24 March this year, in this very Chamber, my delegation called for a cessation of hostilities in the Federal Republic of Yugoslavia and appealed to the parties concerned to find a political solution. We have reiterated that call many a time and today my delegation is pleased that, finally, diplomacy has prevailed. We thank all those who have made it

The Federal Republic of Yugoslavia considers that the mandate and the duration of the United Nations mission must be limited in time. This includes the possibility of their being renewed after three or six months, on the basis of a decision of the Security Council and with the agreement of the Government of the Federal Republic of Yugoslavia. The attempt to grant an open mandate to the United Nations mission is absolutely unacceptable to the Federal Republic of Yugoslavia, since this would amount to a gross violation of the sovereignty of the Federal Republic of Yugoslavia, which otherwise is being reaffirmed by the proposed draft resolution.

I must note with regret that the draft resolution proposed by the G-8 is yet another attempt to marginalize the world Organization aimed at legalizing *post festum* the brutal aggression to which the Federal Republic of Yugoslavia has been exposed in the last two and a half months. In doing so, the Security Council and the international community would become accomplices in the most drastic violation of the basic principles of the Charter of the United Nations to date and in legalizing the rule of force rather than the rule of international law.

It is an historic anomaly that the victim of the aggression is being proclaimed guilty by those who are in possession of force and power and are in breach of all norms of international law and civilized behaviour among States, although the entire world public knows very well who is the victim and who is the guilty party.

The solutions which are being tried to be imposed on the Federal Republic of Yugoslavia set a dangerous precedent for the international community and a great encouragement to separatist and terrorist groups all over the world. They provide a broad authority to those who have conducted a total genocidal war against a sovereign and peace-loving country and legitimize the policy of ultimatum and *diktat*. In sub-item (a) and (b) of operative paragraph 9, the draft resolution requests in all practical terms that the Federal Republic of Yugoslavia renounce a part of its sovereign territory and grant amnesty to terrorists. Furthermore, in operative paragraph 11, the draft resolution establishes a protectorate, provides for the creation of a separate political and economic system in the province and opens up the possibility of the secession of Kosovo and Metohija from Serbia and the Federal Republic of Yugoslavia.

In adopting the present text of the draft resolution, the Security Council would be writing one of the darkest pages of its history. In doing so, the Security Council would not

possible. We sincerely hope that this marks the end of military action against the Federal Republic of Yugoslavia.

It is regrettable, however, that only after the senseless killing of innocent civilians, the destruction of property and the massive displacement of people has a peace plan been possible. Indeed, the international community must draw important lessons from the situation in and around Kosovo.

While the end of hostilities in the Federal Republic of Yugoslavia is hopefully in sight, the root historical causes of this conflict should be addressed fully. Only then can lasting peace be guaranteed in Kosovo and the Federal Republic of Yugoslavia as a whole.

Namibia does not condone ethnic cleansing and other human rights abuses committed in the Federal Republic of Yugoslavia. Equally, we oppose any attempt to dismember the Federal Republic of Yugoslavia, now or in the future.

The purposes and principles of the Charter of the United Nations are clear. It is the primary responsibility of the Security Council to maintain international peace and security. All States Members of the United Nations have the obligation to uphold the provisions of the Charter in that regard.

Mr. Lavrov (Russian Federation) (*spoke in Russian*): Today's draft resolution of the Security Council was prepared by the Ministers for Foreign Affairs of the G-8 on the basis of the principles for a political settlement and the Kosovo settlement to the political track along with the peace plan adopted by the leadership of the Federal Republic of Yugoslavia, as well as of the relevant provisions of previous Security Council decisions. The draft resolution's main significance lies in the fact that it restores the Kosovo settlement to the political track along with the central role of the United Nations. This is the only possible way to surmount the crisis in and around the Yugoslav province of Kosovo. It is precisely such an approach to a solution of the Kosovo problem that Russia has always and consistently advocated, seeking the earliest possible end to the unlawful military actions of the North Atlantic Treaty Organization (NATO) against Yugoslavia as an absolute condition for a political settlement and for overcoming the humanitarian catastrophe.

Russia has strongly condemned the NATO aggression against a sovereign State. This action on the part of the Alliance, which was undertaken in violation of the United Nations Charter and in circumvention of the Security Council, has severely destabilized the entire system of international relations based on the primacy of international

law. The humanitarian crisis in Kosovo was transformed by the NATO bombing into the most serious humanitarian catastrophe, encompassing not only Kosovo, but all Yugoslavia and the Balkans as a whole. The irreparable harm done to the social and economic development of all Balkan States and to the environment is enormous.

We cannot close our eyes to violations of international humanitarian law, wherever they may take place. However, the tragic consequences of the NATO air strikes clearly show that such violations cannot be countered by even greater lawlessness and the wanton use of violence. It is essential to fight for respect of human rights and norms of international humanitarian law, but solely through political and legal methods on the firm basis of the United Nations Charter and the relevant multilateral instruments.

We are pleased that the members of NATO have finally recognized the utter futility of the war they have unleashed and come to understand that there is no alternative to respecting the Charter prerogatives of the Security Council as the body charged with the primary responsibility for the maintenance of international peace and security. This insight, won at such a heavy price, is clearly reflected in the draft resolution, which puts an end to the military actions of NATO and establishes genuine conditions for the return of refugees and displaced persons.

In addition to clearly reaffirming the commitment of all States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the draft resolution authorizes the deployment in Kosovo, under United Nations auspices, of international civil and security presences with a clearly formulated, concrete mandate. The activities of both presences are to be carried out under the thorough political control of the Security Council, to which the Secretary-General will regularly submit reports on the course of the entire operation. As a matter of principle, it is important that the obligations of the Special Representative of the Secretary-General, who is to be appointed in consultation with the Security Council, should include the overall coordination of all international efforts in Kosovo. This will undoubtedly help enhance their effectiveness.

The draft resolution's reference to Chapter VII of the United Nations Charter relates exclusively to ensuring the safety and security of international personnel and compliance with the provisions of the draft resolution. It does not even hint at the possibility of any use of force

beyond the limits of the tasks clearly set out by the Security Council.

The demilitarization of the so-called Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups is of special importance in terms of achieving a lasting and effective political settlement of the Kosovo crisis. The draft resolution clearly defines this as one of the principal duties of the international security presence. This task must be carried out conclusively, with maximal effectiveness and completely. The KLA must scrupulously comply with all demands made of it by the Security Council and must cease to exist as a military force.

The leadership of the Federal Republic of Yugoslavia should, of course, comply fully with the obligations it has entered into.

Russia supports and is taking an active part in efforts to find a comprehensive approach to the social and economic reconstruction, stabilization and development of the Balkan region. We are convinced that the effectiveness of those efforts will depend directly on full, constructive involvement by all States of the region, including the Federal Republic of Yugoslavia. The United Nations has an important coordinating role to play here. We are certain that the adoption and ensuing adequate implementation of the draft resolution will make a vital contribution to achieving a peaceful, just and long-term solution to the Kosovo crisis under United Nations auspices. The Russian Federation will continue actively to promote the earliest possible achievement of that goal.

The draft resolution has even greater significance, going beyond the framework of the Kosovo problem and the Balkan region. It highlights the urgent need to form a truly multi-polar world order based on the Charter of the United Nations, a world order in which there will be no room for unilateral diktat or attempts at domination by force. Only on such a collective basis can we achieve lasting solutions to the complex problems of today's world.

Mr. Shen Guofang (China) (*spoke in Chinese*): The flames of war which have been raging for 79 days on the soil of Yugoslavia have finally died out.

More than two months ago, without authorization from the Security Council, the United States-led North Atlantic Treaty Organization (NATO) blatantly launched military strikes against the sovereign State of the Federal Republic of Yugoslavia. In taking this action, NATO seriously violated the Charter of the United Nations and norms of

international law, and undermined the authority of the Security Council, thus setting an extremely dangerous precedent in the history of international relations.

For over two months, the United States-led NATO has waged an unprecedented and indiscriminate bombing campaign against the Federal Republic of Yugoslavia, killing over 1,000 civilians, injuring thousands and leaving nearly one million displaced persons and refugees. Civilian facilities such as factories, bridges, schools and hospitals have been wantonly destroyed. What is more flagrant is that even the embassy of the People's Republic of China in Yugoslavia, which is under the protection of international conventions, became one of NATO's bombing targets. This war, waged in the name of humanitarianism, has in fact produced the greatest humanitarian catastrophe in post-Second-World-War Europe and has seriously undermined peace and stability in the Balkans. Naturally, it has met with strong international condemnation.

From the very beginning, the Chinese Government and people have made their principled stance clear. We firmly oppose the NATO military action against Yugoslavia and demand that NATO immediately stop all its bombing operations. We stand for peaceful settlement of the question of Kosovo on the basis of respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and guarantees of the legitimate rights and interests of all ethnic groups in the Kosovo region. We are of the view that any proposed solution should take full account of the views of the Federal Republic of Yugoslavia.

Although NATO's bombing has stopped, the damage it has inflicted on the Balkans and the suffering it has brought to the people there cannot possibly disappear soon. Meanwhile, it will give us a lot to ponder for a long time to come.

There are nearly 200 countries and over 2,500 ethnic groups all over the world. The majority of countries are home to multiple ethnic groups, and many countries have ethnic problems; NATO countries are no exception. We have always held that in multiethnic countries there should be equality, unity, harmony and common prosperity among the various ethnic groups. We are not in favour of discrimination against or the oppression of any ethnic group. At the same time, we are also opposed to any act that would create division between different ethnic groups and undermine national unity. Fundamentally speaking, ethnic problems within a State

should be settled in a proper manner by its own Government and people, through the adoption of sound policies. They must not be used as an excuse for external intervention, much less used by foreign States as an excuse for the use of force. Otherwise, there will be no genuine security for States and no normal order for the world.

Fifty-four years ago, on 26 June, the Charter of the United Nations was signed in San Francisco. The birth of the United Nations and its Charter reflected the lofty aspirations of peoples that had suffered enormously from two catastrophic world wars, waged for peace, cooperation and development. Over the ensuing years, the purposes and principles of the Charter have withstood the test of time and have become universally recognized basic norms governing contemporary international relations.

History has proved that only by upholding the purposes and principles of the United Nations Charter and by seeking peaceful solutions to regional and international conflicts and disputes through talks and negotiations, without resorting to force, can all States live in harmony and achieve common development; only thus can world peace be maintained and promoted; and only thus can the United Nations play a role in international affairs. Any deviation from or violation of these purposes and principles will lead to rampant power politics, will make it impossible to effectively safeguard regional and international peace, and will damage the sovereignty and independence of countries, especially the small and weak ones, weakening the role of the United Nations and leaving the world with no peace.

Respect for sovereignty and non-interference in each other's internal affairs are basic principles of the United Nations Charter. Since the end of the cold war, the international situation has undergone major changes, but those principles are by no means outdated. On the contrary, they have acquired even greater relevance. At the threshold of the new century, it is even more imperative for us to reaffirm those principles. In essence, the "human rights over sovereignty" theory serves to infringe upon the sovereignty of other States and to promote hegemonism under the pretext of human rights. This totally runs counter to the purposes and principles of the United Nations Charter. The international community should maintain vigilance against it.

The draft resolution before us has failed to fully reflect China's principled stand and justified concerns. In particular, it makes no mention of the disaster caused by NATO bombing in the Federal Republic of Yugoslavia and

it has failed to impose necessary restrictions on the invoking of Chapter VII of the United Nations Charter. Therefore, we have great difficulty with the draft resolution. However, in view of the fact that the Federal Republic of Yugoslavia has already accepted the peace plan, that NATO has suspended its bombing in the Federal Republic of Yugoslavia, and that the draft resolution has reaffirmed the purposes and principles of the United Nations Charter, the primary responsibility of the Security Council for the maintenance of international peace and security and the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the Chinese delegation will not block the adoption of this draft resolution.

The President: I shall now put to the vote the draft resolution contained in S/1999/661.

A vote was taken by a show of hands.

In favour:

Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Namibia, Netherlands, Russian Federation, Slovenia, United Kingdom of Great Britain and Northern Ireland, United States of America

Against:

None

Abstaining:

China

The President: The result of the voting is as follows: 14 in favour, none against and 1 abstention. The draft resolution has been adopted as resolution 1244 (1999).

I shall now call on those members of the Council who wish to make statements following the voting.

Mr. Türk (Slovenia): Slovenia was among the sponsors of the resolution just adopted, and voted in favour of its adoption. We believe that this is a timely and necessary resolution that contains all the necessary elements with which the Security Council must address the situation in Kosovo. Let me recall some of them.

With this resolution, the Security Council realistically recognizes the existence of the threat to international peace and security and, acting under Chapter

VII, provides the legitimacy for the necessary measures of implementation of the resolution.

The resolution provides for comprehensive international military and civilian presences in Kosovo. The mandates of the missions are clear and precise and, at the same time, sufficiently flexible.

The resolution provides for credible military force and authorizes it to use all necessary means to fulfil its mandate. This is a prerequisite for the force to establish a safe and secure environment for the return of refugees and internally displaced persons.

Finally, the resolution delegates overall responsibility for civilian operations to the United Nations, with the specific responsibility of working with all other institutions and organizations so that the operations will be conducted in an integrated manner. We expect the security and civil presences to cooperate towards the same goal and in a mutually supportive manner.

The resolution reaffirms the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia over Kosovo. Full cooperation of all concerned is required. It is our understanding that the personnel of the United Nations Tribunal should be granted immediate and unimpeded access to Kosovo and that they will be provided with the appropriate support and protection by the international security presence.

An important part of the resolution is devoted to humanitarian issues, which will constitute an essential priority in the immediate future — especially the return of refugees and caring for children in the post-conflict period. Slovenia fully supports these provisions and stands ready to strengthen its cooperation in the humanitarian field, including the priority tasks in the activities of demining and other activities in the field of mine action.

The focused character of the resolution and its clear setting of priorities do not mean that the Security Council is neglecting any of the relevant aspects of the Kosovo crisis. In the area of humanitarian action the Security Council remains committed to all the relevant tasks, including those related to the security and safety of humanitarian personnel. In this context, my delegation would like to repeat its concern over the fate of the two Australian aid workers, Steve Pratt and Peter Wallace, who were convicted by a military court of charges that are difficult to reconcile with international standards of humanitarian law and protection of humanitarian workers.

We hope that they will be released soon, which would improve the confidence needed for effective humanitarian work.

With regard to the military and security aspects, we would like to emphasize the need for the Federal Republic of Yugoslavia (Serbia and Montenegro) to terminate the state of war in the country immediately. In particular, the state of war and related measures must not be used against the Republic of Montenegro, which has demonstrated a reasoned and constructive approach throughout the conflict, including by accepting and taking care of tens of thousands of internally displaced persons. The pressures exerted by Belgrade against Montenegro under the pretext of military needs must stop. Montenegro has suffered economically, socially and politically as a result of those pressures. We expect that the military presence in Montenegro will be reduced to normal levels. We are concerned that without such a measure the situation in Montenegro could escalate into a new threat to international peace and security in the region.

At the political level, the Federal Republic of Yugoslavia must understand the importance of the normalization of its relations with its neighbours and with other States. The requirements in this domain constitute a large agenda and include normalization and establishment of diplomatic relations, acceptance by the Federal Republic of Yugoslavia of the basic principles of State succession and, above all, a far greater degree of realism. The Federal Republic of Yugoslavia must finally accept the principle of equality with the other successor States that emerged as a result of the dissolution of the former Socialist Federal Republic of Yugoslavia, which ceased to exist many years ago. The Federal Republic of Yugoslavia must thus stop its attempts to create the erroneous impression that it is the continuing Member State of the United Nations and should apply for membership in the United Nations, as expressly required by Security Council resolution 777 (1992) and General Assembly resolution of 47/1. Political wisdom and legality require that this issue be resolved on the basis of the relevant resolutions of the Security Council and the General Assembly.

Let me now reflect in a slightly broader context upon the resolution that was adopted a few moments ago. This is necessary because the resolution adopted today provides the platform for the future engagement of the entire international community in the effort to resolve the Kosovo crisis. Its implications can be seen as belonging, broadly speaking, to two groups. First, the resolution and

the tasks that will be necessary for its implementation suggest that there are serious obstacles on the road to peace that will need to be overcome. Let me briefly refer to those obstacles.

Ensuring security in Kosovo means having to create something that did not exist in Kosovo for many years. The Kosovo conflict was not a sudden eruption — it has persisted for decades in different forms, ranging from latent tensions to violent outbursts. This vicious spiral of violence needs to be stopped, and security must become irreversible. The international security presence will therefore face a wide range of tasks reaching beyond the traditional military functions. The willingness and ability to perform these tasks will be an important test of its success.

Complete security will, in turn, require the establishment of an adequate civil administration, a task which presupposes carrying out an ambitious agenda inspired by internationally agreed standards of human rights. The difficulties in securing conditions for the full realization of human rights and fundamental freedoms in Kosovo for all — the Albanians, the Serbs and the others — must not be underestimated. Particular care should be given to the need to prevent any provocation calculated to generate an atmosphere of insecurity or to provoke the emigration from Kosovo of people belonging to the Serb or any other ethnic group.

The fact that basic human rights were denied to the people of Kosovo throughout its past and, most brutally, in the past decade, represents a formidable obstacle to the establishment of normalcy for the future.

Let me repeat that justice will be an essential condition for the durability of peace, and the role of the International Criminal Tribunal for the Former Yugoslavia as an independent criminal court will be indispensable.

The second set of implications relates to the opportunities that the current resolution presents. The success of the international effort in and around Kosovo would show that the international organizations involved in this undertaking are capable of ensuring the essential humanity of the people concerned as well as the preservation of international order and stability, in accordance with the purposes and principles of the United Nations Charter. Success in this specific case would give an example of the balance between the considerations of State sovereignty on the one hand and humanity and international order on the other. It is true that international organizations must be careful in all their efforts and that they must

Security Council spent out what was required of the two parties. A third decision, resolution 1203 (1998) of 24 October 1998, made it possible to deploy the Organization for Security and Cooperation in Europe Verification Mission in Kosovo.

Unfortunately, the Belgrade regime refused to comply with the obligations set out in those resolutions. It opposed and rejected outright the efforts of the negotiators at the Rambouillet conference and all other forms of diplomatic intervention, even though, after lengthy negotiations, the political settlement envisaged at Rambouillet laid out a future for Kosovo. The continued and worsening repression of the civilian population compelled the members of the Atlantic Alliance to resort to military means in order to put an end to a senseless and unacceptable policy of destruction and deportation. However, in parallel with that, the members of the Atlantic Alliance continued their efforts with the Russian Federation, with the assistance of the Secretary-General of the United Nations, to identify the bases of a political settlement.

Fortunately, the negotiations conducted so tenaciously by President Ahtisaari of Finland, on behalf of the European Union, by the Russian envoy Mr. Chernomyrdin and by the American envoy Mr. Talbot, yielded results and have made it possible to envisage a peaceful solution. It will still demand a great deal of effort and a great deal of determination. But the resolution just adopted provides us with the legal, political and practical means to restore peace.

Everyone is now aware that this resolution bolsters the authority of the Security Council. It is the Security Council that is deciding on the deployment of civil and security presences in Kosovo under the auspices of the United Nations. It is the Security Council that is authorizing the Member States and the international organizations concerned to establish the international security presence in Kosovo. It is the Security Council that is authorizing the Secretary-General to establish an international civil presence. It is the Security Council that is determining the precise responsibilities entrusted to the international security presence and to the civil presence. The Security Council is requesting the Secretary-General to appoint a special representative to control the implementation of the civil presence and to ensure close coordination with the international security presence. The Security Council will remain in control of the implementation of the peace plan for Kosovo because it is requesting the Secretary-General to report to it regularly on the implementation of the resolution and to include reports from the leadership of the

civil and security presences. Those of us who wish to recall the primacy of the Security Council for the maintenance of international peace and security, as established by the Charter, have been satisfied. Everyone deserves gratitude for the steps taken to achieve this result.

The chapter that is now closing has been a painful one. This resolution blazes the way towards peace. It enshrines the reaffirmed authority of the Security Council but also the effective and decisive action taken by regional organizations. It underscores the role of the Secretary-General of the United Nations, but it demands a great deal of Member States.

Our vote on this resolution is thus also a commitment to continue to be vigilant and to mobilize our resources and our energies so as to contribute to ensuring that peace, law and justice prevail.

Mr. van Walsum (Netherlands): The Netherlands has voted for this resolution with a sense of relief. This does not stem from a feeling that we are concluding a military operation we should not have been engaged in. We sincerely hope that the few delegations which have maintained that the North Atlantic Treaty Organization (NATO) air strikes against the Federal Republic of Yugoslavia were a violation of the United Nations Charter will one day begin to realize that the Charter is not the only source of international law.

The Charter, to be sure, is much more specific on respect for sovereignty than on respect for human rights, but since the day it was drafted the world has witnessed a gradual shift in that balance, making respect for human rights more mandatory and respect for sovereignty less absolute. Today, we regard it as a generally accepted rule of international law that no sovereign State has the right to terrorise its own citizens. Only if that shift is a reality can we explain how on 26 March the Russian-Chinese draft resolution branding the NATO air strikes a violation of the Charter could be so decisively rejected by 12 votes to 3.

This is not a time to be triumphant about that. One day, when the Kosovo crisis will be a thing of the past, we hope that the Security Council will devote a debate to the balance between respect for national sovereignty and territorial integrity on the one hand and respect for human rights and fundamental freedoms on the other hand, as well as to the shift to which I referred. This will not be a pro-Western or anti-third-world debate. The shift from

sovereignty to human rights spells uncertainty, and we all have our difficulties with it. But the Security Council cannot afford to ignore the phenomenon. Times have changed, and they will not change back. One simply cannot imagine a replay in the twenty-first century of the shameful episode of the 1980s, when the United Nations was apparently more indignant at a Vietnamese military intervention in Cambodia, which almost all Cambodians had experienced as a liberation, than at three years of Khmer Rouge genocide. As a result of that misconception, the large majority of delegations, including my own, allowed the Khmer Rouge to continue to occupy the Cambodian seat in the General Assembly for more than a decade.

Today, 20 years later, it seems inconceivable that respect for national sovereignty and territorial integrity could once more prompt so many States to pursue such a mistaken policy.

Mr. Fowler (Canada) (*spoke in French*): Canada welcomes today's adoption of this resolution on Kosovo, which paves the way for a peaceful settlement of this conflict. Most immediately and importantly, it will create the conditions for the safe return home of refugees in neighbouring countries and displaced persons within Kosovo. It was the plight of these innocent civilians which necessitated the intervention in March; it is the imperative of restoring their security, their hope and their future that motivates our action today.

Today's decision of the Council is a clear demonstration of international unity on the way ahead in Kosovo. It is a success for the diplomacy which brought it about, particularly the work of the G-8. The adoption of this resolution on Kosovo marks the effective re-engagement of the Security Council in the search for peace in Kosovo, something for which Canada has been working hard over the past year. By taking leadership today, the Council's credibility has been enhanced and with it international confidence in a rules-based collective security system.

(*spoke in English*)

The actions and processes authorized by the resolution adopted today pose new challenges for the international community. We have set in motion a complex but eminently workable arrangement involving multilateral, regional, national and non-governmental organizations. We must build on the positive experience gained from recent examples of such interaction and collaboration, under

United Nations leadership, in the context of peace implementation. Canada is confident that the many organizations which will be engaged not only can work effectively as one, but also can play a vitally important role in creating the conditions for a lasting peace in Kosovo. The Security Council can and must play a constructive leadership role in overseeing this process.

Canada is committed to this effort and will contribute actively through a number of forums. We are currently deploying a substantial number of Canadian Forces personnel to participate in the international security force in Kosovo. Our humanitarian and economic assistance to the region, which since March 1999 has totaled \$45 million in Canadian funds, will continue as needs evolve. We also look forward to participating in and assisting the international civil presence in Kosovo as it takes shape and as roles and responsibilities are assigned to its constituent parts.

The international community has recognized that a lasting peace in Kosovo must be based on justice. Canada therefore strongly argued for the provisions of this resolution which facilitate the work of the International Criminal Tribunal for the Former Yugoslavia. The Tribunal's role will be indispensable in building confidence in a just settlement in Kosovo, one in which the perpetrators of crimes against humanity will be held accountable. Canada has supported the Tribunal's efforts in other parts of the former Yugoslavia and will continue to do so in Kosovo by contributing a team of forensic experts to assist in its investigations.

The Council's response today is a recognition of the human dimension of international peace and security. From Rwanda to Kosovo, there is mounting historical evidence which shows how internal conflicts which threaten human security spill over borders and destabilize entire regions. We have learned in Kosovo and from other conflicts that humanitarian and human rights concerns are not just internal matters. Therefore, unlike the delegation of China, Canada considers that such issues can and must be given new weight in the Council's definition of security and in its calculus as to when and how the Council must engage.

We wholeheartedly agree with the Ambassador of the Netherlands that the tensions in the United Nations Charter between state sovereignty on the one hand and the promotion of international peace and security on the other must be more readily reconciled when internal conflicts become internationalized, as in the case of

Kosovo. Canada believes that the agreement reached today in the Council is an important step towards a broader definition of security by the international community.

The resolution adopted today effectively locks in the commitment of the international community to peace-building in the Balkans. Canada pledges its commitment to that process and calls on all parties in Kosovo and the rest of the Federal Republic of Yugoslavia to do the same.

Mr. Burtleigh (United States of America): In adopting this resolution today, the Security Council takes a historic step in reversing the campaign of terror, brutality and ethnic cleansing in Kosovo. This resolution will advance a goal that is shared by all members: the goal of returning hundreds of thousands of Kosovars to their homes with security and self-government. The United States is proud to have voted in favour of this milestone in the search for peace and security in Kosovo and the region.

This resolution lays out a concrete plan for ending the humanitarian tragedy in Kosovo and building a better future for its people. Regrettably, its adoption comes much later than it should have. Months of death, destruction and forced displacement of Kosovars could have been avoided if, in Paris last March, the Belgrade authorities had joined the Kosovar Albanians in saying yes to peace and no to war. While we welcome Belgrade's agreement to principles for resolving this crisis, we cannot forget the Federal Republic of Yugoslavia's brutal, pre-planned, systematic campaign of repression and ethnic cleansing carried out against the people of Kosovo in violation of recognized principles of international law. In this resolution, the international community has clearly demonstrated that such policies and such behaviour will not be tolerated.

Today's vote would not have been possible without the resolve and unity of members, the support of our partners in neighbouring States and elsewhere and the courage and commitment of the men and women of our armed forces in putting an end to the humanitarian tragedy in Kosovo and the surrounding region.

The resolution addresses all of our key objectives as set out by the North Atlantic Treaty Organization (NATO). Let me reiterate them here. The Federal Republic of Yugoslavia must ensure a verifiable and immediate end to violence and repression in Kosovo; must withdraw from Kosovo all its military police and paramilitary forces; must agree to the stationing in Kosovo of an international security presence with substantial NATO participation and unified command and control; must agree to the

unconditional and safe return of all refugees and displaced persons and to unhindered access to such persons by humanitarian aid organizations; and must provide credible assurance of its willingness to engage in a political process aimed at the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords.

This resolution establishes an international security force in Kosovo, which will create a safe and secure environment in which the people of Kosovo can return to their homes and rebuild their lives. NATO has signed a military-technical agreement with the Federal Republic of Yugoslavia authorities that specifies the details for the rapid withdrawal of all Federal Republic of Yugoslavia forces from Kosovo and the details of the role and authorities of the international security force (KFOR). The Federal Republic of Yugoslavia authorities have accepted that that international security force, KFOR, will operate with a unified NATO chain of command, under the political direction of the North Atlantic Council, in consultation with non-NATO force contributors.

We welcome in particular the reiteration in this resolution of the strong mandate of the authority and the jurisdiction of the International Tribunal for the Former Yugoslavia over war crimes committed in the former Yugoslavia, including Kosovo, contained in Security Council resolution 1160 (1998). Indeed, paragraph 14 of today's resolution demands full cooperation with the Tribunal.

The Security Council's vote today also sets up a civilian United Nations mission to provide an interim administration for Kosovo. This is a task of great magnitude to which all Member States will need to contribute. It is important to note that this resolution provides for the civil and military missions to remain in place until the Security Council affirmatively decides that conditions exist for their completion. The United States will work to ensure that the people of Kosovo are given the meaningful self-government they deserve, as envisioned in the Rambouillet accords.

The Federal Republic of Yugoslavia has accepted the principles of the Group of Eight foreign ministers and has agreed to withdraw all of its security forces. Only a few will be permitted to return, to perform very specific and limited functions in accordance with the Belgrade principles. All other groups, including the Kosovo Liberation Army, also must end immediately all offensive

actions. They must demilitarize as they have agreed, and should turn their energies to building the democratic institutions necessary for their future in the European mainstream. Both sides to this conflict must demonstrate a firm commitment to peace. In this context, we welcome public assurances by the Kosovo Liberation Army that it intends to abide by the terms of the Rambouillet accords.

To all the people of South-Eastern Europe, we say that we will dedicate ourselves to fulfilling the vision of a region that is at peace and integrated fully into the Euro-Atlantic community. We are committed to a robust programme of reconstruction and reconciliation through the European Union's Stability Pact for South-Eastern Europe.

To the people of Serbia, we say that now is the time to look to the future and to abandon violence, repression and ethnic hatred. You must begin a journey towards integration into the community of nations dedicated to the principles of international law. You deserve a chance at democracy and a better economic life, as part of the Euro-Atlantic community, with a Government that can lead you responsibly towards these goals without resorting to repression and war.

To the people of Montenegro, we commend you for your principled stance, for your pursuit of democracy and political and economic reform in a difficult environment and for your tolerance and composure as you shoulder the heavy burden of sheltering and providing for refugees and displaced persons.

On behalf of my Government, I would like to take this opportunity to thank all of the international envoys and personnel on the ground who have worked tirelessly for peace, for justice, for relief and for protection for the people of Kosovo over the last year and a half. The resolution the Security Council has adopted today is a tribute to their hard work and dedication to the goal of peace around the world.

Mr. Hasmy (Malaysia): The resolution the Council has just adopted is the culmination of the strenuous efforts of the international community in the search for lasting peace and stability in Kosovo. This resolution seeks to seal the various peace plans that appear in its annexes. While not wishing to downplay the many potential pitfalls of these plans — as many aspects of their full implementation still remain to be anticipated — my delegation recognizes that they offer real and realistic prospects for an early end to the cataclysmic crisis in and around Kosovo. If the plans are to work — and they must — they require the full and genuine

cooperation of all the parties concerned, in particular the Government of the Federal Republic of Yugoslavia's full implementation of and compliance with the provisions of the peace plans and the demands set out in the resolution just adopted. At the same time, there should be strong and unqualified support on the part of the international community to ensure the success of the peace plans.

My delegation is also gratified that the issue has come back to the Council, where it rightly belonged and where it could have been appropriately dealt with had there been a greater sense of unity and common purpose among its members, particularly the permanent members. We hope that the lessons learned from this experience will not be lost and will serve to guide the Council in the conduct of its future work.

My delegation is satisfied that the resolution contains the necessary elements that provide a viable basis for lasting peace and stability in Kosovo and therefore supported it. One of the centrepieces of the resolution pertains to the establishment of the international security and civil presences in Kosovo. The resolution specifies the necessary and critical tasks to be undertaken by the international security and civil presences. My delegation fervently hopes that this collective international mission will be able to discharge its mandates fully, effectively and in a well-coordinated manner. In ensuring the success of this international mission in Kosovo, the international community must be vigilant to any attempt to undermine what has been agreed. Any such attempt must be resolutely resisted.

It is now time for the international community to focus its efforts on dealing with the disastrous consequences of the use of violence and repression in Kosovo, the very reason that prompted the recourse to military action against the Federal Republic of Yugoslavia. We have to come to grips with some very urgent questions, including the guarantee for the safe and unimpeded return of all refugees and displaced persons who have been forcibly expelled from their homes and villages in the wake of the heinous policy of ethnic cleansing that has been carried out by the Yugoslav military, police and paramilitary forces in Kosovo at the behest of the leadership in Belgrade. There should be immediate efforts to provide a secure environment for those refugees and displaced persons to return to their homes in safety and in dignity.

The return and resettlement process will be one of the most challenging tasks of the international community,

strategy from the Balkans by the international community. As part of the international endeavours to nurture peace and to restore normality in Kosovo, efforts towards infrastructure rehabilitation and economic reconstruction must be given immediate and priority attention. In this connection, my delegation is gratified that serious efforts are being made in this direction, particularly by the Office of the United Nations High Commissioner for Refugees (UNHCR) and other United Nations agencies, as well as by the proposed Stability Pact for South-Eastern Europe, which aims at carrying out economic assistance and long-term development in Kosovo and other parts of the southern Balkans. Given the immensity of the humanitarian and reconstruction tasks, there is an obvious need for effective coordination and cooperation between those aid agencies and the members of the international community to avoid unnecessary competition, duplication and wastage of resources.

With regard to the responsibility of the international civil presence, my delegation underscores the paramount importance of the proposed interim administration for Kosovo, which should pave the way for an early settlement of the future status of Kosovo, taking fully into account the political framework proposed in the Rambouillet accords. The root cause of the crisis is clear. The Secretary-General himself stated, in his address to the High-Level Meeting on the crisis in the Balkans, held in Geneva on 14 May 1999:

"Before there was a humanitarian catastrophe in Kosovo, there was a human rights catastrophe. Before there was a human rights catastrophe, there was a political catastrophe: the deliberate, systematic and violent disenfranchisement of the Kosovar Albanian people."

This clearly demonstrates the need to ensure one very fundamental element in the peace settlement: the fulfilment of the legitimate aspirations and expectations of the Kosovar Albanian people, the majority inhabitants of Kosovo. Any departure from this fundamental point will risk unravelling the entire exercise which is being painstakingly put together.

In conclusion, my delegation would like to commend all the efforts of the members of the international community that have been actively engaged in the search for peace in Kosovo, which have brought us to where we are today. We would also like to take this opportunity to express our profound thanks and appreciation to all United Nations agencies and other international and relief

given the enormity of the refugee exodus resulting from Belgrade's systematic attempt not only to evict the ethnic Albanians from Kosovo, but to render them stateless as well. At the same time, there should be massive reconstruction and rehabilitation efforts to rebuild Kosovo virtually from scratch, given the systematic torching and destruction of its inhabitants' homes and properties and the uprooting of their lives and livelihoods.

As we take these tenuous and necessary steps towards a lasting peace in Kosovo, the atrocities and horrors that have been carried out in pursuance of the policy of ethnic cleansing must be addressed as part of any consolidated effort in the implementation of the peace plans. Ethnic cleansing, which reared its ugly head once again in the Balkans, is a crime against humanity and should not be brushed aside out of political expediency. Those responsible for such acts should not be allowed to go unpunished, nor should the victims be denied justice. It is important, therefore, that the work of the International Tribunal for the Former Yugoslavia, whose jurisdiction and mandate are reaffirmed in this resolution, be fully recognized and strongly supported. The work of the Tribunal should, in fact, form part and parcel of the proposed international civil presence in Kosovo. In this regard, the Council's decision, as contained in paragraph 14 of the resolution — which demands full cooperation by all concerned, including the international security presence, with the Tribunal — should be fully implemented. My delegation would have preferred an unequivocal language in this paragraph that would grant the necessary support of this Council to the Tribunal.

Enormous work has already been done by the Tribunal in relation to gross violations of human rights and humanitarian law in Kosovo. Indictments have been made and perhaps more will follow. It is of vital importance for the international community to maintain the credibility of the Tribunal, as well as of this Council, which created it. The arrest and prosecution of indicted war criminals is not only an issue of justice, but one that will have important and long-lasting effects on the process of re-establishing the rule of law and accomplishing reconciliation in Kosovo. It should also serve as a stern warning to would-be perpetrators of crimes against humanity, who should not be allowed to get away with impunity. We strongly believe that, had the international community been more resolute in apprehending the leading indicted war criminals who were responsible for the atrocities in Bosnia and Herzegovina, the ethnic cleansing in Kosovo could have been averted.

Peace in Kosovo and the Balkans as a whole should be viewed as a long-term process and not as a quick-exit

organizations, as well as to several Governments, for their role in alleviating the plight of the refugees and displaced persons.

Mr. Fonseca (Brazil): Tensions in Kosovo have been simmering for a decade. In the month of June 1989, a policy shift on the part of the Belgrade authorities towards the ethnic Albanians in Kosovo marked the beginning of a cycle of intolerance in the former Yugoslavia. This shift would eventually lead to destruction and suffering in the Balkans on a scale not seen in Europe since the Second World War. At the core of this tide of violence were the policies of certain leaders who lost the capacity to understand the logic of peace. Instead of seeking unity in diversity, strength in pluralism and accommodation through dialogue, they resorted to discrimination and violence, without realizing, perhaps, that they were sowing the seeds of disruption of their own society.

The Balkan wars of the 1990s have cast a tragic shadow over the expectations raised by the end of the cold war for a world of increased international cooperation for peace and security. They have wreaked havoc in southeastern Europe and spread discord on a global scale. In dealing with the complex challenges posed by Bosnia and Kosovo, the Security Council has not always been able to devise the most effective strategies to reach its shared objectives of combating ethnic hatred and promoting regional stability.

These have often been times of frustration for those who, like we in Brazil, remain just as firm in their rejection of the instruments of intolerance as they remain committed to preserving and strengthening the authority of the Security Council.

Today we have perhaps reached a turning point. It is with a considerable measure of relief that my Government lends its support to a Security Council resolution that paves the way for the return of refugees to Kosovo under conditions of safety. We trust that these measures will lay the groundwork for putting an end to the enormous suffering that the inhabitants of the region have been subjected to in recent weeks and months. Thousands of lives have been lost. A large number of civilians have died or been wounded. More than a million remain displaced. Those who make it back to their former homes will, for the most part, be returning to destroyed villages. Even if a new regional agenda for cooperation takes hold, it will be years before any semblance of normality can be aspired to.

At the same time — and independent of the moral considerations invoked for these actions, with which we fully identify — problematic precedents have been set in the resort to military force without Security Council authorization. These have neither contributed to upholding the Council's authority nor improved the humanitarian situation.

It is possible to hope that today's meeting will herald a new chapter for the countless Kosovars and others in the region whose lives have been shattered by the ravages of this bloody conflict. It is possible to hope that the Security Council will build upon this day to find a new blend of realism and idealism that will translate itself into greater wisdom and true effectiveness. It is possible to hope, together with the Secretary-General, Mr. Kofi Annan, that, in the future, countries will not have to choose between inaction and genocide, intervention and Council division.

The Security Council and the entire United Nations system are now presented with a historic opportunity to demonstrate their unique capacity for legitimate joint action to promote reconciliation and stability, and to promote peace on the basis of international law. No doubt, the path ahead will be fraught with great challenges as an ambitious programme for a civil and security presence in Kosovo is put into place and a provisional administration for Kosovo is established. But we are confident that this is the correct way for the international community to proceed. As the Security Council resumes its rightful role in the handling of this crisis, there is even scope for hoping that a new inclination to find, within the Council, multilateral solutions to other serious problems affecting world security, will gradually emerge.

Let me conclude by quoting the prominent Albanian writer Ismail Kadare, whose *Funeral Chants for Kosovo* suggest that

(spoke in French)

“Without hope, time passes far more slowly than when it is imbued with hope”.

(spoke in English)

The traumatic experiences of the past 10 years will not be easily forgotten. But if an age of hope can now be imagined, it is up to the members of the Security Council, as participants in the only universally recognized organ in

work of the International Criminal Tribunal for the former Yugoslavia, and for an effective international security presence to re-establish a safe environment in Kosovo. This force must command the confidence of Kosovo Albanian refugees if they are to return home. That is why NATO has made clear that it will be essential to have a unified NATO chain of command under the political direction of the North Atlantic Council in consultation with non-NATO force contributors. This force, with NATO at its core, will be commanded by a British general. The United Kingdom will provide the leading contribution of at least 13,000 troops.

This resolution applies also in full to the Kosovo Albanians, requiring them to play their full part in the restoration of normal life to Kosovo and in the creation of democratic, self-governing institutions. The Kosovo Albanian people and its leadership must rise to the challenge of peace by accepting the obligations of the resolution, in particular to demilitarize the Kosovo Liberation Army (KLA) and other armed groups.

To have come this far, to have secured Belgrade's acceptance of all our demands, has required a huge diplomatic effort. My Government pays tribute and expresses its gratitude to Mr. Chernomyrdin, President Ahtisaari and Mr. Talbot for their outstanding contribution. The positive engagement of the Russian Government, via its Special Representative and in the preparation of this resolution by Ministers of the Group of Eight, has been vital.

Our common challenge is now to use the momentum towards peace generated by this settlement to move the whole region decisively away from the tension and ethnic conflict of the past and towards durable peace and prosperity. This is going to require a sustained international effort. We therefore welcome the resolution's emphasis on a comprehensive approach to the economic development and stabilization of the region.

We are taking today the first step towards lasting peace in Kosovo. A vast amount of work remains to be done. But this resolution, and the shared resolve which it reflects, constitutes an essential contribution to the process. It brings the United Nations, and our Secretary-General, to the forefront of international action to give the Balkans a stable future in a modern Europe. It has the unqualified support of the United Kingdom.

Mr. Petrella (Argentina) *(spoke in Spanish):* The resolution just adopted by the Security Council is of

the field of peace and security, to ensure that Kosovo is allowed a new beginning.

The President: I should like on behalf of the Council to assure Ambassador Fonseca, to whom I extend a warm welcome as Permanent Representative of Brazil to the United Nations, of our cooperation with him in the Council's work.

Sir Jeremy Greenstock (United Kingdom): The Government of Mr. Milosevic has taken a long time to come to a political agreement on Kosovo. Mr. Milosevic never showed any real interest, from 1989 onwards, in a status for Kosovo that met minimum international standards. He never showed any real interest in the negotiations in France this past winter. He was preparing something else for Kosovo. The world has witnessed the devastating effects. What a tragedy for the Serb people that the North Atlantic Treaty Organization (NATO) allies had to act, after trying every other avenue, with force. The Yugoslav Chargé d'Affaires said at this meeting that the Federal Republic of Yugoslavia did not threaten anybody. Clearly, 1.8 million Kosovo Albanians fell below the category of “anybody” for the Yugoslav authorities. We have now stopped Mr. Milosevic's ethnic cleansing machine in its tracks.

The authorities of the Federal Republic of Yugoslavia and the Serb Parliament have now accepted the principles and demands set out in the G-8 statement of 6 May and in the Chernomyrdin-Ahtisaari paper. What a cost to the people of Rambouillet three months ago. Instead he tried the despicable route of murder, systematic rape, destruction of housing, displacement: he attempted to destroy the lives and the homeland of a whole people. In that he has been defeated.

But this is not a victory — not for the families who have lost loved ones, not for those whose lives have been torn apart, and not for those whose homes have been destroyed. Our job now is to help them home safely, to get their lives back to normal, and to help assure their future in the Balkans without further fear of persecution.

This Chapter-VII resolution and its annexes clearly set out the key demands of the international community, which Belgrade must satisfy. The interpretation and conditions which the delegation of the Federal Republic of Yugoslavia has attempted to propose have been rejected. The resolution also provides for the deployment of an international civil presence, led by the United Nations, for the continuing

singular importance for various reasons. First, it marks the end of a humanitarian tragedy in which the main victims were thousands of innocent civilians whose fundamental human rights were being systematically and persistently violated.

Secondly, it lays the foundation for a definitive political solution to the Kosovo crisis that will respect the sovereignty and territorial integrity of the Federal Republic of Yugoslavia. The rights of minorities and of all the inhabitants of Kosovo, without exception, to live in a climate of peace and tolerance must also be unequivocally recognized.

Thirdly, this resolution confirms the central and irreplaceable role of the United Nations, and in particular that of the Security Council and the Secretary-General at times when there is a need to join efforts in order to maintain international peace and security.

Lastly, it represents an interpretation of the Charter that reflects the current recognition of human rights throughout the international community.

We would not like to let this opportunity go by without highlighting the valuable contributions made by the Secretary-General - warnings, efforts and initiatives - throughout this critical and dramatic process, which date back to long before the beginning of military action.

We are aware of the task that lies ahead in order for thousands of refugees and displaced persons to be able to return to their homes in conditions of safety and security. We must do our utmost to that end. We urge an early convening of the donors' conference provided for in paragraph 13 of the resolution.

Furthermore, we believe that it is essential to express deep gratitude to those who tirelessly negotiated with the parties to achieve this peace and the beginning of reconstruction. The roles of the President of Finland, Martti Ahtisaari, of the Special Representative of the Russian Federation, Viktor Chermomyrdin, and of the Secretary-General of the United Nations must all be acknowledged. They were all supported by the sense and the content of the debates and decisions of the Security Council of 26 March and 14 May, as well as the conviction that once diplomatic efforts have been exhausted, humanitarian tragedies of the magnitude that we have witnessed cannot, at the close of the century, be tolerated in the context of the letter and the spirit of the Charter.

In closing, at a time like this, when peace and respect for human rights and democratic values seem to be accepted, we should not forget that in other regions — particularly in Africa — thousands of human beings also wish to lead decent lives in peace and harmony. The international community should also extend its generosity to them and not fail them.

We hope that this will have been the last great tragedy of this century. In this vein, and as we said at the outset, this resolution takes on far-reaching historical importance.

Mr. Buallay (Bahrain) (*spoke in Arabic*): In adopting this resolution on the situation in Kosovo, the Security Council today finds itself at a historic turning point. Through this action the Council is conferring the international legitimacy necessary to settle this situation, which is both tragic and complex.

The members of the Security Council have followed with great concern the entire series of events that have taken place in that Province, beginning with the Kosovo Serbs' deportation of and commission of acts of violence against Kosovar Albanians. The burnings, rapes and other acts of violence recalled recent events in Bosnia and Herzegovina, which perhaps gave the Serbian forces harmful experience of all forms of violence. That violence was given its harshest expression in Kosovo, especially since some of those who perpetrated it continue to abide away and are thus able to persist in their abusive violence.

The resolution adopted today establishes rules and regulations for the withdrawal of Serbian troops from the province of Kosovo under the supervision of an international security and civil presence. But we should not forget that the substantial international efforts that gave rise to this resolution should, in the final analysis, guarantee the return of refugees displaced from their homes, who represent over three quarters of the population of the province. This is outrageous.

In our view, the urgent question is where, when and how these displaced persons will return. Their houses and farms have been demolished and burned and their identity cards have been taken from them. Will they return to their own territory to live in temporary tents and again be refugees and displaced persons? This is indeed a tragedy, whether created unwittingly or purposefully by the Belgrade authorities, which will have consequences for a long time to come. It is discouraging to know that some

Security Council, in the maintenance of international peace and security.

Indeed, the first preambular paragraph recalls the purposes and principles of the Charter of the United Nations. Paragraphs 6, 10 and 20 clearly spell out the mission entrusted to the Secretary-General of the United Nations in the implementation of this resolution. Likewise, the resolution reaffirms the principles of dialogue, negotiation and peace, which Gabon holds very dear.

For all of those reasons, we co-sponsored the resolution and voted in favour of it.

The President: I shall now make a statement in my capacity as representative of the Gambia.

Throughout the crisis over Kosovo, the Security Council has endeavoured to set out clearly the concerns of the international community. The more resolutions and statements the Council adopted on this issue, the more Belgrade brazenly stepped up its repression and violence against the civilian population in Kosovo. Such violence and flagrant violations of human rights have shocked the collective conscience of mankind. The subsequent massive influx of refugees into neighbouring countries and their accounts of the atrocities inflicted on them and their families can leave no one indifferent. The international community could no longer afford the luxury of being a helpless spectator while the policy of ethnic cleansing was going on in Kosovo. It is regrettable that force had to be used to arrive at where we are today. We therefore welcome wholeheartedly the agreements reached a few hours ago for a political settlement of the Kosovo crisis. The delegation of the Gambia always upheld the view that the plight of the refugees and internally displaced persons would persist unless and until the underlying political problems were addressed.

The whole world has a lot to celebrate today. We would, however, guard against euphoria, because there remains a lot of healing to be done. As far as the United Nations — and especially the Security Council — is concerned, it is a happy day, in view of the fact that the issue of Kosovo has divided the Council for so long. At long last, the Security Council is once more able to find unity around this issue and, above all, it is again able to assume its primary responsibility in the maintenance of international peace and security. Its authority has been recognized and restored.

refugees and displaced persons from Bosnia have still not yet returned to their homes and territory. Joint international efforts must therefore be made quickly to ensure that refugees and displaced persons from Kosovo can return to their homes, and priority must be given to that issue before a decision is taken on a political settlement in Kosovo.

The delegation of Bahrain took part in the adoption of resolution 1239 (1999), on the humanitarian aspects of the situation in Kosovo, and bearing that resolution in mind, we recommend that we give priority to the future of refugees and displaced persons who, in the final analysis, are the legitimate population of the province of Kosovo. By voting in favour of the resolution today we have reaffirmed that position, because we could not contemplate a settlement of the situation in the province at a time when its own population has been displaced.

Mr. Dangué Réwaka (Gabon) (*spoke in French*): It will be recalled that before 24 March 1999, the Security Council, the Contact Group — consisting of the Ministers for Foreign Affairs of Germany, the United States of America, the Russian Federation, France, Italy and the United Kingdom of Great Britain and Northern Ireland — and the Permanent Council of the Organization for Security and Cooperation in Europe had to strive unceasingly to bring about a lasting political solution to the Kosovo crisis.

For its part, the Security Council adopted resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998 and 1203 (1998) of 24 October 1998. All of them called, *inter alia*, for the cessation of hostilities in Kosovo, in the Federal Republic of Yugoslavia, and for the beginning of constructive dialogue with a view to arriving at a political settlement to the Kosovo situation.

Neither the peaceful measures that were advocated nor the condemnation repeatedly expressed by the international community succeeded in curbing the violence in Kosovo. Villages have been destroyed, causing thousands of casualties and displacing hundreds of thousands of people. The confrontations in February and March 1998 in the Drenica region, in the centre of Kosovo, are a vivid illustration of this dramatic situation. Should this tragedy have been allowed to continue? The answer is clearly no.

It is therefore understandable that the regional Powers had to resort to the means they deemed best suited to the situation. The resolution that we have just adopted not only offers fresh prospects for a resolution of the Kosovo conflict and for peace in the Balkan region, it also bolsters the key role of the United Nations, in particular that of the

Furthermore, the preponderant role of the Secretary-General has been clearly spelled out. It is high time we gave to Caesar what belongs to Caesar. The resolution that we have just adopted takes on particular importance for my delegation for two reasons. First, it is a comprehensive and well-balanced text — in other words, a blueprint for the peaceful resolution of the Kosovo crisis. Secondly, it recognizes and restores the authority of the Security Council and places it on a firmer footing to tackle other major crisis situations that are still pending. That is the beauty of it, and we therefore voted in favour.

I now resume my functions as President of the Council.

The Council has thus concluded its voting procedure.

I call on the Secretary-General of the United Nations, Mr. Kofi Annan, to make a statement.

The Secretary-General: With this resolution, the United Nations Security Council has charted the way towards a better future for the inhabitants of Kosovo: a future in which all the refugees and internally displaced persons can return safely to their homes; a future in which full respect is assured for the civil, political and human rights of all.

Today, we are seeing at least the beginning of the end of a dark and desolate chapter in the history of the Balkans. Today, we embark on the path of peace. This path will be marked by difficulties and dangers that will require no less courage and determination than the events that brought us to this point. Let no one be in any doubt about the magnitude of our challenge: after the violence, the human rights abuses, the expulsions and the devastation of the past year, the task of restoring Kosovo to a semblance of normal life is immense.

Rebuilding homes, restoring infrastructure, renewing institutions and revitalizing civil society will require sacrifice, dedication and persistence on the part of all who share responsibility for the future of Kosovo. In planning terms, winter is fast approaching, and we are in a race against time.

The United Nations is determined to lead the civilian implementation of the peace effectively and efficiently. But to do so, we need the cooperation of all parties, and we need the means to carry out the mandate.

The commitment to peace is not enough. The will to implement it — in all its aspects — is what counts. This includes tasks for which the United Nations is not responsible, but which are vital if peace and stability are to be restored. I have in mind, for example, the need for the full withdrawal of Serb military, paramilitary and police forces, and for the demilitarization of the UCK. I look to those responsible for the security aspects of the resolution to act swiftly.

I intend very soon to revert to the Council with specific proposals on how to make the civilian operation authorized by this resolution truly integrated and effective.

There also lies ahead the hard and extremely complex work of building a durable peace, of reconciling positions which are far apart. In doing so, we need to deal with the roots of this crisis.

I said a few minutes ago that this was the beginning of the end of a dark and ugly chapter. Let us rejoice today that the Council has adopted a landmark resolution which gives strong legal underpinning to the task ahead. But let us not be triumphalist, for that task is indeed daunting. Instead, let us — all of us — buckle down and get on with the job.

The President: I thank the Secretary-General for his important statement.

There are a number of speakers remaining on my list. In view of the lateness of the hour and with the concurrence of the members of the Council, I intend to suspend the meeting now.

The meeting was suspended at 2.25 p.m.

**Memorandum of Understanding between the
Government of the Republic of Angola and UNITA on
the Peace Process, 2002 (S/2002/483)**



Security Council

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Annex to the identical letters dated 25 April 2002 from the Permanent Representative of Angola to the United Nations addressed to the Secretary-General and the President of the Security Council

Preamble

The delegation of the Angolan Armed Forces (FAA), mandated by the Government of the Republic of Angola;

The delegation of UNITA Military Forces, mandated by its Management Commission;

In the presence of the UN, represented by Mr. Ibrahim Gambari, Undersecretary General of the UN and Special Advisor for Africa, as well as the Observer Countries to the Angolan Peace Process;

Taking into account that the Lusaka Protocol, signed 20 November 1994 by the Government and by UNITA with the mediation of the UN and in the presence of Observer Countries to the Angolan Peace Process, was undertaken as the political-judicial instrument for the resolution of the Angolan conflict, in order to achieve peace and national reconciliation, but has not yet experienced the positive evolution expected toward final completion;

Considering the growing and pressing need to achieve peace and national reconciliation in Angola, expressed and felt daily by all Angolans, it is urgent and imperative and requires first of all the cessation of the armed conflict between UNITA, still a politico-military structure, and the Government. This should be accomplished through the promotion of appropriate initiatives, undertaken with creativity and flexibility, to reach final completion of the Lusaka Protocol;

Aware that an end to the internal conflict leads to peace and national reconciliation in the Republic of Angola and constitutes a challenge that, in some way, the parties commit themselves to overcome and to succeed for the benefit of the Angolan people;

Accordingly, in order to materialize their promises and obligations in the context of the Lusaka Protocol, the parties have decided to adopt the Memorandum of Understanding in the following terms:

Identical letters dated 25 April 2002 from the Permanent Representative of Angola to the United Nations addressed to the Secretary-General and the President of the Security Council

I have the honour to transmit herewith a copy of the memorandum of understanding between the Government of the Republic of Angola and UNITA on the peace process, signed on 4 April 2002 (see annex).

I should be most grateful if you would have this letter and its annex circulated as a document of the Security Council.

(Signed) Ismael A. Gaspar Martins
Ambassador
Permanent Representative



CHAPTER I

SUBJECT AND PRINCIPLES OF THE MEMORANDUM OF UNDERSTANDING

1 - SUBJECT

- 1.1. The subject of the Memorandum of Understanding is the commitment of the parties, through fraternal and active collaboration, to guarantee the achievement and activation of the cease-fire and resolution of all pending military issues. Subsequently, this includes the definitive resolution of the armed conflict, and the renewed undertaking of the complete execution of the task of concluding with the formation of the Angolan Armed Forces under the terms of the Lusaka Protocol.
- 1.2. The objective of the Memorandum of Understanding is collaboration between the parties for the resolution of negative military factors posing an obstacle to the Lusaka Protocol, and the creation of conditions for its definitive conclusion.

2 - FUNDAMENTAL PRINCIPLES

- 2.1. The parties reaffirm their respect for the rule of law and for the democratic institutions of the Republic of Angola. Accordingly, that includes observance of the Constitution and all other legislation in effect within the Republic of Angola.
- 2.2. The parties reiterate their unequivocal acceptance of the validity of pertinent political-judicial instruments, namely the Lusaka Protocol and UN Security Council resolutions related to the Angolan peace process.
- 2.3. The parties recognize that respect for democracy in all spheres and at levels of national life is essential to peace and national reconciliation.

CHAPTER II

AGENDA FOR THE MEMORANDUM OF UNDERSTANDING

I - GENERAL

- 1.1. In order to materialize their commitments and obligations under the Lusaka Protocol, the parties accept the following as the Working Agenda for Military Talks:
 - I - Issues of national reconciliation
 - Sole item: Amnesty
 - II - Cessation of hostilities and pending military issues under the terms of the Lusaka Protocol
 - a) Cease-fire
 - b) Disengagement, quartering and completion of the demilitarization of UNITA Military Forces
 - c) Integration into the Angolan Armed Forces of general officers, senior officers, junior officers, non-commissioned officers and junior enlisted personnel of UNITA Military Forces, in accordance with existing vacancies
 - d) Integration into the National Police of general officers and senior officers of the Military Forces of UNITA, in accordance with existing vacancies.
 - e) Demobilization of excess personnel from UNITA Military Forces and the extinction of the Armed Forces of UNITA.
 - f) Social and professional reintegration into national life of personnel demobilized from the ex-UNITA Military Forces

III - Institutional issues

- a) Institutional structure for coordinating the Understanding
 - b) Schedule for the implementation of the Understanding
 - c) Signature of the Understanding
- 1.2. In order to materialize their commitments and obligations in the context of the Lusaka Protocol, the parties accept as Conclusions of the Agenda for Military Talks those items described in the following points.

2 – ISSUES OF NATIONAL RECONCILIATION

Sole item: Amnesty

2.1 The Government guarantees, in the interest of peace and national reconciliation, the approval and publication by competent organs and institutions of the state of the Republic of Angola an Amnesty Law covering all crimes committed in conjunction with the armed conflict between UNITA Military Forces and the Government.

3 - CESSATION OF HOSTILITIES AND PENDING MILITARY ISSUES UNDER THE TERMS OF THE LUSAKA PROTOCOL

A) CEASE-FIRE

3.1 The parties reiterate their engagement in the scrupulous fulfillment of their commitments and obligations relating to the task of reestablishing the cease-fire (in the spirit foreseen in Annex 3, Point II.1 of the Work Agenda - Military Issues I of the Lusaka Protocol).

3.2 In this sense, the Government, through the General Staff of the Angolan Armed Forces, and UNITA Military Forces, through the High General Staff, release and carry out a declaration recognizing a cease-fire aimed at ending the armed conflict in order to achieve peace and national reconciliation.

3.3 The task of reestablishing a cease-fire encompasses the following:

- a) The cessation of all military actions throughout the country and the end of hostile propaganda.
- b) The halting of all force movements in the reinforcement or occupation of new military positions, as well as the termination of all acts of violence against civilian populations and the destruction of property.
- c) Regular information on the situation regarding positioning of units and all other paramilitary elements of UNITA Military Forces in probable zones or areas of military tension.
- d) The guarantee of protection for people and their possessions, of resources and public assets, as well as the free circulation of persons and goods.

B) DESENGAGEMENT, QUARTERING AND CONCLUSION OF THE DEMILITARIZATION OF UNITA MILITARY FORCES

3.4 The parties reiterate their engagement in the scrupulous fulfillment of their commitments and obligations related to the task of quartering and demilitarizing of UNITA Military Forces (in the spirit foreseen in Annex 3, point II.1 of the Work Agenda - Military Issues I of the Lusaka Protocol).

3.5 In this regard, the Joint Military Commission, with the support of the General Staff of the Angolan Armed Forces, proceeds to the quartering and demilitarization of all units and paramilitary elements of UNITA Military Forces as follows:

- a) Providing information, from the High General Staff of UNITA Military Forces to the Joint Military Commission, covering all reliable and verifiable data related to the combat and numerical composition and location of units and paramilitary elements of UNITA Military Forces.
 - b) The establishment of monitoring mechanisms for the process of demilitarizing UNITA Military Forces.
 - c) The identification of military units and paramilitary elements of UNITA Military Forces and the establishment of quartering areas for them.
 - d) The definition of respective itineraries and means of movement, as well as the actual movement to quartering areas by military units and paramilitary elements of UNITA Military Forces.
 - e) The disengagement from stationing locations and movement to quartering areas of military units and paramilitary elements of UNITA Military Forces.
 - f) The reception, housing and feeding, as well as registration in quartering areas of personnel from military units and paramilitary elements of UNITA Military Forces.
 - g) The turn-in and continuous process of collecting all armament and equipment of military units and paramilitary elements of UNITA Military Forces.
- C) **INTEGRATION OF GENERAL OFFICERS, SENIOR OFFICERS, JUNIOR OFFICERS, NON-COMMISSIONED OFFICERS AND JUNIOR ENLISTED PERSONNEL COMING FROM THE MILITARY FORCES OF UNITA**
- 3.6 The Government proceeds, in the interest of national reconciliation, through the General Staff of the Angolan Armed Forces, to the integration into the Angolan Armed Forces of general officers, senior officers, junior officers, non-commissioned officers and junior enlisted personnel from UNITA Military Forces, in accordance with existing vacancies.

3.7 In this regard, the process of integrating general officers, senior officers, junior officers, non-commissioned officers and junior enlisted personnel from the Military Forces of UNITA encompasses the following:

- a) The incorporation into the Angolan Armed Forces and the awarding of rank to general officers, senior officers, junior officers, and rate to non-commissioned officers and junior enlisted personnel from UNITA Military Forces, in accordance with existing vacancies.
- b) The preparation and operational assignment of general officers, senior officers, junior officers, non-commissioned officers and junior enlisted personnel from UNITA Military Forces.

D) INTEGRATION INTO THE NATIONAL POLICE OF GENERAL OFFICERS AND SENIOR OFFICERS COMING FROM THE MILITARY FORCES OF UNITA

3.8 The Government, in the interest of national reconciliation, through the General Command of the National Police, proceeds to the integration into the National Police of some general officers and senior officers coming from UNITA Military Forces, in accordance with existing vacancies.

3.9. In this regard, the process of integrating general officers and senior officers coming from UNITA Military Forces encompasses the following:

- a) The incorporation into the National Police and awarding of rank to commissioners and superintendents coming from UNITA Military Forces, in accordance with existing vacancies.
- b) The preparation and operational assignment of commissioners and superintendents coming from UNITA Military Forces.

E) DEMOBILIZATION OF UNITA MILITARY FORCES PERSONNEL AND THE EXTINCTION OF UNITA MILITARY FORCES

3.10 The parties reiterate their engagement in the scrupulous fulfillment of their commitments and obligations related to the task of demobilizing excess personnel coming from UNITA Military Forces and the extinction of the Military Forces of UNITA (in the spirit foreseen in Annex 4, Point II.1 of the Work Agenda - Military Issues II of the Lusaka Protocol).

3.11 In this regard, the Joint Military Commission, with the support of the UN, in accordance with the mandate to be given by the UN Security Council or other organs of the UN system, proceeds to the demobilization of excess personnel coming from UNITA Military Forces and the extinction of UNITA Military Forces. The process encompasses the following:

- a) The individual demobilization of excess personnel coming from UNITA Military Forces.
- b) The formal and final extinction of UNITA Military Forces.
- c) The placement of demobilized ex-UNITA Military Forces personnel under the administrative responsibility of the General Staff of the Angolan Armed Forces through its military regions and operational commands.

F) SOCIAL AND PROFESSIONAL REINTEGRATION OF DEMOBILIZED EX-MILITARY FORCES OF UNITA PERSONNEL INTO THE NATIONAL LIFE

3.12. The parties reiterate their engagement in the scrupulous fulfillment of their commitments and obligations related to the task of social reintegration of demobilized personnel (in the spirit foreseen in Annex 4, point II.1 of the Work Agenda - Military Issues II of the Lusaka Protocol).

3.13 In this regard, the Government, through the General Staff of the Angolan Armed Forces and competent public organizations and services, with the participation of UNITA and with the assistance of the international community, proceeds to the reintegration of demobilized personnel into civil society under a program of socio-professional reintegration.

3.14 The social and professional reintegration of demobilized personnel from the ex-UNITA Military Forces encompasses the following:

- a) The protection, housing and feeding of ex-UNITA Military Forces personnel in preparation centers.
- b) The professional preparation of ex-UNITA Military Forces personnel regarding their competence to enter the national labor market. This will be accomplished by way of an urgent and special social reintegration program.

CHAPTER III

COORDINATION AND IMPLEMENTATION
OF THE MEMORANDUM OF UNDERSTANDING

1- COORDINATION OF THE MEMORANDUM OF UNDERSTANDING

1.1. The institutional coordinating structures of the memorandum of Understanding are the following:

- a) Joint Military Commission
 - b) Technical Group
- 1.3. The Joint Military Commission has the following composition, powers and working rules:
- a) Composition and Leadership:
 - a.1 A seat as executive member and President of the Joint Military Commission:
 - The military representative of the Government
 - a.2 A seat as executive member of the Joint Military Commission:
 - The military representative of UNITA Military Forces
 - a.3 A seat as permanent observer members of the Joint Military Commission:
 - The UN military representative in accordance with the mandate to be given by the UN Security Council or other organs of the UN system
 - The military representative of the United States of America
 - The military representative of Russia
 - The military representative of Portugal

b) Powers

- b.1 Assist the Joint Military Commission in carrying out its duties
- b.2 Manage the implementation of all provisions of the Memorandum of Understanding
- b.3 Organize *ad hoc* meetings of military experts to study the causes of eventual difficulties impeding the effective execution of the Memorandum of Understanding or other issues considered to be of interest by the Joint Military Commission.
- b.4 Prepare a schedule detailing the activities to be undertaken in the context of implementing the Memorandum of Understanding.

9

c) Working rules:

- c.1 Meet, as a matter of routine, in order to prepare for meetings of the Joint Military Commission, and extraordinarily to analyze issues passed on from the Joint Military Commission, or whenever it may be necessary.
- c.2 At the regional level, meet daily under the direction of a military expert from the Angolan Armed Forces.

2 - IMPLEMENTATION SCHEDULE FOR THE MEMORANDUM OF UNDERSTANDING

2.1 To accomplish the implementation of the Memorandum of Understanding, the Angolan Armed Forces and UNITA Military Forces assume a commitment to the following Implementation Schedule:

- 1) Effective date for the Memorandum of Understanding
 - Signature of the Memorandum
 - Declaration of a bilateral cease-fire
 - Effective date of the cease-fire

D Day
- 2) Activation of the Joint Military Commission
 - Promulgation of the Amnesty Law
 - Commencement of work by the Joint Military Commission and Technical Group

Beginning
D Day + 001
- 3) Realization of all activities listed in paragraph a) of Point II, namely:
 - Consolidating the reestablishment of the cease-fire

D day + 001
- 4) Accomplishment of all activities listed in paragraph b) of Point II, namely:
 - Disengagement, Quartering, completion of the Demilitarization of UNITA Military Forces
 - Quartering, Disarming and Repatriation of Foreign Military Forces in areas of the national territory, under the control of UNITA Military Forces

D Day + 002
to D + 047
- 5) Accomplishment of all activities listed in paragraphs c) and d) of Point II, namely:
 - Integration into the FAA of general officer, senior

D Day + 048 to

10

D+078

officers, junior officers, non-commissioned officers and junior enlisted personnel coming from UNITA Military Forces, in accordance with existing vacancies
 - Integration into the National Police of general officers and senior officers coming from UNITA Military Forces, in accordance with existing vacancies

- 6) Accomplishment of all activities contained in paragraph e) of Point II, namely:
- Demobilization UNITA Military Forces personnel and the extinction of UNITA Military Forces
- 7) Accomplishment of all activities contained in paragraph f) of Point II, namely:
- Social and political reintegration of demobilized ex-UNITA Military Forces personnel into the national life

CHAPTER IV FINAL ARRANGEMENTS

1 – ANNEXES TO THE MEMORANDUM OF UNDERSTANDING

1.1 The following documents comprise annexes to the Memorandum of Understanding:

- | | |
|----------------------|---|
| Annex 1
Annex 1/A | - Document related to the Quartering of UNITA Military Forces
- Document related to the Quartering, Disarming and Repatriation of foreign military forces in areas of the national territory under the control of UNITA Military Forces |
| Annex 2 | - Document related to the integration into the Angolan Armed Forces of general officers, senior officers, junior officers, non-commissioned officers and junior enlisted personnel coming from UNITA Military Forces, in accordance with existing vacancies |
| Annex 3 | - Document related to the integration into the National Police of general officers and senior officers coming from UNITA Military Forces, in accordance with existing vacancies |
| Annex 4 | - Document related to the social and professional reintegration of demobilized ex-UNITA Military Forces personnel into the national life |
| Annex 5 | - Document related to considerations referring to conditions for the conclusion of the Lusaka Protocol |
| Annex 6 | - Document related to considerations referring to special security under terms of the Lusaka Protocol |

2 – INTERPRETATION

- 2.1 Differences in interpretation or implementation of the Memorandum of Understanding are to be submitted to the Joint Military Commission for resolution in a spirit of friendship, tolerance and understanding.

3 – ENTRANCE INTO EFFECT OF THE MEMORANDUM OF UNDERSTANDING

- 3.1 The memorandum of Understanding enters into effect immediately after its signature by the parties.

4 - SIGNATURES OF THE MEMORANDUM OF UNDERSTANDING

4.1 The parties sign the Memorandum of Understanding, binding themselves to it, agreeing and committing themselves to execute, in good faith, and in an obligatory and complete manner, all of its provisions.

Luanda, Republic of Angola, 4 April 2002.

FOR THE DELEGAÇÃO FOR THE DELEGATION
OF THE ANGOLAN ARMED FORCES OF THE MILITARY FORCES UNITA

GENERAL OF THE ARMY
ARMANDO DA CRUZ NETO

GENERAL
GERALDO ABREU MUENGO
UCUATCHITEMBO "KAMORTEIRO"

CHEFE DO ESTADO MAIOR GENERAL CHEFE DO ALTO ESTADO MAIOR GERAL
DAS FORÇAS DAS FORÇAS MILITARES DA UNITA
ARMADAS ANGOLANAS

TESTEMUNHADO PELAS ENTIDADES A SEGUIR MENCIONADAS

PELA ONU

IBRAHIM GAMBARI
UNDERSECRETARIO GENERAL OF THE UN
AND SPECIAL ADVISOR FOR AFRICA

FOR THE OBSERVER COUNTRIES TO THE ANGOLAN PEACE PROCESS

CHRISTOPHER WILLIAM DELL
AMBASSADOR OF THE UNITED STATES OF AMERICA IN ANGOLA

ANDREEV SERGUEI VADIMOVICH
AMBASSADOR OF THE RUSSIAN FEDERATION IN ANGOLA

FERNANDO MENDONÇA D'OLIVEIRA NEVES
AMBASSADOR OF THE PORTUGUESE REPUBLIC IN ANGOLA

ANNEX I

TO THE COMPLEMENTARY MEMORANDUM OF UNDERSTANDING
TO THE LUSAKA PROTOCOL
FOR THE CESSATION OF HOSTILITIES AND RESOLUTION OF REMAINING
MILITARY ISSUES PENDING UNDER THE TERMS OF THE LUSAKA PROTOCOL

DOCUMENT RELATED
TO THE QUARTERING OF UNITA MILITARY FORCES

The Delegation of the Angolan Armed Forces and the Delegation of UNITA Military Forces to the military talks, regarding the quartering of UNITA Military Forces, agree to the following:

1. Generalities related to quartering
 - (i) The quartering of Military Forces of UNITA should provide for the living conditions necessary for the accommodation of up to 50,000 military personnel. The breakdown of personnel is as follows: Approximately 12 generals and 47 brigadier generals, around 1,700 senior officers, about 17,350 junior officers, around 3,150 sergeants/non-commissioned officers and about 27,740 other enlisted personnel. They will remain for a specified period of time from initial reception until their integration into the FAA and National Police or, in the case of demobilized personnel, social-professional reintegration.
 - (ii) The quartering areas should have a working structure that is exceptionally well managed, with a capacity to accommodate up to 1,600 military personnel, and with security and easy access.
 - (iii) The quartering of UNITA Military Forces also implies on the one hand, the accommodation of 12 generals and 47 brigadier generals in cities close to the quartering areas. On the other hand, it also requires the organization and the arrangement of locations for the installation of military families near the quartering areas. The number of family members, including men, women and children could reach 300,000.
 - (iv) Living arrangements and initial emergency assistance for families of UNITA Military Forces personnel, as well as facilitating their reintegration in small activities producing goods and services, that is, projects for the rapid generation of income in the agriculture sector, rural commerce and other possible areas, is to be guaranteed by competent organs and entities of the state administration in strict collaboration the General Staff of the FAA, with the participation of the UN in accordance with the mandate to be given by the UN Security Council or other organs of the UN System.

2. The Structure of the Quartering Area

(i) The quartering area has the following structure:

- The leadership of the quartering area is to include a Commander, a Deputy Commander, a Civic Education Officer, a Personnel Officer, a Weapons Officer, and a Communications Officer, to be designated from among the quartered personnel by the High General Staff of UNITA Military Forces.
- The Services and Support Group is to be comprised of a guard and garrison, a radio post, a medical post, cooking facilities and dining area, and a transportation section, designated from among the personnel to be quartered by the High General Staff of the UNITA Military Forces.
- Up to 16 companies of quartered personnel, each comprised of 100 military personnel.

(ii) The Commander of the quartering area is subordinate to the Commander of the Work Team from the General Staff of the FAA and is the individual responsible for the operation and discipline of the quartering area.

3. Management of the Quartering Areas

- (i) The management of the quartering areas is undertaken by the General Staff of the FAA through a Work Team headed by an Angolan Armed Forces general integrated from UNITA Military Forces, and with the cooperation of the UN, in accordance with a mandate to be given by the UN Security Council or other organs of the UN system that lend technical assistance to the organization and management, as well as support in material means.
- (ii) The locations for the installation of military families of members of UNITA Military Forces are materially supported and administratively managed by competent organs of state administration in strict collaboration with the FAA General Staff, in addition to the participation of the UN in accordance with a mandate to be given by the UN Security Council or other organs of the UN system that lend technical assistance to the organization and management, as well as material means.

4. Quartering Area Locations

(i) For personnel of UNITA Military Forces in the northern region:

- Madimba, township of Madimba, municipality of M'Banza Congo, Zaire Province;
- Vale do Loge, township of Vale do Loge, municipality of Bembe, Uige Province;
- Wamba, township of Wamba, municipality of Sanza Pomba, Uige Province;

- Fazenda Santa Cruz, township of Quibaxi, municipality of Quibaxi, Bengo Province;
- Town of Mussabo, municipality of Samba-Caju, Kwanza-Norte Province.

(ii) For personnel of UNITA Military Forces in the northeast region:

- Capaia, township of Capaia, municipality of Lucapa, Lunda Norte Province;
- Damba Penitenciária, township of Catala, municipality of Caculama, Malange Province;
- Ganga Sol, township of Quissole, municipality of Malange, Malange Province.
- Chingege, township of Muriege, municipality of Muconda, Lunda Sul Province.
- N'Guimbi, township of Xá-Muteba, municipality of Xá-Muteba, Lunda Norte Province.

(iii) For personnel of UNITA Military Forces in the central region:

- Gando, township of Cambandua, municipality of Kuito, Bié Province;
- Capeça, township of Belo Horizonte, municipality of Cuhinga, Bié Province;
- Ponte do Rio Cacuchi, township of Cachungues, municipality of Chitembo, Bié Province;
- Sachitembo, township of Sambo, municipality of Tchikala Tchaloanga, Huambo Province;
- Lunge, township of Lunge, municipality of Bailundo, Huambo Province;
- Menga, township of Galanga, municipality of Londuimbale, Huambo Province;
- Chingongo, township of Chingongo, municipality of Balombo, Benguela Province;
- Fazenda Caporoto, township of Caporoto, municipality of Chongoroi, Benguela Province;
- Tchissamba, township of Mussende, municipality of Mussende, Kuanza Sul Province.

(iv) For personnel of UNITA Military Forces in the east region:

- Chicala, township of Cangumbe, municipality of Moxico, Moxico Province;
- Calapo, township of Lucusse, municipality of Moxico, Moxico Province.

(v) For personnel of UNITA Military Forces in the military zone of Cazombo:

- Calala, township of Calunda, municipality of Alto Zambeze, Moxico Province.

(vi) For personnel of UNITA Military Forces in the south region:

- Quilómetro 50, township of Galangue, municipality of Chipindo, Huila Province;
- Kamuambo, township of Mupa, municipality of Cuvelai, Cunene Province.

(vii) For personnel of UNITA Military Forces in Menongue:

- Soba Matias, township of Soba Matias, municipality of Menongue, Kuando Kubango Province.

ANNEX 1/A

(viii) For personnel of UNITA Military Forces around Jamba:

- Tchimbunjango, township of Mavinga, municipality of Mavinga, Kuando Kubango Province.
- Capembe, township of Mavinga, municipality of Mavinga, Kuando Kubango Province.

Luanda, Republic de Angola, 4 April 2002

FOR THE DELEGACÃO FOR THE DELEGATION
OF THE ANGOLAN ARMED FORCES OF THE MILITARY FORCES UNITA

GENERAL OF THE ARMY
ARMANDO DA CRUZ NETO

GENERAL
GERALDO ABREU MUENGO
UCUATCHITEMBO "KAMORTEIRO"

CHEFE DO ESTADO MAIOR GENERAL CHEFE DO ALTO ESTADO MAIOR GERAL
DAS FORÇAS DAS FORÇAS MILITARES DA UNITA
ARMADAS ANGOLANAS

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**TO THE COMPLEMENTARY MEMORANDUM OF UNDERSTANDING TO THE
LUSAKA PROTOCOL FOR THE CESSATION OF HOSTILITIES
AND RESOLUTION OF REMAINING MILITARY ISSUES
PENDING UNDER THE TERMS OF THE LUSAKA PROTOCOL**

**DOCUMENT RELATED
OF FOREIGN MILITARY FORCES IN AREAS
OF THE NATIONAL TERRITORY UNDER THE CONTROL
OF UNITA MILITARY FORCES**

The delegation of the Angolan Armed Forces and the delegation of UNITA Military Forces to the military talks, agree to the following with regard to quartering, disarmament and repatriation of foreign military forces in areas of national territory under the control of UNITA Military Forces:

1.1. The parties recognize the existence of foreign military forces in areas of the national territory under the control of UNITA Military Forces, namely units comprised of citizens of the Democratic Republic of Congo and units comprised of citizens of Rwanda of Tutsi-Banyamulenge and Hutu, and the necessity of proceeding with their urgent repatriation.

1.2 In this regard, the FAA General Staff, in strict cooperation with the High General Staff of UNITA Military Forces, and with the participation of the Joint Military Commission and support of the UN, in accordance with the mandate to be given by the UN Security Council or other organs of the UN system, proceed to the cantonment and disarming of foreign military forces in areas of the national territory under the control of UNITA Military Forces, with the following understanding:

- a) The informing of the FAA General Staff and Joint Military Commission by the High General Staff of UNITA Military Forces of all reliable and verifiable data related to the combat and numerical composition and location of units of foreign military forces in areas of national territory under the control of UNITA Military Forces.
- b) The identification of units of foreign military forces under the control of UNITA Military Forces.
- c) The movement of personnel of foreign military forces to quartering areas for UNITA Military Forces.
- d) The reception, housing and feeding, as well as the registration of foreign military personnel in quartering areas.
- e) The disarming, collection and storage of all armament and military equipment of foreign military forces in quartering areas.

ANNEX 2

f) The handover to the UN of members of foreign military forces in accordance with the mandate to be given by the UN Security Council or other organs of the UN System, for purposes of repatriation of personnel to their countries of origin, namely the RDC and the Republic of Rwanda.

TO THE COMPLEMENTARY MEMORANDUM OF UNDERSTANDING TO THE LUSAKA PROTOCOL FOR THE CESSATION OF HOSTILITIES AND RESOLUTION OF REMAINING MILITARY ISSUES PENDING UNDER THE TERMS OF THE LUSAKA PROTOCOL

Luanda, Republic de Angola, 4 April 2002

DOCUMENT RELATED TO THE INTEGRATION INTO THE ANGOLAN ARMED FORCES OF GENERAL OFFICERS, SENIOR OFFICERS, JUNIOR OFFICERS, NON-COMMISSIONED OFFICERS AND JUNIOR ENLISTED PERSONNEL COMING FROM UNITA MILITARY FORCES, IN ACCORDANCE WITH EXISTING VACANCIES

FOR THE DELEGAÇÃO FOR THE DELEGATION OF THE ANGOLAN ARMED FORCES OF THE MILITARY FORCES UNITA

GENERAL OF THE ARMY ARMANDO DA CRUZ NETO

GENERAL GERALDO ABREU MUENGO UCUATCHITEMBO "KAMORTEIRO"

CHEFE DO ESTADO MAIOR GENERAL CHEFE DO ALTO ESTADO MAIOR GERAL DAS FORÇAS ARMADAS ANGOLANAS DAS FORÇAS MILITARES DA UNITA

The delegation of the Angolan Armed Forces and the delegation of UNITA Military Forces to the military talks agree to the following concerning the integration into the Angolan Armed Forces of general officers, senior officers, junior officers, non-commissioned officers and enlisted personnel coming from UNITA Military Forces, in accordance with existing vacancies:

- 1. The integration of active duty personnel coming from UNITA Military Forces as based in the principle of overall incorporation and, in continuing action, the incorporation of general officers, senior officers, junior officers and non-commissioned officers, sergeants and other enlisted personnel and the subsequent demobilization and social-professional reintegration of remaining personnel.
2. The designation of general officers, senior officers, junior officers, sergeants and other enlisted personnel coming from UNITA Military Forces to be integrated into the FAA is the responsibility of the High General Staff of UNITA Military Forces.
3. The incorporation into the FAA and awarding of rank to general officers, senior officers and junior officers, and rate to sergeants and other enlisted personnel is the responsibility of the FAA General Staff, in accordance with the below military personnel list:

MILITARY PERSONNEL LIST

DESIGNATION	TOTAL
GENERAL	4
LIEUTENANT GENERAL	8
BRIGADIER GENERAL	18
COLONEL	40
LIEUTENANT COLONEL	60
MAJOR	100
CAPTAIN	150
LIEUTENANT	200
1 ST LIEUTENANT	250
CADET	300
SERGEANT MAJOR	20
SERGEANT	30
1 ST SERGEANT	50
2 ND SERGEANT	200
CORPORAL	500
PRIVATE	3077
TOTAL	5007

4. The incorporation into the FAA and awarding of rank to remaining general officers, namely 6 Lieutenant Generals and 14 Brigadier Generals, and their placement as general officers at the disposition of the FAA general Staff.

Luanda, Republic de Angola, 4 April 2002

FOR THE DELEGAÇÃO FOR THE DELEGATION
OF THE ANGOLAN ARMED FORCES OF THE MILITARY FORCES UNITA

GENERAL OF THE ARMY GENERAL
ARMANDO DA CRUZ NETO GERALDO ABREU MUENGO
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CHEFE DO ESTADO MAIOR GENERAL CHEFE DO ALTO ESTADO MAIOR GERAL
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ARMADAS ANGOLANAS

ANNEX 3

TO THE COMPLEMENTARY MEMORANDUM OF UNDERSTANDING TO THE
LUSAKA PROTOCOL FOR THE CESSATION OF HOSTILITIES
AND RESOLUTION OF REMAINING MILITARY ISSUES
PENDING UNDER THE TERMS OF THE LUSAKA PROTOCOL

DOCUMENT RELATED

TO THE INTEGRATION INTO THE NATIONAL POLICE OF GENERAL OFFICERS
AND SENIOR OFFICERS COMING FROM UNITA MILITARY FORCES, IN
ACCORDANCE WITH EXISTING VACANCIES

The delegation of the Angolan Armed Forces and the delegation of UNITA Military Forces to the military talks, agree on the following regarding the integration into the National Police of general officers and senior officers coming from UNITA Military Forces, in accordance with existing vacancies.

1. The designation of general officers and senior officers coming from UNITA Armed Forces to integrate the National Police is the responsibility of the High General Staff of UNITA Military Forces.
2. The incorporation into the National Police and awarding of rank to commissioners and superintendents is the responsibility of the General Command of the National Police, in accordance with the below list of National Police personnel.

LIST OF MILITARY PERSONNEL

DESIGNATION	TOTAL
DEPUTY COMMISSIONER	3
1 ST SUPERINTENDENT	5
SUPERINTENDENT	14
ADMINISTRATOR	18
TOTAL	40

Luanda, Republic de Angola, 4 April 2002

ANNEX 4

TO THE COMPLEMENTARY MEMORANDUM OF UNDERSTANDING TO THE
LUSAKA PROTOCOL FOR THE CESSATION OF HOSTILITIES
AND RESOLUTION OF REMAINING MILITARY ISSUES
PENDING UNDER THE TERMS OF THE LUSAKA PROTOCOL

FOR THE DELEGAÇÃO FOR THE DELEGATION
OF THE ANGOLAN ARMED FORCES OF THE MILITARY FORCES UNITA

GENERAL OF THE ARMY
ARMANDO DA CRUZ NETO

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CHEFE DO ESTADO MAIOR GENERAL CHEFE DO ALTO ESTADO MAIOR GERAL
DAS FORÇAS DAS FORÇAS MILITARES DA UNITA
ARMADAS ANGOLANAS

DOCUMENT RELATED TO
THE SOCIAL-PROFESSIONAL REINTEGRATION
OF DEMOBILIZED EX-UNITA MILITARY FORCES PERSONNEL

The delegation of the Angolan Armed Forces and the delegation of UNITA Military Forces to the military talks, agree to the following concerning the social-professional reintegration of demobilized ex-UNITA Military Forces personnel:

1. The social-professional reintegration of demobilized ex-UNITA Military Forces personnel consists of ascribing civic value and undertaking socio-economic promotion by competent organs and entities of the state in strict cooperation with the FAA General Staff and with the support of the UN, in accordance with the mandate to be given by the UN Security Council or other agencies of the UN system. To achieve this end, it is considered imperative to:
 - (i) Guarantee initial assistance to demobilized ex-UNITA Military Forces personnel.
 - (ii) Guarantee general and specific preparation of ex-UNITA Military Forces personnel.
 - (iii) Assure their supported reintegration into national life.
2. The process of social-professional reintegration of ex-UNITA Military Forces personnel is to be realized by the following different means:
 - (i) The social-professional reintegration of ex-UNITA Military Forces personnel into the National Reconstruction Service.
 - (ii) The social-professional reintegration of ex-UNITA Military Forces personnel into the national labor market, namely the public sector and private sector.
 - (iii) The social-professional reintegration of ex-UNITA Military Forces personnel into the Population Resettlement Program.
3. The number of ex-UNITA Military Forces personnel subject to social-professional reintegration may reach 45,000.

ANNEX 5

Luanda, Republic de Angola, 4 April 2002

TO THE COMPLEMENTARY MEMORANDUM OF UNDERSTANDING TO THE LUSAKA PROTOCOL FOR THE CESSATION OF HOSTILITIES AND RESOLUTION OF REMAINING MILITARY ISSUES PENDING UNDER THE TERMS OF THE LUSAKA PROTOCOL

FOR THE DELEGAÇÃO FOR THE DELEGATION OF THE ANGOLAN ARMED FORCES OF THE MILITARY FORCES UNITA

GENERAL OF THE ARMY
ARMANDO DA CRUZ NETO

GENERAL
GERALDO ABREU MUENGO
UCUATCHITEMBO "KAMORTEIRO"

CHEFE DO ESTADO MAIOR GENERAL CHEFE DO ALTO ESTADO MAIOR GERAL
DAS FORÇAS DAS FORÇAS MILITARES DA UNITA
ARMADAS ANGOLANAS

DOCUMENT RELATED
TO CONSIDERATIONS ON LAW AND ORDER
AND CONDITIONS FOR THE CONCLUSION
OF THE LUSAKA PROTOCOL

Bearing in mind that UNITA Military Forces were part of a politico-military organization and, noting that the extinction of the military component of this organization conforms to the same law and order of the Republic of Angola;

In accordance with the spirit of the provisions of Points 6 and 8 of the Government declaration of 13 March 2002, as well as Paragraph 1.1 of Point 1 of Chapter II of the Memorandum of Understanding, and noting that the signatures and implementation by the parties constitute the conditions for the conclusion of the implementation of the Lusaka Protocol;

The parties consider that conditions are created that guarantee continuity in the participation of UNITA in the process of concluding the implementation of the Lusaka Protocol.

Therefore, the parties recommend to UNITA the necessity of rapidly establishing the necessary internal consensus so that it may, as a partner of the Government, participate in the process of completing the implementation of the Lusaka Protocol.

Luanda, Republic de Angola, 4 April 2002

FOR THE DELEGAÇÃO FOR THE DELEGATION
OF THE ANGOLAN ARMED FORCES OF THE MILITARY FORCES UNITA

GENERAL OF THE ARMY
ARMANDO DA CRUZ NETO

GENERAL
GERALDO ABREU MUENGO
UCUATCHITEMBO "KAMORTEIRO"

CHEFE DO ESTADO MAIOR GENERAL CHEFE DO ALTO ESTADO MAIOR GERAL
DAS FORÇAS DAS FORÇAS MILITARES DA UNITA
ARMADAS ANGOLANAS

ANNEX 6

**TO THE COMPLEMENTARY MEMORANDUM OF UNDERSTANDING TO THE
LUSAKA PROTOCOL FOR THE CESSATION OF HOSTILITIES
AND RESOLUTION OF REMAINING MILITARY ISSUES
PENDING UNDER THE TERMS OF THE LUSAKA PROTOCOL**

**DOCUMENT RELATED
TO CONSIDERATIONS ON LAW AND ORDER AND SPECIAL SECURITY
UNDER THE TERMS OF THE LUSAKA PROTOCOL**

Bearing in mind that Annex 5 institutes the anticipate participation of UNITA in the process of concluding the implementation of the Lusaka Protocol;

The parties consider valid and applicable the provision in the Document Related to the Special Security Regime guaranteed for UNITA leaders under Paragraph 3 of the Modalities for National Reconciliation of the Lusaka Protocol.

Luanda, Republic de Angola, 4 April 2002

FOR THE DELEGAÇÃO FOR THE DELEGATION
OF THE ANGOLAN ARMED FORCES OF THE MILITARY FORCES UNITA

GENERAL OF THE ARMY
ARMANDO DA CRUZ NETO

GENERAL
GERALDO ABREU MUENGO
UCUATCHITEMBO "KAMORTEIRO"

CHEFE DO ESTADO MAIOR GENERAL CHEFE DO ALTO ESTADO MAIOR GERAL
DAS FORÇAS DAS FORÇAS MILITARES DA UNITA
ARMADAS ANGOLANAS

**Case concerning the delimitation of maritime
boundary between Guinea-Bissau and Senegal,
Decision of 31 July 1989, Reports of International
Arbitral Awards, vol. XX**

CASE CONCERNING THE
ARBITRAL AWARD OF 31 JULY 1989
(GUINEA-BISSAU v. SENEGAL)

ANNEX TO THE
APPLICATION INSTITUTING PROCEEDINGS
OF THE GOVERNMENT OF THE REPUBLIC
OF GUINEA-BISSAU

[TRANSLATION]

23 AUGUST 1989

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The pagination of the present English translation, prepared by the Registry of the International Court of Justice on the basis of the authoritative French text of the Award, has been aligned with the pagination of that French text.

**ARBITRATION TRIBUNAL FOR THE DETERMINATION
OF THE MARITIME BOUNDARY**

GUINEA-BISSAU/SENEGAL

Award of 31 July 1989

President **Barberis**
Arbitrators **Bedjaoui, Gros**
Registrar **Torres Bernárdez**

In the case concerning the determination of the maritime boundary
between

the Republic of Guinea-Bissau,
represented by

His Excellency Mr. Fidélis Cabral de Almada, Minister of Education,
Culture and Sports

as Agent,

His Excellency Mr. Plo Correia, Secretary of State for Transport,
as Co-agent,

His Excellency Mr. Boubacar Touré, Ambassador of Guinea-Bissau to
Belgium, the European Economic Community and Switzerland,

Mr. Joao Aurigema Cruz Pinto, Judge at the Supreme Court,

Lieutenant-Commander Feliciano Gomes, Chief of the Navy General
Staff,

Mr. Mário Lopes, Head of the Office of the President of the Council
of State,

Mrs. Monique Chemillier-Gendreau, Professor at the University of
Paris VII,

Mr. Miguel Galvão Teles, advocate,

Mr. António Duarte Silva, former Assistant at the Faculty of Laws of
Lisbon, former Professor at the School of Law of Guinea-Bissau,

as Counsel,

Mr. Maurice Baussart, geophysicist,

Mr. André de Cae, geophysicist,

as Experts;

Geneva, 1989

and
the Republic of Senegal
represented by:

His Excellency Mr. Doudou Thiam, Advocate at the Court of Appeal,
former President of the Bar Council, member of the International
Law Commission,

as Agent,

Mr. Birame Ndiaye, Professor of Law,

Mr. Ousmane Tanor Dien, diplomatic adviser to the President of the
Republic of Senegal,

Mr. Tafsir Malick Ndiaye, Professor of Law,

as Co-agents,

Mr. Daniel Bardonnnet, Professor at the University of Law, Economics
and Social Sciences of Paris, Associate of the Institute of
International Law,

Mr. Lucius Cafilisch, Professor at the Graduate Institute of
International Studies of Geneva, Member of the Institute of
International Law,

Mr. Paul De Visscher, Professor Emeritus of the Faculty of Law of
the Catholic University of Louvain, Member of the Institute of
International Law,

Mr. Ibou Diaïte, Professor at the Faculty of Legal and Economic
Sciences of Dakar,

as Counsel,

Mr. Samba Diouf, geologist,

Mr. André Roubertou, hydrographer,

Mrs. Isabella Niang, Assistant Professor at the Faculty of Sciences
of Dakar,

Mr. Amadou Tahirou Diaw, Assistant Professor at the Faculty of
Sciences of Dakar,

as Experts,

THE TRIBUNAL, composed as above,

gives the following Award:

1. On 12 March 1985 at Dakar the Governments of the Republic of
Senegal and the Republic of Guinea-Bissau signed an Arbitration Agreement
reading as follows:

"The Government of the Republic of Senegal and the
Government of the Republic of Guinea-Bissau,

Recognizing that they have been unable to settle by means
of diplomatic negotiation the dispute relating to the
determination of their maritime boundary,

Desirous, in view of their friendly relations, to reach a
settlement of that dispute as soon as possible and, to that end,
having decided to resort to arbitration,

Have agreed as follows:

Article 1

1. The Arbitration Tribunal (hereinafter called "the
Tribunal") shall consist of three members designated in the
following manner:

Each Party shall appoint one arbitrator of its choice;

The third arbitrator, who shall function as President of
the Tribunal, shall be appointed by mutual agreement of the two
Parties or, in the absence of such agreement, by agreement of
the two arbitrators after consultation with the two Parties.

2. The three members of the Tribunal must be nationals of
third States.

The arbitrators shall be designated within 60 days from the
signature of the present Arbitration Agreement.

3. In the event that the President or another member of the
Tribunal should cease to act, the vacancy shall be filled by a
new member designated by the Government which appointed the
member to be replaced, in the case of the two arbitrators
designated respectively by the two Governments, or, in the case
of the President, by repeating the procedure set forth in
paragraph 1 above.

Article 2

The Tribunal is requested to decide in accordance with the norms of international law on the following questions:

1. Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?
2. In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?

Article 3

The seat of the Tribunal shall be at Geneva (Switzerland).

Article 4

1. The Tribunal shall take its decisions only in its full composition.

2. The decisions of the Tribunal relating to all questions of substance or procedure, including all questions relating to the jurisdiction of the Tribunal and the interpretation of the Agreement, shall be taken by a majority of its members.

Article 5

1. Each of the Parties shall, within 30 days from the signature of the present Agreement, designate for the purposes of the arbitration an agent and one or more co-agents, and shall communicate the names and addresses of their respective agents to the other Party and to the Tribunal.

2. The Tribunal, as soon as it is constituted, shall appoint a Registrar after consulting the two Agents.

Article 6

1. The proceedings before the Tribunal shall be adversarial. It shall consist of two phases: a written phase and an oral phase.

2. The written phase shall comprise:

- (a) A Memorial to be submitted by the Republic of Guinea-Bissau not later than four months after the setting-up of the Tribunal;
 - (b) A Counter-Memorial to be submitted by the Republic of Senegal, not later than four months after the filing of the Memorial by the Republic of Guinea-Bissau;
 - (c) A Reply, to be submitted by the Republic of Guinea-Bissau not later than two months after the filing of the Counter-Memorial by the Republic of Senegal;
 - (d) A Rejoinder to be submitted by the Republic of Senegal not later than two months after the filing of the Reply by the Republic of Guinea-Bissau.
3. The Tribunal may extend the above time-limits at the request of either of the Parties.

Article 7

1. The written and oral pleadings shall be in the French and/or the Portuguese language; the decisions of the Tribunal shall be formulated in those two languages,

2. The Tribunal shall, so far as necessary, arrange for translations and interpretations and shall be empowered to recruit secretariat staff, to appoint experts, and to take all measures relating to premises and to the purchase or rental of equipment.

Article 8

The general expenses of the arbitration shall be settled by the Tribunal and borne in equal shares by the two Governments; each Government, however, shall bear its own expenses involved in or for the preparation and presentation of its arguments.

Article 9

1. Upon completion of the proceedings before it, the Tribunal shall inform the two Governments of its decision regarding the questions set forth in Article 2 of the present Agreement.
2. That decision shall include the drawing of the boundary line on a map. To that end, the Tribunal shall be empowered to appoint one or more technical experts to assist it in the

3. The Award shall state in full the reasons on which it is based.
4. The two Governments shall decide whether or not to publish the Award and/or the documents of the written or oral proceedings.

Article 10

1. The Arbitral Award shall be signed by the President of the Tribunal and by the Registrar. The latter shall hand to the Agents of the two Parties a certified copy in the two languages.
2. The Award shall be final and binding upon the two States which shall be under a duty to take all necessary steps for its implementation.
3. The original text of the Award shall be deposited in the archives of the United Nations and of the International Court of Justice.

Article 11

1. No activity of the Parties during the course of the proceedings may be deemed to prejudice their sovereignty over the area the subject of the Arbitration Agreement.
2. The Tribunal shall have the power to order, at the request of one of the Parties and if the circumstances so require, any provisional measures to be taken to safeguard the rights of the Parties.

Article 12

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

In witness whereof, the undersigned, duly authorized by their respective Governments, have signed the present agreement.

Done in duplicate at Dakar, on 12 March 1985, in the French and Portuguese languages, both texts being equally authentic."

2. Pursuant to Article 1 of the Arbitration Agreement,

Mr. Mohammed Bedjaoui was appointed a member of the Tribunal by Guinea-Bissau and Mr. André Gros by Senegal, both within the specified time-limit of 60 days. Pursuant to the same Article of the Arbitration Agreement, Guinea-Bissau and Senegal appointed by mutual agreement Mr. Julio A. Barberis as third arbitrator and President of the Tribunal after one year had elapsed.

3. As soon as it was established, on 6 June 1986, the Tribunal, after consulting the Agents of the Parties, appointed Mr. Etienne Grisel as its Registrar, pursuant to Article 5, paragraph 2, of the Arbitration Agreement. Mr. Etienne Grisel having subsequently resigned, the Tribunal on 6 September 1988, after consulting the Agents of the Parties, appointed Mr. Santiago Torres Bernárdez as Registrar of the Tribunal.

4. Pursuant to Article 5, paragraph 1, of the Arbitration Agreement, the Government of Guinea-Bissau designated as agent His Excellency Mr. Fidélis Cabral de Almada and the Government of Senegal, His Excellency Mr. Doudou Thiam.

5. Geneva having been designated by Article 3 of the Arbitration Agreement as the seat of the Tribunal, an Agreement relating to the status, privileges and immunities of the Tribunal in Switzerland was concluded by the Parties with the host State. This Agreement took the form of an exchange of Notes between the Federal Department of Foreign

Affairs of Switzerland and the Embassy of the Republic of Senegal at Bern and the Embassy of the Republic of Guinea-Bissau at Brussels.

6. The inaugural meeting was held on 6 June 1986 in the presence of the Parties at the International Conference Centre at Geneva.

7. On 14 March 1988, the Tribunal held a special meeting in the Alabama Room in the Town Hall of Geneva where, in the course of a ceremony, the members of the Tribunal and the delegations of the Parties were received by the Council of State of the Republic and Canton of Geneva.

8. The meetings of the Tribunal were held at first in premises placed at its disposal by the Swiss authorities at the International Conference Centre at Geneva and at Villa Lullin at Genthod (Geneva), and subsequently in premises arranged for by the Tribunal itself, in particular at the headquarters of the International Labour Organisation.

9. With regard to the procedure, the Tribunal agreed to draw inspiration as far as possible from the rules of procedure of the International Court of Justice and to adopt supplementary procedural decisions as necessary.

10. The Memorial of Guinea-Bissau was filed on 6 October 1986 and the Counter-Memorial of Senegal on 6 February 1987, within the time-limits set by the provisions of Article 6, paragraph 2, subparagraphs (a) and (b) of the Arbitration Agreement of 12 March 1985. At the request of the Parties

the Tribunal agreed to extend the time-limit specified in Article 6, paragraph 2, subparagraphs (c) and (d) of the Arbitration Agreement for the Reply by Guinea-Bissau and the Rejoinder by Senegal. Guinea-Bissau filed its Reply on 6 June 1987 and Senegal its Rejoinder on 6 October 1987, i.e., within the time-limits as extended by the Tribunal.

11. The case being thus ready for hearing, the Tribunal, after consulting the Agents of the Parties, fixed 14 March 1988 for the opening of the oral proceedings. It was agreed that the representatives of Guinea-Bissau would speak first.

12. In the course of 16 private meetings held at the Villa Lullin at Genthod (Geneva) on 14, 15, 16, 21, 22, 23, 26 and 29 March 1988, the Tribunal heard, for Guinea-Bissau, their Excellencies Mr. Cabral de Almada and Mr. Pio Correia, Lieutenant-Commander Gomes, Mr. Lopes, Mrs. Chemillier-Gendreau, and Mr. Galvão Teles, Mr. Duarte Silva, Mr. Baussart and Mr. de Cae and, for Senegal, His Excellency Mr. Thiam, Mr. De Visscher, Mr. Bardonnet, Mr. Caflisch, Mr. Diaïte, Mr. Roubertou, Mr. Diouf and Mrs. Niang.

13. Guinea-Bissau called Mr. Grandin as expert. Mr. Grandin made a statement and replied to the questions put to him by counsel for Guinea-Bissau. Senegal did not call any experts other than those forming part of its delegation. Neither of the Parties called any witnesses.

14. Availing itself of the powers vested in it by Article 9, paragraph 2, of the Arbitration Agreement, the Tribunal, after consulting the Agents of the Parties, designated Commander Peter Bryan Beazley as technical expert of the Tribunal.

15. In the written phase of the proceedings, the following submissions were presented by the Parties.

On behalf of Guinea-Bissau, in the Memorial:

"May it please the Tribunal to decide that:

- The rules on the succession of States in respect of treaties (Arts. 11, 13 and 14 of the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties) do not permit Senegal to invoke against Guinea-Bissau the exchange of letters effected on 26 April 1960 between France and Portugal, which in any case is absolutely null and void and non-existent;
- The maritime delimitation between Senegal and Guinea-Bissau has thus never been determined;
- The delimitation of the territorial seas of the two States shall be made by application of Article 15 of the Convention on the Law of the Sea of 10 December 1982 in accordance with an equidistance line (azimuth 247°) from the baselines of the two States;
- For the delimitation of the continental shelves and exclusive economic zones, since consideration of all the relevant circumstances and enquiry into suitable methods to reach an equitable solution produces similar results lying between azimuths 264° and 270°, the maritime delimitation between the two States should be fixed between these two lines."

The submissions presented in the Reply by Guinea-Bissau reiterate

those of the Memorial reproduced above, except that in the first paragraph

the word "concluded" replaces the word "effected" to describe the exchange of letters of 16 April 1960 and that the adverb "absolutely" no longer qualifies the word "null" in the Reply.

On behalf of Senegal in the Counter-Memorial:

"May it please the Tribunal:

To reject the submissions of the Republic of Guinea-Bissau;

To declare and adjudge:

That by the exchange of letters of 26 April 1960 'on the subject of the maritime boundary between the Republic of Senegal and the Portuguese province of Guinea', France and Portugal, in the full exercise of their sovereignty and in conformity with the principles governing the validity of international treaties and agreements, have carried out the delimitation of a maritime boundary;

That this Agreement, confirmed by the subsequent conduct of the contracting Parties as well as by the conduct of the sovereign States which succeeded to them, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal."

The submissions in the Rejoinder by Senegal reiterated those set forth in the Counter-Memorial and reproduced above, except for the insertion in the last paragraph of the words "and supplemented" between the word "confirmed" and the words "by the subsequent conduct".

16. In the course of the oral proceedings, the following submissions were presented by the Parties.

On behalf of Guinea-Bissau at the hearing of 26 March 1988,

(afternoon):

"May it please the Tribunal to decide that:

(1) Senegal is not entitled to invoke against the Republic of Guinea-Bissau the exchange of letters of 26 April 1960 between France and Portugal.

On behalf of Senegal, at the hearing of 29 March 1988 (afternoon):

- a correct interpretation of the rules of *uti possidetis iuris*, which concern solely land frontiers and do not extend to maritime delimitations;
- the non-publication of the Agreement in Portugal and in Guinea;
- the right of peoples to self-determination and the process of liberation of the people of Guinea-Bissau, which had already begun on the date of the Franco-Portuguese Agreement;
- the principle of permanent sovereignty of every people and every State over its natural wealth and resources, which finds its expression today in Article 13 of the Vienna Convention on Succession of States of 23 August 1978;

The Franco-Portuguese exchange of letters is in addition absolutely void by reason of violation of the principles of *ius cogens* and is void by reason of non-conformity with the fundamental norm of contemporary law in the matter of maritime delimitation and by reason of manifest violation of rules of internal law of fundamental importance concerning competence to conclude treaties. It is also [legally] non-existent.

Thus, the Agreement concluded by exchange of letters of 26 April 1960 does not have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal and no maritime delimitation has been effected between them.

(2) The delimitation of the territorial waters between the two States should be made by application of Article 15 of the Convention on the Law of the Sea of 10 December 1982 on a line of equidistance from the baselines of the two States running in the direction of azimuth 247°.

For the delimitation of the continental shelves and the exclusive economic zones, since consideration of all the relevant circumstances and enquiry into appropriate methods to reach an equitable solution produces results situated between the directions of azimuths 264° and 270°, it is between these two lines that the maritime delimitation between the two States should be fixed."

"May it please the Tribunal:

To reject the submissions of the Government of the Republic of Guinea-Bissau:

To declare and adjudge,

That by the exchange of letters of 26 April 1960 'on the subject of the maritime boundary between the Republic of Senegal and the Portuguese province of Guinea', France and Portugal, in the full exercise of their sovereignty and in conformity with the principles governing the validity of international treaties and agreements, have carried out the delimitation of a maritime boundary;

That this Agreement, confirmed and supplemented by the subsequent conduct of the Contracting Parties as well as by the conduct of the sovereign States which succeeded to them, has the force of law in the relations between the Republic of Senegal and the Republic of Guinea-Bissau;

That whatever reply be given by the Tribunal to the question set out in Article 2, paragraph 1, of the Arbitration Agreement, and for the reasons stated by the Republic of Senegal, the maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau is constituted by the line drawn on azimuth 240° from the lighthouse at Cape Roxo and by its prolongation in a straight line raised to the superjacent water-column.

That the terminal point is situated at the intersection of that same line on azimuth 240° and the 200-nautical-mile limit."

17. By an Order of the Tribunal of 18 January 1989 the Parties were invited to submit by 1 April 1989 a supplementary note on any information that might have come to their knowledge or which they had been able to obtain relating to actual or potential resources in the matter of fisheries and hydrocarbons of the disputed zone, and their geographical

location. In response to that request, Senegal and Guinea-Bissau filed within the specified time-limit notes concerning the information in question.

*

*

18. The dispute submitted to the Tribunal pursuant to the Arbitration Agreement of 12 March 1989 reproduced in paragraph 1 above is a dispute of a legal nature between the Republic of Senegal and the Republic of Guinea-Bissau, i.e., between two adjacent States which occupy that part of West Africa which lies on the shores of the Atlantic Ocean between Mauritania to the north of Senegal and Guinea to the south of Guinea-Bissau, except of course for the part that belongs to Gambia, which is an enclave in Senegal and also has an Atlantic coastline. As such, this dispute could only have emerged after the accession to full sovereignty and independence at the international level of whichever non-autonomous territory was the last to be decolonized. This is admitted both by the Republic of Senegal and by the Republic of Guinea-Bissau.

However, the view of each of those two States as to the meaning and scope to be attributed to certain agreements and actions on the part of their respective predecessor States has played a very important role in the origin of the dispute.

19. Senegal, a French overseas territory since 1946, became on 25 November 1958, by a decision of the Senegalese Territorial Assembly, an autonomous State within the Communauté then instituted by the French Constitution, an option which had been previously accepted on 28 September of the same year by a referendum of the Senegalese people. In

January 1959, Senegal formed, still within the Communauté, with French Sudan the Federation of Mali. That Federation became independent on 4 April 1960 and acceded to full sovereignty on 20 June 1960. The Federation of Mali was subsequently dissolved and Senegal became on 20 August 1960, under the name of the Republic of Senegal, an independent and sovereign State separate and distinct from that of the Republic of Mali (the former French Sudan). The Republic of Senegal was admitted to the United Nations on 28 September 1960. As for Guinea-Bissau, its independence was proclaimed on 24 September 1973 by the National People's Assembly, having been until then under Portuguese administration. The independence of Guinea-Bissau has been the outcome of a long struggle for national liberation, at first of a political nature and later, from early 1963 onwards, by the military action of the African Party for the Independence of Guinea and Cape Verde (PAIGC) against Portugal, which at

It is not disputed by the Parties to the present dispute that the delimitation effected by that Franco-Portuguese Convention of 1886 defines the land frontier between the Republic of Senegal and the Republic of Guinea-Bissau. The two Parties are also in agreement that the Franco-Portuguese Convention of 1886 does not define the maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau.

21. But while the Parties to the present dispute are agreed on the meaning and scope of the Franco-Portuguese Convention of 1886, that is far from being the case as regards the Agreement concluded by an exchange of letters on 26 April 1960 between France and Portugal for the purpose of defining the maritime boundary between the Republic of Senegal (at that time an autonomous State within the Communauté) and the Portuguese territory of Guinea. A Portuguese Decree of 26 February 1958 which empowered the Minister for Overseas Affairs to sign a contract granting a concession to the Esso Company gave rise to objections on the part of France. There followed negotiations at Lisbon from 8 to 10 September 1959 for the purpose of arriving at an agreed delimitation of the territorial sea, the contiguous zones and the continental shelf. On 10 September 1959 the negotiators established "recommendations" which were submitted to the two Governments. The first of these "recommendations" is the source of the content of the Agreement of 26 April 1960. That Agreement was published in the Official Journal in France as well as in those of the

that time was under the régime of Dr. António de Oliveira Salazar. Under a Treaty concluded at Algiers on 26 August 1974, Portugal recognized Guinea-Bissau as an independent and sovereign State. The admission of Guinea-Bissau to the United Nations took place on 17 December 1974.

20. Prior to the events which led to the international sovereignty and independence of the Republic of Senegal and the Republic of Guinea-Bissau, France and Portugal had concluded certain agreements on the delimitation of their respective possessions in West Africa. Thus, by a convention signed in Paris on 12 May 1886, Portugal and France established a delimitation between Portuguese Guinea (the present Republic of Guinea-Bissau) on the one side and the French Colonies of Senegal (the present Republic of Senegal) to the north and Guinea (the present Republic of Guinea) to the south and east, on the other, by virtue of which the land frontier between Guinea Bissau and Senegal reached the Atlantic Ocean at Cape Roxo. It should also be noted that the convention specified that the following should belong to Portugal:

"all the islands comprised between the meridian of Cape Roxo, the coast and a southern limit formed by a line which shall follow the thalweg of the Cajet River and continue in a south-westerly direction across the Pilots channel to reach 10° 40' north latitude with which it shall merge as far as the meridian of Cape Roxo".

Communauté and of the Federation of Mali, but not in the Official Journal of Portugal or that of its Province of Guinea, nor was it registered with the Secretariat of the United Nations either by France or by Portugal.

22. The Republic of Guinea-Bissau considers that the Franco-Portuguese exchange of letters mentioned above is void and legally non-existent, and that, in any case, it is not opposable to it. According to the Republic of Senegal, on the other hand, the Franco-Portuguese Agreement of 26 April 1960 has the force of law in the relations between it and the Republic of Guinea-Bissau with regard to their maritime boundary. It follows that, for the Republic of Guinea-Bissau, there is no maritime delimitation between it and the Republic of Senegal so that such a delimitation will have to be effected ex novo, whereas for the Republic of Senegal a maritime delimitation already exists, corresponding to that resulting from the Franco-Portuguese Agreement of 26 April 1960. These divergent positions of the Parties explain why Article 2 of the Arbitration Agreement of 12 March 1985 requests the Tribunal to reply, in the first place, to the question whether the Agreement of 26 April 1960 has the force of law in the relations between the Republic of Senegal and the Republic of Guinea-Bissau, and requests also the Tribunal, in the event of a negative answer to that question, to say what is the course of

the line delimiting the maritime territories appertaining to the Republic of Senegal and the Republic of Guinea-Bissau respectively.

23. The Republic of Guinea-Bissau contends that when, in September 1977, negotiations between the Parties were, on its initiative, begun for the purpose of settling the question of the determination of the maritime boundary between them, Guinea-Bissau was not even aware of the existence of the Franco-Portuguese exchange of letters of 26 April 1960, and it was only from 1978 on that the Republic of Senegal invoked it in the course of the negotiations. Senegal asserts that it had always been aware of the Franco-Portuguese negotiations which culminated in the Agreement of 26 April 1960, since the French delegation included a Senegalese member, that it has constantly relied on the 240° maritime boundary defined by the 1960 Agreement, and that Guinea-Bissau has also respected the Agreement, that for many years it has not protested against it and that the proclamation of independence of Guinea-Bissau, in its reference to the boundaries of the territorial waters, tacitly recognized the 240° limit.

24. It should also be mentioned here that the disagreement between the Parties to the present dispute regarding the Franco-Portuguese exchange of letters of 26 April 1960 does not concern only the period after the independence of Guinea-Bissau or the period after the commencement of the negotiations in 1977 mentioned above. The

disagreement extends also to the question of the application of the 1960 Agreement before those dates. For example, Guinea-Bissau maintains that when in 1963 the Portuguese authorities authorized the exploration for hydrocarbons in the area, they did so without any regard for a maritime boundary, thus proving that they considered such a boundary as non-existent. Senegal on the other hand emphasizes that the 1960 Agreement has been applied by all those concerned and that, despite the incidents that took place in and after 1963 between it and Portugal, the latter country never disputed the Agreement, and observed it. Senegal maintains that there was a mistake in a reply given by its administration to the Italian Embassy, which was corrected a month later, and asserts that it had always exercised its State jurisdiction in the area (granting of fishing licences or permits for the exploration or exploitation of hydrocarbons, protests against violations, etc.) in reliance on the maritime boundary established by the Franco-Portuguese Agreement of 1960.

25. A number of other events marked the genesis of the dispute: some incidents occurred at sea, in particular in 1977, in 1978 and again in 1984, when Senegal authorized the construction of drilling platforms in the disputed zone, which prompted a protest on the part of the Government of the Republic of Guinea-Bissau. Moreover, in 1985 a law enacted by the

Republic of Guinea-Bissau concerning a new system of straight baselines for that country gave rise to a protest by Senegal lodged with the Secretary-General of the United Nations.

26. These events did not however prevent the continuation of the negotiations between the Parties that had begun in 1977; as from 1982, those negotiations dealt essentially with the conclusion of an Arbitration Agreement. On 12 March 1985, that Arbitration Agreement was concluded and, by 7 April 1986, the three arbitrators had been selected.

27. The sole object of the dispute submitted by the Parties to the Tribunal accordingly relates to the determination of the maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau, a question which they have not been able to settle by means of negotiation. The case is one of a delimitation between adjacent maritime territories which concerns sea areas situated in the Atlantic Ocean off the coasts of Senegal and Guinea-Bissau. In their written documents as well as in the pleadings, the Parties have not failed to draw the Tribunal's attention to a whole series of geographical, geological and morphological data relating to the area concerned by the delimitation as well as to their coasts, in order to enlighten the Tribunal in its task. At the present stage of the discussion, the Tribunal sees no need to give a precise definition of the area in which the delimitation of the maritime boundary is to be effected,

or to say what, in the Tribunal's view, would be the effect of the various special features, geographical in particular, on the legal position.

28. Guinea-Bissau, the coast of which is considerably broken up by the estuaries of waterways, and off which lie the islands of the Bijagós Archipelago, stretches from the boundary of Guinea-Bissau with Guinea to Cape Roxo. Senegal lies to the north of Guinea-Bissau, and its coasts extend first from Cape Roxo to the frontier with the south of the Gambia, then from the frontier with the north of the Gambia to the boundary with Mauritania. According to Senegal, the Franco-Portuguese Agreement of 1960 has the force of law between the Parties, and the maritime boundary is accordingly constituted by a line drawn at azimuth 240° from the lighthouse of Cape Roxo and by its prolongation in a straight line seaward. In the view of Guinea-Bissau, on the other hand, the delimitation of the territorial waters between the two countries should follow the course of an equidistance line corresponding to azimuth 247° from the baseline of the two States; and the further line relating to the delimitation of the continental shelf and the exclusive economic zones would lie between azimuths 264° and 270°, the latter corresponding to a parallel of latitude.

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29. According to Article 2 of the Arbitration Agreement, the Tribunal must first reply to the following question:

"Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?"

30. Before proceeding to examine this question, it is appropriate to define the competence of the Tribunal in this regard. The Tribunal was established by an international treaty concluded between the Republic of Guinea-Bissau and the Republic of Senegal for the purpose of deciding, in the first place, whether the Franco-Portuguese Agreement of 26 April 1960 has the force of law between them. It might be questioned whether an arbitration tribunal is competent to examine the validity of a treaty concluded by two States which have not consented to that examination and which have not participated in the arbitral proceedings. Similarly, the question could be raised whether a country which was not a party to a treaty can assert its validity or its nullity.

31. It should be pointed out that the present case is not one in which two States have established a tribunal to decide on the validity or the nullity of an agreement concluded between other countries which are totally unrelated to them, as would be the situation, for instance, if the present Tribunal were asked to pronounce on the validity or nullity of an Agreement concluded between Norway and Uruguay.

The present dispute concerns an Agreement between two countries, of which the Parties are the successor States, Senegal and Guinea-Bissau

are, respectively, the successor States of France and Portugal. Although Guinea-Bissau declared tabula rasa as regards the application of treaties concluded by Portugal, the two Parties have recognized the principle of the African uti possidetis proclaimed by the Organization of African Unity, and they have reiterated it expressly in the present arbitration.

In addition, from the conduct of the Republic of Guinea-Bissau and the Republic of Senegal in the present arbitration, it can be inferred that they are acting as the successors of Portugal and France respectively, i.e., as States which, by the operation of the succession of States, have replaced Portugal and France in the responsibility for the international relations of the territories of Guinea-Bissau and Senegal respectively. The very fact of invoking before the Tribunal grounds of non-existence or nullity of the 1960 Agreement, or to claim before it entitlement to rights derived from that Agreement, implies acknowledgement of the status of successor of one of the States which concluded that Agreement.

32. The two countries admit that they are the successors of the States which concluded the 1960 Agreement, but their views diverge regarding the rules governing succession between States. Thus, while Senegal asserts that succession operates for the 1960 Agreement, Guinea-Bissau maintains the contrary.

33. A successor State can invoke before a tribunal all grounds of claim or objection which could have been invoked by the State to which it has succeeded. Consequently, Guinea-Bissau, as a successor State, is entitled to invoke before the Tribunal all the grounds of nullity which could have been raised by Portugal regarding the 1960 Agreement.

Guinea-Bissau can also submit to the Tribunal any reasons for non-opposibility to it of the Agreement, which in its view exclude succession to that Agreement. Similarly, Senegal can likewise invoke before the Tribunal all the grounds which, in its view, support the existence and validity of the Agreement and its effect in the present case.

34. The Tribunal will therefore proceed to analyse the 1960 Agreement, in so far as it may be the subject of a succession of States, and with regard to its effects in the relations between Guinea-Bissau and Senegal. The validity of that Agreement in the relations between Portugal and France and the effects which it might still have between those two countries are not affected by the present Award, which will obviously have effect only as between the Parties to the arbitration.

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35. Guinea-Bissau has stated the various reasons on which it relies to assert that the 1960 Agreement does not have the force of law in its relations with Senegal. From a legal point of view, these reasons may be classified into four categories: (I) grounds of non-existence and nullity; (II) grounds of non-opposability; (III) non-registration of the Agreement with the Secretariat of the United Nations; and (IV) existence of a right of verification or review. The Tribunal will analyse separately each of the reasons thus invoked.

I. GROUNDS OF NON-EXISTENCE AND NULLITY INVOKED BY GUINEA-BISSAU

36. In a number of passages of its Memorial (for example, pp. 117, 129, 130, 158, 164 and 246) and of its Reply (pp. 203 and 339), Guinea-Bissau refers to the 1960 Agreement as having no existence. The competence of this Tribunal is based on the Arbitration Agreement on which its existence is based, and the limits of its jurisdiction are there defined. The first question to be answered by the Tribunal is the following: "Does the Agreement ... have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?" That question implies the existence of a treaty. If, on the other hand, the question had been "Is there an Agreement relating to the maritime boundary ...?", the problem would be different. On the latter hypothesis,

the State which claimed the existence of the Agreement would have had to prove it. In view, however, of the wording of the first question contained in Article 2 of the Arbitration Agreement, the 1960 Agreement is presumed to exist, and a claim that it is void would have to be proved. Consequently, as regards the burden of proof, the grounds for non-existence put forward by Guinea-Bissau will be treated by the Tribunal as grounds of nullity.

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A. INCOMPATIBILITY OF THE 1960 AGREEMENT WITH THE INTERNATIONAL RULES OF JUS COGENS

37. The first ground of nullity invoked by Guinea-Bissau is that the Agreement of 26 April 1960 is allegedly incompatible with certain international legal norms of jus cogens. In this regard, Guinea-Bissau states in its Memorial that the rule which enshrines the right of peoples to self-determination has the character of a peremptory norm. In its turn, that norm is allegedly "accompanied by corollaries" having also the character of belonging to peremptory international law (p. 140). These corollaries are stated to include the principle of permanent sovereignty

over natural resources, a principle which according to Guinea-Bissau (PV/3, P. 131) is no more than the "logical development" of the principle of self-determination of peoples.

In the view of Guinea-Bissau, the violation in the present case of the norms of jus cogens concerning the right of peoples to self-determination and permanent sovereignty over natural resources takes two different forms: (i) in the first place, there would be a contradiction between such norms and the 1960 Agreement, because that Agreement constituted an alienation of territory, and as such was contrary to the principle of permanent sovereignty over natural resources; (ii) in the second place, the process of liberation is claimed to have been already under way at the time of the signature of the Agreement, thereby rendering it incompatible with the principle of the right of peoples to self-determination.

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38. The rule of permanent sovereignty over natural resources has been spelled out in resolutions 1803 (XVII) and 2158 (XXI) of the General Assembly of the United Nations. Paragraph I, 1, of resolution 1803 (XVII) concerns the "right of peoples and nations to permanent sovereignty over their natural wealth and resources" and

paragraph I, 1, of resolution 2158 (XXI) reaffirms "the inalienable right of all countries to exercise permanent sovereignty over their natural resources". The rule contained in these resolutions of the United Nations General Assembly guarantees to every State the right to exploit its own resources and recognizes the right of each of them to nationalize assets found on its territory which are being exploited by foreign enterprises.

39. The application of the principle of permanent sovereignty over natural resources presupposes that the resources in question are to be found within the territory of the State which invokes that principle. In the present case, the 1960 Agreement determined what was the territory of each State, i.e., it establishes what belongs to each of them. Before the Agreement, the maritime boundaries had not been determined, and consequently neither of the two States could assert that a particular portion of the maritime area was "its own". From a logical point of view, Guinea-Bissau cannot assert that the norm which determined the extent of its maritime territory (the 1960 Agreement) has taken away from it part of the maritime territory which was "its own". That assertion could only make sense if there had been a pre-existing legal norm which had attributed that territory to Guinea-Bissau, which has not been demonstrated in the course of the present arbitration. Any State claiming to have been deprived of part of its territory or natural resources must first demonstrate that they belonged to it.

It follows from the foregoing that the principle of permanent sovereignty over natural resources is not applicable in the present case.

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40. Guinea-Bissau asserts that the signing of the 1960 Agreement was in conflict with a corollary which follows from the principle of self-determination of peoples, whereby once a process of liberation is initiated, the colonial State cannot conclude treaties relating to essential elements of the right of peoples. This norm, since it is only a corollary, is said to derive its legal existence and its peremptory character from the above-mentioned fundamental principle. Accordingly, in the view of Guinea-Bissau, the principle of self-determination of peoples entails as a logical consequence a restriction of the ius tractatus of the colonial State as from the initiation of a process of national liberation. In addition, that limitation is claimed to have the character of a rule of ius cogens.

41. Contemporary writers on international law have dwelt at length on ius cogens, particularly since the 1969 Vienna Convention on the Law of Treaties. Some of those writers present ius cogens as consisting of norms of a superior hierarchical order. The studies on the notion of ius cogens

and on the identification of rules having that character have often been influenced by ideological conceptions and by political attitudes. From the point of view of the law of treaties, ius cogens is simply a peculiar feature of certain legal norms, namely that of not admitting derogation by Agreement.

42. Respect for the principle of equal rights and self-determination of peoples is mentioned in paragraph 2 of Article 1 of the Charter of the United Nations as one of the Purposes of the Organization, and this principle has subsequently been the subject of reformulations - in full or in part - in certain international instruments and documents, in particular certain resolutions of the General Assembly of the United Nations such as those concerning the "Declaration on the Granting of Independence to Colonial Countries and Peoples" (res. 1514 (XV)) of 1960, which has been invoked on several occasions by Guinea-Bissau during the present arbitration (see for example Memorial, Vol. I, pp. 139, 141 and 145; PV/1, pp. 113 and 122; PV/13, pp. 112 and 113), and the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" (res. 2625 (XXV) of 1970).

43. Guinea-Bissau claims that the rule whereby ius tractatus undergoes a restriction as from the initiation of a process of national liberation is a corollary of the principle of the right of peoples to

self-determination. In the view of the Tribunal, the relation between these two propositions is not that of a corollary in which the soundness of one proposition can be inferred from that of the other by a simple operation of formal logic. Guinea-Bissau has not put forward any evidence or any demonstration to show that the logical relation existing between the two rules is that of a corollary. The mere assertion that there is a certain logical relationship between two propositions is not sufficient. The rule invoked by Guinea-Bissau has a content which cannot be inferred from the right of peoples to self-determination. It constitutes a legal norm independent of the principle of self-determination and one which is connected more with the principle of effectiveness and the rules governing the formation of States in the international sphere.

44. A State born of a process of national liberation has the right to accept or to reject any treaties concluded by the colonial State after the initiation of that process. In this field, the newly-independent State enjoys a total and absolute freedom and there is no peremptory norm obliging it to declare null and void the treaties concluded during that period, or to reject them.

Guinea-Bissau has not established in the present arbitration that the norm invoked by it has become a rule of jus cogens either by custom or by the formation of a general principle of law.

45. In the present case, Guinea-Bissau alleges that France, by signing the 1960 Agreement, committed a breach, to the detriment of

Senegal, of a corollary of the principle of self-determination of peoples, according to which a colonial State could not conclude, after the initiation of a process of national liberation, treaties bearing on essential elements of the right of peoples. According to Guinea-Bissau, that Agreement is null and void and, since a norm of jus cogens is involved, Senegal has no right to confirm the treaty. The norm relied upon by Guinea-Bissau exists in international law but, as stated in the previous paragraph, it is not one of jus cogens. Senegal had therefore total and absolute freedom to accept or reject the 1960 Agreement. By virtue of that faculty, Senegal has accepted it and now invokes its application before the Tribunal. As for Guinea-Bissau, it is not entitled to request the Tribunal to declare null and void the 1960 Agreement on the ground of a breach of the asserted norm committed by France to the detriment of Senegal.

46. Guinea-Bissau also claims that Portugal has violated, to its detriment, the same rule mentioned above, which is alleged to be a corollary of the principle of self-determination of peoples. More specifically, it asserts that Portugal in 1960 did not have the necessary competence to sign the Agreement: "Neither of the colonial powers still retained in 1960 the necessary full sovereignty to conclude an Agreement" (PV/3, p. 133).

47. With a view to proving that this rule is applicable in the present case, Guinea-Bissau has sought to demonstrate that in April 1960,

the date of the Franco-Portuguese Agreement, the process of national liberation in Guinea had already started.

Both in its Reply and during the hearings, Guinea-Bissau has dealt in particular with the evolution of the process of national liberation in the Portuguese province of Guinea. According to the evidence adduced, the period from 1955 to 1960 was marked by the foundation, in Guinea or abroad, of a number of associations, some of them clandestine, whose declared ultimate objective was the independence of their country. Thus, in 1955 the Movement for the National Independence of Portuguese Guinea (MING) was set up at Bissau consisting of a group of merchants, public officials and students - a movement which was to disappear again the following year. In September 1956 the African Independence Party (PAI) was founded at Bissau; as from October 1960, it was renamed PAIGC. In 1958 the Anti-Colonial Movement (MAC) appeared; it was the outcome of the activities of a small study group which had met in Paris in November 1957 to examine the situation and the prospects of a struggle in the Portuguese Colonies. In 1959 the Liberation Front of Guinea and Cape Verde (FLGCV) was set up. In 1960, PAIGC and the People's Movement for the Liberation of Angola (MPLA) created the FRAIN (African Revolutionary Front for the Independence of the Portuguese Colonies). That entity lasted only one year, and was replaced in 1961 by the Conference of Nationalist Organizations of the Portuguese Colonies (CNGP).

During that period, and more precisely on 3 August 1959, the repression of the workers at Pidjiguiti took place, in the course of which 50 persons were killed. That event became the symbol of the struggle for national liberation.

On 3 August 1961 PAIGC proclaimed the change-over from political struggle to national insurrection. A few acts of sabotage were then committed, which provoked a large number of arrests. The armed struggle in Guinea began only in January 1963 (Reply, Vol. I, p. 213; PV/3, p. 64).

48. As far as Portugal was concerned, its policy was to deny the existence of its own Colonies. It regarded itself as a unitary State constituted by provinces situated in several continents. During the 1960's, Portugal continued to represent its overseas provinces both in the United Nations and in other international organizations. In 1972, the General Assembly of the United Nations, in its resolution 2918 (XXVIII) confirmed "that the national liberation movements of Angola, Guinea (Bissau) and Cape Verde and Mozambique are the authentic representatives of the true aspirations of those territories" but without designating those movements by name. Resolution 3113 (XXVIII) reiterated that statement, and finally resolution 3294 (XXIX) reaffirmed that the "Frente Nacional para a Liberação de Angola, the Movimento Popular de Liberação de Angola, the Partido Africano da Independência da Guiné e Cabo Verde, the

Frete de Liberação de Moçambique and the Movimento de Liberação de São Tomé e Príncipe ... are the authentic representatives of the peoples concerned". Until 1973 Portugal exercised in the United Nations the representation of the Overseas Province of Guinea. On 17 December 1973, by its resolution 3181 I (XXVIII), the General Assembly approved the credentials of the representatives of Portugal solely for the State existing within its frontiers in Europe and denied them all powers of representation for Mozambique, Angola and Guinea-Bissau. That resolution was but the logical consequence of resolution 3061 (XXVIII) of 2 November 1973 whereby the General Assembly had welcomed the accession to independence of Guinea-Bissau.

49. Senegal claims that the principle of self-determination of peoples appeared after 1960 and cannot be applied retroactively. As for the corollary which Guinea-Bissau derives from that principle, whereby a colonial State could not conclude certain treaties concerning its colonial territory from the moment when a process of liberation had begun, Senegal accepted it in its pleadings (PV/9, p. 62) but contended that the situation in Guinea in 1960 could not be considered as that of the initiation of a process of that kind.

50. In any process of national liberation, there is always at the outset a small group of determined men who organize themselves and who gradually develop their intellectual, political and military activity until the independence of their country is obtained. The duration of this

process and the methods to be applied depend on a number of factors, among which may be mentioned the policy of the colonial State and the assistance which the liberation movement receives from abroad. In the process of liberation a stage is reached in which the aspirations of the movement are defined and it requires an institutional organization. Once it has a structure, the movement can begin to act, and comes out into the open. The action taken is not necessarily guerrilla activity; it may be only a political activity. It must be stressed, however, that the decisive element for the success or failure of a liberation movement is always popular support.

51. In this process of formation of a national liberation movement, the legal problem is not that of identifying the precise moment in which the movement as such is born. The important point to be determined is the moment from which its activity acquired an international impact.

As pointed out by Senegal, there exists today in western Europe and in other parts of the world a number of independence movements. It is not possible to assert that the activity of one or other of those movements has an international impact merely because it has constituted itself as an organization, or has held a number of public events.

Such activities have a bearing at the international level from the moment when they constitute, in the institutional life of the territorial

State, an abnormal event which compels it to take exceptional measures, i.e., when in order to control, or try to control events, it is obliged to resort to means which are not those used normally to deal with occasional disturbances.

In the case of what was then Portuguese Guinea, the Tribunal does not have to examine whether the process of national liberation had, or had not, started in April 1960; what must be ascertained is whether the activities whereby that process manifested itself in April 1960 had an international impact or not.

52. Guinea-Bissau has stated in this connection in its Memorial (p. 62) with reference to the period when the Agreement of 26 April was signed: "In 1959/1960, it could not yet be said that there was any encroachment on the integrity of the Portuguese powers at the territorial level." In addition, in the present arbitration, there have been repeated statements confirming the assertion in the Arbitral Award of 14 February 1985 between Guinea and Guinea-Bissau to the effect that the war of liberation only began in 1963 in Portuguese Guinea (Reply, Vol. I, p. 213; PV/3, p. 64). As for the United Nations, it was only in November 1973, i.e., after the proclamation of the independence of Guinea-Bissau, that a resolution was adopted to the effect that Portugal no longer represented that country. No evidence has been adduced in the

present case to establish that in 1960 the institutional life of what was then Portuguese Guinea had experienced such upheavals that the State had been obliged to resort to extraordinary measures to ensure the normal conduct of civil activities and to guarantee public security.

For all these reasons, the norm which limits the capacity of the State to conclude treaties upon the initiation of a process of liberation is not applicable to the situation which existed in 1960 in Portuguese Guinea.

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B. BREACH OF INTERNAL LAW

53. Guinea-Bissau claims that the Agreement concluded by exchange of Notes on 26 April 1960 is null and void because, by signing it, both Portugal and France committed a breach of norms of internal law of fundamental importance.

With regard to Portuguese law, at the time of the signature of the 1960 Agreement, the Constitution of 11 April 1933 was in force, Article 2 of which specified that the State could not alienate any part of the national territory without the consent of the National Assembly. Moreover, Article 91, paragraph 9, specified that the National Assembly had the power to "define the limits of the territories of the Nation ("definir os limites dos territórios da Nação")". As to the conclusion of

agreements, the procedure was indicated in Articles 81, paragraph 7, Article 91, paragraph 7 and Article 102, paragraph 2. According to those Articles, the National Assembly's approval was necessary for international conventions and agreements concluded by the Government, except in cases of urgency. The Constitution of 1933 did not contemplate the system of agreements in simplified form. Nevertheless, that practice was accepted by Portugal and was used for agreements relating to subjects which were not of the competence of the National Assembly (Memorial, P. 112). From an analysis of those provisions, Guinea-Bissau concludes that, according to the Portuguese Constitution of 1933, the 1960 Agreement should have been submitted for approval to the National Assembly. That breach of constitutional law was of a "manifest" character and, in accordance with the rule codified in Article 46 of the Vienna Convention on the Law of Treaties, the Franco-Portuguese Agreement was, it is claimed, null and void.

Senegal does not share this view. Its arguments are based on a different interpretation of the constitutional texts, as well as on the fact that, in addition to the written text of the Constitution, consideration has to be given to "a whole body of customs and practices which have appreciably altered the original meaning of the constitutional texts" (Counter-Memorial, p. 40). In particular, Senegal asserts that the competence conferred upon the National Assembly by Article 91 of the Constitution was not exclusive, and could be delegated to the Government (Art. 91, para. 13). In support of that assertion, it relies on the fact

that Chapter III, Title III of Part Two of the Constitution in force in 1960 concerning the powers of the National Assembly draws a distinction between those indicated in Article 91 and those mentioned in Article 93. For the latter, the Constitution specifies that they are "matters of the exclusive competence of the National Assembly" ("matéria da exclusiva competência da Assembleia Nacional"), whereas Article 91 says nothing on this subject. This circumstance, combined with what is stated in paragraph 13 of Article 91, make it possible to infer that for the matters mentioned in that Article delegation was possible. Similarly, Senegal maintains that Article 2 does not apply to the 1960 Agreement because that Agreement does not embody an alienation of territory but a territorial delimitation. Senegal gives in addition an account of international case-law and diplomatic precedents relating to the nullity of treaties on grounds of the violation of internal law. On that question, it reaches the conclusion that the 1960 Agreement did not involve any manifest violation of Portuguese internal law. It states in this respect:

"The 1960 Agreement was concluded by an exchange of notes effected, on the Portuguese side, by a man who combined the offices of Head of Government, Minister for Foreign Affairs and strongman of the political régime of Portugal and on this basis alone such a commitment enjoys absolute presumption of validity." (Counter-Memorial, p. 131.)

Senegal further asserts that:

"The 'constitutional deviation' experienced by Portugal for over 35 years under the authoritarian régime established by President Salazar had the effect of reducing to a symbolic role the authority of the National Assembly and, in particular, the functions entrusted to it by the Constitution in the matter of approval of international treaties." (Counter-Memorial, p. 131.)

In its Reply, Guinea-Bissau reiterates that, in accordance with the 1933 Constitution, the competence vested in the National Assembly by Article 91 was not capable of delegation (p. 144). Guinea-Bissau points out that none of the Agreements in simplified form subscribed by Portugal concerned delimitation (p. 38). As for the real constitutional situation obtaining during the régime of Dr. António Oliveira Salazar, the Reply states that "the Constitution of 1933 never became a nominal Constitution, especially with regard to rules of competence and form" (p. 166). Further on, the Reply adds: "The Portuguese Constitution of 1933 had binding force and the rules on separation of powers and on questions of form established by it had to be respected." (P. 168.)

Senegal's Rejoinder confirms that State's position regarding the régime in force in Portugal in 1960, and the international validity of the Agreement signed that year. As for the Portuguese practice in the matter of delimitation, the Rejoinder points to two Agreements concluded by exchange of letters with the United Kingdom in 1936/1937 and in 1940.

In their oral argument, the two Parties developed the arguments put forward in the written phase of the proceedings.

54. Before examining the question of the possible nullity of the Franco-Portuguese Agreement by reason of manifest violation of internal law, it is first necessary to determine the applicable law in the matter.

There is a general principle that the law to be applied to a given situation must be the law in force at the time when it arose (see Island of Palmas case in UNRIIAA, Vol. II, p. 845). Consequently, the present case must be examined in the light of international law in force in 1960. The Tribunal will therefore not spend time analysing the 1969 Vienna Convention on the Law of Treaties, nor on the question, discussed in the present proceedings whether or not one of its clauses, in particular Article 46, does or does not constitute the codification of a rule of general international law.

55. The question whether a State was, or was not acting in conformity with its internal law when it signed an international treaty, and the importance of that issue from the standpoint of international law, were not governed by any general treaty in 1960. The applicable norms were those of customary law. As for the practice of international courts and arbitral tribunals, there was no precedent of a treaty being declared null and void because one of the contracting states had violated its own

internal law in signing it. Diplomatic precedents were not uniform but, in general, it could be deduced from them that only a grave and manifest violation of internal law could justify a treaty being declared null and void.

The Tribunal considers that its decision on that subject must be governed by the principle of good faith. That principle was undoubtedly the rule observed by States in 1960 with regard to the conclusion of international agreements.

56. The question whether a treaty has been concluded in conformity with the internal law of a State must be examined in the light of the law in force in that country, i.e., that law as actually interpreted and applied by the organs of the State, including its judicial and administrative organs.

57. To this end, it is first of all necessary to examine the political Constitution of the Portuguese Republic of 1933, which was in force in 1960. According to that Constitution, the President of the Republic represented the Nation, directed foreign policy and was empowered to "conclude international conventions" ("ajustar convenções internacionais") (Art. 81, para. 7). The exercise of that constitutional power of the President was attributed in 1938 to the Minister for Foreign Affairs by Legislative Decree No. 29319. Article 91, paragraph 7, specified that the National Assembly was competent to "approve, under the terms of No. 7 of Article 81, international conventions and treaties" ("aprovar, nos termos do No. 7º do artigo 81º, as convenções e tratados internacionais"). Furthermore, paragraph 9 of the same Article conferred

upon the National Assembly the competence to "define the limits of the territories of the Nation" ("definir os limites dos territórios da Nação"). In addition, Article 81, paragraph 7, already quoted specified that treaties signed by the President had to be submitted by the Government for approval to the National Assembly.

These clauses show that the normal process for concluding an international agreement according to the Portuguese Constitution was as follows: signature authorized by the President of the Republic, presentation by the Government to the Assembly, and approval by that Assembly. The Constitution provided also that the Government could "in cases of urgency, approve international conventions and treaties" ("em casos de urgência, aprovar as convenções e tratados internacionais") (Art. 109, para. 2).

58. In practice, the competence of the National Assembly became restricted for two main reasons. In the first place, in Portugal, as in most countries, the practice developed of concluding agreements by exchange of letters. In the second place, the Government eventually invoked grounds of urgency regularly in order to approve international treaties itself in place of the Assembly. The fact that the Government systematically invoked reasons of urgency meant that, in the words of a commentator, "Parliamentary approval had almost disappeared" ("quase tivesse desaparecido a aprovação parlamentar") (Marcello Caetano, Manual de Ciência Política e Direito Constitucional, 6th edition, Lisbon, 1972, Vol. II, p. 617).

According to Guinea-Bissau, agreements by exchange of letters dealt with subjects which were not within the competence of the National Assembly

The practice of that period, however, shows matters in a different light. Thus, the National Assembly did not take action to approve the Charter of the United Nations, or the 1943 and 1971 Agreements with the United States of America on the Azores Islands base, or the frontier Agreements of 11 May 1936/28 December 1937 and 29 October 1940 with the United Kingdom.

Guinea-Bissau asserts that the 1960 Agreement was void for lack of Parliamentary approval. In the text of that instrument, the Portuguese Minister for Foreign Affairs ad interim gave his co-signatory, the French Ambassador, to understand that the Agreement entered into force at the time of its signature. When two countries conclude by exchange of letters an agreement which, for constitutional reasons, requires the approval of the Parliament of one of them, it is customary to mention that fact in the text or during the negotiations. That was not done in the present case.

59. If account is taken of the Agreement of 26 April 1960, the sporadic character of the National Assembly's interventions in the approval of international conventions, of the fact that certain instruments as important as the Charter of the United Nations were not approved by that Assembly, and of the fact that the Agreement was signed by Dr. António Oliveira Salazar, undisputed head of the authoritarian

régime which existed at the time in Portugal, it may be concluded that the French Government had good reason to believe in all good faith that the treaty which had been signed was valid.

50. Guinea-Bissau also argues, as evidence of the nullity of the 1960 Agreement, that France had allegedly violated its internal law on its conclusion. The only State which could invoke such grounds of nullity is Senegal. Guinea-Bissau has no standing to submit that claim to the Tribunal.

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II. THE GROUNDS OF NON-OPPOSABILITY ADVANCED BY GUINEA-BISSAU

61. In addition to the grounds of nullity already mentioned, Guinea-Bissau claims that the Agreement concluded between France and Portugal on 26 April 1960 is not opposable to it, i.e., that even supposing the Agreement to be valid, State succession would not operate in the present case, and the rules of succession would therefore not apply in the relations between Senegal and Guinea-Bissau.

The question of succession of States in the matter of boundaries acquired a very special importance in America during the 19th century, because of the accession to independence of the States born of the Spanish

colonial empire. In certain cases, the new States decided by common agreement that the international limits of their respective territories would be those which already existed to mark the administrative subdivisions of the colonial period. In other cases, the States claimed as part of their national territory what had previously corresponded to a Vice-royalty, an Audiencia or a Captaincy-General. In all those cases, the ancient colonial law ("derecho de Indias") was invoked to determine the international boundaries between the new States. This method of determining international boundaries is known under the name of uti possidetis or uti possidetis iuris.

In Africa, on the other hand, uti possidetis has a broader meaning because it concerns both the boundaries of countries born of the same colonial empire and boundaries which during the colonial era had already an international character because they separated colonies belonging to different colonial empires.

62. In the present case, the Parties are agreed on the fact that boundary treaties signed during the colonial period continue to be valid as between the new States. For this reason, the tabula rasa proclaimed by the People's Assembly of Guinea-Bissau on 24 September 1973 for the treaties concluded by Portugal is not applicable to treaties dealing with frontiers. Accordingly, Senegal and Guinea-Bissau recognize that their

land frontier is determined by the Franco-Portuguese Convention of 12 May 1886. In addition, it is material to recall that the Organization of African Unity, of which both Parties are members, adopted on 21 July 1964 in Cairo a resolution whereby "all Member States pledge themselves to respect the borders existing on their achievement of national independence" (doc. AHG/Res. 16 (I)).

Although both Parties are agreed on the fact that succession is the rule in the realm of boundary treaties, they differ with regard to the extent of the content of that norm. Senegal maintains that there has been succession in the present case, whereas Guinea-Bissau asserts that various exceptions operate which have the effect that there was no succession for the 1960 Agreement.

The Tribunal will analyse below the exceptions to the rule of succession in the matter of boundary treaties which have been put forward by Guinea-Bissau.

* *

A. THE DELIMITATION OF MARITIME FRONTIERS

63. Guinea-Bissau maintains that State succession does not apply to maritime boundaries.

An international frontier is a line formed by the successive extremities of the area of validity in space of the norms of the legal order of a particular State. The delimitation of the area of spatial validity of the State may relate to the land area, the waters of rivers and lakes, the sea, the subsoil or the atmosphere. In all cases, the purpose of the relevant treaties is the same: to determine in a stable and permanent manner the area of validity in space of the legal norms of the State. From a legal point of view, there is no reason to establish different régimes dependent on which material element is being delimited. The Judgment of the International Court of Justice in the case concerning the Aegean Sea Continental Shelf constitutes a precedent to this effect (I.C.J. Reports 1978, pp. 35-36. See also the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, pp. 98 and 131; case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984, pp. 246 et seq.).

64. One of the arguments invoked by Guinea-Bissau is the absence of cases in which the question of succession has arisen in respect of maritime boundaries. The law of the sea, except for questions of navigation and for some others concerning fishing, has only taken shape in comparatively recent times, and one cannot expect to find precedents going back to the last century, the period when the States of Latin America acceded to independence. An analysis of the disputes which have occurred in that part of the world and which relate to frontiers shows that the

question of maritime boundaries arose in only two cases: that of the Beagle Channel and that of Fonseca Bay. The first case concerned the interpretation of the Boundary Treaty between Argentina and Chile of 1881 and consequently the uti possidetis rule was not applied. In the Fonseca Bay case, on the other hand, the Central American Court of Justice decided that the limits with the high seas which the Crown of Castille had established in that Bay had devolved in 1821 on the Federal Republic of Central America and subsequently to El Salvador, Honduras and Nicaragua (Anales de la Corte de Justicia centroamericana, Vol. VI, Nos. 16-18, pp. 100 and 131).

Another precedent which may be cited is the Anglo-Danish Convention of 24 June 1901 concerning fisheries limits, which remained applicable to Iceland by succession from Denmark until 1951; reference was made thereto by Sir Humphrey Waldock in his separate opinion in the case concerning Fisheries Jurisdiction (I.C.J. Reports, 1974, pp. 106 et seq.).

Lastly, it is possible to refer to a number of cases of succession in the matter of maritime boundaries in Asia, in consequence of the decolonisation which followed the Second World War. The geographical maps of Malaysia, Philippines and Brunei, for example, show as maritime boundaries lines the origin of which goes back to the colonial era. While

it is true that there are not many cases of State succession to maritime boundaries, it is equally true that Guinea-Bissau, for its part, has not been able to invoke any precedent in which the tabula rasa rule was applied to a maritime boundary established in the colonial era.

65. Another argument put forward by Guinea-Bissau as constituting a distinction between land frontiers and maritime frontiers is that the latter establish limits only for certain matters, such as fisheries or the exploitation of natural resources. Land frontiers, on the other hand, it is claimed, determine jurisdictional limits which are valid for all activities or in all fields. In reality, that is not the case. There are many examples of land frontiers between two countries which are not constituted by a single line but by several different lines. Examples would be where boundaries on the surface of the land do not coincide with the limits established for the subsoil, generally when the exploitation of mines is involved. Where a river separates two States, there is sometimes one limit for the division of islands and another different limit for the waters. The town where this Tribunal has its seat is itself separated from France by two different delimitation lines.

The fact that a frontier establishes a delimitation for all kinds of jurisdiction or only for some of them does not constitute a valid reason for establishing different legal régimes.

66. The contention put forward by Guinea-Bissau in the course of the present arbitration is not compatible with the attitude it has hitherto maintained. In the Note 3032/CNE/SG/77 addressed on 4 November 1977 by the Comissariato de Estado dos Negocios Estrangeiros to the Embassy of Senegal, it was stated that the maritime boundary between the two States was determined by the 1886 Franco-Portuguese Convention (Memorial, Ann. 6bis). The same position was maintained in the Note of 3 April 1979 addressed by the representative of Guinea-Bissau to the Special Representative of the Secretary-General of the United Nations to the Third Conference on the Law of the Sea (Reply, Ann. 3). Although later, and in consequence of the Arbitral Award of 14 February 1985 in the case of the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, it was acknowledged that the 1886 Convention had defined only the land frontiers, the above-mentioned notes show that Guinea-Bissau accepted State succession in the matter of maritime boundaries. The Arbitration Agreement of 18 February 1983 signed by Guinea-Bissau and Guinea invokes "the solemn declaration of the Meeting of Heads of State and Government of the Organization of African Unity held in Cairo from 17 to 21 July 1964 by which the Member States pledge themselves to respect the borders existing on their achievement of national independence". Since that Arbitration Agreement concerned only the delimitation of a maritime boundary, the

reference quoted means that the two Parties recognized that that principle was applicable to boundaries of that category. In oral argument also in that same Arbitration, Guinea-Bissau also acknowledged that succession of States operates in respect of treaties on maritime boundaries (Pleadings, verbatim record No. 8, pp. 76 and 77).

* * *

B. DURATION OF THE AGREEMENT

67. The question of the age of the Agreement is dealt with from two viewpoints by Guinea-Bissau. In the first place, it maintains that international treaties concluded by a colonial State with respect to a dependent territory are null and void if the process of liberation has begun and the treaties in question relate to essential elements of the right of peoples to self-determination. In the second place, it asserts that only international treaties of a certain duration - the length of which it does not specify - can be invoked against the successor State. Thus, in its Memorial Guinea-Bissau refers to the uti possidetis principle and declares that "the logic and the bases of the principle require that it should apply only to treaties concluded a long time back" (p. 87). Further on, it stresses "the need to distinguish ancient delimitations

from recent ones, which must then be removed from the scope of application of the uti possidetis rule" (p. 89).

68. The Tribunal has already indicated that the 1960 Agreement was signed 13 years before the independence of Guinea-Bissau, and at a time when the process of liberation of Portuguese Guinea had no effects at the level of international law. The agreements relating to boundaries signed by a colonial State before the process of liberation had an international impact do not have to fulfil any special condition of antecedence for them to be validly invoked against the successor State. Guinea-Bissau has not been able to establish in the course of the present arbitration the existence of any norm of international law imposing such a condition.

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C. NON-PUBLICATION OF THE AGREEMENT

69. The question of the publication of the 1960 Agreement has been raised in various manners in the course of the arbitral proceedings.

In its Memorial, Guinea-Bissau states that the Agreement of 26 April was not the subject of any publication in Portugal. It explains in that connection that the obligation to publish it was laid down in Article 81,

paragraph 9, and Article 150, paragraph 2, of the 1933 Portuguese Constitution. The latter Article relates to the publication of instruments which were to enter into force in the Overseas Provinces, and was later strengthened by the Organic Law on the Overseas Provinces of 27 June 1953 and 25 May 1955. It is claimed that this total absence of publication resulted in the 1960 Agreement being unknown to the authorities of Guinea-Bissau at the time of independence. In support of that thesis, Guinea-Bissau describes its position at the time of the declaration of independence. It had just emerged from a long war of liberation which had exhausted its people and had plunged it deeper into poverty. In addition, the population was for the most part illiterate and of a low cultural level (Memorial, p. 64).

70. Relying on these facts, Guinea-Bissau maintains that the 1960 Agreement is not opposable to it because it was unknown to it, and also asserts that the failure to observe the constitutional provisions concerning publication involved a manifest violation of internal law, thereby giving rise to nullity of the Agreement (Memorial, pp. 150 and 152).

Senegal, for its part, has put forward several pieces of evidence to show that the 1960 Agreement was to some extent made public and was in some measure known in international circles.

71. Non-publication has thus been invoked in the Guinea-Bissau

Memorial as a ground of nullity for manifest violation of internal law and as grounds for treating the Agreement as not opposable to Guinea-Bissau.

That approach was abandoned in the oral argument, when Guinea-Bissau declared that it was not claiming "that the Agreement was not internationally valid by reason of its non-publication" but rather that "publication and the internal effectiveness of a treaty in a colony are a condition of the succession to that treaty for the newly independent State" (PV/14, p. 164).

72. The Agreement of 26 April 1960 was not concluded in secret and, at the time of the independence of Guinea-Bissau (1973), it had already been the subject of some publication. Its text was published in the Official Journal of the French Republic of 30-31 May 1960, in the Official Journal of the Communauté of 15 June 1960 and in the Official Journal of the Federation of Mali of 20 August 1960. In addition, the Agreement appears in the compilation of treaties and agreements of France (Vol. II, pp. 12-14) published in 1966, as well as in the Revue Générale de droit international public (Vol. 64, 1960, pp. 891-892). The Agreement was also invoked by the Parties to the dispute in the North Sea Continental Shelf cases, and was mentioned by Judge Fouad Amoun in his separate opinion attached to the Judgment of the Court in those cases (I.C.J. Reports 1962, p. 126). It was also mentioned in Volume IV of Whiteman's Digest of International Law (1965), in the book by J. Lang entitled "Le plateau

continental de la mer du Nord" (Paris, 1970, p. 114) and in the commentary published in the Annuaire français de droit international (1969, p. 236).

73. Guinea-Bissau's argument is based on the idea that because of the absence of publication, the 1960 Agreement could not be relied on against the population of Portuguese Guinea under the legislation then in force. Starting from that point, Guinea-Bissau asserts that, since the treaty was not opposable to the population of the Portuguese Colony, it was not opposable to the successor State in that territory either (PV/3, p. 21).

74. It must be stressed from the outset that the obligation of Portugal to publish the Agreement in its African province of Guinea was a matter exclusively for Portuguese internal law. Similarly, any obligation which might have been incumbent upon Portugal to publish that Agreement officially in Lisbon was also an obligation of Portugal's internal law. The non-fulfilment of that obligation cannot therefore be considered as a non-compliance by Portugal with an obligation imposed upon it by international law. The only aspect of the publication of treaties which is the subject of international regulation is the registration of treaties, in particular with the Secretariat of the United Nations, a question which will be examined by the Tribunal below.

75. That said, to return to Guinea-Bissau's argument mentioned in paragraph 73: according to that reasoning, independence resulted in a

succession between Portuguese Guinea and Guinea-Bissau. From the stand-point of international law, that point of departure is incorrect, for the succession of sovereignty was from Portugal to Guinea-Bissau. A succession of States always takes place between States - Portugal and Guinea-Bissau in this instance - and not between part of a State, as Portuguese Guinea was in 1960, and a new State created on the same territory. Any breach of internal law consisting in a failure by Portugal properly to publish the 1960 Agreement in its former African Colony cannot be invoked by its successor, on the international level, as grounds for claiming that that Agreement is not opposable to it. Still less can that claim be made in relation to a third State which had duly published the Agreement. It must be added also that, as indicated in paragraph 72, the 1960 Agreement was not a secret treaty. The concepts of unpublished agreement and secret agreement are in no way synonymous.

76. Guinea-Bissau states also that it did not receive any notification from Portugal relating to the 1960 Agreement, that it even requested clarifications on the subject but never received a reply (PV/1, p. 92). The question of notifications between Portugal and Guinea-Bissau regarding the 1960 Agreement, and any responsibility that might possibly

arise therefrom, concern the relations between those two countries and does not fall within the competence of this Tribunal.

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III. FAILURE TO REGISTER THE 1960 AGREEMENT WITH THE SECRETARIAT OF THE UNITED NATIONS

77. In addition to the grounds already examined on which Guinea-Bissau maintains that the 1960 Agreement is void and not opposable to it, it claims (Memorial, pp. 152-156 and 159) that since that Agreement was not registered with the Secretariat of the United Nations (Article 102 of the Charter), it cannot be invoked in the present arbitration.

78. On this point, it must be stressed that the Tribunal is not an organ of the United Nations and consequently Article 102, paragraph 2, of the Charter is not applicable.

In addition, it should be pointed out that it does not seem logical for a claim that the 1960 Agreement cannot be invoked before this Tribunal to be made by a country which has concluded an Arbitration Agreement attributing to this same Tribunal competence to decide specifically whether that Agreement has the force of law between the Parties. The non-registration of the Agreement of 26 April 1960 does not

therefore constitute a valid reason to debar the Parties from invoking it in the present arbitration.

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IV. EXISTENCE OF A RIGHT OF VERIFICATION OR REVIEW

79. Guinea-Bissau also maintains that, even if the 1960 Agreement were opposable to it, it

"would be entitled to require that the equitable character of the line resulting from that Agreement be verified, and that too in the context of a possible application of that Agreement" (Reply, p. 274).

According to Guinea-Bissau, that right of verification or review of the Agreement exists whenever a treaty concluded under the régime of the 1958 Geneva Conventions governs, by the operation of a succession, the relations of a State which has never been a Party to those conventions but which is a Party to the 1982 Montego Bay Convention.

This claim has been submitted by Guinea-Bissau as a subsidiary one (Reply, pp. 273-274) in the event that the 1960 Agreement is held to be opposable to it. The main thesis of that country is that the 1960 Agreement is not opposable to it, because it deals with a maritime boundary for which succession does not operate (see above, paras. 63-66).

The right of verification or review invoked by Guinea-Bissau could originate either in treaty law or in unwritten law. With regard to treaty law, Guinea-Bissau relies on the Montego Bay Convention, in particular Articles 74 and 83. The Tribunal would merely note on this point that the 1982 Convention does not apply in the present case because it has not yet entered into force. That does not of course mean that the Tribunal interprets Articles 74 and 83 of that Convention so as to recognize the existence of a right of review or verification. As for the unwritten law, there does not exist at present in positive international law any customary norm or any general principle of law that would authorize States which have concluded a valid treaty concerning maritime delimitation, or their successors, to verify or review its equitable character.

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V. THE SCOPE OF SUBSTANTIVE VALIDITY OF THE 1960 AGREEMENT

80. The analysis made by the Tribunal in the above sections I, II, III and IV of the present Award leads to the conclusion that the 1960 Agreement is valid and can be opposed to Senegal and to Guinea-Bissau.

With regard to the maritime boundary, that Agreement provides as follows:

"As far as the outer limit of the territorial seas, the boundary shall consist of a straight line drawn at 240° from the intersection of the prolongation of the land frontier and the low water mark, represented for that purpose by the Cape Roxo lighthouse.

As regards the contiguous zones and the continental shelf, the delimitation shall be constituted by the prolongation in a straight line in the same direction of the boundary of the territorial seas."

This text clearly determines the maritime boundary as regards the territorial sea, the contiguous zone and the continental shelf. Those three domains constituted the law of the sea in 1960, date of the signature of the Agreement. Senegal, however, has argued before the Tribunal that the 1960 Agreement must be interpreted as applying also to the delimitation of the exclusive economic zones and it has put forward a number of arguments to this effect, which the Tribunal will examine one by one.

81. The first argument is stated in the Counter-Memorial (p. 316, note 534) and refers to the Arbitration Agreement. Senegal points out

that the Parties, albeit for different reasons, interpret Article 2 of the Arbitration Agreement as meaning that a single maritime boundary should be arrived at. This would mean, according to Senegal, that if the Tribunal arrives at the conclusion that the 1960 Agreement has the force of law, the boundary set by that Agreement must apply to the whole extent of the continental shelf and also to the exclusive economic zones.

The Arbitration Agreement of 12 March 1985 is the treaty which has set up the Tribunal and which determines its competence, the powers delegated by the Parties and the main rules governing its constitution, but it does not contain any particular rule on the substantive law to be applied to the questions which the Tribunal is called upon to answer.

Article 2 of the Arbitration Agreement says simply that the Tribunal must decide "in accordance with the norms of international law". There are in the Arbitration Agreement no provisions setting forth special substantive rules applicable to the case. With regard to the merits of the case, the 1985 Arbitration Agreement does not therefore contain any specific norm and does no more than call upon the Tribunal to decide in accordance with the law of nations.

82. A second argument has been put forward by Senegal during the oral argument (PV/10, p. 213). According to this argument, to interpret the 1960 Agreement so that it applies only to certain territories and not to a whole body of maritime areas would be tantamount to saying, by

implication, that this Agreement is partially valid and partially void, which would be contrary to certain rules on the divisibility of treaty provisions.

The question here is not one of nullity. The Tribunal has already stated clearly in the present Award that the 1960 Agreement is valid, wholly valid. The question which the Tribunal has now to resolve concerns solely the interpretation of that Agreement and not its validity or its nullity. The interpretation of the meaning and scope of the text of a treaty is a legal operation which must not be confused with that of declaring the nullity of a treaty or of one of its clauses.

83. Senegal also considers that practice subsequent to the 1960 Agreement, and the acquiescence of each of the two States to the legislation of the other on the seaward reach of the various maritime areas, have given rise to a tacit agreement, or to a bilateral custom, fixing as the limit for the waters of the exclusive economic zone or the fishery zone the very line of the 1960 Agreement (Rejoinder, pp. 183 et seq.; PV/11, pp. 34, 41 and 42).

The Tribunal is not attempting to determine at this point whether there exists a delimitation of the exclusive economic zones based on a legal norm other than the 1960 Agreement, such as a tacit agreement, a bilateral custom or a general norm. It is merely seeking to determine whether the Agreement in itself can be interpreted so as to cover the delimitation of the whole body of maritime areas existing at present.

84. Lastly, Senegal maintains that the 1960 Agreement must be interpreted taking into account the evolution of the law of the sea. The maritime boundary established by the Agreement should therefore be prolonged and enhanced in keeping with functional requirements, which are altogether essential to maintain good neighbourly relations and relations of security. A delimitation agreement should not have any gaps, and such should be filled up in the light of good sense and the nature of things (PW/11, p. 42).

85. The Tribunal considers that the 1960 Agreement must be interpreted in the light of the law in force at the date of its conclusion. It is a well established general principle that a legal event must be assessed in the light of the law in force at the time of its occurrence and the application of that aspect of intertemporal law to cases such as the present one is confirmed by case-law in the realm of the law of the sea (International Law Reports, 1951, pp. 161 et seq.; The International and Comparative Law Quarterly, 1952, pp. 247 et seq.).

In the light of the text, and of the applicable principles of intertemporal law, the Tribunal considers that the 1960 Agreement does not delimit those maritime spaces which did not exist at that date, whether they be termed "exclusive economic zone", "fishery zone" or whatever. For example, it was only very recently that the International Court of Justice has confirmed that the rules relating to the "exclusive economic zone" can be considered as forming part of general international

law in the matter (I.C.J. Reports 1982, p. 74; I.C.J. Reports 1984, p. 294; I.C.J. Reports 1985, p. 33). To interpret an agreement concluded in 1960 so as to cover also the delimitation of areas such as the "exclusive economic zone" would involve a real modification of its text and, in accordance with a well-known dictum of the International Court of Justice, it is the duty of a court to interpret treaties, not to revise them (I.C.J. Reports 1950, p. 229; I.C.J. Reports 1952, p. 196; I.C.J. Reports 1966, p. 48). We are not concerned here with the evolution of the content, or even of the extent, of a maritime space which existed in international law at the time of the conclusion of the 1960 Agreement, but with the actual non-existence in international law of a maritime space such as the "exclusive economic zone" at the date of the conclusion of the 1960 Agreement.

On the other hand, the position regarding the territorial sea, the contiguous zone and the continental shelf is quite different. These three concepts are expressly mentioned in the 1960 Agreement and they existed at the time of its conclusion. In fact, the Agreement itself specifies that its object is to define the maritime boundary "taking into account the Geneva Conventions of 29 April 1958" elaborated by the first United Nations Conference on the Law of the Sea, and these codification conventions define the notions of "territorial sea", "contiguous zone" and "continental shelf". As regards the continental shelf, the question

of determining how far the boundary line extends can arise today, in view of the evolution of the definition of the concept of "continental shelf". In 1960, two criteria served to determine the extent of the continental shelf: that of the 200-metre bathymetric line and that of exploitability. The latter criterion involved a dynamic conception of the continental shelf, since the outer limit would depend on technological developments and could consequently move further and further to seaward. In view of the fact that the "continental shelf" existed in the international law in force in 1960, and that the definition of the concept of that maritime space then included the dynamic criterion indicated, it may be concluded that the Franco-Portuguese Agreement delimits the continental shelf between the Parties over the whole extent of that maritime space as defined at present.

With regard to that question there only remains to determine the meaning and scope of the expression "a straight line drawn at 240°" in the 1960 Agreement.

* * *

86. With regard to the expression just mentioned, Guinea-Bissau has pointed out (Reply, p. 252) that there is no such thing as a "straight

line" on the globe of the Earth, and that this involves a technical inaccuracy which would make the Agreement inapplicable, since it is not indicated precisely whether the line in question is a loxodromic line or a geodesic line. At a distance of 200 miles off the coast, lines of these two types would be several kilometres apart.

Does the 1960 Agreement really contain a technical inaccuracy on this point which would render it inapplicable? In order to reply to that question, one must determine the exact meaning of the expression "a straight line drawn at 240°" in the 1960 Agreement. It is clear that the words "straight line" can relate to a line which could be drawn just as well on a map employing the Mercator projection as on a map using another system. Nor can there be any doubt that a straight line drawn on a Mercator projection map becomes curved when it is transferred on to a different nautical chart, just as a straight line drawn on a map which uses a projection other than the Mercator projection becomes curved when transposed to a map prepared according to the latter system.

The 1960 Agreement, however, does not refer only to a "straight line"; it also mentions a "line ... drawn at 240°". This makes it possible to rule out any geodesic line, because such a line would not satisfy the condition of following a direction of 240°, since it has the peculiarity of not intersecting the meridians and parallels at a constant angle.

The only line which could fulfil that condition would be a loxodromic line. Moreover, on the sketch included in the preparatory work of the 1960 Agreement, the line at 240° appears as a loxodromic line. It can therefore be concluded that the "straight line drawn at 240°" mentioned by the 1960 Agreement is a loxodromic line.

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87. Bearing in mind the above conclusions reached by the Tribunal and the actual wording of Article 2 of the Arbitration Agreement, in the opinion of the Tribunal it is not called upon to reply to the second question.

Furthermore, in view of its decision, the Tribunal has not judged it expedient to append a map showing the course of the boundary line.

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88. For the reasons stated above, the Tribunal decides by two votes to one:

To reply as follows to the first question formulated in Article 2 of the Arbitration Agreement: The Agreement concluded by an exchange of letters on 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with regard solely to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone and the continental shelf. The "straight line drawn at 240°" is a loxodromic line.

In favour: Mr. Julio A. Barberis, President,
Mr. André Gros (Arbitrator)

Against: Mr. Mohammed Bedjaoui (Arbitrator)

Done at Geneva, on the thirty-first day of July one thousand nine hundred and eighty nine, in duplicate, in the French and Portuguese languages, the French text being authentic. The two originals shall be

Case of Loizidou v. Turkey, ECHR



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF LOIZIDOU v. TURKEY (PRELIMINARY OBJECTIONS)

(Application no. 15318/89)

JUDGMENT

STRASBOURG

23 March 1995

In the case of Loizidou v. Turkey¹,

The European Court of Human Rights sitting, in pursuance of Rule 51 of Rules of Court A², as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, *President*
Mr R. BERNHARDT,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr R. MACDONALD,
Mr A. SPIELMANN,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr P. JAMBREK,
Mr U. LOHMUS,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 23 June 1994, 22 August 1994, 23 September 1994, 24 November 1994 and on 23 February 1995,

Delivers the following judgment on the preliminary objections, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the Government of the Republic of Cyprus ("the applicant Government") on 9 November 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an

¹ This case is numbered 40/1993/435/514. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

² Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

application (no. 15318/89) against the Republic of Turkey (see paragraphs 47-52 below) lodged with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) on 22 July 1989 by a Cypriot national, Mrs Titina Loizidou.

The applicant Government's application referred to Article 48 (b) (art. 48-b) of the Convention. The object of the application of the Government was to obtain a decision as to whether the facts of the case concerning the applicant's property disclosed a breach by Turkey of its obligations under Article 1 of Protocol No. 1 (P1-1) and Article 8 (art. 8) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30).

3. The Chamber to be constituted included ex officio Mr F. Gölcüklü and Mr A.N. Loizou, the elected judges of Turkish and Cypriot nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 23 November 1993, in the presence of the Registrar, the President drew by lot the names of the other six members, namely, Mr A. Spielmann, Mr N. Valticos, Mr R. Pekkanen, Mr A.B. Baka, Mr L. Wildhaber and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. In a letter of 26 November 1993 the Agent of the Turkish Government stated that his Government considered that the case fell outside the Court's jurisdiction on the grounds that it related to events which occurred before Turkey's declaration of acceptance of the compulsory jurisdiction of the Court dated 22 January 1990 and did not concern matters arising within the territory covered by this declaration.

5. On 29 November 1993 the President of the Court submitted to the plenary Court for decision, pursuant to Rule 34, the question whether the Government of the Republic of Cyprus had a right under Article 48 (art. 48) to bring the case before the Court.

6. As President of the Chamber (Rule 21 para. 5) Mr Ryssdal, through the Registrar, consulted the Agents of the Governments, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38) in relation to the preliminary objections raised by Turkey. Pursuant to the order made in consequence, the Registrar received on 17 January 1994, 24 February and 28 February the memorials of the Turkish Government, the applicant and the applicant Government respectively. The Delegate's observations on these memorials were submitted on 14 March 1994.

7. On 21 April 1994 the plenary Court considered the issue submitted to it by the President under Rule 34 and decided, without prejudice to the preliminary objections raised by Turkey and to the merits of the case, that the applicant Government had the right to refer the case to the Court under

Article 48 (b) (art. 48-b) of the Convention and that the Chamber should resume consideration of the case.

8. The Chamber subsequently relinquished jurisdiction in favour of a Grand Chamber on 27 May 1994 (Rule 51). By virtue of Rule 51 para. 2 (a) and (b) the President and the Vice-President of the Court (Mr Ryssdal and Mr R. Bernhardt) as well as the other members of the original Chamber are members of the Grand Chamber. On 28 May 1994 the names of the additional judges were drawn by lot by the President, in the presence of the Registrar, namely Mr L.-E. Pettiti, Mr B. Walsh, Mr R. Macdonald, Mr S.K. Martens, Mrs E. Palm, Mr F. Bigi, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici and Mr U. Lohmus.

Subsequently, Mr Valticos, being prevented from taking part in the proceedings, was replaced by Mr J.M. Morenilla (Rules 24 para. 1 and 51 para. 6). In addition Mr Bigi, being unable to participate in the Court's deliberations on 22 August and 23 September 1994, took no further part in the proceedings.

9. In accordance with the President's decision, the hearing of the preliminary objections took place in public in the Human Rights Building, Strasbourg, on 22 June 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Turkish Government

Mr B. ÇAGLAR, *Agent,*

Mr H. GOLSONG, *Counsel,*

Mr M. ÖZMEN, Ministry of Foreign Affairs,

Mrs D. AKÇAY, Ministry of Foreign Affairs, *Advisers;*

- for the Cypriot Government

Mr M. TRIANTAFYLIDES, Attorney-General, *Agent,*

Miss P. POLYCHRONIDOU, Barrister-at-Law, *Counsel;*

- for the Commission

Mr S. TRECHEL, *Delegate;*

- for the applicant

Mr A. DEMETRADES, Barrister-at-Law,

Mr I. BROWNIE, QC,

Ms J. LOIZIDOU, Barrister-at-Law, *Counsel.*

The Court heard addresses by Mr Trechsel, Mr Çaglar, Mr Golsong, Mr Demetriades, Mr Brownlie and Mr Triantafyllides and also replies to a question put by one of its members individually.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

10. The applicant, a Cypriot national, grew up in Kyrenia in northern Cyprus. In 1972 she married and moved with her husband to Nicosia.

11. She claims to be the owner of plots of land nos. 4609, 4610, 4618, 4619, 4748, 4884, 5002, 5004, 5386 and 5390 in Kyrenia in northern Cyprus and she alleges that prior to the Turkish occupation of northern Cyprus on 20 July 1974, work had commenced on plot no. 5390 for the construction of flats, one of which was intended as a home for her family. She states that she has been prevented in the past, and is still prevented, by Turkish forces from returning to Kyrenia and "peacefully enjoying" her property.

12. On 19 March 1989 the applicant participated in a march organised by a women's group ("Women Walk Home" movement) in the village of Lymbia near the Turkish village of Akincilar in the occupied area of northern Cyprus. The aim of the march was to assert the right of Greek Cypriot refugees to return to their homes.

Leading a group of fifty marchers she advanced up a hill towards the Church of the Holy Cross in the Turkish-occupied part of Cyprus passing the United Nations' guard post on the way. When they reached the churchyard they were surrounded by Turkish soldiers and prevented from moving any further.

13. She was eventually detained by members of the Turkish Cypriot police force and brought by ambulance to Nicosia. She was released around midnight, having been detained for more than ten hours.

14. In his report of 31 May 1989 (Security Council document S/20663) on the United Nations Operation in Cyprus (for the period 1 December 1988 - 31 May 1989) the Secretary-General of the United Nations described the demonstration of 19 March 1989 as follows (at paragraph 11):

"In March 1989, considerable tension occurred over the well-publicized plans of a Greek Cypriot women's group to organize a large demonstration with the announced intention of crossing the Turkish forces cease-fire line. In this connection it is relevant to recall that, following violent demonstrations in the United Nations buffer-zone in November 1988, the Government of Cyprus had given assurances that it would in future do whatever was necessary to ensure respect for the buffer-zone... Accordingly, UNFICYP asked the Government to take effective action to prevent any demonstrators from entering the buffer-zone, bearing in mind that such entry would lead to a situation that might be difficult to control. The demonstration took place on 19 March 1989. An estimated 2,000 women crossed the buffer-zone at Lymbia and some managed to cross the Turkish forces' line. A smaller group crossed that line at Akhna. At Lymbia, a large number of Turkish Cypriot women arrived shortly after the Greek Cypriots and mounted a counter demonstration, remaining however on their side of the line. Unarmed Turkish soldiers opposed the demonstrators and, thanks

largely to the manner in which they and the Turkish Cypriot police dealt with the situation, the demonstration passed without serious incident. Altogether, 54 demonstrators were arrested by Turkish Cypriot police in the two locations; they were released to UNFICYP later the same day."

A. Turkey's declaration of 28 January 1987 under Article 25 (art. 25) of the Convention

15. On 28 January 1987 the Government of Turkey deposited the following declaration with the Secretary General of the Council of Europe pursuant to Article 25 (art. 25) of the Convention (see paragraph 65 below):

"The Government of Turkey, acting pursuant to Article 25 (1) (art. 25-1) of the Convention for the Protection of Human Rights and Fundamental Freedoms hereby declares to accept the competence of the European Commission of Human Rights and to receive petitions according to Article 25 (art. 25) of the Convention subject to the following:

(i) the recognition of the right of petition extends only to allegations concerning acts or omissions of public authorities in Turkey performed within the boundaries of the territory to which the Constitution of the Republic of Turkey is applicable;

(ii) the circumstances and conditions under which Turkey, by virtue of Article 15 (art. 15) of the Convention, derogates from her obligations under the Convention in special circumstances must be interpreted, for the purpose of the competence attributed to the Commission under this declaration, in the light of Articles 119 to 122 of the Turkish Constitution;

(iii) the competence attributed to the Commission under this declaration shall not comprise matters regarding the legal status of military personnel and in particular, the system of discipline in the armed forces;

(iv) for the purpose of the competence attributed to the Commission under this declaration, the notion of a "democratic society" in paragraphs 2 of Articles 8, 9, 10 and 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) of the Convention must be understood in conformity with the principles laid down in the Turkish Constitution and in particular its Preamble and its Article 13;

(v) for the purpose of the competence attributed to the Commission under the present declaration, Articles 33, 52 and 135 of the Constitution must be understood as being in conformity with Article 10 and 11 (art. 10, art. 11) of the Convention.

This declaration extends to allegations made in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present declaration. This declaration is valid for three years from the date of deposit with the Secretary General of the Council of Europe."

B. Exchange of correspondence between the Secretary General of the Council of Europe and the Permanent Representative of Turkey

16. On 29 January 1987 the Secretary General of the Council of Europe transmitted the above declaration to the other High Contracting Parties to the Convention indicating that he had drawn the Turkish authorities' attention to the fact that the notification made pursuant to Article 25 para. 3 (art. 25-3) of the Convention in no way prejudged the legal questions which might arise concerning the validity of Turkey's declaration.

17. In a letter dated 5 February 1987 to the Secretary General, the Permanent Representative of Turkey to the Council of Europe stated that the wording of Article 25 para. 3 (art. 25-3) of the Convention offered no basis for expressing opinions or adding comments when transmitting copies of the Turkish declaration to the High Contracting Parties. He added:

"International treaty practice, in particular that followed by the Secretary-General of the United Nations as depositary to similar important treaties as the Statute of the International Court of Justice or the covenants and conventions dealing with human rights and fundamental freedoms, also confirms that the depositary has to refrain from any comments on the substance of any declaration made by a Contracting Party."

C. Reactions of various Contracting Parties to Turkey's Article 25 (art. 25) declaration

18. On 6 April 1987 the Deputy Minister for Foreign Affairs of Greece wrote to the Secretary General stating inter alia that reservations to the European Convention on Human Rights may not be formulated on the basis of any provision other than Article 64 (art. 64). He added:

"Furthermore, Article 25 (art. 25) provides neither directly nor implicitly the possibility of formulating reservations similar to the reservations set out in the Turkish declaration. The position cannot be otherwise, for if reservations could be made on the basis of Article 25 (art. 25), such a method of proceeding would undermine Article 64 (art. 64) and would sooner or later destroy the very foundations of the Convention.

...

It follows that the Turkish reservations, as they are outside the scope of Article 64 (art. 64) must be considered as unauthorised reservations and, accordingly, as illegal reservations. Consequently, they are null and void and may not give rise to any effect in law."

19. In a letter of 21 April 1987 the Permanent Representative of Sweden wrote to the Secretary General stating inter alia that "the reservations and declarations ... raise various legal questions as to the scope of the [Turkish] recognition. The Government therefore reserves the right to return to this question in the light of such decisions by the competent bodies of the

Council of Europe that may occur in connection with concrete petitions from individuals".

20. The Minister for Foreign Affairs of Luxembourg, in a letter of 21 April 1987 to the Secretary General stated inter alia that "Luxembourg reserves to itself the right to express ... its position in regard to the Turkish Government's declaration" before the competent bodies of the Council of Europe. He indicated that "the absence of a formal and official reaction on the merits of the problem should not ... be interpreted as a tacit recognition by Luxembourg of the Turkish Government's reservations".

21. In a letter of 30 April 1987 to the Secretary General the Permanent Representative of Denmark stated inter alia as follows:

"In the view of the Danish Government, the reservations and declarations which accompany the said recognition raise various legal questions as to the scope of the recognition. The Government therefore reserves its right to return to these questions in the light of future decisions by the competent bodies of the Council of Europe in connection with concrete petitions from individuals."

22. The Permanent Representative of Norway, in his letter of 4 May 1987 to the Secretary General, stated that the wording of the declaration could give rise to difficult issues of interpretation as to the scope of the recognition of the right to petition. He considered that such issues fell to be resolved by the European Commission of Human Rights in dealing with concrete petitions. He added:

"It is therefore desirable to avoid any doubt as to the scope and validity of the recognition by individual States of this right which may be raised by generalised stipulations in respect of the context in which petitions would be accepted as admissible, interpretative statements or other conditionalities."

23. In a letter dated 26 June 1987 to the Secretary General, the Permanent Representative of Turkey stated that the points contained in the Turkish declaration were not to be considered as "reservations" in the sense of international treaty law. He pointed out, inter alia, that the only competent organ to make a legally binding assessment as to the validity of the conditions attaching to the Article 25 (art. 25) declaration was "the European Commission of Human Rights, when being seized of an individual application, and eventually the Committee of Ministers, when acting pursuant to Article 32 (art. 32) of the Convention".

24. The Permanent Representative of Belgium, in a letter of 22 July 1987 to the Secretary General, stated that the conditions and qualifications set forth in the declaration raised legal questions as to the system of protection set up under the Convention. He added:

"Belgium therefore reserves the right to express its position in regard to the Turkish Government's declaration, at a later stage and before the competent bodies of the Council of Europe. Meanwhile the absence of a formal reaction on the merits of the problem should by no means be interpreted as a tacit recognition by Belgium of the Turkish Government's conditions and qualifications."

D. Turkey's subsequent Article 25 (art. 25) declarations

25. Turkey subsequently renewed her declaration under Article 25 (art. 25) of the Convention for three years as from 28 January 1990. The declaration read as follows:

"The Government of Turkey, acting pursuant to Article 25 (1) (art. 25-1) of the Convention for the Protection of Human Rights and Fundamental Freedoms hereby declares to accept the competence of the European Commission of Human Rights to receive petitions according to Article 25 (art. 25) of the Convention on the basis of the following:

(i) the recognition of the right of petition extends only to allegations concerning acts or omissions of public authorities in Turkey performed within the boundaries of the national territory of the Republic of Turkey;

(ii) the circumstances and conditions under which Turkey, by virtue of Article 15 (art. 15) of the Convention, derogates from her obligations under the Convention in special circumstances must be interpreted, for the purpose of the competence attributed to the Commission under this declaration, in the light of Articles 119 to 122 of the Turkish Constitution;

(iii) the competence attributed to the Commission under this declaration shall not comprise matters regarding the legal status of military personnel and in particular, the system of discipline in the armed forces;

(iv) for the purpose of the competence attributed to the Commission under this declaration, Articles 8, 9, 10 and 11 (art. 8, art. 9, art. 10, art. 11) of the Convention shall be interpreted by giving special emphasis to 'those legal and factual features which characterize the life of the society' (European Court of Human Rights, Judgment of 23 July 1968, p. 34) in Turkey, as expressed notably by the Turkish Constitution including its Preamble.

This declaration extends to allegations made in respect of facts, including judgments which are based on such facts which have occurred subsequent to 28 January 1987, three years as from January 28, 1990."

26. A further renewal for a three-year period as from 28 January 1993 reads as follows:

"The Government of Turkey, acting pursuant to Article 25 (1) (art. 25-1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, hereby declares to accept the competence of the European Commission of Human Rights, to receive petitions which raise allegations concerning acts or omissions of public authorities in Turkey in as far as they have been performed within the boundaries of the national territory of the Republic of Turkey.

This declaration extends to allegations made in respect of facts, including judgments which are based on such facts which have occurred subsequent to 28 January 1987, date of the deposit of the first declaration made by Turkey under Article 25 (art. 25) of the Convention. This declaration is valid for three years from 28 January 1993."

E. Turkish declaration of 22 January 1990 under Article 46 (art. 46) of the Convention

27. On 22 January 1990, the Turkish Minister for Foreign Affairs deposited the following declaration with the Secretary General of the Council of Europe pursuant to Article 46 (art. 46) of the Convention (see paragraph 66 below):

"On behalf of the Government of the Republic of Turkey and acting in accordance with Article 46 (art. 46) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, I hereby declare as follows:

The Government of the Republic of Turkey acting in accordance with Article 46 (art. 46) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereby recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention which relate to the exercise of jurisdiction within the meaning of Article 1 (art. 1) of the Convention, performed within the boundaries of the national territory of the Republic of Turkey, and provided further that such matters have previously been examined by the Commission within the power conferred upon it by Turkey.

This Declaration is made on condition of reciprocity, including reciprocity of obligations assumed under the Convention. It is valid for a period of 3 years as from the date of its deposit and extends to matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration."

This declaration was renewed for a period of three years as from 22 January 1993 in substantially the same terms.

28. The Secretary General of the Council of Europe acknowledged deposit of the Turkish declaration under Article 46 (art. 46) in a letter dated 26 January 1990 and pointed out that her acknowledgement was without prejudice to the legal questions that might arise concerning the validity of the Turkish declaration.

29. In a letter of 31 May 1990 to the Secretary General of the Council of Europe, the Permanent Representative of Greece stated *inter alia* as follows:

"Article 46 (art. 46) of the said Convention is clear and to be strictly interpreted and applied. It provides that declarations of recognition of the Court's jurisdiction may be subject to two conditions only: (a) on condition of reciprocity, if they are not made unconditionally, and (b) for a specified period.

Consequently, the above-mentioned declaration of the Turkish Government which, in addition to these two conditions, contains further restrictions or reservations, is, where the latter are concerned, incompatible with Article 46 (art. 46) and with the European Convention on Human Rights in general, as indeed was already pointed out in the Greek Government's letter of 6 April 1987 in connection with the Turkish Government's declaration under Article 25 (art. 25) of the said Convention. It follows that these restrictions or reservations are null and void and may have no legal effect."

II. CYPRIOT DECLARATION UNDER ARTICLE 25 (ART. 25)

30. By letter of 9 August 1988 the Government of Cyprus deposited the following declaration under Article 25 (art. 25) of the Convention:

"On behalf of the Government of the Republic of Cyprus, I declare, in accordance with Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, that the Government of the Republic of Cyprus recognizes, for the period beginning on 1 January 1989 and ending on 31 December 1991, the competence of the European Commission of Human Rights to receive petitions submitted to the Secretary General of the Council of Europe subsequently to 31 December 1988, by any person, non-governmental organisation or group of individuals claiming, in relation to any act or decision occurring or any facts or events arising subsequently to 31 December 1988, to be the victim of a violation of the rights set forth in that Convention.

On behalf of the Government of the Republic of Cyprus, I further declare that the competence of the Commission by virtue of Article 25 (art. 25) of the Convention is not to extend to petitions concerning acts or omissions alleged to involve breaches of the Convention or its Protocols, in which the Republic of Cyprus is named as the Respondent, if the acts or omissions relate to measures taken by the Government of the Republic of Cyprus to meet the needs resulting from the situation created by the continuing invasion and military occupation of part of the territory of the Republic of Cyprus by Turkey."

31. In a letter dated 12 September 1988, the Secretary General recalled that according to the general rules, the notification made pursuant to Article 25 para. 3 (art. 25-3) in no way prejudged the legal questions that might arise concerning the validity of the Cypriot declaration.

32. The declaration was renewed in the same terms on 2 January 1992. By letter of 22 December 1994 it was renewed for a further period of three years without the restrictions *ratione materiae* set out above.

III. DECLARATION OF THE UNITED KINGDOM UNDER ARTICLE 25 (ART. 25)

33. The United Kingdom's Article 25 (art. 25) declaration of 14 January 1966, which has been renewed successively, reads as follows:

"On instructions from Her Majesty's Principal Secretary of State for Foreign Affairs, I have the honour to declare in accordance with the provisions of Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on the 4th November, 1950, that the Government of the United Kingdom of Great Britain and Northern Ireland recognise, in respect of the notification, in respect of any other territory for the international relations of which the Government of the United Kingdom are responsible, for the period beginning on the 14th January 1966, and ending on 13th of January 1969, the competence of the European Commission of Human Rights to receive petitions submitted to the Secretary General of the Council of Europe subsequently to the 13th of January 1966, by any person, non-governmental organisation or group of individuals claiming, in

relation to any act or decision occurring or any facts or events arising subsequently to the 13th of January 1966, to be the victim of a violation of the rights set forth in that Convention and in the Protocol thereto which was opened for signature at Paris on the 20th March 1952.

This declaration does not extend to petitions in relation to anything done or occurring in any territory in respect of which the competence of the European Commission of Human Rights to receive petitions has not been recognised by the Government of the United Kingdom or to petitions in relation to anything done or occurring in the United Kingdom in respect of such a territory or of matters arising there."

PROCEEDINGS BEFORE THE COMMISSION

34. Mrs Loizidou lodged her application (no. 15318/89) on 22 July 1989. She complained that her arrest and detention involved violations of Articles 3, 5 and 8 (art. 3, art. 5, art. 8) of the Convention. She further complained that the refusal of access to her property constituted a continuing violation of Article 8 (art. 8) of the Convention and Article 1 of Protocol No. 1 (P1-1).

35. On 4 March 1991 the Commission declared the applicant's complaints admissible in so far as they raised issues under Articles 3, 5 and 8 (art. 3, art. 5, art. 8) in respect of her arrest and detention and Article 8 (art. 8) and Article 1 of Protocol No. 1 (P1-1) concerning continuing violations of her right of access to property alleged to have occurred subsequent to 29 January 1987. Her complaint under the latter two provisions of a continuing violation of her property rights before 29 January 1987 was declared inadmissible.

In its report of 8 July 1993 (Article 31) (art. 31), it expressed the opinion that there had been no violation of Article 3 (art. 3) (unanimously); Article 8 (art. 8) as regards the applicant's private life (eleven votes to two); Article 5 para. 1 (art. 5-1) (nine votes to four); Article 8 (art. 8) as regards the applicant's home (nine votes to four) and Article 1 of Protocol No. 1 (P1-1) (eight votes to five). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment³.

³ Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 310 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

36. At the close of the hearing the Agent of the Turkish Government stated as follows:

"In the light of what has been stated, it is my honour on behalf of the Turkish Government to urge the Court to declare that it has no jurisdiction to examine this case, based on the application lodged by Mrs Loizidou and referred to the Court by the Greek Cypriot administration. The allegations made lie outside the jurisdiction of Turkey within the meaning of Article 1 (art. 1) of the Convention. As a subsidiary argument, we would also like the Court to find that it has no jurisdiction to examine this application filed by Mrs Loizidou on the grounds of the territorial limitation, which is an integral part of the recognition by Turkey of the jurisdiction of the Commission, pursuant to Article 25 (art. 25) of the Convention.

Secondly, on behalf of the Turkish Government, I would ask the Court to declare that it has no jurisdiction to examine the application filed by Mrs Loizidou since the alleged facts occurred prior to the date on which the Turkish declaration, recognising the Court's jurisdiction, entered into force, pursuant to Article 46 (art. 46) of the Convention. Furthermore, the facts occurred prior to the date on which the declaration, recognising the jurisdiction of the Commission, entered into force, pursuant to Article 25 (art. 25)."

37. In their memorial, the applicant Government stated:

"For all the above reasons the Cyprus Government submits that (a) the 'preliminary objections of Turkey' should be rejected, (b) the reference of the case to the Court by the Cyprus Government is well founded and is justified in the interest of the European public order and the protection of the human rights under the Convention and (c) that the complaints of the applicant in the above case for violations of her rights under the Convention are valid."

38. The applicant, in her memorial, concluded as follows:

- "On the basis of the considerations set forth above the Court is requested
- (i) to reject all the preliminary objections advanced on behalf of Turkey; and
- (ii) to affirm the existence of jurisdiction in respect of the continuing violations of Article 1 of Protocol No. 1 (P1-1) and of Article 8 (art. 8) of the Convention with effect from 28 January 1987 or (in the alternative) with effect from 22 January 1990."

AS TO THE LAW

I. THE STANDING OF THE APPLICANT GOVERNMENT

39. Throughout the proceedings the Turkish Government systematically referred to the applicant Government as the "Greek Cypriot administration".

They indicated, without developing any arguments on this point, that they did not accept the capacity of the applicant Government to represent the people of Cyprus and that their appearance before the Court in the present case should not be understood as amounting to any form of recognition of that Government.

40. The Court confines itself to noting, with reference *inter alia* to the consistent practice of the Council of Europe and the decisions of the Commission in the inter-State cases of *Cyprus v. Turkey*, that the applicant Government have been recognised by the international community as the Government of the Republic of Cyprus (see in this connection, applications nos. 6780/74 and 6950/75, *Cyprus v. Turkey*, 26 May 1975, Decisions and Reports (DR) 2, p. 125, at pp. 135-36; no. 8007/77, *Cyprus v. Turkey*, 10 July 1978, DR 13, p. 85, at p. 146). Their locus standi as the Government of a High Contracting Party to the Convention cannot therefore be in doubt. Moreover it has not been contested that the applicant is a national of the Republic of Cyprus.

41. In any event recognition of an applicant Government by a respondent Government is not a precondition for either the institution of proceedings under Article 24 (art. 24) of the Convention or the referral of cases to the Court under Article 48 (art. 48) (see application no. 8007/77, *loc. cit.*, pp. 147-48). If it were otherwise, the system of collective enforcement which is a central element in the Convention system could be effectively neutralised by the interplay of recognition between individual Governments and States.

II. ALLEGED ABUSE OF PROCESS

42. The Turkish Government submitted that the overriding aim of the application was political propaganda. The decision of the applicant Government to bring the case before the Court was not, in fact, made in order to complain of the alleged violations of the applicant's rights but rather to stimulate a debate before the Court on the status of the "Turkish Republic of Northern Cyprus" (the "TRNC"). Such an approach amounted to an abuse of process. The complaints therefore fell outside the Court's competence since they seek to pervert the character of the judicial control procedure.

43. The applicant Government and the Commission took issue with this submission. The Government of Cyprus argued *inter alia* that the applicant's case is one of thousands of instances of displaced persons who have been deprived of their property because of the illegal Turkish occupation of northern Cyprus. Moreover, it was only natural that the Government of Cyprus should be interested in the fate of their citizens. The applicant, for her part, considered that the claim lacked the status of a preliminary objection.

44. The Court observes that this objection was not raised in the proceedings before the Commission. Accordingly the Turkish Government is estopped from raising it before the Court in so far as it applies to Mrs Loizidou.

45. In so far as it is directed to the applicant Government, the Court notes that this Government have referred the case to the Court *inter alia* because of their concern for the rights of the applicant and other citizens in the same situation. The Court does not consider such motivation to be an abuse of its procedures.

It follows that this objection must be rejected.

46. In the light of this conclusion it leaves open the question whether it could refuse jurisdiction in an application by a State under Article 48 (b) (art. 48-b) on the grounds of its allegedly abusive character.

III. THE TURKISH GOVERNMENT'S ROLE IN THE PROCEEDINGS

47. The Turkish Government submitted that, in essence, the present case did not concern the acts or omissions of Turkey but those of the "TRNC" which they claimed to be an independent State established in the north of Cyprus. As the only Contracting Party to have recognised the "TRNC", with whose authorities it has close and friendly relations, its role before the Court was limited to that of an *amicus curiae* since the "TRNC" was not itself able to be a "party" to the present proceedings.

48. For the applicant Government, it was not open to Turkey under the Rules of Court to change its status in this way and to appear on behalf of an illegal regime which had been established in defiance of international law and which has not been recognised by the international community.

49. The applicant for her part considered that the Turkish Government's position amounted, in effect, to an objection *ratione loci*.

50. The Commission maintained that Turkey appeared not as an *amicus curiae* but as a High Contracting Party to the Convention.

51. The Court does not consider that it lies within the discretion of a Contracting Party to the Convention to characterise its standing in the proceedings before the Court in the manner it sees fit. It observes that the case originates in a petition made under Article 25 (art. 25), brought by the applicant against Turkey in her capacity as a High Contracting Party to the Convention and has been referred to the Court under Article 48 (b) (art. 48-b) by another High Contracting Party.

52. The Court therefore considers - without prejudging the remainder of the issues in these proceedings - that Turkey is the respondent Party in this case.

IV. SCOPE OF THE CASE

53. Before the Commission the applicant complained that her right to the peaceful enjoyment of her possessions had been affected as a result of the continued occupation and control of the northern part of Cyprus by Turkish armed forces which have on several occasions prevented her from gaining access to her home and other properties there. She submitted that this state of affairs constituted a continuing violation of her property rights contrary to Article 1 of Protocol No. 1 (P1-1) to the Convention as well as a continuing violation of her right to respect for her home contrary to Article 8 (art. 8) of the Convention. She further alleged violations of Articles 3, 5 para. 1 and 8 (art. 3, art. 5-1, art. 8) of the Convention arising out of her arrest and detention (see paragraph 34 above).

54. In the application referring the present case to the Court under Article 48 (b) (art. 48-b) of the Convention the applicant Government have confined themselves to seeking a ruling on the complaints under Article 1 of Protocol No. 1 (P1-1) and Article 8 (art. 8), in so far as they have been declared admissible by the Commission (see paragraph 35 above), concerning access to the applicant's property. Accordingly, as is undisputed, it is only these complaints which are before the Court. The remaining part of the case concerning the applicant's arrest and detention thus falls within the competence of the Committee of Ministers of the Council of Europe in accordance with Article 32 para. 1 (art. 32-1) of the Convention.

The Court notes that the issue whether the Convention and the Rules of Court permit a partial referral under Article 48 (art. 48), as in the present case, has not been called into question by those appearing before the Court. Indeed, Turkey ("the respondent Government") has accepted that the scope of the case be confined in this way. In these circumstances the Court does not find it necessary to give a general ruling on the question whether it is permissible to limit a referral to the Court to some of the issues on which the Commission has stated its opinion.

V. OBJECTIONS RATIONE LOCI

55. The respondent Government have filed two preliminary objections *ratione loci*. In the first place they claimed that the Court lacks competence to consider the merits of the case on the grounds that the matters complained of did not fall within Turkish jurisdiction but within that of the "TRNC". In the second place they contended that, in accordance with their declarations under Articles 25 and 46 (art. 25, art. 46) of the Convention (see paragraphs 4, 15 and 27 above), they had not accepted either the competence of the Commission or the Court to examine acts and events outside their metropolitan territory.

The Court will examine each of these objections in turn.

A. Whether the facts alleged by the applicant are capable of falling within the jurisdiction of Turkey under Article 1 (art. 1) of the Convention

1. Submissions of those appearing before the Court

56. The respondent Government first pointed out that the question of access to property was obviously outside the realm of Turkey's "jurisdiction". This could be seen from the fact that it formed one of the core items in the inter-communal talks between the Greek-Cypriot and Turkish-Cypriot communities.

Furthermore the mere presence of Turkish armed forces in northern Cyprus was not synonymous with "jurisdiction" any more than it is with the armed forces of other countries stationed abroad. In fact Turkish armed forces had never exercised "jurisdiction" over life and property in northern Cyprus. Undoubtedly it was for this reason that the findings of the Commission in the inter-State cases of *Cyprus v. Turkey* (applications nos. 6780/74, 6950/75 and 8007/77, *supra cit.*) had not been endorsed by the Committee of Ministers whose stand was in line with the realities of the situation prevailing in Cyprus following the intervention of Turkey as one of the three guarantor powers of the Republic of Cyprus.

Nor did Turkey exercise overall control of the border areas as found by the Commission in its admissibility decision in the present case. She shares control with the authorities of the "TRNC" and when her armed forces act alone they do so on behalf of the "TRNC" which does not dispose of sufficient forces of its own. The fact that the Turkish armed forces operate within the command structure of the Turkish army does not alter this position.

According to the respondent Government, far from being a "puppet" State as alleged by the applicant, the "TRNC" is a democratic constitutional State with impeccable democratic features and credentials. Basic rights are effectively guaranteed and there are free elections. It followed that the exercise of public authority in the "TRNC" was not imputable to Turkey. The fact that this State has not been recognised by the international community was not of any relevance in this context.

57. The applicant, whose submissions were endorsed by the Government of Cyprus, contended that the question of responsibility in this case for violations of the Convention must be examined with reference to the relevant principles of international law. In this respect the Commission's approach which focused on the direct involvement of Turkish officials in violations of the Convention was not, under international law, the correct one. A State is, in principle, internationally accountable for violations of rights occurring in territories over which it has physical control.

According to the applicant, international law recognises that a State which is thus accountable with respect to a certain territory remains so even if the territory is administered by a local administration. This is so whether the local administration is illegal, in that it is the consequence of an illegal use of force, or whether it is lawful, as in the case of a protected State or other political dependency. A State cannot avoid legal responsibility for its illegal acts of invasion and military occupation, and for subsequent developments, by setting up or permitting the creation of forms of local administration, however designated. Thus the controlling powers in the "puppet" States that were set up in Manchukuo, Croatia and Slovakia during the period 1939-45 were not regarded as absolved from responsibilities for breaches of international law in these administrations (Whiteman, *Digest of International Law*, vol. 8, pp. 835-37 (1967)). In the same vein, the international accountability of the protecting or ultimate sovereign remains in place even when a legitimate political dependency is created. This responsibility of the State in respect of protectorates and autonomous regions is affirmed by the writings of authoritative legal publicists (Rousseau, *Droit international public*, vol. V, 1983, p. 31, para. 28; Reuter, *Droit international public*, 6th ed., 1983, p. 262; *Répertoire suisse de droit international public*, vol. III, 1975, pp. 1722-23; Verzijl, *International Law in Historical Perspective*, vol. IV, 1973, pp. 710-11).

The applicant further submitted that in the present case to apply a criterion of responsibility which required the direct intervention of Turkish military personnel in respect of each *prima facie* violation of the Convention in northern Cyprus would be wholly at variance with the normal mode of applying the principles of State responsibility set out above. To require applicants to fulfil such a standard at the merits stage would be wholly unrealistic and would also involve a *de facto* amnesty and a denial of justice.

Finally, if Turkey was not to be held responsible for conditions in northern Cyprus, no other legal person can be held responsible. However the principle of the effective protection of Convention rights recognised in the case-law of the Court requires that there be no lacuna in the system of responsibility. The principles of the Convention system and the international law of State responsibility thus converge to produce a regime under which Turkey is responsible for controlling events in northern Cyprus.

58. On this issue the Commission was of the opinion that the applicant had been prevented from gaining access to her property due to the presence of Turkish armed forces in the northern part of Cyprus which exercise an overall control in the border area. This refusal of access was thus imputable to Turkey.

2. *The Court's examination of the issue*

59. Article 1 (art. 1) of the Convention reads as follows:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

60. The question before the Court is whether its competence to examine the applicant's complaints is excluded on the grounds that they concern matters which cannot fall within the "jurisdiction" of the respondent Government.

61. The Court would emphasise that it is not called upon at the preliminary objections stage of its procedure to examine whether Turkey is actually responsible under the Convention for the acts which form the basis of the applicant's complaints. Nor is it called upon to establish the principles that govern State responsibility under the Convention in a situation like that obtaining in the northern part of Cyprus. Such questions belong rather to the merits phase of the Court's procedure. The Court's enquiry is limited to determining whether the matters complained of by the applicant are capable of falling within the "jurisdiction" of Turkey even though they occur outside her national territory.

62. In this respect the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention (see the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, pp. 35-36, para. 91; the *Cruz Varas and Others v. Sweden* judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69 and 70, and the *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, p. 34, para. 103). In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the *Drozd and Janousek v. France and Spain* judgment of 26 June 1992, Series A no. 240, p. 29, para. 91).

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

63. In this connection the respondent Government have acknowledged that the applicant's loss of control of her property stems from the occupation

of the northern part of Cyprus by Turkish troops and the establishment there of the "TRNC". Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property.

64. It follows that such acts are capable of falling within Turkish "jurisdiction" within the meaning of Article 1 (art. 1) of the Convention. Whether the matters complained of are imputable to Turkey and give rise to State responsibility are thus questions which fall to be determined by the Court at the merits phase.

B. Validity of the territorial restrictions attached to Turkey's Article 25 and 46 (art. 25, art. 46) declarations

65. The relevant provisions of Article 25 (art. 25) of the Convention read as follows:

"1. The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

2. Such declarations may be made for a specific period.

"...

66. Article 46 (art. 46) of the Convention states:

"1. Any of the High Contracting Parties may at any time declare that it recognises as compulsory ipso facto and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the ... Convention.

2. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.

3. These declarations shall be deposited with the Secretary General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties."

67. The respondent Government submitted that the relevant territorial and other restrictions contained in the Article 25 and 46 (art. 25, art. 46) declarations of 28 January 1987 and 22 January 1990 (as renewed on 22 January 1993) respectively, are legally valid and bind the Convention institutions. The system set up under Articles 25 and 46 (art. 25, art. 46) is an optional one into which Contracting States may, or may not, "contract-in". There is no indication that the Contracting Parties agreed when the Convention was being drafted that a partial recognition of the competence

of the Commission and Court was impermissible. If they had meant to prohibit restrictions in Article 25 and 46 (art. 25, art. 46) declarations they would have included a special provision to this effect as is common in the treaty practice of the Council of Europe.

In fact the Convention system has multiple clauses, such as Articles 63 and 64 (art. 63, art. 64), Article 6 para. 2 of Protocol No. 4 and Article 7 para. 2 of Protocol No. 7, (P4-6-2, P7-7-2), which provide the basis for "à la carte" undertakings by the Contracting Parties. Moreover, other States have attached substantive restrictions to their instruments of acceptance such as the United Kingdom (see paragraph 33 above) - in this case a territorial restriction - and Cyprus (see paragraphs 30 and 32 above).

The respondent Government also referred to the established practice under Article 36 of the Statute of the International Court of Justice to permit the attachment of substantive, territorial and temporal restrictions to the optional recognition of the Court's jurisdictional competence. The wording in Article 36 para. 3 of the Statute is, in all material respects, the same as that used in Articles 25 and 46 (art. 25, art. 46) of the Convention. In this connection, the drafting history of the Convention reveals that Article 36 of the Statute served as a model for Article 46 (art. 46) of the Convention. It is a well established principle in international treaty law that an expression used in one treaty will bear the same meaning if used in another.

In the respondent Government's further submission, Articles 25 and 46 (art. 25, art. 46) must be interpreted with reference to their meaning when the Convention was being drafted. This principle of contemporaneous meaning is part of the "good faith" interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties. At that time, international judicial practice permitted the addition of conditions or restrictions to any optional recognition of the jurisdiction of an international tribunal. The fact that the drafters of the Convention did not choose to use different words indicates that they intended to give States the same freedom to attach restrictions to their declarations as is enjoyed under Article 36 of the Statute of the International Court of Justice.

Finally, with regard to subsequent treaty practice, while there have been statements opposing the Turkish interpretation of Articles 25 and 46 (art. 25, art. 46), it has not been established that there is a practice reflecting an agreement among all Contracting Parties concerning the attachment of conditions to these instruments of acceptance.

68. For the applicant and the Government of Cyprus, when States make declarations under Articles 25 and 46 (art. 25, art. 46) recognising the competence of the Commission and Court, the only conditions permitted are those *ratione temporis*. In reality, the territorial restriction in the Turkish declarations is tantamount to a disguised reservation.

Furthermore, the long-established practice of the International Court of Justice in accepting restrictions on the jurisdiction of the Court under

Article 36 of the Statute affords no assistance in the present case because of the substantial differences between the two systems. The International Court of Justice is a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention.

69. The Commission, with reference to its admissibility decision in the present case, also considered that the restrictions attaching to the Turkish Article 25 (art. 25) declaration were invalid with the exception of the temporal restriction. It expressed the same view as regards the territorial restriction contained in the Article 46 (art. 46) declaration.

70. The Court observes that Articles 25 and 46 (art. 25, art. 46) of the Convention are provisions which are essential to the effectiveness of the Convention system since they delineate the responsibility of the Commission and Court "to ensure the observance of the engagements undertaken by the High Contracting Parties" (Article 19) (art. 19), by determining their competence to examine complaints concerning alleged violations of the rights and freedoms set out in the Convention. In interpreting these key provisions it must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms.

As was observed in the Court's Ireland v. the United Kingdom judgment of 18 January 1978 (Series A no. 25, p. 90, para. 239),

"Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a 'collective enforcement'."

71. That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law (see, *inter alia*, the Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, pp. 15-16, para. 31). Such an approach, in the Court's view, is not confined to the substantive provisions of the Convention, but also applies to those provisions, such as Articles 25 and 46 (art. 25, art. 46), which govern the operation of the Convention's enforcement machinery. It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.

Accordingly, even if it had been established, which is not the case, that restrictions, other than those *ratione temporis*, were considered permissible under Articles 25 and 46 (art. 25, art. 46) at a time when a minority of the present Contracting Parties adopted the Convention, such evidence could not be decisive.

72. In addition, the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, the above-mentioned Soering judgment, p. 34,

para. 87, and the *Artico v. Italy* judgment of 13 May 1980, Series A no. 37, p. 16, para. 33).

73. To determine whether Contracting Parties may impose restrictions on their acceptance of the competence of the Commission and Court under Articles 25 and 46 (art. 25, art. 46), the Court will seek to ascertain the ordinary meaning to be given to the terms of these provisions in their context and in the light of their object and purpose (see, *inter alia*, the *Johnston and Others v. Ireland* judgment of 18 December 1986, Series A no. 112, p. 24, para. 51, and Article 31 para. 1 of the Vienna Convention of 23 May 1969 on the Law of Treaties). It shall also take into account, together with the context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (see Article 31 para. 3 (b) of the above-mentioned Vienna Convention).

74. Both Article 25 para. 2 and Article 46 para. 2 (art. 25-2, art. 46-2) of the Convention explicitly permit the respective declarations to be made for a specified period. These provisions have been consistently understood as permitting Contracting Parties also to limit the retrospective application of their acceptance of the competence of the Commission and the Court (see, *inter alia*, the *Stamoulakatos v. Greece* judgment of 26 October 1993, Series A no. 271, p. 13, para. 32). This point has not been disputed.

75. Article 25 (art. 25) contains no express provision for other forms of restrictions (see paragraph 65 above). In addition, Article 46 para. 2 (art. 46-2) provides that declarations "may be made unconditionally or on condition of reciprocity ..." (see paragraph 66 above).

If, as contended by the respondent Government, substantive or territorial restrictions were permissible under these provisions, Contracting Parties would be free to subscribe to separate regimes of enforcement of Convention obligations depending on the scope of their acceptances. Such a system, which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*). Moreover, where the Convention permits States to limit their acceptance under Article 25 (art. 25), there is an express stipulation to this effect (see, in this regard, Article 6 para. 2 of Protocol No. 4 and Article 7 para. 2 of Protocol No. 7) (P4-6-2, P7-7-2).

In the Court's view, having regard to the object and purpose of the Convention system as set out above, the consequences for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for. However no such provision exists in either Article 25 or Article 46 (art. 25, art. 46).

76. The Court further notes that Article 64 (art. 64) of the Convention enables States to enter reservations when signing the Convention or when

depositing their instruments of ratification. The power to make reservations under Article 64 (art. 64) is, however, a limited one, being confined to particular provisions of the Convention "to the extent that any law then in force in [the] territory [of the relevant Contracting Party] is not in conformity with the provision". In addition reservations of a general nature are prohibited.

77. In the Court's view, the existence of such a restrictive clause governing reservations suggests that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their "jurisdiction" from supervision by the Convention institutions. The inequality between Contracting States which the permissibility of such qualified acceptances might create would, moreover, run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realisation of human rights.

78. The above considerations in themselves strongly support the view that such restrictions are not permitted under the Convention system.

79. This approach is confirmed by the subsequent practice of Contracting Parties under these provisions. Since the entry into force of the Convention until the present day, almost all of the thirty parties to the Convention, apart from the respondent Government, have accepted the competence of the Commission and Court to examine complaints without restrictions *ratione loci* or *ratione materiae*. The only exceptions to such a consistent practice appear in the restrictions attached to the Cypriot declaration under Article 25 (art. 25) (see paragraphs 30 and 32) which have now been withdrawn (see paragraph 32 above) and - as is claimed by the respondent Government - the United Kingdom Article 25 (art. 25) declaration (see paragraph 33 above).

80. In this respect, the Commission suggested that the restriction was formulated by the United Kingdom, in the light of Article 63 para. 4 (art. 63-4) of the Convention, in order to exclude the competence of the Commission to examine petitions concerning its non-metropolitan territories. In the present context the Court is not called upon to interpret the exact scope of this declaration which has been invoked by the respondent Government as an example of a territorial restriction. Whatever its meaning, this declaration and that of Cyprus do not disturb the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 (art. 25, art. 46) of the Convention do not permit territorial or substantive restrictions.

81. The evidence of such a practice is further supported by the reactions of the Governments of Sweden, Luxembourg, Denmark, Norway and Belgium, as well as the Secretary General of the Council of Europe as depositary, which reserved their positions as regards the legal questions arising as to the scope of Turkey's first Article 25 (art. 25) declaration (see

paragraphs 18-24 above) and the Government of Greece which considered the restrictions to Turkey's declarations under Article 25 and 46 (art. 25, art. 46) to be null and void (see paragraph 18 above).

82. The existence of such a uniform and consistent State practice clearly rebuts the respondent Government's arguments that restrictions attaching to Article 25 and Article 46 (art. 25, art. 46) declarations must have been envisaged by the drafters of the Convention in the light of practice under Article 36 of the Statute of the International Court of Justice.

83. In this connection, it is not disputed that States can attach restrictions to their acceptance of the optional jurisdiction of the International Court. Nor has it been contested that Article 46 (art. 46) of the Convention was modelled on Article 36 of the Statute. However, in the Court's view, it does not follow that such restrictions to the acceptance of jurisdiction of the Commission and Court must also be permissible under the Convention.

84. In the first place, the context within which the International Court of Justice operates is quite distinct from that of the Convention institutions. The International Court is called on *inter alia* to examine any legal dispute between States that might occur in any part of the globe with reference to principles of international law. The subject-matter of a dispute may relate to any area of international law. In the second place, unlike the Convention institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention.

85. Such a fundamental difference in the role and purpose of the respective tribunals, coupled with the existence of a practice of unconditional acceptance under Articles 25 and 46 (art. 25, art. 46), provides a compelling basis for distinguishing Convention practice from that of the International Court.

86. Finally, although the argument has not been elaborated on by the respondent Government, the Court does not consider that the application of Article 63 para. 4 (art. 63-4), by analogy, provides support for the claim that a territorial restriction is permissible under Articles 25 and 46 (art. 25, art. 46).

According to this argument, Article 25 (art. 25) could not apply beyond national boundaries to territories, other than those envisaged by Article 63 (art. 63), unless the State specifically extended it to such territories. As a corollary, the State can limit acceptance of the right of individual petition to its national territory - as has been done in the instant case.

87. The Court first recalls that in accordance with the concept of "jurisdiction" in Article 1 (art. 1) of the Convention, State responsibility may arise in respect of acts and events outside State frontiers (see paragraph 62 above). It follows that there can be no requirement, as under Article 63 para. 4 (art. 63-4) in respect of the overseas territories referred to in that

provision, that the Article 25 (art. 25) acceptance be expressly extended before responsibility can be incurred.

88. In addition, regard must be had to the fact that the object and purpose of Article 25 and Article 63 (art. 25, art. 63) are different. Article 63 (art. 63) concerns a decision by a Contracting Party to assume full responsibility under the Convention for all acts of public authorities in respect of a territory for whose international relations it is responsible. Article 25 (art. 25), on the other hand, concerns an acceptance by a Contracting Party of the competence of the Commission to examine complaints relating to the acts of its own officials acting under its direct authority. Given the fundamentally different nature of these provisions, the fact that a special declaration must be made under Article 63 para. 4 (art. 63-4) accepting the competence of the Commission to receive petitions in respect of such territories, can have no bearing, in the light of the arguments developed above, on the validity of restrictions *ratione loci* in Article 25 and 46 (art. 25, art. 46) declarations.

89. Taking into consideration the character of the Convention, the ordinary meaning of Articles 25 and 46 (art. 25, art. 46) in their context and in the light of their object and purpose and the practice of Contracting Parties, the Court concludes that the restrictions *ratione loci* attached to Turkey's Article 25 and Article 46 (art. 25, art. 46) declarations are invalid.

It remains to be examined whether, as a consequence of this finding, the validity of the acceptances themselves may be called into question.

C. Validity of the Turkish declarations under Articles 25 and 46 (art. 25, art. 46) of the Convention

90. The respondent Government submitted that if the restrictions attached to the Article 25 and 46 (art. 25, art. 46) declarations were not recognised to be valid, as a whole, the declarations were to be considered null and void in their entirety. It would then be for the Turkish Government to draw the political conclusions from such a situation.

In this connection, the Turkish Delegate at the session of the Committee of Ministers of the Council of Europe in March 1987 had underlined that the conditions built into Turkey's Article 25 (art. 25) declaration were so essential that disregarding any of them would make the entire declaration void with the consequence that Turkey's acceptance of the right of individual petition would lapse. This position, it was argued, was equally valid for Turkey's Article 46 (art. 46) declaration.

It was further submitted that in accordance with Article 44 para. 3 (a) and (b) of the Vienna Convention on the Law of Treaties the burden fell on the applicants to show that the restrictions, in particular the territorial restrictions, were not an essential basis for Turkey's willingness to make the declarations.

91. For the applicant, with whom the Government of Cyprus agreed, the respondent Government, in drafting the terms of these declarations, had taken the risk that the restrictions would be declared invalid. It should not now seek to impose the legal consequences of this risk on the Convention institutions.

92. The Commission considered that it was Turkey's main intention when she made her Article 25 (art. 25) declaration on 28 January 1987 to accept the right of individual petition. It was this intention that must prevail. In addition, before the Court the Delegate of the Commission pointed out that the respondent Government had not sought to argue the invalidity of their acceptance of the right of individual petition in cases which had come before the Commission subsequent to the present case.

93. In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (ordre public) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), "to ensure the observance of the engagements undertaken by the High Contracting Parties".

94. It also recalls the finding in its *Belilos v. Switzerland* judgment of 29 April 1988, after having struck down an interpretative declaration on the grounds that it did not conform to Article 64 (art. 64), that Switzerland was still bound by the Convention notwithstanding the invalidity of the declaration (Series A no. 132, p. 28, para. 60).

95. The Court does not consider that the issue of the severability of the invalid parts of Turkey's declarations can be decided by reference to the statements of her representatives expressed subsequent to the filing of the declarations either (as regards the declaration under Article 25) (art. 25) before the Committee of Ministers and the Commission or (as regards both Articles 25 and 46) (art. 25, art. 46) in the hearing before the Court. In this connection, it observes that the respondent Government must have been aware, in view of the consistent practice of Contracting Parties under Articles 25 and 46 (art. 25, art. 46) to accept unconditionally the competence of the Commission and Court, that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs.

It is of relevance to note, in this context, that the Commission had already expressed the opinion to the Court in its pleadings in the *Belgian Linguistic* (Preliminary objection) and *Kjeldsen, Busk Madsen and Pedersen v. Denmark* cases (judgments of 9 February 1967 and 7 December 1976, Series A nos. 5 and 23 respectively) that Article 46 (art. 46) did not permit any restrictions in respect of recognition of the Court's jurisdiction (see respectively, the second memorial of the Commission of 14 July 1966, Series B no. 3, vol. I, p. 432, and the memorial of the Commission (Preliminary objection) of 26 January 1976, Series B no. 21, p. 119).

The subsequent reaction of various Contracting Parties to the Turkish declarations (see paragraphs 18-24 above) lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) - the latter subsequent to the statements by the Contracting Parties referred to above - indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves. Seen in this light, the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government's basic - albeit qualified - intention to accept the competence of the Commission and Court.

96. It thus falls to the Court, in the exercise of its responsibilities under Article 19 (art. 19), to decide this issue with reference to the texts of the respective declarations and the special character of the Convention regime. The latter, it must be said, militates in favour of the severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured in all areas falling within Turkey's "jurisdiction" within the meaning of Article 1 (art. 1) of the Convention.

97. The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Article 25 and 46 (art. 25, art. 46) declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.

98. It follows that the declarations of 28 January 1987 and 22 January 1990 under Articles 25 and 46 (art. 25, art. 46) contain valid acceptances of the competence of the Commission and Court.

VI. OBJECTION RATIONE TEMPORIS

99. The respondent Government recalled that it has only accepted the jurisdiction of the Court in respect of facts or events occurring after 22 January 1990 - the date of deposit of the instrument (see paragraph 27 above). They pointed out that the Commission has made a clear distinction between instantaneous acts, even if they have enduring effects and continuing violations of Convention rights (application no. 7379/76, X v. the United Kingdom, 10 December 1976, DR 8, pp. 211-13, and no. 7317/75, *Lynas v. Switzerland*, 6 October 1976, DR 6, pp. 155-69). It has also found that the action by which a person is deprived of his property does not result in a continuing situation of absence of property (application no. 7379/76, *supra cit.*). However, the deprivation of property of which the

applicant complains is the direct result of an instantaneous act, pursuant to the Turkish intervention in 1974, which occurred prior to the acceptance of the Court's jurisdiction.

According to the respondent Government, it follows from the above that the Court is incompetent *ratione temporis* since the alleged violation results from an instantaneous action which occurred prior to Turkey's acceptance of the optional clauses.

100. The applicant, the Government of Cyprus and the Commission maintained that the applicant's complaints concern continuing violations of Article 1 of Protocol No. 1 (P1-1) on the ground that she has been and continues to be prevented by Turkey from using and enjoying her property in the occupied part of Cyprus. She referred in this respect to the Court's *Papamichalopoulos and Others v. Greece* judgment of 24 June 1993 where it was held that a *de facto* expropriation of land amounted to a continuing violation of Article 1 of Protocol No. 1 (P1-1) (Series A no. 260-B, pp. 75-76, paras. 45-46).

The applicant further submitted that the relevant date for the determination of the Court's jurisdiction was 28 January 1987 - the date of the Turkish declaration recognising the competence of the Commission - rather than 22 January 1990. She maintained that the case brought before the Court was that based upon the original application. It would be anomalous if the Turkish Article 46 (art. 46) declaration, which accepted the jurisdiction of the Court only in respect of facts which have occurred subsequent to the deposit of the declaration (see paragraph 27 above), could frustrate the Court's examination of matters which had been properly referred to it under Article 48 (art. 48). Such a result would be incompatible with Articles 45 and 48 (art. 45, art. 48) and would in general conflict with the procedural order created by the Convention. It would also deprive the applicant of a remedy in respect of an additional three years of deprivation of her rights.

101. The Commission disagreed on this point. It considered the critical date to be 22 January 1990 when Turkey recognised the jurisdiction of the Court.

102. The Court recalls that it is open to Contracting Parties under Article 46 (art. 46) of the Convention to limit, as Turkey has done in her declaration of 22 January 1990, the acceptance of the jurisdiction of the Court to matters which occur subsequent to the time of deposit (see paragraph 27 above). It follows that the Court's jurisdiction extends only to the applicant's allegations of a continuing violation of her property rights subsequent to 22 January 1990. The different temporal competence of the Commission and Court in respect of the same complaint is a direct and foreseeable consequence of separate Convention provisions providing for recognition of the right of individual petition (Article 25) (art. 25) and the jurisdiction of the Court (Article 46) (art. 46).

103. The correct interpretation and application of the restrictions *ratione temporis*, in the Turkish declarations under Articles 25 and 46 (art. 25, art. 46) of the Convention, and the notion of continuing violations of the Convention, raise difficult legal and factual questions.

104. The Court considers that on the present state of the file it has not sufficient elements enabling it to decide these questions. Moreover, they are so closely connected to the merits of the case that they should not be decided at the present phase of the procedure.

105. It therefore decides to join this objection to the merits of the case.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the preliminary objection concerning an alleged abuse of process;
2. Holds by sixteen votes to two that the facts alleged by the applicant are capable of falling within Turkish "jurisdiction" within the meaning of Article 1 (art. 1) of the Convention;
3. Holds by sixteen votes to two that the territorial restrictions attached to Turkey's Article 25 and 46 (art. 25, art. 46) declarations under the Convention are invalid but that the Turkish declarations under Articles 25 and 46 (art. 25, art. 46) contain valid acceptances of the competence of the Commission and Court;
4. Joins unanimously to the merits the preliminary objection *ratione temporis*.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 March 1995.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the joint dissenting opinion of Mr

Gölcüklü and Mr Pettiti and two separate dissenting opinions by them are annexed to this judgment.

R. R.
H. P.

JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ AND PETTITI AND PETTITI

(Translation)

We voted with the majority as regards point 1 of the judgment's operative provisions, concerning the rejection of the preliminary objection in which an abuse of process was alleged, and point 4, concerning joinder to the merits of the preliminary objection *ratione temporis*. We were in the minority as regards points 2 and 3, taking the view, essentially, that the Court could not rule on the issue under Article 1 (art. 1) of the Convention raised in the Turkish Government's preliminary objection ("everyone within their jurisdiction") without examining the *de jure* and *de facto* situation in northern Cyprus as to the merits. We consider that the Court was not yet in possession of all the information it needed in order to assess the administration of justice, the nature and organisation of the courts and the question who had "jurisdiction" under the rules of international law in northern Cyprus and the Green Zone where the United Nations forces operated.

In the first sub-paragraph of paragraph 62 of the judgment the Court holds:

"In this respect the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention (see the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, pp. 35-36, para. 91; the *Cruz Varas and Others v. Sweden* judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69 and 70; and the *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, p. 34, para. 103). In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the *Drozdz and Janousek v. France and Spain* judgment of 26 June 1992, Series A no. 240, p. 29, para. 91)."

Admittedly the concept of jurisdiction is not restricted to the territory of the High Contracting Parties, but it is still necessary to explain exactly why jurisdiction should be ascribed to a Contracting Party and in what form and manner it is exercised. We note that in the *Drozdz and Janousek v. France and Spain* judgment cited in paragraph 62 the Court eventually found that there had been no violation.

While the responsibility of a Contracting Party may be engaged as a consequence of military action outside its territory, this does not imply exercise of its jurisdiction. The finding in paragraph 64 does not refer to any criterion for deciding the question of jurisdiction. In our opinion, therefore,

there is a contradiction between what the Court says in paragraph 62 and its conclusion in paragraph 64, and this contradiction reappears in the vote on point 2 of the operative provisions. The Court should have looked into the merits of the question who did or did not have jurisdiction before ruling on the objection.

With regard to the validity of the Turkish Government's declaration

The Court concludes in paragraph 89, on the basis of the considerations set out in paragraphs 77 to 88, that the restrictions *ratione loci* are invalid, while holding that Turkey is bound by the declaration.

Such an approach raised the question whether the Convention institutions are empowered to sever the terms of a declaration by a High Contracting Party by declaring them invalid in part. We consider that, regard being had to the circumstances in which the Turkish declaration was made, its terms cannot be severed in this way as the case stands at present, since this would mean ignoring the scope of the undertaking entered into by a State.

From the point of view of the State concerned this is a manifestation of its intention, for both public and private-law purposes, which fixes the limits of its accession and consent, in a form of words which it considers indivisible. The declaration may be declared invalid, but not split into sections, if it is the State's intention that it should form a whole. It was up to the political organs and the member States to negotiate and decide matters otherwise.

Only five States reserved their positions with regard to the legal issues which might arise concerning the scope of the first Turkish declaration (the Greek Government contending that the restrictions were null and void).

That means that the other member States and the Committee of Ministers have not formally contested the declaration as a whole, nor accepted any one part as essential or subsidiary. Consequently, it cannot be concluded that there is a uniform and consistent practice (paragraph 82) or practically universal agreement (paragraph 80).

At this stage it is useful to point out that numerous declarations set out in instruments of ratification were couched in complex terms or ran to a number of sections (see the appended declarations of France, the United Kingdom and the Netherlands; see also those of Malta and Portugal, the Cypriot declaration of 9 August 1988 or the "colonial" clauses). States expressly named "territories for whose international relations [they were] responsible"; Turkey has not done so in respect of northern Cyprus. Apart from the territorial reservations within the strict meaning of the Convention (800 international treaties include such reservations), the chart of signatures and ratifications shows that some States have made both declarations and reservations (see appended table). In the Belgian Congo case (decision of 30 May 1961 on the admissibility of application no. 1065/61, X and Others v. Belgium, Yearbook of the Convention, 1961, vol. 4, pp. 260-76) the Commission upheld the international relations argument. By analogy, in

order to determine the scope of a declaration, it should be pointed out that, according to the Vienna Convention (Article 44: "Separability of treaty provisions"), a ground for invalidating or terminating a treaty may only be invoked with respect to particular clauses where "(a) the said clauses are separable from the remainder of the treaty with regard to their application" and "(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole". Accordingly, in our opinion, it was inappropriate at the stage reached by this case in the proceedings before the Court to sever the terms of the Turkish declaration.

The only satisfactory solution in our view was to join all the objections to the merits and to hold a public hearing on the merits giving the Parties the possibility of adducing all relevant evidence on the expression "within [the] jurisdiction" (Article 1) (art. 1) and on the way the international relations of northern Cyprus are conducted. This debate on the merits would also enable all Parties to make known their views about the international undertakings and possible intervention of a "third party" or the TRNC under the auspices of the United Nations, the European Union and the Council of Europe (1989 Declaration consisting in two instruments signed by three signatories, including the TRNC; References and Reports of the Secretary General of the United Nations, from 3 April 1992 to 30 May 1994; Council of Europe report of 15 December 1994, Doc. 7206).

APPENDIX

Declaration by France (3 May 1974)

"Article 15, paragraph 1

...

The Government of the Republic further declares that the Convention shall apply to the whole territory of the Republic, having due regard, where the overseas territories are concerned, to local requirements, as mentioned in Article 63 (art. 63)."

Declaration by the United Kingdom (14 January 1966)

The British declaration under Article 25 (art. 25) of 14 January 1966, periodically renewed since then, is reproduced in paragraph 33 of the judgment.

The declaration under Article 63 (art. 63) of 23 October 1953 listed forty-three relevant territories (including Cyprus, the Isle of Man and Gibraltar). The declaration of 10 June 1964 listed the States which had become independent. The declaration of 14 August 1964 listed the territories omitted.

Declaration by the Netherlands (24 December 1985)

"The island of Aruba, which is at present still part of the Netherlands Antilles, will obtain internal autonomy as a country within the Kingdom of the Netherlands as of 1

JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ AND PETTITI

January 1986. Consequently the Kingdom will from then on no longer consist of two countries, namely the Netherlands (the Kingdom in Europe) and the Netherlands Antilles (situated in the Caribbean region), but will consist of three countries, namely the said two countries and the country Aruba.

As the changes being made on 1 January 1986 concern a shift only in the internal constitutional relations within the Kingdom of the Netherlands, and as the Kingdom as such will remain the subject under international law with which treaties are concluded, the said changes will have no consequences in international law regarding treaties concluded by the Kingdom which already apply to the Netherlands Antilles, including Aruba. These treaties will remain in force for Aruba in its new capacity of country within the Kingdom. Therefore these treaties will as of 1 January 1986, as concerns the Kingdom of the Netherlands, apply to the Netherlands Antilles (without Aruba) and Aruba.

Consequently the treaties referred to in the annex, to which the Kingdom of the Netherlands is a Party and which apply to the Netherlands Antilles, will as of 1 January 1986 as concerns the Kingdom of the Netherlands apply to the Netherlands Antilles and Aruba."

Chart of signatures and ratifications of the Convention (at 31 December 1994) (extracts)

Member States	Date of signature	Date of ratification or accession	Date of entry into force	R: reservations D: declarations T: territorial
AUSTRIA	13/12/57	03/09/58	03/09/58	R
CZECH REP.	21/02/91	18/03/92	01/01/93	R
FINLAND	05/05/89	10/05/90	10/05/90	R
FRANCE	04/11/50	03/05/74	03/05/74	R/T
GERMANY	04/11/50	05/12/52	03/09/53	R
HUNGARY	06/11/90	05/11/92	05/11/92	R
IRELAND	04/11/50	25/02/53	03/09/53	R
LIECHTEN-STEIN	23/11/78	08/09/82	08/09/82	R
MALTA	12/12/66	23/01/67	23/01/67	D
NETHER-LANDS	04/11/50	31/08/54	31/08/54	T
PORTUGAL	22/09/76	09/11/78	09/11/78	R
ROMANIA	07/10/93	20/06/94	20/06/94	R
SAN MARINO	16/11/88	22/03/89	22/03/89	R/D
SLOVAKIA	21/02/91	18/03/92	01/01/93	R
SPAIN	24/11/77	04/10/79	04/10/79	R/D
SWITZER-LAND	21/12/72	28/11/74	28/11/74	R/D

JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ AND PETTITI

UNITED

KINGDOM 04/11/50 08/03/51 03/09/53 T

INDIVIDUAL DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

In addition to the matters I raised in my joint dissenting opinion with Mr Pettiti concerning the preliminary objections on the questions of "jurisdiction" (Article 1 (art. 1) of the Convention; paragraphs 62 and 64 of the present judgment) and the "inseparability" of the Turkish declarations under Articles 25 and 46 (art. 25, art. 46) of the Convention (paragraphs 93 et seq.), I cannot agree, to my great regret, with the Court's conclusions on two other aspects of this case.

1. I consider that it is not possible in this case to reach a conclusion on the role of the "Turkish Government", or in other words on its status as "respondent", without first looking into the merits of the case. On 21 April 1994 the plenary Court did not decide whether Turkey had the status of respondent, but only considered the question submitted to it by the President, under Rule 34 of Rules A and decided, without prejudice to the preliminary objections raised by the Government of Turkey or the merits of the case, that the applicant Government had standing under Article 48 (b) (art. 48-b) of the Convention to refer the case to the Court and that the Chamber should resume consideration of the case (paragraph 7). And in its final submissions Turkey had asked the Court to hold that the applicant's allegations lay outside the jurisdiction of Turkey within the meaning of Article 1 (art. 1) of the Convention. It goes without saying that this question of "respondent status" is closely bound up with the question of "jurisdiction" within the meaning of Article 1 (art. 1) of the Convention. The Court took the view that it was not within the discretion of a Contracting Party to characterise its standing in the proceedings before the Court as it saw fit (paragraph 51). By the same token, the applicant is not entitled to name any State she sees fit as respondent in a case before the Court, nor is it for the Court to build a whole procedure on top of this unverified allegation. Therefore, instead of delivering a separate judgment on this specific question, as it has done, the Court should have joined the preliminary objection in question lodged by Turkey to the merits of the case.

2. With regard to point 3 of the judgment's operative provisions, I entirely agree with the dissenting opinion expressed in this case by five eminent members of the Commission (Mr Nørgaard, the President, and Mr Gaukur Jörundsson, Mr Gözübüyük, Mr Soyer and Mr Danelius) in which they declared (see pp. 55-56 below):

"Moreover, under Article 63 (art. 63) of the Convention, certain territorial limitations are also expressly provided for. However, Article 63 (art. 63) concerns territories for whose international relations a Contracting State is responsible, and the northern part of Cyprus cannot be regarded as such a territory. Nevertheless, Article

63 (art. 63) shows that, when making a declaration under Article 25 (art. 25), a Contracting State may, in some circumstances, make a distinction between different territories.

If a State may exclude the application of Article 25 (art. 25) to a territory referred to in Article 63 (art. 63), there would seem to be no specific reason why it should not be allowed to exclude the application of the right of individual petition to a territory having even looser constitutional ties with the State's main territory. If this was not permitted, the result might in some circumstances be that the State would refrain altogether from recognising the right of individual petition, which would not serve the cause of human rights.

We consider that the territorial limitation in the Turkish declaration, in so far as it excludes the northern part of Cyprus, cannot be considered incompatible with the object and purpose of the Convention and that it should therefore be regarded as having legal effect.

In these circumstances, it is not necessary to examine what the legal consequences would have been if the territorial limitation had been held not to be legally valid.

It follows that ... the Commission is not competent to deal with the applicant's complaints of violations of the Convention in Cyprus. For these reasons, we have voted against any finding of a violation of the Convention in the present case."

I interpret Article 6 of Protocol No. 7 (P7-6) in the same way. I would also like to cite, in this connection, another opinion to the above effect, that of Professor Christian Tomuschat.

"Turkey's refusal to accept the supervisory authority of the Commission with regard to all other areas than the Turkish national territory itself ... may be justifiable under Article 63 para. 4 (art. 63-4). This provision admits of a differentiation between metropolitan territories and other territories 'for whose international relations' a State is 'responsible'. Although the text avoids speaking of colonial territories, the intention of the drafters was precisely to leave States Parties some latitude with regard to their extra-European dependencies. If interpreted in this restricted sense, Article 63 para. 4 (art. 63-4) could not be relied upon by Turkey. However, doubts may be raised as to the precise scope of Article 63 para. 4 (art. 63-4). The United Kingdom also invoked it in respect of its European dependencies, namely the Bailiwicks of Guernsey and Jersey and the Isle of Man. Originally, Guernsey and the Isle of Man were mentioned in the first declaration under Article 25 (art. 25) of 12 September 1967 which defined the competence of the Commission in territorial terms. When the declaration was renewed for the first time in 1969, Guernsey and the Isle of Man were excluded. Afterwards, the two territories were again added to the geographical lists accompanying the relevant declarations. As mentioned above, the Isle of Man was dropped from those lists in 1976. Strangely enough, Jersey is mentioned for the first time explicitly in the declaration of 4 December 1981, though in a positive sense, as being placed again ('renew') under the control mechanism of Article 25 (art. 25). To date, no objections have been lodged against this practice. It might be argued, therefore, that Article 63 para. 4 (art. 63-4) has evolved into a clause conferring unfettered discretion on States concerning the territorial scope of their declarations under Article 25 (art. 25), whenever territories beyond the national boundaries are concerned.

Additionally, it might be contended that valid substantive reasons could be identified to support such a conclusion. The extraterritorial legal effect of human rights standards is particularly difficult to assess. While there can be no doubt that States have to refrain from interfering with human rights irrespective of the place of their actions, to ensure human rights beyond their boundaries is mostly beyond their capabilities. It is noteworthy, in this connection, that the International Covenant on Civil and Political Rights limits the commitments of States to individuals within their territory and subject to their jurisdiction (Article 2 para. 1). ("Turkey's declaration under Article 25 (art. 25) of the European Convention on Human Rights", *Festschrift für Felix Ermacora*, Kehl, Engel, 1988, pp. 128-29).

For other examples supporting this argument, it is sufficient to cast a glance at the long list of reservations and declarations deposited by the Contracting States.

I therefore consider valid the territorial restrictions contained in the Turkish declarations under Articles 25 and 46 (art. 25, art. 46), applying, at least by analogy, Article 63 (art. 63) of the Convention.

INDIVIDUAL DISSENTING OPINION OF JUDGE PETTITI

(Translation)

The solution advocated, i.e. joining all the preliminary objections to the merits, had the advantage of permitting an overall view of the situation of Cyprus and Turkey regarding the disputes concerning northern Cyprus. It is not appropriate to sever the objection *ratione loci* from interpretation of Article 1 (art. 1); to my mind these issues are inseparable. Consideration of the merits as a whole would have made it easier to elucidate the question of the TRNC's international or other status, and that of the agreement concluded as a result of the relations and negotiations conducted at the United Nations, under which people do not enjoy liberty of movement in both directions.

I consider that this overall examination of the merits, before consideration of the first objection and the declaration, was necessary in order to decide the very scope of the declaration. The European Convention is not an international treaty of the traditional type nor a synallagmatic convention, as legal writers, and particularly Professor Cohen-Jonathan, have pointed out, since it is not based on reciprocity.

It is based on the principle that all individual subjects of law are its beneficiaries, so that fundamental rights can be protected more securely. The Court is the guarantor of the Convention and must endeavour to extend its protection as far as possible; it is therefore empowered to draw the consequences of instruments deposited by the States. Consequently, the Court can better fulfil its protective role by having at its disposal all the information necessary to assess the legal and factual situation.

In the search for a peaceful compromise, the northern Cyprus question has been discussed in all international negotiations concerning Greece, Cyprus and Turkey, including those relating to European Union customs agreements or GATT agreements.

At the examination of preliminary objections stage, after the discussion at the public hearing, which was limited to analysis of these objections by the Parties, the European Court was not able to take cognisance of all the problems, and this circumstance militated even more forcefully in favour of joining all these objections to the merits. To date legal writers have not considered analysis of the Turkish declaration a simple matter (see Claudio Zanghi, Christian Tomuschat, Walter Kalin, Pierre-Henri Imbert, Christopher Lush, etc.).

An overall assessment of the situation, beginning with the concepts of sovereignty and jurisdiction, would make it possible to review the criteria ("occupation", "annexation", territorial application of the Geneva Conventions in northern Cyprus, "conduct of international relations") on the basis of which the UN has analysed both the problem whether or not to

recognise northern Cyprus as a State and the problem of the application of the UN Charter (see Security Council Resolution 930). The responsibilities of the European Convention institutions, when faced with such difficulties, reflect the mutual commitment of the member States to ensuring the best and widest protection of individuals and fundamental rights in the countries concerned by applying the Convention provisions in a manner consistent with their object and purpose.

Prosecutor v. Dusko Tadic, ICTY

25/05/2011

Decision on the Defence Motion on Jur...

Before: Judge McDonald, Presiding

Judge Stephen

Judge Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision: 10 August 1995

PROSECUTOR

v.

DUSKO TADIC A/K/A "DULE"

DECISION ON THE DEFENCE MOTION ON JURISDICTION

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Brenda Hollis

Mr. Alan Tieger

Mr. William Fenrick

Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff

Mr. A.M.M. Orié

Mr. Milan Vujin

Mr. Krstan Simic

DECISION

On 23 June 1995 the Defence filed a preliminary motion, pursuant to Rule 73 (A) (i) of the Rules of Procedure and Evidence ("the Rules") which provides for objections based on lack of jurisdiction, seeking dismissal of all of the charges against the accused. The Defence motion challenges the powers of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal") to try the accused under three heads: the alleged improper establishment of the International Tribunal; the improper grant of primacy to the International Tribunal; and challenges to the subject-matter jurisdiction of the International Tribunal. The Prosecutor contends that none of these points is valid and that the International Tribunal has jurisdiction over the accused as charged. The Government of the United States of America has submitted a brief as *amicus curiae*.

The argument of the parties on this motion was heard on 25 and 26 July and judgement on the motion was reserved, to be delivered this day.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties and the written submission of the *amicus curiae*,

HEREBY ISSUES ITS DECISION.

REASONS FOR DECISION

I. The Establishment of the International Tribunal

A. Legitimacy of creation

1. The attack on the competence of the International Tribunal in this case is based on a number of grounds, some of which may be subsumed

under one general heading: that the action of the Security Council in establishing the International Tribunal and in adopting the Statute under which it functions is beyond power; hence the International Tribunal is not duly established by law and cannot try the accused.

2. It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what the creation of the International Tribunal did; that there existed and exists now no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong.

3. Essential to these submissions is, of course, the concept that this Trial Chamber has the capacity to review and rule upon the legality of the acts of the Security Council in establishing the International Tribunal. This the Defence asserts, doing so by way of attack upon the jurisdiction of the International Tribunal.

4. There are, clearly enough, matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged. These are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather of the lawfulness of its creation, involving scrutiny of the powers of the Security Council and of the manner of their exercise; perhaps, too, of the appropriateness of its response to the situation in the former Yugoslavia.

5. The Trial Chamber has heard out the Defence in its submissions involving judicial review of the actions of the Security Council. However, this International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.

6. The force of criminal law draws its efficacy, in part, from the fact that it reflects a consensus on what is demanded of human behaviour. But it is of equal importance that a body that judges the criminality of this behaviour should be viewed as legitimate. This is the first time that the international community has created a court with criminal jurisdiction. The establishment of the International Tribunal has now spawned the creation of an ad hoc Tribunal for Rwanda. Each of these ad hoc Tribunals represents an important step towards the establishment of a permanent international criminal tribunal. In this context, the Trial Chamber considers that it would be inappropriate to dismiss without comment the accused's contentions that the establishment of the International Tribunal by the Security Council was beyond power and an ill-founded political action, not reasonably aimed at restoring and maintaining peace, and that the International Tribunal is not duly established by law.

7. Any discussion of this matter must begin with the Charter of the United Nations. Article 24 (1) provides that the Members of the United Nations:

confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

The powers of the Security Council to discharge its primary responsibility for the maintenance of international peace and security are set out in Chapters VI, VII, VIII and XII of the Charter. The International Tribunal was established under Chapter VII. The Security Council has broad discretion in exercising its authority under Chapter VII and there are few limits on the exercise of that power. As indicated by the *travaux préparatoires*:

Wide freedom of judgment is left as regards the moment [the Security Council] may choose to intervene and the means to be applied, with sole reserve that it should act 'in accordance with the purposes and principles of the [United Nations].'

(See Statement of the Rapporteur of Committee III/3, Doc. 134, III/3/3, 11 U.N.C.I.O. Docs. 785 (1945).)

The broad discretion given to the Security Council in the exercise of its Chapter VII authority itself suggests that decisions taken under this head are not reviewable.

8. For the Defence it is said that it is a basic human right of an accused to have a fair and public hearing by a competent, independent and impartial tribunal established by law. The Defence asserts that this right is protected by a panoply of principles of fundamental justice recognized by human rights law. There can be no doubt that the International Tribunal should seek to provide just such a trial; indeed, in enacting its Statute, care has been taken by the Security Council to ensure that this in fact occurs and the Judges of the International Tribunal, in framing its Rules, have also paid scrupulous regard to the requirements of a fair trial. For example, Article 21 of the Statute of the International Tribunal guarantees the accused the right to a fair trial and Article 20 obligates the Trial Chambers to ensure that trials are, in fact, fair. There are several other provisions to the same effect. However, it is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal.

9. The Defence seeks to extend the competence of the International Tribunal to review the actions of the Security Council by reference to the Rules of the International Tribunal. It refers first to Rule 73 (A)(i), which provides that preliminary motions by the accused can include: "objections based on lack of jurisdiction". That Rule relates to challenges to jurisdiction and is no authority for engaging in an investigation, not into jurisdiction, but into the legality of the action of the Security Council in establishing the International Tribunal. The Defence also points to Rule 91, *False Testimony Under Solemn Declaration*, as an example of the exercise by the International Tribunal of powers that are not explicitly provided for in its Statute. There is, however, no analogy to be drawn between the inherent authority of a Chamber to control its own proceedings and any suggested power to review the authority of the Security Council. Therefore, even were it conceivable that the Rules adopted by the Judges could extend the competence of the International Tribunal, the Rules referred to by the Defence do not support such an enlargement.

10. The Defence relies on, or at least refers to, what has been said by the International Court of Justice ("the Court") in three cases: *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 168 (Advisory Opinion of 20 July) (the "*Expenses Advisory Opinion*"), *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16, 45 (Advisory Opinion of 21 June) (the "*Namibia Advisory Opinion*") and *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.)*, 1992 I.C.J. 114, 176 (Provisional Measures Order of 14 April) (the "*Lockerbie decision*"). In the first of these, the *Expenses Advisory Opinion*, the Court specifically stated that, unlike the legal system of some States, there exists no procedure for determining the validity of acts of organs of the United Nations. It referred to proposals at the time of drafting of the Charter that such a power should be given to the Court and to the rejection of those proposals.

11. In the second of these cases, the *Namibia Advisory Opinion*, the Court dealt very specifically with this matter, stating that: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".

12. Finally, in the *Lockerbie decision*, Judge Weeramantry, in his dissenting opinion, but in this respect not in dissent from other members of the Court, said that "it is not for this Court to sit in review on a given resolution of the Security Council" and, that in relation to the exercise by the Security Council of its powers under Chapter VII:

the determination under Article 39 of the existence of any threat to the peace . . . is one entirely within the discretion of the Council. . . . the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. . . . Once [such a determination is] taken the door is opened to the various decisions the Council may make under that Chapter.

13. These opinions of the Court clearly provide no basis for the International Tribunal to review the actions of the Security Council, indeed, they are authorities to the contrary.

14. In support of its submission that this Trial Chamber should review the actions of the Security Council, the Defence contends that the decisions of the Security Council are not "sacrosanct". Certainly, commentators have suggested that there are limits to the authority of the Security Council. It has been posited that such limits may be based on Article 24 (2), which provides that the Security Council:

shall act in accordance with the Purposes and Principles of the United Nations. The specific powers appointed to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

One commentator interprets this provision to mean that the Security Council "cannot, in principle, act arbitrarily and unfettered by any restraints." (D. W. Bowett, *The Law of International Institutions* 33 (1982).) Another commentator has taken the position that although the Security Council has broad discretion in the field of international peace and security, it cannot "act arbitrarily or use the existence of a threat to the peace as a basis for action which . . . is for collateral and independent purposes, such as the overthrow of a government or the partition of a State." (Ian Brownlie, *The Decisions of Political Organs of the United Nations and the Rule of Law, in Essays in Honour of Wang Tieya* 95 (1992).)

15. Support for the view that the Security Council cannot act arbitrarily or for an ulterior purpose is found in the nature of the Charter as a treaty delegating certain powers to the United Nations. In fact, such a limitation is almost a corollary of the principle that the organs of the United Nations must act in accordance with the powers delegated them. It is a matter of logic that if the Security Council acted arbitrarily or for an ulterior purpose it would be acting outside the purview of the powers delegated to it in the Charter.

16. Although it is not for this Trial Chamber to judge the reasonableness of the acts of the Security Council, it is without doubt that, with respect to the former Yugoslavia, the Security Council did not act arbitrarily. To the contrary, the Security Council's establishment of the International Tribunal represents its informed judgement, after great deliberation, that violations of international humanitarian law were occurring in the former Yugoslavia and that such violations created a threat to the peace. One commentator has noted the "careful, incremental approach" of the Security Council to the situation in the former Yugoslavia and described the establishment of the International Tribunal as a protracted, four-step process involving: "(1) condemnation; (2) publication; (3) investigation; and (4) punishment." (James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 Am. J. Int'l L. 639, 640-42 (1993).) First, with its resolution 764, adopted on 13 July 1992, the Security Council stressed that "persons who commit or order the commission of grave breaches of the [1949 Geneva] Conventions are *individually responsible* in respect of such breaches". Second, the Security Council publicized this condemnation by adopting, on 12 August 1992, resolution 771, which called upon States and other bodies to submit "substantiated information" to the Secretary-General, who would report to the Security Council "recommending additional measures that might be appropriate". Third, by resolution 780 of 6 October 1992, the Security Council established the Commission of Experts to investigate these violations of international humanitarian law. The Security Council in due course received the report of the Commission of Experts, which concluded that grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia, including wilful killing, "ethnic cleansing," mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. (See Interim Report of the Commission of Experts, U.N. Doc. S/25274 (26 January 1993).) Finally, on 22 February 1993, by resolution 808, the Security Council decided that an international tribunal should be established and directed the Secretary-General to submit specific proposals for the implementation of that decision. On 25 May 1993, in resolution 827, the Security Council adopted the draft Statute and thus established the International Tribunal.

17. None of the hypothetical cases which commentators have suggested as examples of limits on the powers of the Security Council, whether imposed by the terms of the Charter or general principles of international law and, in particular, *jus cogens*, have any relevance to the present case. Moreover, even if there be such limits, that is not to say that any judicial body, let alone this International Tribunal, can exercise powers of judicial review to determine whether, in relation to an exercise by the Security Council of powers under Chapter VII, those limits have been exceeded.

18. One may add that in the present case any submission to the contrary becomes particularly unattractive when, in the notorious circumstances of the former Yugoslavia, the Security Council has done no more than take the step of "ameliorating a threat to international peace and security by providing for the prosecution of individuals who violate well-established international law. . . . [something] best addressed by a judicial remedy". (O'Brien, *supra*, at 643.)

19. It is not irrelevant that what the Security Council has enacted under Chapter VII is the creation of a tribunal whose jurisdiction is expressly confined to the prosecution of breaches of international humanitarian law that are beyond any doubt part of customary law, not the establishment of some eccentric and novel code of conduct or some wholly irrational criterion, such as the possession of white hair, as was instanced in argument by the Defence. Arguments based upon *reductio ad absurdum* may be useful to destroy a fallacious proposition but will seldom provide a firm foundation for the creation of a valid one.

20. In argument the spectre was raised of interference by the Security Council in the proceedings of the International Tribunal, for instance, by the abolition of the International Tribunal, in midstream as it were, for wholly political reasons. No doubt this would be within the power of the Security Council, but so too is like action in a national context. National legislatures, with greater or lesser ease, depending upon their powers under their respective constitutions or governing laws, may abolish courts previously created but this in no way detracts from the status of those courts as entities established by law.

21. The Security Council established the International Tribunal as an enforcement measure under Chapter VII of the United Nations Charter after finding that the violations of international humanitarian law in the former Yugoslavia constituted a threat to the peace. In making this finding, the Security Council acted under Article 39 of the Charter, which provides:

The Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

22. When, in resolution 827, the Security Council stated that it was "convinced" that, in the "particular circumstances of the former Yugoslavia", the establishment of the International Tribunal would contribute to the restoration and maintenance of peace, the course it took was novel only in the means adopted but not in the object sought to be attained. The Security Council has on a number of occasions addressed humanitarian law issues

in the context of threats to the peace, has called upon States to comply with obligations imposed by humanitarian law and has on occasion taken steps to ensure such compliance. It has done so, for example, in relation to Southern Rhodesia in 1965 and 1966, South Africa in 1977, Lebanon on a number of occasions in the 1980's, Iran and Iraq in 1987, Iraq again in 1991, Haiti and Somalia in 1993 and, of course, Rwanda in 1994. In the last of these, the establishment of the Rwanda Tribunal by the Security Council followed its finding that the conflict there involved violations of humanitarian law and was a threat to the peace.

23. The making of a judgement as to whether there was such an emergency in the former Yugoslavia as would justify the setting up of the International Tribunal under Chapter VII is eminently one for the Security Council and only for it; it is certainly not a justiciable issue but one involving considerations of high policy and of a political nature. As to whether the particular measure of establishing the International Tribunal is, in fact, likely to be conducive to the restoration of peace and security is, again, pre-eminently a matter for the Security Council and for it alone and no judicial body, certainly not this Trial Chamber, can or should review that step.

24. The concept of non-justiciability, in a national context, has been described as follows:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

(*Baker v. Carr*, 369 U.S. 186, 217 (1962).)

The validity of the decision of the Security Council to establish the International Tribunal rests on its finding that the events in the former Yugoslavia constituted a threat to the peace. This finding is necessarily fact-based and raises political, non-justiciable issues. As noted by Judge Weeramantry, such a decision "entails a factual and political judgement and not a legal one". (The *Lockerbie* decision at 176.) A commentator has agreed, saying that "a threat to international peace and security is not a fixed standard which can be easily and automatically applied". (David L. Johnson, *Note, Sanctions and South Africa*, 19 Harv. Int'l L. J. 887, 901 (1978).) The factual and political nature of an Article 39 determination by the Security Council makes it inherently inappropriate for any review by this Trial Chamber.

25. The Defence contends that there has been a lack of consistency in the actions of the Security Council. Certainly the International Tribunal is the first of its kind to be created. However, the fact that the Security Council has not taken a similar step in other, earlier cases cannot in itself be of any relevance in determining the legality of its action in this case.

26. Article 41 of the Charter provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Article, on its face, does not limit the discretion of the Security Council to take measures not involving the use of armed force.

27. That it was not originally envisaged that an ad hoc judicial tribunal might be created under Chapter VII, even if that be factually correct, is nothing to the point. Chapter VII confers very wide powers upon the Security Council and no good reason has been advanced why Article 41 should be read as excluding the step, very appropriate in the circumstances, of creating the International Tribunal to deal with the notorious situation existing in the former Yugoslavia. This is a situation clearly suited to adjudication by a tribunal and punishment of those found guilty of crimes that violate international humanitarian law. This is not, as the Defence puts it, a question of the Security Council doing anything it likes; it is a seemingly entirely appropriate reaction to a situation in which international peace is clearly endangered.

28. The Defence argues that the establishment of the International Tribunal is not a measure contemplated by Article 41 because the examples included in that Article focus on economic and political measures, not judicial measures. As the Defence concedes, however, the list in that Article is not exhaustive. Once again, the decision of the Security Council in this regard is fraught with fact-based, policy determinations that make this issue non-justiciable.

29. Further, the Defence contends that the International Tribunal is not an appropriate measure under Article 41 because it has failed to restore peace in the former Yugoslavia. However, the accused is but the first and, as yet, the only accused to be brought before the International Tribunal, and it is wholly premature at this initial stage of its functioning to attempt to assess the effectiveness of the International Tribunal as a measure to

restore peace, even were it the function of the International Tribunal to do so.

30. The Security Council discussions on the situation in the former Yugoslavia suggest two ways in which the International Tribunal would help in the restoring and maintaining of peace. First, several States expressed the view that the creation of the International Tribunal would deter further violations of international humanitarian law. (See Provisional Verbatim Record, U.N. SCOR, 48th Sess., 3175th mtg. at 8, 22, U.N. Doc. S/PV.3175 (22 February 1993); Provisional Verbatim Record, U.N. SCOR, 48th Sess., 3217th mtg. at 12, 19, U.N. Doc. S/PV.3217 (25 May 1993).)

31. Second, States took the position that the establishment of the International Tribunal would assist in the restoration of peace in the region. At the Security Council meeting on resolution 808, Hungary, in supporting the establishment of the International Tribunal, explained how the International Tribunal would be helpful in this regard:

The way the international community deals with questions relating to the events in the former Yugoslavia will leave a profound mark on the future of that part of Europe, and beyond. It will make either easier or more painful, or even impossible, the healing of the psychological wounds the conflict has inflicted upon peoples who for centuries have lived together in harmony and good-neighbourliness, regardless of what we may hear today from certain parties to the conflict. We cannot forget that the peoples, the ethnic communities and the national minorities of Central and Eastern Europe are watching us and following our work with close attention.

(Provisional Verbatim Record of 22 February 1993, *supra*, at 19-20.)

Slovenia also indicated its conviction that:

[T]he establishment of such a tribunal is a necessary and very important step, given the fact that those responsible for such crimes would be judged by an impartial judicial body as well as the fact that it could also contribute positively to the finding of solutions for the restoration of peace in the above-mentioned regions.

(Letter from the Permanent Representative of Slovenia to the United Nations, to the Secretary-General, U.N. Doc. S/25652 (22 April 1993).)

Similarly, a commentator who has written extensively about the International Tribunal has stated:

[I]t is important to try individuals responsible for crimes if there is to be any real hope of defusing ethnic tensions in this region. Blame should not rest on an entire nation but should be assigned to individual perpetrators of crimes and responsible leaders.

(Theodor Meron, *Case for War Crimes Trials in Yugoslavia*, 72 *Foreign Affairs* 122, 134 (1993).)

The Trial Chamber agrees that due to the nature of the conflict, an adjudicatory body is a particularly appropriate measure to achieve lasting peace in the former Yugoslavia. In any case, the ultimate success or failure of the International Tribunal is certainly not an issue for this Trial Chamber.

32. Then it is said that international law requires that criminal courts be independent and impartial and that no court created by a political body such as the Security Council can have those characteristics. Of course, criminal courts worldwide are the creations of legislatures, eminently political bodies. The Court, in the *Effect of Awards* case, specifically held that a political organ of the United Nations - in that case, the General Assembly - could and had created "an independent and truly judicial body". (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, 1954 I.C.J. 47, 53 (Advisory Opinion of 13 July) ("*Effect of Awards*").) The question whether a court is independent and impartial depends not upon the body that creates it but upon its constitution, its judges and the way in which they function. The International Tribunal has, as its Statute and Rules attest, been constituted so as to ensure a fair trial to an accused and it is to be hoped that the way its Judges administer their jurisdiction will leave no room for complaints about lack of impartiality or want of independence.

33. The fact that the Security Council has established an ad hoc tribunal is also said to reveal invalidity because it is said to deny to the accused the right conferred by Article 14 of the International Convention on the Protection of Civil and Political Rights ("ICCPR") to be tried by a tribunal "established by law". However, on analysis this introduces no new concept; it is but another way of expressing the general complaint that the creation of the International Tribunal was beyond the power of the Security Council.

34. It is noteworthy that, in the context of the International Covenant and its entitlement in Article 14 to trial by a "tribunal established by law", this phrase requires only that the tribunal be legally constituted. At the time Article 14 was being drafted, it was sought unsuccessfully to amend it to require that tribunals should be "pre-established". As Professor David Harris puts it in his article *The Right to a Fair Trial in Criminal*

An amendment which sought to change the wording of the United Nations text to read 'pre-established' and so cover all ad hoc or special tribunals was firmly and successfully opposed, however, on the ground that this would make normal judicial reorganization difficult. Mention was also made of the Nuremberg and Tokyo Tribunals which were ad hoc and yet which, it is generally agreed, gave the accused a fair trial in a procedural sense in most respects. . . . the important consideration is whether a court observes certain other requirements once it begins to function, however it might be created.

35. It is also argued that Article 29 of Chapter VI of the Charter does not contemplate the creation by the Security Council of an international judicial body when it refers to the creation of subsidiary organs. The reasoning behind this submission is no more than an assertion that a judicial body cannot be an additional organ of some other body; yet Article 29 is expressed in the broadest terms and nothing appears to limit its scope to non-judicial organs. In any event, it is not under Chapter VI of the Charter that the Security Council has established this Tribunal; as the Statute of the International Tribunal declares in its opening paragraph, it is as a measure under Chapter VII that the Security Council has created this International Tribunal. Moreover, in the *Effect of Awards* case mentioned above, the Court specifically decided that the General Assembly had the power to create an administrative tribunal. (*Effect of Awards* case at 56-61.) If the General Assembly has the authority to create a subsidiary judicial body, then surely the Security Council can create such a body in the exercise of its wide discretion to act under Chapter VII.

36. Nor has any basis been established for denying to the Security Council the power of indirect imposition of criminal liability upon individuals through the creation of a tribunal having criminal jurisdiction. On the contrary, given that the Security Council found that the threat to the peace posed by the conflict in the former Yugoslavia arose because of large scale violations of international humanitarian law committed by individuals, it was both appropriate and necessary for the Security Council, through the International Tribunal, to act on individuals in order to address the threat to the peace. In this regard it is important that when, in its resolutions 731 and 748, the Security Council required the Libyan Government to surrender the two Libyan nationals who were accused of the Lockerbie bombing and imposed mandatory commercial and diplomatic sanctions to obtain Libya's compliance with its decision, it was, in substance, acting upon individuals, seeking the extradition and trial of those Libyan nationals.

37. Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter. In particular, that was achieved, in the case of action by the Security Council under Chapter VII, by Article 2(7) of the Charter and its reference to the application of enforcement measures under Chapter VII. The same observation applies to the contention that there is some vice involved in the conferring of primacy upon this Tribunal. That is no more than a means by which the Security Council seeks to give effect to the powers conferred upon it by Chapter VII. In any event, it is by no means clear that an individual defendant has standing to raise this point.

38. The submission that there should have been involvement of the General Assembly in the creation of the International Tribunal can only have any meaning if what is suggested is the creation of a tribunal by means of an amendment of the Charter. If, however, the International Tribunal can, as seems clear, be created under Chapter VII, the suggestion of an amendment of the Charter is as unnecessary, as it is impractical as a measure appropriate by way of a response to the current situation in the former Yugoslavia.

39. It was claimed on behalf of the accused that he was disadvantaged by his removal from the jurisdiction of German courts to that of the International Tribunal since that denied him the opportunity under the optional Protocol to the ICCPR to have recourse to the Human Rights Committee to complain about the trial accorded him. No doubt this is so, since that right does not appear to apply to proceedings before international tribunals, but that is nothing to the point in any challenge to the jurisdiction of this Trial Chamber; it can only be remedied, if remedy is required, by a further Protocol to the ICCPR. A similar comment applies in the case of the European Convention on Human Rights, to which the Defence also refers.

40. The foregoing disposes of the various submissions of the Defence so far as they relate to the legality of the creation of the International Tribunal, submissions to which the Trial Chamber felt it proper to refer since the Defence raised them but, many of which, as stated above, it does not regard as properly open for consideration by this Trial Chamber since they go, not so much to its jurisdiction, as to the unreviewable lawfulness of the actions of the Security Council.

B. Primacy of the International Tribunal

41. The Trial Chamber deals next with the Defence argument that the primacy jurisdiction conferred upon the International Tribunal by Article 9 (2) finds no basis in international law because the national courts of Bosnia and Herzegovina or, alternatively, of the entity known as the Bosnian Serb Republic, have primary jurisdiction to try the accused. This argument in effect again challenges the legality of the action of the Security Council in establishing the International Tribunal: the answer to this has already been provided above. The Trial Chamber is not entitled to engage in an exercise involving the review of a resolution passed by the Security Council. In any event, the accused not being a State lacks the *locus*

standi to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from that State. (*See Israel v. Eichmann*, 36 I.L.R. 5, 62 (1961).) In this regard, it is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused - Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction. As to the entity known as the Bosnian Serb Republic, similarly, the accused as an individual, has no *locus standi*, for the reasons given above, to raise the issue of this entity's sovereignty rights should it have been endowed with all the attributes of statehood.

42. Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.

43. As to the invocation of *jus de non evocando*, which has been dealt with above, nothing more need be said except that the Defence has in no way established that the principle is so universal in application that it amounts to a peremptory norm of international law which cannot be breached in any event. Therefore the Trial Chamber proposes to speak no more of it.

44. One final word before leaving this topic. The crimes with which the accused is charged form part of customary international law and existed well before the establishment of the International Tribunal. If the Security Council in its informed wisdom, acting well within its powers pursuant to Article 39 and 41 under Chapter VII of the Charter, creates the International Tribunal to share the burden of bringing perpetrators of universal crimes to justice, the Trial Chamber can see no invasion into a State's jurisdiction because, as it has been rightly argued on behalf of the Prosecutor, they were never crimes within the exclusive jurisdiction of any individual State. In any event, Article 2 (7) of the Charter, as has been noted above, prohibiting intervention by the United Nations in matters essentially within a State's domestic jurisdiction, is qualified in that "this principle shall not prejudice the application of enforcement measures under Chapter VII".

II. Subject-Matter Jurisdiction

45. The Trial Chamber must turn now to what are truly matters of jurisdiction. The Defence contends that the charges laid against the accused do not fall within the subject-matter jurisdiction of this Tribunal and it is necessary accordingly to examine the limits of that jurisdiction.

A. Article 2 : Grave Breaches of the Geneva Convention of 1949

46. The Statute of the International Tribunal confers jurisdiction by Articles 1 to 8 and supplements, and in one respect qualifies, that jurisdiction in Articles 9 and 10. However it is essentially Articles 1, 2, 3 and 5 with which this motion is concerned.

47. Article 1 does no more than confer power to prosecute for serious violations of international humanitarian law and confines that power, spatially, to breaches committed in the territory of the former Yugoslavia and, temporally, to the period since 1991. It further requires that the power thus conferred be exercised in accordance with the provisions of the Statute.

48. Article 2 confers subject-matter jurisdiction to prosecute in respect of grave breaches of the Geneva Conventions and identifies those breaches by the phrase, "namely the following acts against persons or property protected under the provisions of the relevant Geneva Conventions." There then follows an enumeration of acts, culled from the four Conventions and, with very slight variations, repeating and in effect consolidating, the terms of the grave breaches provisions to be found in varying form in each of those Conventions.

49. The Article has been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of "persons or property protected." In the present case it is not contended that the alleged victims in the several charges were not protected persons; in any event that will be a matter for evidence in due course.

50. What is contended is that for Article 2 to have any application there must exist a state of international conflict and that none in fact existed at any relevant time or place. However, the requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.

51. The Report of the Secretary-General, (U.N. Doc. S/25704 (3 May 1993)) (the "Report") makes it clear, in paragraph 34, that it was intended that the rules of international law that were to be applied should be "beyond any doubt part of customary law", so that problems of non-adherence of particular States to any international Convention should not arise. Hence, no doubt, the specific reference to the law of the Geneva Conventions

in Article 2 since, as the Report states in paragraph 35, that law applicable in armed conflict has beyond doubt become part of customary law. But there is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things. It simply confers subject matter jurisdiction to prosecute what, if one were concerned with the Conventions, would indeed be grave breaches of those Conventions, but which are, in the present context, simple enactments of the Statute.

52. When what is in issue is what the Geneva Conventions contemplate in the case of grave breaches, namely their prosecution before a national court and not before an international tribunal, it is natural enough that there should be a requirement of internationality; a nation might well view with concern, as an unacceptable infringement of sovereignty, the action of a foreign court in trying an accused for grave breaches committed in a conflict internal to that nation. Such considerations do not apply to the International Tribunal, any more than do the references in the Conventions to High Contracting Parties and much else in the Conventions; all these are simply inapplicable to the International Tribunal. They do not apply because the International Tribunal is not in fact, applying conventional international law but, rather, customary international law, as the Secretary-General makes clear in his Report, and is doing so by virtue of the mandate conferred upon it by the Security Council. In the case of what are commonly referred to as "grave breaches", this conventional law has become customary law, though some of it may well have been conventional law before being written into the predecessors of the present Geneva Conventions.

53. It follows that the element of internationality forms no jurisdictional criterion of the offences created by Article 2 of the Statute of the International Tribunal. If it did, there are clear indications in the great volume of material before the Trial Chamber that the acts alleged in the indictment were in fact committed in the course of an international armed conflict. However, little of this material is such that judicial notice can be taken of it and none of it is in the form of, nor has it been tendered as, evidence. In these circumstances the Trial Chamber makes no finding regarding the nature of the armed conflict in question.

54. As a submission alternative to its principal submission that there was here an international armed conflict, the Prosecutor contended that certain agreements entered into were, in any event, such that they operated, pursuant to common Article 3 of the 1949 Geneva Conventions ("common Article 3"), "to bring into force, by means of special agreements", those provisions of the Conventions relating to serious breaches.

55. Those agreements, entered into under the auspices of the International Committee of the Red Cross on 22 and 23 May and on 1 October 1992, were accompanied by a programme of action agreed upon on 27 August 1992.

56. That these agreements had the effect contended for by the Prosecutor was contested by the Defence. In view of the conclusion of the Trial Chamber that Article 2 of our Statute expressly and directly confers jurisdiction to prosecute in respect of the commission of the acts enumerated in that Article, it is also unnecessary to express any conclusion regarding this alternative submission.

B. Article 3: Violations of the Laws or Customs of War

57. The Defence contends that the accused may not be tried for violations of laws or customs of war under Article 3 of the Statute because that article is based on the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the regulations thereto of 18 October 1907 ("Hague Convention"), and the 1977 Protocol I, which apply only to an international conflict, and that none, in fact, existed at any relevant time or place. The Prosecutor responds by asserting that the term "laws or customs of war" in Article 3 applies to both international and internal conflict and that the International Tribunal may apply the minimum standards of common Article 3 which are applicable to both international and internal armed conflicts. Since the Prosecutor seemingly does not seek to import Protocol I into Article 3 of the Statute, the Trial Chamber does not address that issue.

58. Having considered the position of the parties, the Trial Chamber finds that the character of the conflict, whether international or internal, does not affect the subject-matter jurisdiction of the International Tribunal under Article 3 to try persons who are charged with violations of laws or customs of war.

59. The interpretation of the scope of Article 2 of the Statute is applicable to the view of the Trial Chamber of its subject matter jurisdiction under Article 3. Contrary to the position of the Defence, nothing in the words of Article 3 expressly requires the existence of an international conflict. Indeed, with respect to Article 3, unlike Article 2, there is no mention of any convention. Article 3 simply provides that the International Tribunal "shall have the power to prosecute persons violating the laws or customs of war". A list of prohibitory acts are then set forth in the Article. It is clear that the list is illustrative and not exhaustive, for the list is preceded with the phrase, "such violations shall include, but not be limited to . . ."

60. The competence of the International Tribunal extends to serious violations of international humanitarian law that are a part of customary law. International humanitarian law includes international rules designed to solve humanitarian problems arising from international or non-international armed conflicts. (*See Commentary on the Additional Protocols of 8 June 1977*, at p. XXVII (ICRC 1987).) Even though the acts enumerated in Article 3 are from the Hague Convention, the term "laws or customs of war" should not be limited to international conflicts. Laws or customs of war include prohibitions of acts committed both in international and internal armed conflicts. Indeed, common Article 3 is clear evidence that customary international law limits the conduct of hostilities in internal armed conflicts. However, unlike contracting parties to treaties, the International Tribunal is not called upon to apply conventional law but instead is mandated to apply customary international law. Therefore, the

element of internationality forms no jurisdictional criterion even if the Hague Convention was originally envisaged by the Contracting Parties to apply to international conflicts.

61. Violations of the laws or customs of war are commonly referred to as "war crimes". They can be defined as crimes committed by any person in violation of recognized obligations under rules derived from conventional or customary law applicable to the parties to the conflict. (See L.C. Green, *The Contemporary Law of Armed Conflict* 276 (1993), ("war crimes are violations of the laws and customs of the law of armed conflict and are punishable whether committed by combatants or civilians, including the nationals of neutral states"). See also, C.H. Bassiouni, *A Draft International Criminal Code And Draft Statute For An International Criminal Tribunal* 130 (1987) ("[w]ar crimes consist of conduct (acts or omissions) which is prohibited by the rules of international law applicable in armed conflict, conventions to which the parties to the conflict are Parties, and the recognized principles and rules of international law of armed conflict").)

62. In Article 6 (b) of the Charter of the International Military Tribunal at Nuremberg, war crimes are defined as:

[V]iolations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destructions of cities, towns, or villages, or devastation not justified by military necessity.

63. Although the Statute of the International Military Tribunal limited its competence to the international armed conflict of World War II, historically laws or customs of war have not been limited by the nature of the conflict they regulate. The Lieber Code, broadly recognized as the most famous early example of a national manual outlining the laws of war for the use of armed forces, and one of the first attempts to codify the laws of land warfare, was drafted to regulate the conduct of the United States armed forces during the American Civil War. (*The Lieber Code, Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War*, General Orders No. 100, Washington, D.C. (24 April 1863), reprinted in L. Friedman (ed.) *I A Documentary History* 158 (1972).) This Code, based on what Lieber regarded as the generally accepted law of his day, was used as the model for other manuals and greatly inspired later developments of the laws of war. Indeed, the drafters of the first proposal for a codification of the "laws or customs of war on land" in The Hague, relied heavily on the "Declaration of Brussels of 1874", which in turn, was strongly influenced by the Lieber Code. (See F. Kalshoven, *Constraints on the Waging of War* 13 (1987).) It is also an established principle of customary international law that the laws of war might become applicable to non-international armed conflicts of a certain intensity through the doctrine of "recognition of belligerency". (See, for example, *1956 United States Army Field Manual*, which stipulated that "the customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents", para. 11a.) Further, even in internal conflict situations where the recognition of belligerency was explicitly withheld, it has been recognized that some fundamental rules of the law of war would nevertheless apply, regardless of non-recognition of belligerency. (See A. Cassese "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflict", in *Current Problems of International Law* 313 (Cassese, ed. 1975).) Additionally, under the International Law Commission's *Draft Code on Crimes Against The Peace and Security of Mankind*, the notion of "exceptionally serious war crimes", is defined to include certain conduct and no differentiation is made with respect to whether committed in the course of an international or non-international armed conflict. Members of the Security Council are also of the opinion that the term "laws or customs" is not limited to international armed conflicts. (See Statements of U.S., U.K. and French representatives to the Security Council following the adoption of resolution 827, U.N. Doc. S/PV.3217, 15 (May 25, 1993).)

64. The Trial Chamber concludes that Article 3 of the Statute provides a non-exhaustive list of acts which fit within the rubric of "laws or customs of war". The offences that it may consider are not limited to those contained in the Hague Convention and may arise during an armed conflict regardless of whether it is international or internal.

65. The Prosecutor affirmatively contends that the minimum standards contained in common Article 3 are incorporated in Article 3 of the Statute. The Trial Chamber finds that it has subject-matter jurisdiction under Article 3 because violations of laws or customs of war are a part of customary international law over which it has competence regardless of whether the conflict is international or national. However, the Trial Chamber considers that it is necessary to respond to the specific assertion by the Prosecutor that laws or customs of war include the obligations imposed by common Article 3. The Trial Chamber finds that common Article 3 imposes obligations that are within the subject-matter jurisdiction of Article 3 of the Statute because those obligations are a part of customary international law. Further, the Trial Chamber finds that violations of these prohibitions can be enforced against individuals. Imposing criminal responsibility upon individuals for these violations does not violate the principle of *nullum crimen sine lege*.

66. Common Article 3 prohibits the following acts when committed against persons taking no active part in the hostilities:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

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

67. For the reasons discussed herein, the acts proscribed by common Article 3 constitute criminal offences under international law. The fact that common Article 3 is part of customary international law was definitively decided by the International Court of Justice in the *Nicaragua* case (Military and Paramilitary Activities (Nicar. v. U.S.)), 1986 I.C.J. 4 (Merits Judgement of 27 June 1986) in which the Court, applying customary international law, determined that the rules contained in common Article 3 constitute a "minimum yardstick" applicable in both international and non-international armed conflicts, thus finding that these prohibitions are part of customary international law. As early as 1958 the view was already held that common Article 3:

. . . merely demands respect for certain rules, which were already recognised as essential in all civilised countries, and embodied in the municipal law of the states in question, long before the Convention was signed. . . . no government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.

(*Commentary on the Geneva Conventions of 12 August 1949: [No.] IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 36 (Pictet ed., 1958).)

A more recent commentator notes that ". . . the norms stated in Article 3(1)(a)-(c) are of such an elementary, ethical character, and echo so many provisions in other humanitarian and human rights treaties, that they must be regarded as embodying minimum standards of customary law also applicable to non-international armed conflicts." (Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 35 (1991).) The customary status of common Article 3 is further supported by statements made by representatives to the Security Council following the adoption of resolution 827 adopting the Statute of the International Tribunal. The United States representative explicitly stated that she considered Article 3 of the Statute to include common Article 3 of the 1949 Geneva Conventions, and representatives from the United Kingdom and France made similar statements. (UN Doc. S/PV.3217 (25 May 1993), paras. 11, 15 and 19.)

68. The fact that acts proscribed by common Article 3 constitute criminal offences under international law is also evident from the fact that the acts within common Article 3 are criminal in nature. They are similar in content to acts prohibited by the grave breaches provisions, which clearly entail individual criminal liability. In addition, the type of acts listed in common Article 3 have been found in the past to result in individual criminal liability. For example, Article 44 of the Lieber Code *supra* provided for the prohibition, criminal responsibility and punishment of persons committing acts which are of the type that would today fall within common Article 3. In addition, there have been national trials for individuals charged with violations similar to common Article 3. (See Jordan Paust, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 *Vanderbilt Journal of Transnational Law* 1, 25 (1978).)

69. The customary international law doctrine of recognition of belligerency allows for the application to internal conflicts of the laws applicable to international armed conflict, thus ensuring that even in a non-international conflict individuals can be held criminally responsible for violations of the laws and customs of war. Additionally, some national military manuals and laws emphasise the criminal nature of acts within common Article 3. For example, the United States Army regards violations of common Article 3 as encompassed by the notion of war crimes, thus empowering it to prosecute captured military personnel for war crimes if they were accused of breaches of common Article 3. The German Military Manual describes violations of common Article 3 as "grave breaches of international humanitarian law," implying that violations of common Article 3 could form the basis for individual criminal responsibility. (See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 *Am. J. Int'l. L.* 554, 564-65 (1995).) Further, the criminal nature of the acts within common Article 3 is evident from the language of common Article 3 itself, which is clearly prohibitory and addresses fundamental offences such as murder and torture which are prohibited in all States:

Therefore, no person who has committed such acts . . . could claim in good faith that he/she did not understand that the acts were prohibited. And the principle *nullum crimen* is designed to protect a person only from being punished for an act that he or she reasonably believed to be lawful when committed.

(*Id.* at 566.)

70. The individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability. This is evident from the use of the Fourth Hague Convention and the 1929 Geneva Prisoners of War Convention as the basis for prosecutions and convictions at Nuremberg, despite the fact that neither convention contain any reference to penal prosecution or individual liability for breaches.

71. A further indication that the acts proscribed by common Article 3 constitute criminal offences under international law is that, assuming *arguendo* that there is no clear obligation to punish or extradite violators of non-grave breach provisions of the Geneva Conventions, such as common Article 3, all States have the right to punish those violators. Therefore, individuals can be prosecuted for the violations of the acts listed and thus prosecution by the International Tribunal based on primacy does not violate the *ex post facto* prohibition. In addition, in the *Nicaragua* case, the Court recognised the applicability of common Article 1 of the Geneva Conventions to non-international armed conflicts. The requirement in common Article 1 that all Contracting Parties must respect and ensure respect for the Conventions may entail resort to penal measures.

72. In his Report, the Secretary-General states that "the application of the principle *nullum crimen sine lege* requires that the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law". (UN Doc. S/25704, para. 34.) Article 15(1) of the ICCPR contains the prohibition against *nullum crimen sine lege*, and provides in relevant part that "[n]o one shall be held guilty of any criminal offence on account of an act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed". As is demonstrated from the above, common Article 3 is beyond doubt part of customary international law, therefore the principle of *nullum crimen sine lege* is not violated by incorporating the prohibitory norms of common Article 3 in Article 3 of the Statute of the International Tribunal.

73. Additional support for the finding that there is no violation of the principle of *nullum crimen sine lege* is that by incorporating the prohibitory norms of common Article 3 into its national law, the former Yugoslavia has criminalized these offences. (See Art. 125 of the Criminal Code of the former Yugoslavia, which provides that the prohibition of war crimes against the civilian population applies to situations of "war, armed conflict or occupation," irrespective of the nature of the conflict, thus implying that situations of non-international armed conflict could be covered.)

74. For these reasons, the Trial Chamber finds that the character of the conflict, whether international or internal, does not affect the subject-matter jurisdiction of the Tribunal under Article 3. The term "laws or customs of war", applies to international and internal armed conflicts. The minimum standards of common Article 3 apply to the conflict in the former Yugoslavia and the accused's prosecution for those offences does not violate the principle of *nullum crimen sine lege*.

C. Article 5: Crimes Against Humanity

75. Crimes against humanity have been described by the Secretary-General in his Report (at paragraph 48) as those inhumane acts of a very serious nature committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The Statute then defines the jurisdiction of the International Tribunal over crimes against humanity in Article 5 of the Statute as follows:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

76. There is no question but that crimes against humanity form part of customary international law. They found expression in Article 6(c) of the Nuremberg Charter of 8 August 1945, Article II(1)(c) of Law No. 10 of the Control Council for Germany of 20 December 1945 and Article 5(c) of the Tokyo Charter of 26 April 1946, three major documents promulgated in the aftermath of World War II.

77. The Defence claims that "the Tribunal only has jurisdiction under Article 5 of the Statute if it involves crimes that have been committed in the execution of or in connection with an international armed conflict." It purports to find authority for this proposition requiring the existence of an armed conflict of an international nature in the Nuremberg Charter which, in its definition of crimes against humanity, spoke of inhumane acts committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal . . ." and in the affirmation given to the principles of international law recognised by the Charter of the Nuremberg Tribunal and Judgement of the Tribunal in General Assembly resolution 95(1) of 1948. The Defence further contends that the broadening of the scope of Article 5 to crimes when committed in armed conflicts of an internal character offends the *nullum crimen* principle.

78. The Trial Chamber does not agree. The nexus in the Nuremberg Charter between crimes against humanity and the other two categories, crimes against peace and war crimes, was peculiar to the context of the Nuremberg Tribunal established specifically "for the just and prompt trial and punishment of the major war criminals of the European Axis countries." (*Nuremberg Charter*, Article 1). As some of the crimes perpetrated

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by Nazi Germany were of such a heinous nature as to shock the conscience of mankind, it was decided to include crimes against humanity in order to enable the International Military Tribunal to try the major war criminals for the barbarous acts committed against German Jews, amongst others, who, as German nationals, were outside the protection of the laws of warfare which only prohibited violations involving the adversary or enemy populations. (See Antonio Cassese, *International Law in a Divided World* para. 169 (1986).)

79. That no nexus is required in customary international law between crimes against humanity and crimes against peace or war crimes is strongly evidenced by subsequent case law. The military tribunal established under Control Council Law No. 10 stated in the *Einsatzgruppen* case that:

Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty . . . The International Military Tribunal, operating under the London Charter, declared that the Charter's provisions limited the Tribunal to consider only those crimes against humanity which were committed in the execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law.

(4 Trials of War Criminals 499).

80. Further, the Special Rapporteur of the International Law Commission had this to say:

First linked to a state of belligerency . . . the concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes . . . Crimes against humanity may be committed in time of war or in time of peace; war crimes can only be committed in time of war.

(Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, [1989] 2 Yearbook of ILC, U.N. Doc., A/N/CN. 4/SER. A/1986/Add. 1).

81. Finally, this view that crimes against humanity are autonomous is confirmed by the opus classicus on international law, Oppenheim's *International Law*, where special reference is made to the fact that crimes against humanity "are now generally regarded as a self-contained category, without the need for any formal link with war crimes . . ." (R. Jennings and A. Watts, 1 *Oppenheim's International Law* 966 (1992)).

82. Even were it arguable that a nexus is required between crimes against humanity and war crimes, the element of internationality certainly forms no jurisdictional criterion because, as has been shown above, war crimes are prohibited under customary international law in armed conflicts both of an international and internal nature.

83. In conclusion, the Trial Chamber emphasises that the definition of Article 5 is in fact more restrictive than the general definition of crimes against humanity recognised by customary international law. The inclusion of the nexus with armed conflict in the article imposes a limitation on the jurisdiction of the International Tribunal and certainly can in no way offend the *nullum crimen* principle so as to bar the International Tribunal from trying the crimes enumerated therein. Because the language of Article 5 is clear, the crimes against humanity to be tried in the International Tribunal must have a nexus with an armed conflict, be it international or internal.

DISPOSITION

The foregoing deals with the several objections to jurisdiction proper raised by the Defence as well as with the other objections not properly relating to jurisdiction but which instead put in issue the lawful creation and competence of the International Tribunal.

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Defence, and

PURSUANT TO RULE 72

HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal

HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal.

Gabrielle Kirk McDonald
Presiding Judge

Prosecutor v. Dusko Tadic, ICTY, Appeals Chamber

Before:
Judge Cassese, Presiding
Judge Li
Judge Deschênes
Judge Abi-Saab Judge Sidhwa

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 octobre 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

**DECISION ON THE DEFENCE MOTION FOR
INTERLOCUTORY APPEAL ON JURISDICTION**

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orié
Mr. Milan Vujin
Mr. Krstan Simic

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

2. Before the Trial Chamber, Appellant had launched a three-pronged attack:

- a) illegal foundation of the International Tribunal;
- b) wrongful primacy of the International Tribunal over national courts;
- c) lack of jurisdiction *ratione materiae*.

The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

"THE TRIAL CHAMBER [. . .]HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal." (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995 (Case No. IT-94-1-T), at 33 (hereinafter *Decision at Trial*).

Appellant now alleges error of law on the part of the Trial Chamber.

3. As can readily be seen from the operative part of the judgement, the Trial Chamber took a different approach to the first ground of contestation, on which it refused to rule, from the route it followed with respect to the last two grounds, which it dismissed. This distinction ought to be observed and will be referred to below.

From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

- a) the jurisdiction of the Appeals Chamber to hear this appeal;
- b) the jurisdiction of the International Tribunal to hear this case on the merits.

Before anything more is said on the merits, consideration must be given to the preliminary question: whether the Appeals Chamber is endowed with the jurisdiction to hear this appeal at all.

B. Jurisdiction Of The Appeals Chamber

4. Article 25 of the Statute of the International Tribunal (Statute of the International Tribunal (originally published as annex to *the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)* (U.N. Doc. S/25704) and adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter *Statute of the International Tribunal*)) adopted by the United Nations Security Council opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal (International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) (hereinafter *ICCPR*)).

As the Prosecutor of the International Tribunal has acknowledged at the hearing of 7 and 8 September 1995, the Statute is general in nature and the Security Council surely expected that it would be supplemented, where advisable, by the rules which the Judges were mandated to adopt, especially for "*Trials and Appeals*" (Art.15). The Judges did indeed adopt such rules: Part Seven of the Rules of Procedure and Evidence (Rules of Procedure and Evidence, 107-08 (adopted on 11 February 1994 pursuant to Article 15 of the Statute of the International Tribunal, as amended (IT/32/Rev. 5))(hereinafter *Rules of Procedure*)).

5. However, Rule 73 had already provided for "*Preliminary Motions by Accused*", including five headings. The first one is: "objections based on lack of jurisdiction." Rule 72 (B) then provides:

"The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction." (Rules of Procedure, Rule 72 (B).)

This is easily understandable and the Prosecutor put it clearly in his argument:

"I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.

Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orié mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.

So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.

[. . .]

So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter *Appeal Transcript*).)

The question has, however, been put whether the three grounds relied upon by Appellant really go to the jurisdiction of the International Tribunal, in which case only, could they form the basis of an interlocutory appeal. More specifically, can the legality of the foundation of the International Tribunal and its primacy be used as the building bricks of such an appeal?

In his Brief in appeal, at page 2, the Prosecutor has argued in support of a negative answer, based on the distinction between the validity of the creation of the International Tribunal and its jurisdiction. The second aspect alone would be appealable whilst the legality and primacy of the International Tribunal could not be challenged in appeal. (Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 7 July 1995 (Case No. IT-94-1-T), at 4 (hereinafter *Prosecutor Trial Brief*).)

6. This narrow interpretation of the concept of jurisdiction, which has been advocated by the Prosecutor and one *amicus curiae*, falls foul of a modern vision of the administration of justice. Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a

potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed - this is by no means conclusive, but interesting nevertheless: were not those questions to be dealt with *in limine litis*, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of Appellant's interlocutory appeal is indisputable.

C. Grounds Of Appeal

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It has also read the *amicus curiae* briefs submitted by *Juristes sans Frontières* and the Government of the United States of America, to whom it expresses its gratitude.

8. Appellant has submitted two successive Briefs in appeal. The second Brief was late but, in the absence of any objection by the Prosecutor, the Appeals Chamber granted the extension of time requested by Appellant under Rule 116.

The second Brief tends essentially to bolster the arguments developed by Appellant in his original Brief. They are offered under the following headings:

- a) unlawful establishment of the International Tribunal;
- b) unjustified primacy of the International Tribunal over competent domestic courts;
- c) lack of subject-matter jurisdiction.

The Appeals Chamber proposes to examine each of the grounds of appeal in the order in which they are raised by Appellant.

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

9. The first ground of appeal attacks the validity of the establishment of the International Tribunal.

A. Meaning Of Jurisdiction

10. In discussing the Defence plea to the jurisdiction of the International Tribunal on grounds of invalidity of its establishment by the Security Council, the Trial Chamber declared:

"There are clearly enough matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged. These are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather the lawfulness of its creation [. . .]" (Decision at Trial, at para. 4.)

There is a *petitio principii* underlying this affirmation and it fails to explain the criteria by which it the Trial Chamber disqualifies the plea of invalidity of the establishment of the International Tribunal as a plea to jurisdiction. What is more important, that proposition implies a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae and materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is visible from the Latin origin of the word

itself, *jurisdictio* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.

This is the meaning which it carries in all legal systems. Thus, historically, in common law, the **Termes de la ley** provide the following definition:

"jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (Stroud's Judicial Dictionary, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

"[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Black's Law Dictionary, 712 (6th ed. 1990) (citing *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633).

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal

13. Before the Trial Chamber, the Prosecutor maintained that:

- (1) the International Tribunal lacks authority to review its establishment by the Security Council (Prosecutor Trial Brief, at 10-12); and that in any case
- (2) the question whether the Security Council in establishing the International Tribunal complied with the United Nations Charter raises "political questions" which are "non-justiciable" (id. at 12-14).

The Trial Chamber approved this line of argument.

This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject-matter of the plea as a "political question" and, as such, "non-justiciable", i.e., regardless of whether or not it falls within its jurisdiction.

1. Does The International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

"[I]t is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal." (Decision at Trial, at para. 8.)

Both the first and the last sentences of this quotation need qualification. The first sentence assumes a subjective stance, considering that jurisdiction can be determined exclusively by reference to or inference from the intention of the Security Council, thus totally ignoring any residual powers which may derive from the requirements of the "judicial function" itself. That is also the qualification that needs to be added to the last sentence.

Indeed, the jurisdiction of the International Tribunal, which is defined in the middle sentence and described in the last sentence as "the full extent of the competence of the International Tribunal", is not, in fact, so. It is what is termed in international law "original" or "primary" and sometimes "substantive" jurisdiction. But it does not include the "incidental" or "inherent" jurisdiction which derives automatically from the exercise of the judicial function.

15. To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (see United Nations Charter, Arts. 7(2) & 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal.

16. In treating a similar case in its advisory opinion on the *Effect of Awards of the United Nations Administrative Tribunal*, the International Court of Justice declared:

"[T]he view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgements cannot bind the General Assembly which established it.

[. . .]

The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body." (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Reports 47, at 60-1 (Advisory Opinion of 13 July) (hereinafter *Effect of Awards*)).

17. Earlier, the Court had derived the judicial nature of the United Nations Administrative Tribunal

("UNAT") from the use of certain terms and language in the Statute and its possession of certain attributes. Prominent among these attributes of the judicial function figures the power provided for in Article 2, paragraph 3, of the Statute of UNAT:

"In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal." (Id. at 51-2, *quoting* Statute of the United Nations Administrative Tribunal, art. 2, para. 3.)

18. This power, known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction." It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done (see, e.g., Statute of the International Court of Justice, Art. 36, para. 6). But in the words of the International Court of Justice:

"[T]his principle, which is accepted by the general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal [. . .] but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation." (Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. Reports 7, 119 (21 March).)

This is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court - as of any other judicial body - is to ascertain its own competence." (Judge Cordova, dissenting opinion, advisory opinion on Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. Reports, 77, 163 (Advisory Opinion of 23 October)(Cordova, J., dissenting).)

19. It is true that this power can be limited by an express provision in the arbitration agreement or in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. But it is absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.

As no such limitative text appears in the Statute of the International Tribunal, the International Tribunal can and indeed has to exercise its "*compétence de la compétence*" and examine the jurisdictional plea of the Defence, in order to ascertain its jurisdiction to hear the case on the merits.

20. It has been argued by the Prosecutor, and held by the Trial Chamber that:

"[T]his International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council." (Decision at Trial, at para. 5; *see also* paras. 7, 8, 9, 17, 24, *passim*.)

There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own "creator." It was not established for that purpose, as is clear from the definition of the ambit of its "primary" or "substantive" jurisdiction in Articles 1 to 5 of its Statute.

But this is beside the point. The question before the Appeals Chamber is whether the International Tribunal, in exercising this "incidental" jurisdiction, can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own "primary" jurisdiction over the case before it.

21. The Trial Chamber has sought support for its position in some dicta of the International Court of Justice or its individual Judges, (see Decision at Trial, at paras. 10 - 13), to the effect that:

"Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Reports 16, at para. 89 (Advisory Opinion of 21 June) (hereafter the *Namibia Advisory Opinion*).

All these dicta, however, address the hypothesis of the Court exercising such judicial review as a matter of "primary" jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of "incidental" jurisdiction, in order to ascertain and be able to exercise its "primary" jurisdiction over the matter before it. Indeed, in the *Namibia Advisory Opinion*, immediately after the dictum reproduced above and quoted by the Trial Chamber (concerning its "primary" jurisdiction), the International Court of Justice proceeded to exercise the very same "incidental" jurisdiction discussed here:

"[T]he question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions." (Id. at para. 89.)

The same sort of examination was undertaken by the International Court of Justice, *inter alia*, in its advisory opinion on the *Effect of Awards Case*:

"[T]he legal power of the General Assembly to establish a tribunal competent to render judgements binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter." (Effect of Awards, at 56.)

Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.

22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.

2. Is The Question At Issue Political And As Such Non-Justiciable?

23. The Trial Chamber accepted this argument and classification. (See Decision at Trial, at para. 24.)

24. The doctrines of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty", "national honour", etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the "political question"

argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.

The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue. On this question, the International Court of Justice declared in its advisory opinion on *Certain Expenses of the United Nations*:

"[I]t has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision." (*Certain Expenses of the United Nations*, 1962 I.C.J. Reports 151, at 155 (Advisory Opinion of 20 July).)

This dictum applies almost literally to the present case.

25. The Appeals Chamber does not consider that the International Tribunal is barred from examination of the Defence jurisdictional plea by the so-called "political" or "non-justiciable" nature of the issue it raises.

C. The Issue Of Constitutionality

26. Many arguments have been put forward by Appellant in support of the contention that the establishment of the International Tribunal is invalid under the Charter of the United Nations or that it was not duly established by law. Many of these arguments were presented orally and in written submissions before the Trial Chamber. Appellant has asked this Chamber to incorporate into the argument before the Appeals Chamber all the points made at trial. (See Appeal Transcript, 7 September 1995, at 7.) Apart from the issues specifically dealt with below, the Appeals Chamber is content to allow the treatment of these issues by the Trial Chamber to stand.

27. The Trial Chamber summarized the claims of the Appellant as follows:

"It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types

of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

These arguments raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. Put in the interrogative, they can be formulated as follows:

1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?
2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?
3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

1. The Power Of The Security Council To Invoke Chapter VII

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, 26 June 1945, Art. 39.)

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).

In particular, Article 24, after declaring, in paragraph 1, that the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security", imposes on it, in paragraph 3, the obligation to report annually (or more frequently) to the General Assembly, and provides, more importantly, in paragraph 2, that:

"In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." (Id., Art. 24(2).)

The Charter thus speaks the language of specific powers, not of absolute fiat.

29. What is the extent of the powers of the Security Council under Article 39 and the limits thereon, if any?

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the **determination** that there exists one of the situations justifying the use of the

"exceptional powers" of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes **recommendations** (i.e., opts not to use the exceptional powers but to continue to operate under Chapter VI) or decides to use the exceptional powers by ordering measures to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security.

The situations justifying resort to the powers provided for in Chapter VII are a "threat to the peace", a "breach of the peace" or an "act of aggression." While the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

30. It is not necessary for the purposes of the present decision to examine any further the question of the limits of the discretion of the Security Council in determining the existence of a "threat to the peace", for two reasons.

The first is that an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words "breach of the peace" (between the parties or, at the very least, would be as a "threat to the peace" of others).

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.

The second reason, which is more particular to the case at hand, is that Appellant has amended his position from that contained in the Brief submitted to the Trial Chamber. Appellant no longer contests the Security Council's power to determine whether the situation in the former Yugoslavia constituted a threat to the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to such threats [. . .] by appropriate measures." [Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), at para. 5.4 (hereinafter *Defence Appeal Brief*.) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

2. The Range of Measures Envisaged Under Chapter VII

31. Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action: as noted above (see para. 29) it can either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI ("*Pacific Settlement of Disputes*") or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, art. 39.)

A question arises in this respect as to whether the choice of the Security Council is limited to the

measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 suggests), or whether it has even larger discretion in the form of general powers to maintain and restore international peace and security under Chapter VII at large. In the latter case, one of course does not have to locate every measure decided by the Security Council under Chapter VII within the confines of Articles 41 and 42, or possibly Article 40. In any case, under both interpretations, the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

These powers are **coercive** *vis-à-vis* the culprit State or entity. But they are also **mandatory** *vis-à-vis* the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Articles 49), in the implementation of the action or measures decided by the Security Council.

3. The Establishment Of The International Tribunal As A Measure Under Chapter VII

32. As with the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace. But here again, this discretion is not unfettered; moreover, it is limited to the measures provided for in Articles 41 and 42. Indeed, in the case at hand, this last point serves as a basis for the Appellant's contention of invalidity of the establishment of the International Tribunal.

In its resolution 827, the Security Council considers that "in the particular circumstances of the former Yugoslavia", the establishment of the International Tribunal "would contribute to the restoration and maintenance of peace" and indicates that, in establishing it, the Security Council was acting under Chapter VII (S.C. Res. 827, U.N. Doc. S/RES/827 (1993)). However, it did not specify a particular Article as a basis for this action.

Appellant has attacked the legality of this decision at different stages before the Trial Chamber as well as before this Chamber on at least three grounds:

- a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures;
- b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;
- c) that the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

(a) What Article of Chapter VII Serves As A Basis For The Establishment Of A Tribunal?

33. The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42.

Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. These measures, as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned." (United Nations Charter, art. 40.) They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law. Moreover, not being enforcement action, according to the language of Article 40 itself ("before making the recommendations or deciding upon the measures provided for in Article 39"), such provisional measures are subject to the Charter limitation of Article 2, paragraph 7, and the question of their mandatory or recommendatory character is subject to great controversy; all of which renders inappropriate the classification of the International Tribunal under these measures.

34. *Prima facie*, the International Tribunal matches perfectly the description in Article 41 of "measures not involving the use of force." Appellant, however, has argued before both the Trial Chamber and this Appeals Chamber, that:"

...[I]t is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures." (Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 3.2.1 (hereinafter *Defence Trial Brief*).

It has also been argued that the measures contemplated under Article 41 are all measures to be undertaken by Member States, which is not the case with the establishment of the International Tribunal.

35. The first argument does not stand by its own language. Article 41 reads as follows:"

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." (United Nations Charter, art. 41.)

It is evident that the measures set out in Article 41 are merely illustrative **examples** which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition.

That the examples do not suggest judicial measures goes some way towards the other argument that the Article does not contemplate institutional measures implemented directly by the United Nations through one of its organs but, as the given examples suggest, only action by Member States, such as economic sanctions (though possibly coordinated through an organ of the Organization). However, as mentioned above, nothing in the Article suggests the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be.

Moreover, even a simple literal analysis of the Article shows that the first phrase of the first sentence carries a very general prescription which can accommodate both institutional and Member State action. The second phrase can be read as referring particularly to one species of this very large category of measures referred to in the first phrase, but not necessarily the only one, namely, measures undertaken directly by States. It is also clear that the second sentence, starting with "These [measures]" not "Those [measures]", refers to the species mentioned in the second phrase rather than to the "genus" referred to in

the first phrase of this sentence.

36. Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of "collective measures" that they are collectively undertaken. Action by Member States on behalf of the Organization is but a poor substitute *faute de mieux*, or a "second best" for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force.

In sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.

(b) Can The Security Council Establish A Subsidiary Organ With Judicial Powers?

37. The argument that the Security Council, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such powers is untenable: it results from a fundamental misunderstanding of the constitutional set-up of the Charter.

Plainly, the Security Council is not a judicial organ and is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings). The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.

38. The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East ("UNEF") in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the *Effect of Awards*, the International Court of Justice, in addressing practically the same objection, declared:

"[T]he Charter does not confer judicial functions on the General Assembly [. . .] By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations." (*Effect of Awards*, at 61.)

(c) Was The Establishment Of The International Tribunal An Appropriate Measure?

39. The third argument is directed against the discretionary power of the Security Council in evaluating the appropriateness of the chosen measure and its effectiveness in achieving its objective, the restoration of peace.

Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide

discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

40. For the aforementioned reasons, the Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.

4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

41. Appellant challenges the establishment of the International Tribunal by contending that it has not been established by law. The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. It provides: "

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, para. 1.)

Similar provisions can be found in Article 6(1) of the European Convention on Human Rights, which states: "

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]"(European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, art. 6, para. 1, 213 U.N.T.S. 222 (hereinafter ECHR))

and in Article 8(1) of the American Convention on Human Rights, which provides: "

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law." (American Convention on Human Rights, 22 November 1969, art. 8, para. 1, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2 (hereinafter ACHR).)"

Appellant argues that the right to have a criminal charge determined by a tribunal established by law is one which forms part of international law as a "general principle of law recognized by civilized nations", one of the sources of international law in Article 38 of the Statute of the International Court of Justice. In support of this assertion, Appellant emphasises the fundamental nature of the "fair trial" or "due process" guarantees afforded in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. Appellant asserts that they are minimum requirements in international law for the administration of criminal justice.

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law

imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."

43. Indeed, there are three possible interpretations of the term "established by law." First, as Appellant argues, "established by law" could mean established by a legislature. Appellant claims that the International Tribunal is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organisation in a democratic society." Therefore Appellant maintains that the International Tribunal not been "established by law." (Defence Appeal Brief, at para. 5.4.)

The case law applying the words "established by law" in the European Convention on Human Rights has favoured this interpretation of the expression. This case law bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (See *Zand v. Austria*, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, at 80 (1979); *Piersack v. Belgium*, App. No. 8692/79, 47 Eur. Ct. H.R. (ser. B) at 12 (1981); *Crociani, Palmiotti, Tanassi and D'Ovidio v. Italy*, App. Nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined) 22 Eur. Comm'n H.R. Dec. & Rep. 147, at 219 (1981).)

Or, put another way, the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature.

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter.

According to Appellant, however, there must be something more for a tribunal to be "established by law." Appellant takes the position that, given the differences between the United Nations system and national division of powers, discussed above, the conclusion must be that the United Nations system is not

capable of creating the International Tribunal unless there is an amendment to the United Nations Charter. We disagree. It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. As set out above (paras. 28-40) we are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.

In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions. (See G.A. Res. 48/88 (20 December 1993) and G.A. Res. 48/143 (20 December 1993), G.A. Res. 49/10 (8 November 1994) and G.A. Res. 49/205 (23 December 1994).)

45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.

This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. As noted by the Trial Chamber, at the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law and not merely "established by law" (Decision at Trial, at para. 34). Two similar proposals to this effect were made (one by the representative of Lebanon and one by the representative of Chile); if adopted, their effect would have been to prevent all *ad hoc* tribunals. In response, the delegate from the Philippines noted the disadvantages of using the language of "pre-established by law":

"If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes." (See E/CN.4/SR 109. United Nations Economic and Social Council, Commission on Human Rights, 5th Sess., Sum. Rec. 8 June 1949, U.N. Doc. 6.)

As noted by the Trial Chamber in its Decision, there is wide agreement that, in most respects, the International Military Tribunals at Nuremberg and Tokyo gave the accused a fair trial in a procedural sense (Decision at Trial, at para. 34). The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.

This concern about *ad hoc* tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase "established by law" contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights. (See General Comment on Article 14, H.R. Comm.

43rd Sess., Supp. No. 40, at para. 4, U.N. Doc. A/43/40 (1988), *Cariboni v. Uruguay* H.R.Comm. 159/83. 39th Sess. Supp. No. 40 U.N. Doc. A/39/40.) A similar approach has been taken by the Inter-American Commission. (*See, e.g.,* Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 March 1974, at 2-4.) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinise closely "special" or "extraordinary" criminal courts in order to ascertain whether they ensure compliance with the fair trial requirements of Article 14.

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

47. In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus "established by law."

48. The first ground of Appeal: unlawful establishment of the International Tribunal, is accordingly dismissed.

III. UNJUSTIFIED PRIMACY OF THE INTERNATIONAL TRIBUNAL OVER COMPETENT DOMESTIC COURTS

49. The second ground of appeal attacks the primacy of the International Tribunal over national courts.

50. This primacy is established by Article 9 of the Statute of the International Tribunal, which provides:

"Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. *The International Tribunal shall have primacy over national courts.* At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." (Emphasis added.)

Appellant's submission is material to the issue, inasmuch as Appellant is expected to stand trial before this International Tribunal as a consequence of a request for deferral which the International Tribunal submitted to the Government of the Federal Republic of Germany on 8 November 1994 and which this Government, as it was bound to do, agreed to honour by surrendering Appellant to the International Tribunal. (United Nations Charter, art. 25, 48 & 49; Statute of the Tribunal, art. 29.2(e); Rules of Procedure, Rule 10.)

In relevant part, Appellant's motion alleges: "[The International Tribunal's] primacy over domestic courts constitutes an infringement upon the sovereignty of the States directly affected." ([Defence] Motion on

the Jurisdiction of the Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 2.)

Appellant's Brief in support of the motion before the Trial Chamber went into further details which he set down under three headings:

- (a) domestic jurisdiction;
- (b) sovereignty of States;
- (c) *jus de non evocando*.

The Prosecutor has contested each of the propositions put forward by Appellant. So have two of the *amicus curiae*, one before the Trial Chamber, the other in appeal.

The Trial Chamber has analysed Appellant's submissions and has concluded that they cannot be entertained.

51. Before this Chamber, Appellant has somewhat shifted the focus of his approach to the question of primacy. It seems fair to quote here Appellant's Brief in appeal:

"The defence submits that the Trial Chamber should have denied it's [sic] competence to exercise primary jurisdiction while the accused was at trial in the Federal Republic of Germany and the German judicial authorities were adequately meeting their obligations under international law." (Defence Appeal Brief, at para. 7.5.)

However, the three points raised in first instance were discussed at length by the Trial Chamber and, even though not specifically called in aid by Appellant here, are nevertheless intimately intermingled when the issue of primacy is considered. The Appeals Chamber therefore proposes to address those three points but not before having dealt with an apparent confusion which has found its way into Appellant's brief.

52. In paragraph 7.4 of his Brief, Appellant states that "the accused was diligently prosecuted by the German judicial authorities" (*id.*, at para 7.4 (Emphasis added)). In paragraph 7.5 Appellant returns to the period "while the accused was at trial." (*id.*, at para 7.5 (Emphasis added).) These statements are not in agreement with the findings of the Trial Chamber I in its decision on deferral of 8 November 1994:

"The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by the Counsel for Du{ko Tadic, that the said Du{ko Tadic is the subject of an *investigation* instituted by the national courts of the Federal Republic of Germany in respect of the matters listed in paragraph 2 hereof." (Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Du{ko Tadic, 8 November 1994 (Case No. IT-94-1-D), at 8 (Emphasis added).)

There is a distinct difference between an investigation and a trial. The argument of Appellant, based erroneously on the existence of an actual trial in Germany, cannot be heard in support of his challenge to jurisdiction when the matter has not yet passed the stage of investigation.

But there is more to it. Appellant insists repeatedly (*see* Defence Appeal Brief, at paras. 7.2 & 7.4) on impartial and independent proceedings diligently pursued and not designed to shield the accused from international criminal responsibility. One recognises at once that this vocabulary is borrowed from Article 10, paragraph 2, of the Statute. This provision has nothing to do with the present case. This is not

an instance of an accused being tried anew by this International Tribunal, under the exceptional circumstances described in Article 10 of the Statute. Actually, the proceedings against Appellant were deferred to the International Tribunal on the strength of Article 9 of the Statute which provides that a request for deferral may be made "at any stage of the procedure" (Statute of the International Tribunal, art. 9, para. 2). The Prosecutor has never sought to bring Appellant before the International Tribunal for a new trial for the reason that one or the other of the conditions enumerated in Article 10 would have vitiated his trial in Germany. Deferral of the proceedings against Appellant was requested in accordance with the procedure set down in Rule 9 (iii):

"What is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal [. . .]" (Rules of Procedure, Rule 9 (iii).)

After the Trial Chamber had found that that condition was satisfied, the request for deferral followed automatically. The conditions alleged by Appellant in his Brief were irrelevant.

Once this approach is rectified, Appellant's contentions lose all merit.

53. As pointed out above, however, three specific arguments were advanced before the Trial Chamber, which are clearly referred to in Appellant's Brief in appeal. It would not be advisable to leave this ground of appeal based on primacy without giving those questions the consideration they deserve.

The Chamber now proposes to examine those three points in the order in which they have been raised by Appellant.

A. Domestic Jurisdiction

54. Appellant argued in first instance that:

"From the moment Bosnia-Herzegovina was recognised as an independent state, it had the competence to establish jurisdiction to try crimes that have been committed on its territory." (Defence Trial Brief, at para. 5.)

Appellant added that:

"As a matter of fact the state of Bosnia-Herzegovina does exercise its jurisdiction, not only in matters of ordinary criminal law, but also in matters of alleged violations of crimes against humanity, as for example is the case with the prosecution of Mr Karadzic et al."(Id. at para. 5.2.)

This first point is not contested and the Prosecutor has conceded as much. But it does not, by itself, settle the question of the primacy of the International Tribunal. Appellant also seems so to realise. Appellant therefore explores the matter further and raises the question of State sovereignty.

B. Sovereignty Of States

55. Article 2 of the United Nations Charter provides in paragraph 1: "The Organization is based on the principle of the sovereign equality of all its Members."

In Appellant's view, no State can assume jurisdiction to prosecute crimes committed on the territory of another State, barring a universal interest "justified by a treaty or customary international law or an *opinio*

juris on the issue." (Defence Trial Brief, at para. 6.2.)

Based on this proposition, Appellant argues that the same requirements should underpin the establishment of an international tribunal destined to invade an area essentially within the domestic jurisdiction of States. In the present instance, the principle of State sovereignty would have been violated. The Trial Chamber has rejected this plea, holding among other reasons:

"In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State." (Decision at Trial, para. 41.)

The Trial Chamber relied on the judgement of the District Court of Jerusalem in *Israel v. Eichmann*:

"The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State." (36 **International Law Reports** 5, 62 (1961), affirmed by Supreme Court of Israel, 36 **International Law Reports** 277 (1962).)

Consistently with a long line of cases, a similar principle was upheld more recently in the United States of America in the matter of *United States v. Noriega*:

"As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved." (746 F. Supp. 1506, 1533 (S.D. Fla. 1990).)

Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.

56. That Appellant be recognised the right to plead State sovereignty does not mean, of course, that his plea must be favourably received. He has to discharge successfully the test of the burden of demonstration. Appellant's plea faces several obstacles, each of which may be fatal, as the Trial Chamber has actually determined.

Appellant can call in aid Article 2, paragraph 7, of the United Nations Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State [. . .]." However, one should not forget the commanding restriction at the end of the same paragraph: "but this principle shall not prejudice the application of enforcement measures under Chapter VII." (United Nations Charter, art. 2, para. 7.)

Those are precisely the provisions under which the International Tribunal has been established. Even without these provisions, matters can be taken out of the jurisdiction of a State. In the present case, the Republic of Bosnia and Herzegovina not only has not contested the jurisdiction of the International Tribunal but has actually approved, and collaborated with, the International Tribunal, as witnessed by:

- a) Letter dated 10 August 1992 from the President of the Republic of Bosnia and Herzegovina addressed to the Secretary-General of the United Nations (U.N. Doc. E/CN.4/1992/S-1/5 (1992));
- b) Decree with Force of Law on Deferral upon Request by the International Tribunal 12 Official Gazette of the Republic of Bosnia and Herzegovina 317 (10 April 1995) (translation);
- c) Letter from Vasvija Vidovic, Liaison Officer of the Republic of Bosnia and Herzegovina, to the International Tribunal (4 July 1995).

As to the Federal Republic of Germany, its cooperation with the International Tribunal is public and has been previously noted.

The Trial Chamber was therefore fully justified to write, on this particular issue:

"[I]t is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused - Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction." (Decision at Trial, at para. 41.)

57. This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind.

As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held:

"These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one.

[. . .]

The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be.

[. . .]

Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lèse-humanité* (*reati di lesa umanità*) and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same

way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed (articles 537 and 604 of the penal code)." (13 March 1950, in **Rivista Penale** 753, 757 (Sup. Mil. Trib., Italy 1950; unofficial translation).¹

Twelve years later the Supreme Court of Israel in the *Eichmann* case could draw a similar picture:

"[T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct. [. . .]

Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilised nations.

[. . .]

[T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing."(Israel v. Eichmann, 36 **International Law Reports** 277, 291-93 (Isr. S. Ct. 1962).)

58. The public revulsion against similar offences in the 1990s brought about a reaction on the part of the community of nations: hence, among other remedies, the establishment of an international judicial body by an organ of an organization representing the community of nations: the Security Council. This organ is empowered and mandated, by definition, to deal with trans-boundary matters or matters which, though domestic in nature, may affect "international peace and security" (United Nations Charter, art 2. (1), 2. (7), 24, & 37). It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. In the *Barbie* case, the Court of Cassation of France has quoted with approval the following statement of the Court of Appeal:

"[. . .]by reason of their nature, the crimes against humanity [. . .] do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign. (*Fédération Nationale de Déportés et Internés Résistants et Patriotes And Others v. Barbie*, 78 *International Law Reports* 125, 130 (Cass. crim.1983).)²

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused", or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.

59. The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10

of the Rules of Procedure of the International Tribunal.

The Trial Chamber was fully justified in writing:

"Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community."(Decision at Trial, at para. 42.)

60. The plea of State sovereignty must therefore be dismissed.

C. Jus De Non Evocando

61. Appellant argues that he has a right to be tried by his national courts under his national laws.

No one has questioned that right of Appellant. The problem is elsewhere: is that right exclusive? Does it prevent Appellant from being tried - and having an equally fair trial (see Statute of the International Tribunal, art. 21) - before an international tribunal?

Appellant contends that such an exclusive right has received universal acceptance: yet one cannot find it expressed either in the Universal Declaration of Human Rights or in the International Covenant on Civil and Political Rights, unless one is prepared to stretch to breaking point the interpretation of their provisions.

In support of this stand, Appellant has quoted seven national Constitutions (Article 17 of the Constitution of the Netherlands, Article 101 of the Constitution of Germany (unified), Article 13 of the Constitution of Belgium, Article 25 of the Constitution of Italy, Article 24 of the Constitution of Spain, Article 10 of the Constitution of Surinam and Article 30 of the Constitution of Venezuela). However, on examination, these provisions do not support Appellant's argument. For instance, the Constitution of Belgium (being the first in time) provides:

"**Art. 13:** No person may be withdrawn from the judge assigned to him by the law, save with his consent." (Blaustein & Flanz, *Constitutions of the Countries of the World*, (1991).)

The other constitutional provisions cited are either similar in substance, requiring only that no person be removed from his or her "natural judge" established by law, or are irrelevant to Appellant's argument.

62. As a matter of fact - and of law - the principle advocated by Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial.

This principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations. No rights of accused are thereby infringed or threatened; quite to the contrary, they are all specifically spelt out and protected under the Statute of the International Tribunal. No accused can complain. True, he will be removed from his "natural" national forum; but he will be brought before a tribunal at least equally fair, more distanced from the facts

of the case and taking a broader view of the matter.

Furthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.

63. The objection founded on the theory of *jus de non evocando* was considered by the Trial Chamber which disposed of it in the following terms:

"Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter." (Decision at Trial, at para. 37.)

No new objections were raised before the Appeals Chamber, which is satisfied with concurring, on this particular point, with the views expressed by the Trial Chamber.

64. For these reasons the Appeals Chamber concludes that Appellant's second ground of appeal, contesting the primacy of the International Tribunal, is ill-founded and must be dismissed.

IV. LACK OF SUBJECT-MATTER JURISDICTION

65. Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is Appellant's claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal is limited to crimes committed in the context of an international armed conflict. Before the Trial Chamber, Appellant claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict. On appeal an additional alternative claim is asserted to the effect that there was no armed conflict at all in the region where the crimes were allegedly committed.

Before the Trial Chamber, the Prosecutor responded with alternative arguments that: (a) the conflicts in the former Yugoslavia should be characterized as an international armed conflict; and (b) even if the conflicts were characterized as internal, the International Tribunal has jurisdiction under Articles 3 and 5 to adjudicate the crimes alleged. On appeal, the Prosecutor maintains that, upon adoption of the Statute, the Security Council determined that the conflicts in the former Yugoslavia were international and that, by dint of that determination, the International Tribunal has jurisdiction over this case.

The Trial Chamber denied Appellant's motion, concluding that the notion of international armed conflict was not a jurisdictional criterion of Article 2 and that Articles 3 and 5 each apply to both internal and international armed conflicts. The Trial Chamber concluded therefore that it had jurisdiction, regardless of the nature of the conflict, and that it need not determine whether the conflict is internal or international.

A. Preliminary Issue: The Existence Of An Armed Conflict

66. Appellant now asserts the new position that there did not exist a legally cognizable armed conflict - either internal or international - at the time and place that the alleged offences were committed.

Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 (hereinafter *Geneva Convention I*); Convention relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 (hereinafter *Geneva Convention III*); see also Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter *Geneva Convention IV*.)

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

"[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations." (Geneva Convention IV, art. 6, para. 2 (Emphasis added).)

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter *Protocol I*.) In addition to these textual references, the very nature of the Conventions - particularly Conventions III and IV - dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in paragraphs 88 and 114 below, may be regarded as applicable to some aspects of the conflicts in the former Yugoslavia) also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of

Non-International Armed Conflicts, 12 December 1977, art. 4, para.1, 1125 U.N.T.S. 609 (hereinafter Protocol II). Article 2, paragraph 1, provides:

"[t]his Protocol shall be applied [. . .] to all persons *affected* by an armed conflict as defined in Article 1."(Id. at art. 2, para. 1 (Emphasis added).)

The same provision specifies in paragraph 2 that:

"[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."(Id. at art. 2, para. 2.)

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opstina of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb take-over and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence but has admitted in oral argument that in the Prijedor region there were detention camps run not by the central authorities of Bosnia-Herzegovina but by Bosnian Serbs (Appeal Transcript; 8 September 1995, at 36-7). In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

B. Does The Statute Refer Only To International Armed Conflicts?

1. Literal Interpretation Of The Statute

71. On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to "grave breaches" of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 5 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument *a contrario* based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). It is notable that the parties to this case also agree that the conflicts in the former Yugoslavia since 1991 have had both internal and international aspects. (*See* Transcript of the Hearing on the Motion on Jurisdiction, 26 July 1995, at 47, 111.)

73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples' Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (*See* Memorandum of Understanding, 27 November 1991.) Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing

internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegovic (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karadzic (President of the Serbian Democratic Party), and Mr. Miljenko Brkic (President of the Croatian Democratic Community) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1-6 (hereinafter **Agreement No. 1**)). Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were **internal**, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. ("No special agreement shall adversely affect the situation of [the protected persons] as defined by the present Convention, nor restrict the rights which it confers upon them." (Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7.)) If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.

Taken together, the agreements reached between the various parties to the conflict(s) in the former Yugoslavia bear out the proposition that, when the Security Council adopted the Statute of the International Tribunal in 1993, it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.

74. The Security Council's many statements leading up to the establishment of the International Tribunal reflect an awareness of the mixed character of the conflicts. On the one hand, prior to creating the International Tribunal, the Security Council adopted several resolutions condemning the presence of JNA forces in Bosnia-Herzegovina and Croatia as a violation of the sovereignty of these latter States. See, e.g., S.C. Res. 752 (15 May 1992); S.C. Res. 757 (30 May 1992); S.C. Res. 779 (6 Oct. 1992); S.C. Res. 787 (16 Nov. 1992). On the other hand, in none of these many resolutions did the Security Council explicitly state that the conflicts were international.

In each of its successive resolutions, the Security Council focused on the practices with which it was concerned, without reference to the nature of the conflict. For example, in resolution 771 of 13 August 1992, the Security Council expressed "grave alarm" at the

"[c]ontinuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in

detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." (S.C. Res. 771 (13 August 1992).)

As with every other Security Council statement on the subject, this resolution makes no mention of the nature of the armed conflict at issue. The Security Council was clearly preoccupied with bringing to justice those responsible for these specifically condemned acts, regardless of context. The Prosecutor makes much of the Security Council's repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that, as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in internal armed conflicts as well.

75. The intent of the Security Council to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General of 3 May 1993 and by statements of Security Council members regarding their interpretation of the Statute. The Report of the Secretary-General explicitly states that the clause of the Statute concerning the temporal jurisdiction of the International Tribunal was

"clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised." (Report of the Secretary-General, at para. 62, U.N. Doc. S/25704 (3 May 1993) (hereinafter *Report of the Secretary-General*)).

In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding that the jurisdiction of the International Tribunal under Article 3, with respect to laws or customs of war, included any humanitarian law agreement in force in the former Yugoslavia. (See statements by representatives of France, the United States, and the United Kingdom, Provisional Verbatim Record of the 3217th Meeting, at 11, 15, & 19, U.N. Doc. S/PV.3217 (25 May 1993).) As an example of such supplementary agreements, the United States cited the rules on internal armed conflict contained in Article 3 of the Geneva Conventions as well as "the 1977 Additional Protocols to these [Geneva] Conventions [of 1949]." (*Id.* at 15). This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the Statute of the International Tribunal, pointed out: "[W]e understand that other members of the [Security] Council share our view regarding the following clarifications related to the Statute."(*id.*)).

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of

Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

78. With the exception of Article 5 dealing with crimes against humanity, none of the statutory provisions makes explicit reference to the type of conflict as an element of the crime; and, as will be shown below, the reference in Article 5 is made to distinguish the nexus required by the Statute from the nexus required by Article 6 of the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg. Since customary international law no longer requires any nexus between crimes against humanity and armed conflict (*see below*, paras. 140 and 141), Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal. As previously noted, although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions suggest that it is limited to international armed conflicts. It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly punishable only under Articles 2 and 3 of the Statute. Appellant maintains that these Articles apply only to international armed conflicts. However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.

Thus, the Security Council's object in enacting the Statute - to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects - suggests that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts.

In light of this understanding of the Security Council's purpose in creating the International Tribunal, we turn below to discussion of Appellant's specific arguments regarding the scope of the jurisdiction of the International Tribunal under Articles 2, 3 and 5 of the Statute.

3. Logical And Systematic Interpretation Of The Statute

(a) Article 2

79. Article 2 of the Statute of the International Tribunal provides:

"The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages."

By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to "grave breaches" of the Conventions. Each of the four Geneva Conventions of 1949 contains a "grave breaches" provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (see, e.g., [Amicus Curiae] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, *U.S. Amicus Curiae Brief*), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. Appellant argues that, as the grave breaches enforcement system only applies to international armed conflicts, reference in Article 2 of the Statute to the grave breaches provisions of the Geneva Conventions limits the International Tribunal's jurisdiction under that Article to acts committed in the context of an international armed conflict. The Trial Chamber has held that Article 2:

"[H]as been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of 'persons or property protected'."

[. . .]

[T]he requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.

[. . .]

[T]here is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention [sic] to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things." (Decision at Trial, at paras. 49-51.)

80. With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal. The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches." The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: "persons or property protected under the provisions of the relevant Geneva Conventions." (Statute of the Tribunal, art. 2.) For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.

82. The above interpretation is borne out by what could be considered as part of the preparatory works of the Statute of the International Tribunal, namely the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the "grave breaches" system of the Geneva Conventions, reference is made to "international armed conflicts" (Report of the Secretary-General at para. 37).

83. We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (see paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the *amicus curiae* brief submitted by the Government of the United States, where it is contended that:

"the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. *Amicus Curiae* Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual mentioned below (para. 131), whereby grave breaches of international humanitarian law include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (*see above*, para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (*see id.* at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

84. Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts.

85. Before the Trial Chamber, the Prosecutor asserted an alternative argument whereby the provisions on grave breaches of the Geneva Conventions could be applied to internal conflicts on the strength of some agreements entered into by the conflicting parties. For the reasons stated below, in Section IV C (para. 144), we find it unnecessary to resolve this issue at this time.

(b) Article 3

86. Article 3 of the Statute declares the International Tribunal competent to adjudicate violations of the laws or customs of war. The provision states:

"The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property."

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is *in casu* an internal armed conflict; therefore, to the extent that the jurisdiction of the International Tribunal under Article 3 is based on the Hague Regulations, it lacks jurisdiction under Article 3 to adjudicate alleged violations in the former Yugoslavia. Appellant's argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). However, as the Report indicates, the Hague Convention, considered *qua* customary law, constitutes an important area of humanitarian international law. (*Id.*) In other words, the Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" and that the so-called "Hague Regulations" constitute an important segment of such law. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities; in the words of the Report: "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions." (*Id.*, at para. 43.) These comments suggest that Article 3 is intended to cover both Geneva and Hague rules law. On the other hand, the Secretary-General's subsequent comments indicate that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions (*id.*, at paras. 43-4). As pointed out above, this list is, however, merely illustrative: indeed, Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3

may be taken to cover **all violations** of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

88. That Article 3 does not confine itself to covering violations of Hague law, but is intended also to refer to all violations of international humanitarian law (subject to the limitations just stated), is borne out by the debates in the Security Council that followed the adoption of the resolution establishing the International Tribunal. As mentioned above, three Member States of the Council, namely France, the United States and the United Kingdom, expressly stated that Article 3 of the Statute also covers obligations stemming from agreements in force between the conflicting parties, that is Article 3 common to the Geneva Conventions and the two Additional Protocols, as well as other agreements entered into by the conflicting parties. The French delegate stated that:

"[T]he expression 'laws or customs of war' used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed." (Provisional Verbatim Record of the 3217th Meeting, at 11, U.N. Doc. S/PV.3217 (25 May 1993).)

The American delegate stated the following:

"[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute:

Firstly, it is understood that the 'laws or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions." (*Id.*, at p. 15.)

The British delegate stated:

"[I]t would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions." (*Id.*, at p. 19.)

It should be added that the representative of Hungary stressed:

"the importance of the fact that the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia." (*Id.*, at p. 20.)

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.

89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law (on this point *see below*, para. 143).

90. The Appeals Chamber would like to add that, in interpreting the meaning and purport of the expressions "violations of the laws or customs of war" or "violations of international humanitarian law", one must take account of the context of the Statute as a whole. A systematic construction of the Statute emphasises the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to "**serious violations**" of international humanitarian law" (*See Statute of the International Tribunal, Preamble, arts. 1, 9(1), 10(1)-(2), 23(1), 29(1) (Emphasis added.)*). It is therefore appropriate to take the expression "violations of the laws or customs of war" to cover serious violations of international humanitarian law.

91. Article 3 thus confers on the International Tribunal jurisdiction over **any** serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely "grave breaches" of the Geneva Conventions or violations of the "Hague law." Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

93. The above interpretation is further confirmed if Article 3 is viewed in its more general perspective, that is to say, is appraised in its historical context. As the International Court of Justice stated in the *Nicaragua* case, Article 1 of the four Geneva Conventions, whereby the contracting parties "undertake to respect and ensure respect" for the Conventions "in all circumstances", has become a "general principle [. . .] of humanitarian law to which the Conventions merely give specific expression." (*Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits)*, 1986 I.C.J. Reports 14, at para. 220 (27 June) (hereinafter *Nicaragua Case*). This general principle lays down an obligation that is incumbent, not only on States, but also on other international entities including the United Nations. It was with this obligation in mind that, in 1977, the States drafting the two Additional Protocols to the Geneva Conventions agreed upon Article 89 of Protocol I, whereby:

"In situations of **serious violations** of the Conventions or of this Protocol, the High Contracting Parties **undertake to act, jointly or individually, in co-operation with the United Nations** and in conformity with the United Nations Charter." (Protocol I, at art. 89 (Emphasis added).)

Article 3 is intended to realise that undertaking by endowing the International Tribunal with the power to prosecute all "serious violations" of international humanitarian law.

(ii) The Conditions That Must Be Fulfilled For A Violation Of International Humanitarian Law To Be Subject To Article 3

94. The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (see below, para. 143);

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife: and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

(iii) Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts

a. General

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed

violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936-39, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. Principal Rules

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard

the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

"The rules of international law as to what constitutes a military objective are undefined and pending the conclusion of the examination of this question [. . .] I am not in a position to make any statement on the subject. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature." (333 House of Commons Debates, col. 1177 (23 March 1938).)

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

"I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

"[r]ecognize[d] the following principles as a necessary basis for any subsequent regulations:

- (1) The intentional bombing of civilian populations is illegal;
- (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
- (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence." (**League of Nations, O.J. Spec. Supp. 183**, at 135-36 (1938).)

102. Subsequent State practice indicates that the Spanish Civil War was not exceptional in bringing about

the extension of some general principles of the laws of warfare to internal armed conflict. While the rules that evolved as a result of the Spanish Civil War were intended to protect civilians finding themselves in the theatre of hostilities, rules designed to protect those who do not (or no longer) take part in hostilities emerged after World War II. In 1947, instructions were issued to the Chinese "peoples' liberation army" by Mao Tse-Tung who instructed them not to "kill or humiliate any of Chiang Kai-Shek's army officers and men who lay down their arms." (*Manifesto of the Chinese People's Liberation Army*, in Mao Tse-Tung, 4 Selected Works (1961) 147, at 151.) He also instructed the insurgents, among other things, not to "ill-treat captives", "damage crops" or "take liberties with women." (*On the Reissue of the Three Main Rules of Discipline and the Eight Points for Attention - Instruction of the General Headquarters of the Chinese People's Liberation Army*, in *id.*, 155.)

In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (Nicaragua Case, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.

104. Agreements made pursuant to common Article 3 are not the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law.

105. As a notable example, we cite the conduct of the Democratic Republic of the Congo in its civil war. In a public statement issued on 21 October 1964, the Prime Minister made the following commitment regarding the conduct of hostilities:

"For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.

In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [sic]. It also expects the rebels - and makes an urgent appeal to them to that effect - to act in the same manner.

As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention [sic] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in **American Journal of International Law** (1965) 614, at 616.)

This statement indicates acceptance of rules regarding the conduct of internal hostilities, and, in

particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.

106. A further confirmation can be found in the "Operational Code of Conduct for Nigerian Armed Forces", issued in July 1967 by the Head of the Federal Military Government, Major General Y. Gowon, to regulate the conduct of military operations of the Federal Army against the rebels. In this "Operational Code of Conduct", it was stated that, to repress the rebellion in Biafra, the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations. (See A.H.M. Kirk-Greene, **1 Crisis and Conflict in Nigeria, A Documentary Sourcebook 1966-1969**, 455-57 (1971).) This "Operational Code of Conduct" shows that in a large-scale and protracted civil war the central authorities, while refusing to grant recognition of belligerency, deemed it necessary to apply not only the provisions of the Geneva Conventions designed to protect civilians in the hands of the enemy and captured combatants, but also general rules on the conduct of hostilities that are normally applicable in international conflicts. It should be noted that the code was actually applied by the Nigerian authorities. Thus, for instance, it is reported that on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba, (see *New Nigerian*, 28 June 1968, at 1). In addition, reportedly on 3 September 1968, a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba. (See *Daily Times - Nigeria*, 3 September 1968, at 1; *Daily Times, - Nigeria*, 4 September 1968, at 1.)

This attitude of the Nigerian authorities confirms the trend initiated with the Spanish Civil War and referred to above (see paras. 101-102), whereby the central authorities of a State where civil strife has broken out prefer to withhold recognition of belligerency but, at the same time, extend to the conflict the bulk of the body of legal rules concerning conflicts between States.

107. A more recent instance of this tendency can be found in the stand taken in 1988 by the rebels (the FMLN) in El Salvador, when it became clear that the Government was not ready to apply the Additional Protocol II it had previously ratified. The FMLN undertook to respect both common Article 3 and Protocol II:

"The FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II, take into consideration the needs of the majority of the population, and defend their fundamental freedoms." (FMLN, *La legitimidad de nuestros metodos de lucha*, Secretaria de promocion y proteccion de lo Derechos Humanos del FMLN, El Salvador, 10 Octubre 1988, at 89; unofficial translation.)³

108. In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of the customary rules at issue. The Appeals Chamber will mention in particular the action of the ICRC, two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals.

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that,

when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously⁴ adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

"the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." (G.A. Res. 2444, U.N. GAOR., 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).)

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was "declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (See 67 **American Journal of International Law** (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously⁵ adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); *see also* U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).) The resolution stated the following:

"Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:

1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

2. In the conduct of military operations during armed conflicts, a distinction must be made at all

times between persons actively taking part in the hostilities and civilian populations.

3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.
4. Civilian populations as such should not be the object of military operations.
5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.
6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.
7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.
8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application." (G.A. Res. 2675, U.N. GAOR., 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).)

112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

"In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter." (6 European Political Cooperation Documentation Bulletin, at 295 (1990).)

114. A similar, albeit more general, appeal was made by the Security Council in its resolution 788 (in operative paragraph 5 it called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law") (S.C. Res. 788 (19 November 1992)), an appeal reiterated in resolution 972 (S.C. Res. 972 (13 January 1995)) and in resolution 1001 (S.C. Res. 1001 (30 June 1995)).

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international

humanitarian law, "the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population") (S.C. Res. 794 (3 December 1992)) and resolution 814 (S.C. Res. 814 (26 March 1993)). As for Georgia, see Resolution 993, (in which the Security Council reaffirmed "the need for the parties to comply with international humanitarian law") (S.C. Res. 993 (12 May 1993)).

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for international humanitarian law in the civil war in Chechnya. On 17 January 1995 the Presidency of the European Union issued a declaration stating:

"The European Union is following the continuing fighting in Chechnya with the greatest concern. The promised cease-fires are not having any effect on the ground. Serious violations of human rights and international humanitarian law are continuing. The European Union strongly deplores the large number of victims and the suffering being inflicted on the civilian population." (Council of the European Union - General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 January 1995).)

The appeal was reiterated on 23 January 1995, when the European Union made the following declaration:

"It deplores the serious violations of human rights and international humanitarian law which are still occurring [in Chechnya]. It calls for an immediate cessation of the fighting and for the opening of negotiations to allow a political solution to the conflict to be found. It demands that freedom of access to Chechnya and the proper conveying of humanitarian aid to the population be guaranteed." (Council of the European Union-General Secretariat, Press Release 4385/95 (Presse 24), at 1 (23 January 1995).)

116. It must be stressed that, in the statements and resolutions referred to above, the European Union and the United Nations Security Council did not mention common Article 3 of the Geneva Conventions, but adverted to "international humanitarian law", thus clearly articulating the view that there exists a **corpus** of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope.

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

This proposition is confirmed by the views expressed by a number of States. Thus, for example, mention can be made of the stand taken in 1987 by El Salvador (a State party to Protocol II). After having been repeatedly invited by the General Assembly to comply with humanitarian law in the civil war raging on its territory (*see, e.g., G.A. Res. 41/157 (1986)*), the Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war (although an objective evaluation prompted some Governments to conclude that all the conditions for such applications were met, (*see, e.g., 43 Annuaire Suisse de Droit International, (1987) at 185-87*). Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place"⁽⁶⁾ (*See Informe de la Fuerza Armada de El Salvador sobre el respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el periodo de Septiembre de 1986 a Agosto de 1987, at 3 (31 August 1987)*) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission (2 October 1987).; (unofficial translation). Similarly, in 1987, Mr. M.J. Matheson, speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

"[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (Humanitarian Law Conference, Remarks of Michael J. Matheson, (2) **American University Journal of International Law and Policy** (1987) 419, at 430-31).

118. That at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." (Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, August 1992, DSK AV207320065, at para. 211 in fine; unofficial translation.)(7)

119. So far we have pointed to the formation of general rules or principles designed to protect **civilians or civilian objects** from the hostilities or, more generally, to protect **those who do not (or no longer) take active part in hostilities**. We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards **means and methods of warfare**. As the Appeals Chamber has pointed out above (see para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby "[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." (*Declaration of Minimum Humanitarian Standards, reprinted in, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).*) It should be noted that this Declaration, emanating from a group of distinguished experts in human rights and humanitarian law, has been indirectly endorsed by the Conference on Security and Cooperation in Europe in its Budapest Document of 1994 (Conference on Security and Cooperation in Europe, Budapest Document 1994: Towards Genuine Partnership in a New Era, para. 34 (1994)) and in 1995 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (*Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Agenda Item 19, at 1, U.N. Doc. E/CN.4/1995/L.33 (1995)*).

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

"The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of

these weapons. They call for respect of international humanitarian law, including the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." (4 European Political Cooperation Documentation Bulletin, (1988) at 92.)

This statement was reiterated by the Greek representative, on behalf of the Twelve, on many occasions. (See U.N. GAOR, 1st Comm., 43rd Sess., 4th Mtg., at 47, U.N. Doc. A/C.1/43/PV.4 (1988)(statement of 18 October 1988 in the First Committee of the General Assembly); U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtg., at 23, U.N. Doc. A/C.1/43/PV.31 (statement of 9 November 1988 in meeting of First Committee of the General Assembly to the effect inter alia that "The Twelve [. . .] call for respect for the Geneva Protocol of 1925 and other relevant rules of customary international law"); U.N. GAOR, 1st Comm., 43rd Sess., 49th Mtg., at 16, U.N. Doc. A/C.3/43/SR.49 (summary of statement of 22 November 1988 in Third Committee of the General Assembly); *see also Report on European Union [EPC Aspects]*, 4 European Political Cooperation Documentation Bulletin (1988), 325, at 330; *Question No 362/88 by Mr. Arbeloa Muru (S-E) Concerning the Poisoning of Opposition Members in Iraq*, 4 European Political Cooperation Documentation Bulletin (1988), 187 (statement of the Presidency in response to a question of a member of the European Parliament).)

121. A firm position to the same effect was taken by the British authorities: in 1988 the Foreign Office stated that the Iraqi use of chemical weapons against the civilian population of the town of Halabja represented "a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The U.K. condemns unreservedly this and all other uses of chemical weapons." (59 **British Yearbook of International Law** (1988) at 579; *see also id.* at 579-80.) A similar stand was taken by the German authorities. On 27 October 1988 the German Parliament passed a resolution whereby it "resolutely rejected the view that the use of poison gas was allowed on one's own territory and in clashes akin to civil wars, assertedly because it was not expressly prohibited by the Geneva Protocol of 1925"⁽⁸⁾. (50 **Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht** (1990), at 382-83; unofficial translation.) Subsequently the German representative in the General Assembly expressed Germany's alarm "about reports of the use of chemical weapons against the Kurdish population" and referred to "breaches of the Geneva Protocol of 1925 and other norms of international law." (U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtg., at 16, U.N. Doc. A/C.1/43/PV.31 (1988).)

122. A clear position on the matter was also taken by the United States Government. In a "press guidance" statement issued by the State Department on 9 September 1988 it was stated that:

Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against [chemical weapon] use 'in war' applies to [chemical weapon] use in internal conflicts. However, it is clear that such use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements." (United States, Department of State, Press Guidance (9 September 1988).)

On 13 September 1988, Secretary of State George Schultz, in a hearing before the United States Senate Judiciary Committee strongly condemned as "completely unacceptable" the use of chemical weapons by Iraq. (*Hearing on Refugee Consultation with Witness Secretary of State George Shultz*, 100th Cong., 2d Sess., (13 September 1988) (Statement of Secretary of State Shultz).) On 13 October of the same year, Ambassador R.W. Murphy, Assistant Secretary for Near Eastern and South Asian Affairs, before the Sub-Committee on Europe and the Middle East of the House of Representatives Foreign Affairs Committee did the same, branding that use as "illegal." (See **Department of State Bulletin** (December 1988) 41, at 43-4.)

123. It is interesting to note that, reportedly, the Iraqi Government "flatly denied the poison gas

charges." (New York Times, 16 September 1988, at A 11.) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. In the aforementioned statement, Ambassador Murphy said:

"On September 17, Iraq reaffirmed its adherence to international law, including the 1925 Geneva Protocol on chemical weapons as well as other international humanitarian law. We welcomed this statement as a positive step and asked for confirmation that Iraq means by this to renounce the use of chemical weapons inside Iraq as well as against foreign enemies. On October 3, the Iraqi Foreign Minister confirmed this directly to Secretary Schultz." (*Id.* at 44.)

This information had already been provided on 20 September 1988 in a press conference by the State Department spokesman Mr Redman. (See State Department Daily Briefing, 20 September 1988, Transcript ID: 390807, p. 8.) It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrain, Kuwait) as well as the Arab League in a meeting of Foreign Ministers at Tunis on 12 September 1988, strongly disagreed with United States' assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons; rather, those countries accused the United States of "conducting a smear media campaign against Iraq." (See New York Times, 15 September 1988, at A 13; Washington Post, 20 September 1988, at A 21.)

124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals - a matter on which this Chamber obviously cannot and does not express any opinion - there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.

125. State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations. (*See Pius Nwaoga v. The State*, 52 **International Law Reports**, 494, at 496-97 (Nig. S. Ct. 1972).)

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. (On these and other limitations of international humanitarian law governing civil strife, see the important message of the Swiss Federal Council to the Swiss Chambers on the ratification of the two 1977 Additional Protocols (38 **Annuaire Suisse de Droit International** (1982) 137 at 145-49.))

127. Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

(iv) **Individual Criminal Responsibility In Internal Armed Conflict**

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (See *The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22*, at 445, 467 (1950).) The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals (*id.*, at 445-47, 467). Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (*id.*, at 447.)

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts. As mentioned above, during the Nigerian Civil War, both members of the Federal Army and rebels were brought before Nigerian courts and tried for violations of principles of international humanitarian law (see paras. 106 and 125).

131. Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany (**Humanitäres Völkerrecht in bewaffneten Konflikten** - Handbuch, August 1992, DSK AV2073200065, at para. 1209)(unofficial translation), which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3, such as "wilful killing, mutilation, torture or inhumane treatment including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages", as well as "the fact of impeding a fair and regular trial"⁽⁹⁾. (Interestingly, a previous edition of the German Military Manual did not contain any such provision. See *Kriegsvölkerrecht - Allgemeine Bestimmungen des Kriegführungsrechts und Landkriegsrecht*, ZDv 15-10, March 1961, para. 12; *Kriegsvölkerrecht - Allgemeine Bestimmungen des Humanitätsrechts*, ZDv 15/5, August 1959, paras. 15-16, 30-2). Furthermore, the "Interim Law of Armed Conflict Manual" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence" (New Zealand Defence Force Directorate of Legal Services, DM (1992) at 112, *Interim Law of Armed Conflict Manual*, para. 1807, 8). The relevant provisions of the manual of the United States (Department of the Army, *The Law of Land Warfare*, Department of the Army Field Manual, FM 27-10, (1956), at paras. 11 & 499) may also lend themselves to the interpretation that "war crimes", i.e., "every violation of the law of war", include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 (War Office, *The Law of War on Land*, Being Part III of the

Manual of Military Law (1958), at para. 626).

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. (Socialist Federal Republic of Yugoslavia, Federal Criminal Code, arts. 142-43 (1990).) (It should be noted that by a decree having force of law, of 11 April 1992, the Republic of Bosnia and Herzegovina has adopted that Criminal Code, subject to some amendments.) (2 Official Gazette of the Republic of Bosnia and Herzegovina 98 (11 April 1992)(translation).) Furthermore, on 26 December 1978 a law was passed by the Yugoslav Parliament to implement the two Additional Protocols of 1977 (Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, Medunarodni Ugovori, at 1083 (26 December 1978).) as a result, by virtue of Article 210 of the Yugoslav Constitution, those two Protocols are "directly applicable" by the courts of Yugoslavia. (Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.) Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (*infractions graves*) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" (*[c]onstituent des crimes de droit international*) within the jurisdiction of Belgian criminal courts (Article 7). (*Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions*, Moniteur Belge, (5 August 1993).)

133. Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them. (See S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity. As pointed out above (*see* para. 132) such violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.

136. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Herzegovina, made under the auspices of the ICRC, clearly undertook to punish those responsible for violations of international humanitarian law. Thus, Article 5, paragraph 2, of the aforementioned Agreement of 22 May 1992 provides that:

"Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence **and to punish those responsible in accordance with the law in force.**" (Agreement No. 1, art. 5, para. 2 (Emphasis added).)

Furthermore, the Agreement of 1st October 1992 provides in Article 3, paragraph 1, that

"All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention, as well as in Article 85 of Additional Protocol I, will be unilaterally and unconditionally released." (Agreement No. 2, 1 October 1992, art. 3, para. 1.)

This provision, which is supplemented by Article 4, paragraphs 1 and 2 of the Agreement, implies that all those responsible for offences contrary to the Geneva provisions referred to in that Article must be brought to trial. As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict.

(v) **Conclusion**

137. In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied.

(c) **Article 5**

138. Article 5 of the Statute confers jurisdiction over crimes against humanity. More specifically, the Article provides:

"The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;

- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts."

As noted by the Secretary-General in his Report on the Statute, crimes against humanity were first recognized in the trials of war criminals following World War II. (Report of the Secretary-General, at para. 47.) The offence was defined in Article 6, paragraph 2(c) of the Nuremberg Charter and subsequently affirmed in the 1948 General Assembly Resolution affirming the Nuremberg principles.

139. Before the Trial Chamber, Counsel for Defence emphasized that both of these formulations of the crime limited it to those acts committed "in the execution of or in connection with any crime against peace or any war crime." He argued that this limitation persists in contemporary international law and constitutes a requirement that crimes against humanity be committed in the context of an international armed conflict (which assertedly was missing in the instant case). According to Counsel for Defence, jurisdiction under Article 5 over crimes against humanity "committed in armed conflict, whether international or internal in character" constitutes an ex post facto law violating the principle of *nullum crimen sine lege*. Although before the Appeals Chamber the Appellant has forgone this argument (*see* Appeal Transcript, 8 September 1995, at 45), in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5.

140. As the Prosecutor observed before the Trial Chamber, the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law No. 10 of 20 December 1945. (Control Council Law No. 10, Control Council for Germany, Official Gazette, 31 January 1946, at p. 50.). The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict. (Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 1, 78 U.N.T.S. 277, Article 1 (providing that genocide, "whether committed in time of peace or in time of war, is a crime under international law"); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243, arts. 1-2 Article . I(1)).

141. It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege*.

142. We conclude, therefore, that Article 5 may be invoked as a basis of jurisdiction over crimes

committed in either internal or international armed conflicts. In addition, for the reasons stated above, in Section IV A, (paras. 66-70), we conclude that in this case there was an armed conflict. Therefore, the Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N. SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).).

144. We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute. As the defendant in this case has not been charged with any violations of any specific agreement, we find it unnecessary to determine whether any specific agreement gives the International Tribunal jurisdiction over the alleged crimes.

145. For the reasons stated above, the third ground of appeal, based on lack of subject-matter jurisdiction, must be dismissed.

V. DISPOSITION

146. For the reasons hereinabove expressed and
Acting under Article 25 of the Statute and Rules 72, 116 bis and 117 of the Rules of Procedure and Evidence,

The Appeals Chamber

(1) By 4 votes to 1,

Decides that the International Tribunal is empowered to pronounce upon the plea challenging the legality of the establishment of the International Tribunal.

IN FAVOUR: *President Cassese, Judges Deschênes, Abi-Saab and Sidhwa*

AGAINST: *Judge Li*

(2) Unanimously

Decides that the aforementioned plea is dismissed.

(3) Unanimously

Decides that the challenge to the primacy of the International Tribunal over national courts is dismissed.

(4) By 4 votes to 1

Decides that the International Tribunal has subject-matter jurisdiction over the current case.

IN FAVOUR: *President Cassese, Judges Li, Deschênes, Abi-Saab*

AGAINST: *Judge Sidhwa*

ACCORDINGLY, THE DECISION OF THE TRIAL CHAMBER OF 10 AUGUST 1995 STANDS REVISED, THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL IS AFFIRMED AND THE APPEAL IS DISMISSED.

Done in English, this text being authoritative.*

(Signed) Antonio Cassese,
President

Judges Li, Abi-Saab and Sidhwa append separate opinions to the Decision of the Appeals Chamber

Judge Deschênes appends a Declaration.

(Initialled) A. C.

Dated this second day of October 1995
The Hague
The Netherlands

[Seal of the Tribunal]

* French translation to follow

1 "Trattasi di norme [concernenti i reati contro le leggi e gli usi della guerra] che, per il loro contenuto altamente etico e umanitario, hanno carattere non territoriale, ma universale... Dalla solidarietà delle varie nazioni, intesa a lenire nel miglior modo possibile gli orrori della guerra, scaturisce la necessità di dettare disposizioni che non conoscano barriere, colpendo chi delinque, dovunque esso si trovi...
..[I] reati contro le leggi e gli usi della guerra non possono essere considerati delitti politici, poichè non offendono un interesse politico di uno Stato determinato ovvero un diritto politico di un suo cittadino. Essi invece sono reati di lesa umanità, e, come si è precedentemente dimostrato, le norme relative hanno carattere universale, e non semplicemente territoriale. Tali reati sono,

di conseguenza, per il loro oggetto giuridico e per la loro particolare natura, proprio di specie opposta e diversa da quella dei delitti politici. Questi, di norma, interessano solo lo Stato a danno del quale sono stati commessi, quelli invece interessano tutti gli Stati civili, e vanno combattuti e repressi, come sono combattuti e repressi il reato di pirateria, la tratta delle donne e dei minori, la riduzione in schiavitù, dovunque siano stati commessi." (art. 537 e 604 c. p.).

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2. "[E]n raison de leur nature, les crimes contre l'humanité (...) ne relèvent pas seulement du droit interne français, mais encore d'un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères." (6 octobre 1983, 88 Revue Générale de Droit international public, 1984, p. 509.)

3 "El FMLN procura que sus métodos de lucha cumplan con lo estipulado per el artículo 3 comun a los Convenios de Ginebra y su Protocolo II Adicional, tomen en consideración las necesidades de la mayor'a de la población y estén orientados a defender sus libertades fundamentales."

4 The recorded vote on the resolution was 111 in favour and 0 against. After the vote was taken, however, Gabon represented that it had intended to vote against the resolution. (U.N. GAOR, 23rd Sess., 1748th Mtg., at 7, 12, U.N.Doc. A/PV.1748 (1968)).

5 The recorded vote on the resolution was 109 in favour and 0 against, with 8 members abstaining. (U.N. GAOR, 1922nd Mtg., at 12, U.N.Doc. A/PV.1922 (1970).)

6 "Dentro de esta línea de conducta, su mayor preocupación [de la Fuerza Armada] ha sido el mantenerse apegada estrictamente al cumplimiento de las disposiciones contenidas en los Convenios de Ginebra y en El Protocolo II de dichos Convenios, ya que no siendo el mismo aplicable a la situación que confronta actualmente el país, el Gobierno de El Salvador acata y cumple las disposiciones contenidas en dicho instrumento, por considerar que ellas constituyen el desarrollo y la complementación del Art. 3, como a los Convenios de Ginebra del 12 de agosto de 1949, que a su vez representa la protección mínima que se debe al ser humano en cualquier tiempo y lugar."

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7 "Ebenso wie ihre Verbündeten beachten Soldaten der Bundeswehr die Regeln des humanitären Völkerrechts bei militärischen Operationen in allen bewaffneten Konflikten, gleichgültig welcher Art."

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8 "Der Deutsche Bundestag befürchtet, dass Berichte zutreffend sein könnten, dass die irakischen Streitkräfte auf dem Territorium des Iraks nunmehr im Kampf mit kurdischen Aufständischen Giftgas eingesetzt haben. Er weist mit Entschiedenheit die Auffassung zurück, dass der Einsatz von Giftgas im Innern und bei bürgerkriegsähnlichen Auseinandersetzungen zulässig sei, weil er durch das Genfer Protokoll von 1925 nicht ausdrücklich verboten werde..."

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9 "1209. Schwere Verletzungen des humanitären Völkerrechts sind insbesondere; -Straftaten gegen geschützte Personen (Verwundete, Kranke, Sanitätspersonal, Militärgeistliche, Kriegsgefangene, Bewohner besetzter Gebiete, andere Zivilpersonen), wie vorsätzliche Tötung, Verstümmelung, Folterung oder unmenschliche Behandlung einschliesslich biologischer Versuche, vorsätzliche Verursachung grosser Leiden, schwere Beeinträchtigung der körperlichen Integrität oder Gesundheit, Geiselnahme (1 3, 49-51; 2 3, 50, 51; 3 3, 129, 130; 4 3, 146, 147; 5 11 Abs. 2, 85 Abs. 3 Buchst. a)

[. . .]

-Verhinderung eines unparteiischen ordentlichen Gerichtsverfahrens (1 3 Abs. 3 Buchst. d; 3 3 Abs. 1d; 5 85 Abs. 4 Buchst. e)."

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FELLOWSHIP PROGRAMME

Peace Palace – The Hague, the Netherlands
11 to 12 July 2011

STATE RESPONSIBILITY
JUDGE KENNETH KEITH

Codification Division of the United Nations Office of Legal Affairs

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Responsibility of States for Internationally Wrongful Acts (General Assembly resolution 56/83 of 12 December 2001, annex) 302

Jurisprudence

1. *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, Decision of 30 April 1990, Reports of International Arbitral Awards, vol. XX, pp. 215-284* 310
2. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007* 346

**The Law Relating to State Responsibility
and the Peaceful Settlement of International Disputes**
11-12, 15 July 2011
Judge Kenneth Keith
International Court of Justice

Introduction – common themes

These topics, like others in the program, present common themes about legal method. One is about the ways in which the law gets clarified and developed – by treaties which are of greatly different kinds, by subordinate instruments made under the authority of treaties, by state practice generating customary international law, by the recommendations, texts and decisions of organs of the UN (including the International Law Commission) and other international organisations, by decisions and opinions of courts and tribunals, by scholarly writing ... How are choices to be made between those different means? How, in determining the current state of the law, are those sources to be related? How, as a practical matter, are they to be accessed?

A second theme is about the way the law is stated – as detailed rules, as standards, as principles or as policies. There may also be issues about the relationships between those different forms.

A third is about the ways in which the law is implemented and applied, and about the ways in which disputes about its interpretation and application are settled or handled. How are choices to be made between those means?

A fourth theme is about the individuals who participate in these different processes – lawyers in private practice, in public practice (foreign ministries, defence, trade, finance, environment, communications, law departments ...) and in international organisations; government ministries and legislators; judges in national and international courts and tribunals; negotiators; scholars ... What may be said about their responsibilities?

These issues arise in national legal systems as well. Take care not to treat national legal issues and international ones separately. There is much overlap.

State responsibility

The International Law Commission in preparing its draft articles on State responsibility referred to them as “secondary” rules. By using that adjective they did not mean to indicate that they are of lesser importance. On the contrary, to quote the words of Professor James Crawford, the final special rapporteur on the topic, they are a contribution to the codification and progressive development of a fundamental chapter in international law, ranking, potentially at least, alongside the ILC’s draft articles on the law of treaties which with limited changes became the Vienna Convention on the Law of Treaties. The articles provide a framework, basic rules of international law concerning the responsibility of States for their internationally wrongful acts.

These draft articles present an array of important questions:

1. What is their legal force? Compare the Charter or the Vienna Convention, or the Friendly Relations Declaration. The ILC in referring them to the General Assembly recommended that the Assembly initially take note of and append the articles to a resolution, reserving to a later session the question whether they should be embodied in a convention. The Assembly has considered the articles at four sessions beginning in 2001, has acknowledged their importance, and commended them to the attention of governments without prejudice to the question of their future adoption or other appropriate action. The UN Secretariat has collected relevant case law and States have provided comment and information. See also the interaction between the ILC and courts and tribunals as the text was being prepared.

2. How are the rules stated in the draft articles and other rules of law to be related? What for instance is the impact of the rules stated in Chapter V of Part 1 (Articles 20-27) on obligations arising under other rules of law?

3. What is the significance of different types of obligations, e.g. obligations of a continuing character and not of a continuing character, obligations of conduct and of result, obligations owed to a particular State, a group of States or the international community as a whole, obligations arising under a peremptory norm ...; or the significance of a gross or serious breach?

4. In what circumstances will the actions of persons, bodies or groups which are not part of the State be attributed to it?

5. What is the relationship between the responsibility of the State and the responsibility of the individual who undertakes the action? Can the one exclude the other?

Peaceful settlement of international disputes

We may begin with the balance between the prohibition or the use of force and the obligation to settle disputes by peaceful means as seen in the Kellogg Briand Pact, Articles 2 (3) and 2 (4) of the Charter of the UN, along with Article 33 of the Charter and the annexed Statute of the ICJ, the 1970 Friendly Relations Declaration and the 2005 UN outcome statement. We may go back further to the 1899 and the 1907 Hague Conventions on the Peaceful Settlement of International Disputes. Note first of all the very wide choice of means that is available to States. Note too the basic proposition that they are not subject to any process for peaceful settlement means unless they agree; but, to balance that, note that States are increasingly subject to many such processes as a result for instance of becoming a member of the UN, the WTO, the ILO ... or being a party to the treaties such as those on the Law of the Sea or human rights. Note too that international processes are increasingly available to individuals and legal

persons (corporations, companies ...). And that national courts too are involved in deciding matters of an international character or governed by international law.

1. What matters should States weigh in deciding to become subject to international processes for dispute settlement?

2. How should they choose between available methods, when choices are available?

3. How is the “dispute” to be defined in any particular case? See the use of the words “questions” and “situations” as well as “disputes” in the Charter. Is the word “settled” always the most appropriate? “Handled”? “Left to one side”?

4. Consider those very broad questions by reference to the subject matters, cases and disputes you are discussing over these weeks. Consider them by reference to your national experience – of negotiation, inquiry, mediation, good offices, arbitration, special tribunals, courts ...

5. Does the rapid development of international courts and tribunals threaten the coherence of international law? Is there a danger of fragmentation?

**Responsibility of States for
Internationally Wrongful Acts
(General Assembly resolution 56/83
of 12 December 2001)**



General Assembly

Distr.: General
28 January 2002

Fifty-sixth session
Agenda item 162

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/56/589 and Corr.1)]

56/83. Responsibility of States for internationally wrongful acts

The General Assembly,

Having considered chapter IV of the report of the International Law Commission on the work of its fifty-third session,¹ which contains the draft articles on responsibility of States for internationally wrongful acts,

Noting that the International Law Commission decided to recommend to the General Assembly that it should take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution and annex the draft articles to that resolution, and that it should consider at a later stage, in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic,²

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in the relations of States,

1. *Welcomes* the conclusion of the work of the International Law Commission on responsibility of States for internationally wrongful acts and its adoption of the draft articles and a detailed commentary on the subject;

2. *Expresses its appreciation* to the International Law Commission for its continuing contribution to the codification and progressive development of international law;

3. *Takes note* of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action;

4. *Decides* to include in the provisional agenda of its fifty-ninth session an item entitled “Responsibility of States for internationally wrongful acts”.

*85th plenary meeting
12 December 2001*

Annex

Responsibility of States for internationally wrongful acts

PART ONE THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Chapter I General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Chapter II Attribution of conduct to a State

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

¹ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 and corrigendum (A/56/10 and Corr.1).*

² *Ibid.*, paras. 72 and 73.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5
Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6
Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7
Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9
Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10
Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11
Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Chapter III
Breach of an international obligation

Article 12
Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13
International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15
Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Chapter IV Responsibility of a State in connection with the act of another State

Article 16 Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 17 Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 18 Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) The coercing State does so with knowledge of the circumstances of the act.

Article 19 Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Chapter V Circumstances precluding wrongfulness

Article 20 Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21 Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22 Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23 Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

- (a) The situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) The State has assumed the risk of that situation occurring.

Article 24 Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

- (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) The act in question is likely to create a comparable or greater peril.

Article 25 Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) The international obligation in question excludes the possibility of invoking necessity; or
- (b) The State has contributed to the situation of necessity.

Article 26

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) The question of compensation for any material loss caused by the act in question.

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I

General principles

Article 28

Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Article 29

Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33

Scope of international obligations set out in this part

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Chapter II

Reparation for injury

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

*Article 37**Satisfaction*

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

*Article 38**Interest*

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

*Article 39**Contribution to the injury*

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Chapter III**Serious breaches of obligations under peremptory norms of general international law***Article 40**Application of this chapter*

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

*Article 41**Particular consequences of a serious breach of an obligation under this chapter*

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE**THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE****Chapter I****Invocation of the responsibility of a State***Article 42**Invocation of responsibility by an injured State*

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) Specially affects that State; or
 - (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

*Article 43**Notice of claim by an injured State*

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
 - (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
 - (b) What form reparation should take in accordance with the provisions of part two.

*Article 44**Admissibility of claims*

The responsibility of a State may not be invoked if:

- (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

*Article 45**Loss of the right to invoke responsibility*

The responsibility of a State may not be invoked if:

- (a) The injured State has validly waived the claim;
- (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46
Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47
Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

- (a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
- (b) Is without prejudice to any right of recourse against the other responsible States.

Article 48

Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

- (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
- (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Chapter II
Countermeasures

Article 49

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50
Obligations not affected by countermeasures

1. Countermeasures shall not affect:
 - (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) Obligations for the protection of fundamental human rights;
 - (c) Obligations of a humanitarian character prohibiting reprisals;
 - (d) Other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
 - (a) Under any dispute settlement procedure applicable between it and the responsible State;
 - (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51
Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:
 - (a) Call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;
 - (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
 - (a) The internationally wrongful act has ceased; and
 - (b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

*Article 54**Measures taken by States other than an injured State*

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR**GENERAL PROVISIONS***Article 55*

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

*Article 56**Questions of State responsibility not regulated by these articles*

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

*Article 57**Responsibility of an international organization*

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

*Article 58**Individual responsibility*

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

*Article 59**Charter of the United Nations*

These articles are without prejudice to the Charter of the United Nations.

**Case concerning the difference between New Zealand
and France concerning the interpretation or
application of two agreements, concluded on
9 July 1986 between the two States and which related
to the problems arising from the Rainbow Warrior
Affair, Decision of 30 April 1990,
Reports of International Arbitral Awards, vol. XX**

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair

30 April 1990

VOLUME XX pp. 215-284

CASE CONCERNING THE DIFFERENCE BETWEEN NEW ZEALAND AND FRANCE CONCERNING THE INTERPRETATION OR APPLICATION OF TWO AGREEMENTS, CONCLUDED ON 9 JULY 1986 BETWEEN THE TWO STATES AND WHICH RELATED TO THE PROBLEMS ARISING FROM THE RAINBOW WARRIOR AFFAIR*

30 APRIL 1990

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

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

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

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

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



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* The Award was rendered in English and French.

I. AGREEMENT TO ARBITRATE

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

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

I have the honour to refer to the two Agreements concluded today in the light of the ruling of the Secretary-General of the United Nations.

On the basis of that ruling, I have the honour further to propose that any dispute concerning the interpretation or application of either of these two Agreements which it has not been possible to resolve through the diplomatic channel shall, at the request of either of our two Governments, be submitted to an Arbitral Tribunal under the following conditions:

(a) each Government shall designate a member of the Tribunal within 30 days of the date of the delivery by either Government to the other of a written request for arbitration of the dispute, and the two Governments shall, within 60 days of that date, appoint a third member of the Tribunal who shall be its Chairman;

(b) if, within the times prescribed, either Government fails to designate a member of the Tribunal or the third member is not agreed the Secretary-General of the United Nations shall be requested to make the necessary appointment after consultations with the two Governments by choosing the member or members of the Tribunal;

(c) a majority of the members of the Tribunal shall constitute a quorum and all decisions shall be made by a majority vote;

(d) the decisions of the Tribunal, including all rulings concerning its constitution, procedure and jurisdiction, shall be binding on the two Governments.

If the foregoing is acceptable to the Government of New Zealand, I would propose that the present letter and your response to it to that effect should constitute an agreement between our two Governments with effect from today's date.

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

The Government of New Zealand and the Government of the French Republic RECALLING the three Agreements concluded by Exchanges of Letters of 9 July 1986 following the ruling of the Secretary-General of the United Nations relating to the Rainbow Warrior affair;

RECALLING FURTHER that the third Agreement establishes an arbitral procedure for the settlement of any dispute concerning the interpretation or application of either of the first two Agreements which it has not been possible to settle through the diplomatic channel;

NOTING that the Government of New Zealand by diplomatic Note of 22 September 1988 requested that this procedure be used to settle such a dispute;

NOTING ALSO that in accordance with the third Agreement an Arbitral Tribunal has been constituted comprising:

Dr. Eduardo Jiménez de Aréchaga, Chairman of the Tribunal, appointed by the two Governments,

Sir Kenneth Keith, designated by the Government of New Zealand, Mr. Jean-Denis Bredin, designated by the Government of the French Republic; BEARING IN MIND the provisions of the third Agreement;

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

HAVE AGREED AS FOLLOWS:

Article 1

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

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

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

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

Article 2

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

Article 3

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

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

Article 4

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

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

Article 5

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

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

2. The written pleadings shall consist of:

- (a) A Memorial, which shall be submitted by the Government of New Zealand to the Registrar of the Tribunal and to the French Agent within eight weeks after entry into force of this Agreement;
 - (b) A Counter-Memorial, which shall be submitted by the Government of the French Republic to the Registrar of the Tribunal and the New Zealand Agent within eight weeks after the date of receipt by the French Agent of the New Zealand Memorial;
 - (c) A Reply, which shall be submitted by the Government of New Zealand to the Registrar of the Tribunal and the French Agent within four weeks after the date of receipt by the New Zealand Agent of the French Counter-Memorial;
 - (d) A Rejoinder, which shall be submitted by the Government of the French Republic to the Registrar of the Tribunal and the New Zealand Agent within four weeks after the date of receipt by the French Agent of the New Zealand Reply;
 - (e) Such other written material as the Tribunal may determine to be necessary.
3. The Registrar shall notify the two Agents of the address for deposit of written pleadings and other written material.
4. Each document shall be communicated in six copies.
5. The Tribunal may extend the above time limits at the request of either Government.
6. The oral hearings shall follow the written proceedings after an interval of not less than two weeks.
7. Each Government shall be represented at the oral hearings by its Agent or deputy Agent and such counsel and experts as it deems necessary for this purpose.

Article 6

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

Article 7

1. On completion of the proceedings, the Tribunal shall render its Award as soon as possible and shall forward a copy of the Award, signed by the Chairman and the Registrar of the Tribunal, to the two Agents.
2. The Award shall state in full the reasons for the conclusions reached.

Article 8

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

Article 9

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

Article 10

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

II. SUMMARY OF THE PROCEEDINGS

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

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

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

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

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

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

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

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

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

For New Zealand:

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

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

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

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

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

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

For France:

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

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

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

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

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

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

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

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

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

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

III. FINAL SUBMISSIONS OF THE PARTIES

7. The final submissions of the parties are as follows:
For New Zealand, in the Memorial:

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

- (a) A declaration that the French Republic:
- (i) breached its obligations to New Zealand by failing to seek in good faith the consent of New Zealand to the removal of Major Mafart and Captain Prieur from the island of Hao;
 - (ii) breached its obligations to New Zealand by the removal of Major Mafart and Captain Prieur from the island of Hao;
 - (iii) is in breach of its obligations to New Zealand by the continuous absence of Major Mafart and Captain Prieur from the island of Hao;
 - (iv) is under an obligation to return Major Mafart and Captain Prieur promptly to the island of Hao for the balance of their three year periods in accordance with the conditions of the First Agreement;
- (b) An order that the French Republic shall promptly return Major Mafart and Captain Prieur to the island of Hao for the balance of their three year periods in accordance with the conditions of the First Agreement.

For France, in the Counter-Memorial:

Conclusion

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

For New Zealand, in the Reply:

Conclusion

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

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

For France, in the Rejoinder:

Conclusion

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

Oral conclusions:

For New Zealand:

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

For France:

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

IV. THE FACTS

The 1986 Ruling and Agreements

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

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

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

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

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

Ruling

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

1. *Apology*

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

2. *Compensation*

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

3. *The two French service agents*

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

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

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

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

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

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

My ruling is as follows:

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

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

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

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

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

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

4. *Trade issues*

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

(a) Not oppose continuing imports of New Zealand butter into the United Kingdom in 1987 and 1988 at levels proposed by the Commission of the European Communities insofar as these do not exceed those mentioned in document COM (83) 574 of 6 October 1983, that is to say, 77,000 tonnes in 1987 and 75,000 tonnes in 1988; and

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

5. *Arbitration*

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

The Case of Major Mafart

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A—The New Zealand request to have Major Mafart examined by a New Zealand physician who would go to Hao, via Papeete, then return to Auckland to report to his Government, who would then make their decision known, would delay the French officer's health-related transfer to mainland France by an excessive period of time that could be as long as several days, given the available transport opportunities. The French authorities feel that this additional delay is absolutely incompatible with the urgency, stressed by the doctor who examined Major Mafart, of transporting the Major to a highly specialized medical facility in mainland France.

B—In carrying out their duty to protect the health of their agents, the French authorities, in this case of *force majeure*, are forced to proceed, without any further delay, with the French officer's health-related repatriation. Major Mafart will leave Hao on Sunday 13 December at 2.00 (local time) on board a military plane that will arrive in Paris on Monday 14 December at about 10.00 (local time) after a technical stop in Poente-a-Pitre.

C—The French authorities reiterate that they are willing to allow Major Mafart to be examined by a physician chosen by New Zealand, as soon as he arrives in Paris, and that they are even willing to cover the cost of sending a physician from New Zealand for this purpose, if this solution is preferred by the New Zealand Government.

D—All measures have been taken to insure the confidentiality of the entire operation and to see to it that it remains secret, in any event until Major Mafart can be examined in mainland France by the physician designated by the New Zealand authorities".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the event that our doctor's examination does not confirm a medical condition requiring urgent specialist attention then he shall be returned forthwith to Hao and in the event that there is disagreement as to that then the provisions of (d) shall apply. I should be grateful for your urgent confirmation that this proposal is acceptable to you.

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

I hope that Major Mafart's health will improve.

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

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

Questions Dr. Croxson was asked to address:

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

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

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

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

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

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

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

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

(c) 2-3 weeks;

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. To supervise Major Mafart closely and in particular to witness if possible a major crisis at which time he would have a surgical consultation available.
2. To this end Major Mafart must remain close to his department near the hospital. Professor Daly would wish to review him should any new crisis appear and would be seeing him regularly at least once weekly for the next three to four weeks, and in his opinion Mafart should not return to Hao until the diagnosis and plan of treatment is more certain.
3. He feels that Mafart is very tired after the many investigations and explorations and is anxious in view of the diagnosis still not being settled, and he feels that some degree of "convalescence" for about three to four weeks is necessary.
4. He feels that perhaps exploratory surgery might be necessary, but again emphasized that he is not keen on blind laparotomy in view of the danger of new adhesions. I understand that he is proposing to discharge Mafart later this week and to review him once weekly.

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

Professor Croxson concluded:

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

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

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

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

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

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

40. On 28 January 1988 Professor Daly advised that:

Major Alain MAFART was hospitalized on 14 December 1987 at the VAL-de-GRACE hospital where he underwent in-depth radiological, biological and clinical tests. Given the need for close, specialized medical observation and on the basis of the standards of fitness governing military personnel, he must be considered as unfit to serve overseas for an indefinite period.

Prospects—Medical Decision:

1. Given the current uncertainties of the diagnosis, it does not seem warranted to propose an exploratory laparotomy right away for this abdominal ailment.
2. Depending on the subsequent clinical development, various additional tests can be considered:

—barium enema

—Wirsungography and pancreas function

—Mesenteric arteriography

These points have been discussed with Professor MALLINSON and Dr. CROXSON.

3. So, close observation is called for in order to forestall a more acute crisis, which is liable to entail a surgical procedure, or to schedule the aforementioned explorations.

4. So, Major MAFART must be kept in mainland France insofar as this observation can be done only in a modern, well-equipped hospital center.

Because of these exigencies, and pursuant to the standards of fitness governing French military personnel, he is declared unfit to serve overseas for an indefinite period.

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

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

Dr. Mallinson, consultant gastroenterologist, and myself examined Major Mafart in the Val-de-Grace hospital on Monday 25 January in the presence of and with the assistance of Professor Daly and Dr. Laverdant . . . we reviewed all the investigations, x-rays, laboratory studies which had been carried out . . .

Major Mafart has remained well, since his last report on 18 January, with no major episodes of pain or abdominal distension. He has been eating a light and varied diet and living in a house within the hospital confines . . . He did not appear depressed; his pulse, blood pressure and temperature were normal . . .

The report concluded as follows:

I believe the investigations have proceeded at a very slow pace and could well have been compressed within one to two weeks. There was no evidence produced to show that Major Mafart had an impending obstruction at the time he was evacuated from Hao and certainly if he had, he should have been airlifted to the nearest general surgical center, which we believe exists in Tahiti. It would have been dangerous to have flown him to Paris.

We do not believe that he needs to remain in the confines of a major hospital center for the indefinite future but that he could be returned to Hao now, continue life as normal, rest during minor attacks and obtain treatment from the military medical facilities in Hao if the attacks were of a more severe nature comparable to the satisfactory management of the two previous attacks in July and December which were carried out at Hao.

In the unlikely event that a major crisis with acute irreversible obstruction did occur, and we emphasize that none have appeared in the last 22 years, surgical treatment in Tahiti would be the logical appropriate and safest management. We do not feel that mesenteric angiography nor an ERCP are essential investigations in his management; if they were they could have been carried out by now.

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

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

The note added:

The medical reports available to both parties fully support the New Zealand position, which is corroborated by other evidence. There was no medical situation requiring emergency evacuation and the alternative proposals suggested by New Zealand for medical examination prior to giving consent to his departure were reasonable.

Despite the existence of this dispute regarding France's application of the Ruling and the Agreement, and while fully reserving its legal position at every

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

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

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

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

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

Mr. Bos' Visit to Hao

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

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

The Case of Captain Prieur

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

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

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

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

While New Zealand's consent is required in terms of the 1986 Agreement, this is not a case where, if the medical situation justifies it, consent would be unreasonably withheld.

The New Zealand Government would like, on the basis of medical consultation, to determine the nature of any special treatment that Captain Prieur might need and the place where the necessary tests and on-going treatment could be carried out if the facilities at Hao are not adequate.

As a first step to coming to an agreement on this basis, the New Zealand authorities are making arrangements for a New Zealand military doctor with the requisite qualifications to fly on the first available flight to Papeete for onward flight to Hao.

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

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

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

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

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

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

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

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

- A. It was not possible to ready a New Zealand military aircraft to leave for Hao "within the time limit set by France".
- B. Mr. Lange was not willing to agree to the departure of Mrs. Prieur from Hao for the reason invoked the same morning by the French Government (the state of health of the interested party's father).
- C. The response and offer that New Zealand had made regarding Mrs. Prieur's pregnancy were still valid.
- D. New Zealand would not give any guarantee of confidentiality regarding the state of health of Mrs. Prieur's father.
- E. New Zealand agreed to send a doctor on Friday morning to verify the state of health of Mrs. Prieur's father.

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

- A. The French Government considers it impossible, for obvious humanitarian reasons, to keep Mrs. Prieur on Hao while her father is dying in Paris. The French officer will therefore depart immediately for Paris.
- B. We agree that a New Zealand doctor may contact the doctors treating Dominique Prieur's father and, if those doctors agree to it, may examine the patient.
- C. Our offer of a medical examination of Mrs. Prieur, upon her return to metropolitan France, by a doctor chosen by New Zealand, remains valid.

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

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

The Government of New Zealand feels obliged to place on record at this time its concern about the actions of the former French Government with respect to France's obligations to New Zealand under international law in connection with the Agreement following from the Ruling of 6 July 1986 by the Secretary-General of the United Nations and incorporated in the Exchange of Letters between France and New Zealand of 9 July 1986. New Zealand must protest these actions in the strongest possible terms.

In this connection New Zealand must also recall the previous violations of those solemn undertakings when Major Mafart was removed from Hao in December 1987 without New Zealand's consent and when, contrary to the clear medical indications of adequate fitness, French authorities refused to restore compliance. New Zealand has sought to retain a cooperative relationship with France, including the activation of a medical team to visit Hao last week to examine Captain Prieur. Last week's unilateral acts by the former French Government constitute a further serious violation of legal obligations under the Agreement concluded under the auspices of the United Nations Secretary-General and give rise to a further legal dispute between France and New Zealand.

Prior to the events of last week New Zealand had publicly committed itself to seeking to resolve these problems through the diplomatic channel. It remains New Zealand's very strong wish to restore a climate of mutual confidence in its relations with France, and, accordingly, New Zealand continues to be willing to seek a settlement under which France would voluntarily return Major Mafart and Captain Prieur to Hao. An agreement whereby both officers could undergo specialist medical treatment in Tahiti, if that became necessary, and subject to appropriate conditions, could be envisaged.

The alternative approach is that the actions of the former French Government in this matter should be subject to independent review in accordance with the arbitration agreement between France and New Zealand. New Zealand awaits the response of the new French administration.

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

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

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

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

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

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

V. DISCUSSION

The Contentions of the Parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Applicable Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention (P.C.I.J., Series A, Nos. 9, 21 (1927)).

And the present Court has said:

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

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

Circumstances Precluding Wrongfulness

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

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

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

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

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

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

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

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

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

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

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

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

Article 32 (1) reads as follows:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

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

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

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

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

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

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

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

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

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

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

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

- 1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.
- 2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.
- 3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.

The Case of Major Mafart

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Case of Captain Prieur

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

99. In summary, the circumstances of distress, of extreme urgency and the humanitarian considerations invoked by France may have been circumstances excluding responsibility for the unilateral removal of Major Mafart without obtaining New Zealand's consent, but clearly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations and a breach of a material character.

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

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

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

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

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

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

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

Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach.

And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishing of the reparation which is adequate for a violation presenting these two features.

For the foregoing reasons the Tribunal:

- declares that the French Republic committed a material breach of its obligations to New Zealand by not endeavouring in good faith to obtain on 5 May 1988 New Zealand's consent to Captain Prieur's leaving the island of Hao;
- declares that as a consequence the French Republic committed a material breach of its obligations by removing Captain Prieur from the island of Hao on 5 and 6 May 1988;
- declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Captain Prieur to the island of Hao.

Duration of the Obligations

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

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

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

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

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

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

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

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

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

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

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

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

the termination of a treaty under its provisions

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

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

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

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

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

For the foregoing reasons the Tribunal:

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

Existence of Damage

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

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

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

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

in inter-State relations, the concept of damage does not possess an exclusive material or patrimonial character. Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State (cf. Soerensen, *Manual cit.*, p. 534).

110. In the present case the Tribunal must find that the infringement of the special regime designed by the Secretary-General to reconcile the conflicting views of the Parties has provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage. This damage is of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well.

The Appropriate Remedies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For the foregoing reasons the Tribunal:

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

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

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

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

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

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

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

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

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

On Monetary Compensation

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

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

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

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

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

On Declarations of Unlawfulness as Satisfaction

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

122. There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obliga-

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

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

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

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

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

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

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

For the foregoing reasons the Tribunal:

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

Recommendation

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

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

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

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

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

For the foregoing reasons the Tribunal:

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

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

VI. DECISION

For these reasons,

THE ARBITRAL TRIBUNAL

- 1) by a majority declares that the French Republic did not breach its obligation to New Zealand by removing Major Mafart from the island of Hao on 13 December 1987;
- 2) declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Major Mafart to the island of Hao as from 12 February 1988;
- 3) declares that the French Republic committed a material breach of its obligations to New Zealand by not endeavouring in good faith to obtain on 5 May 1988 New Zealand's consent to Captain Prieur's leaving the island of Hao;
- 4) declares that as a consequence the French Republic committed a material breach of its obligations to New Zealand by removing Captain Prieur from the island of Hao on 5 and 6 May 1988;
- 5) declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Captain Prieur to the island of Hao;
- 6) by a majority declares that the obligations of the French Republic requiring the stay of Major Mafart and Captain Prieur on the island of Hao ended on 22 July 1989;
- 7) as a consequence declares that it cannot accept the requests of New Zealand for a declaration and an order that Major Mafart and Captain Prieur return to the island of Hao;
- 8) declares that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand;
- 9) in the light of the above decisions, recommends that the Governments of the French Republic and of New Zealand set up a fund to promote close and friendly relations between the citizens of the two countries, and that the Government of the French Republic make an initial contribution equivalent to \$US 2 million to that fund.

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

Eduardo JIMÉNEZ DE ARÉCHAGA
President

Michael F. HOELLERING
Registrar

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

Separate opinion of Sir Kenneth Keith

1. As appears from paras. 2 to 5 and 7 to 9 of the Decision of the Tribunal, I agree with major parts of the Award. In particular I agree — that France committed several serious breaches of the agreement it had entered into in 1986 in accordance with the binding ruling of the United Nations Secretary-General, — that the Tribunal should declare its condemnation of those breaches in its Award which it also decides to make public, and — that the parties should be recommended to establish a Fund, France making the first contribution equivalent to \$US 2 million, to promote close and friendly relations between the citizens of the 2 countries.
 2. To my regret and with great respect to my colleagues, I do however disagree with them on two matters— — the lawfulness of the removal of Major Mafart from the island of Hao (paras. 80-88 of the Award), and — the duration of the period the two agents were to stay on the island (paras. 102-106).
- I have accordingly prepared this separate opinion giving my reasons for that disagreement.

The removal of Major Mafart

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Duration of the obligations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (1) prohibits departure *from the island* without consent;
- (2) requires isolation *during their assignment in Hao* from persons other than military or associated personnel and immediate family and friends; and
- (3) prohibits contact with the press or other media.

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

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

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

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

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

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

- the expression of philosophical, religious and political beliefs in the context of the service;
- the obligation of discretion (*réserve*) in all circumstances;
- the requirements of military secrets.

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

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

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

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

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

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

Kenneth KEITH

**Case Concerning the Application of the Convention
on the Prevention and Punishment of the
Crime of Genocide (Bosnia and Herzegovina v.
Serbia and Montenegro), Judgment of
26 February 2007, I.C.J. Reports 2007**

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List of acronyms

Abbreviation	Full name	Comments
ARBiH	Army of the Republic of Bosnia and Herzegovina	
FRY	Federal Republic of Yugoslavia	Name of Serbia and Montenegro between 27 April 1992 (adoption of the Constitution) and 3 February 2003
ICTR	International Criminal Tribunal for Rwanda	
ICTY	International Criminal Tribunal for the former Yugoslavia	
ILC	International Law Commission	
JNA	Yugoslav People's Army	Army of the SFRY (ceased to exist on 27 April 1992, with the creation of the VJ)
MUP	Ministarstvo Unutrašnjih Pollova	Ministry of the Interior
NATO	North Atlantic Treaty Organization	
SFRY	Socialist Federal Republic of Yugoslavia	
TO	Teritorijalna Odbrana	Territorial Defence Forces
UNHCR	United Nations High Commissioner for Refugees	
UNPROFOR	United Nations Protection Force	
VJ	Yugoslav Army	Army of the FRY, under the Constitution of 27 April 1992 (succeeded to the JNA)
VRS	Army of the Republika Srpska	

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INTERNATIONAL COURT OF JUSTICE

YEAR 2007

26 February 2007

CASE CONCERNING THE APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO)

JUDGMENT

Present: *President* HIGGINS; *Vice-President* AL-KHASAWNEH; *Judges* RANJEVA, SHI, KOROMA, OWADA, SIMMA, TOMKA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV; *Judges ad hoc* MAHIOU, KREČA; *Registrar* COUVREUR.

In the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide,

between

Bosnia and Herzegovina,

represented by

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as Deputy Agent;

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Mr. Vladimir Cvetković, Second Secretary of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,

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Ms Dina Dobrkovic, LL.B.,

as Assistants,

The COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina (with effect from 14 December 1995 “Bosnia and Herzegovina”) filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Yugoslavia (with effect from 4 February 2003, “Serbia and Montenegro” and with effect from 3 June 2006, the Republic of Serbia — see paragraphs 67 and 79 below) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter “the Genocide Convention” or “the Convention”), as well as various matters which Bosnia and Herzegovina claimed were connected therewith. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Application was immediately communicated to the Government of the Federal Republic of Yugoslavia (hereinafter “the FRY”) by the Registrar; and in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. In conformity with Article 43 of the Rules of Court, the Registrar addressed the notification provided for in Article 63, paragraph 1, of the Statute to all the States appearing on the list of the parties to the Genocide Convention held by the Secretary-General of the United Nations as depositary. The Registrar also sent to the Secretary-General the notification provided for in Article 34, paragraph 3, of the Statute.

4. On 20 March 1993, immediately after the filing of its Application, Bosnia and Herzegovina submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court. On 31 March 1993, Bosnia and Herzegovina filed in the Registry, and invoked as an additional basis of jurisdiction, the text of a letter dated 8 June 1992, addressed jointly by the President of the then Republic of Montenegro and the President of the then Republic of Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia. On 1 April 1993, the FRY submitted written observations on Bosnia and Herzegovina’s request for provisional measures, in which it, in turn, recommended that the Court indicate provisional measures to be applied to Bosnia and Herzegovina. By an Order dated 8 April 1993, the Court, after hearing the Parties, indicated certain provisional measures with a view to the protection of rights under the Genocide Convention.

5. By an Order dated 16 April 1993, the President of the Court fixed 15 October 1993 as the time-limit for the filing of the Memorial of Bosnia and Herzegovina and 15 April 1994 as the time-limit for the filing of the Counter-Memorial of the FRY.

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Bosnia and Herzegovina chose Mr. Eilhu Lauterpacht and the FRY chose Mr. Milenko Kreća.

7. On 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures. By letters of 6 August and 10 August 1993, the Agent of Bosnia and Herzegovina indicated that his Government wished to invoke additional bases of jurisdiction in the case: the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities, signed at Saint-Germain-en-Laye on 10 September 1919, and customary and conventional international laws of war and international humanitarian law. By a letter of 13 August 1993, the Agent of Bosnia and Herzegovina confirmed his Government's intention also to rely on the above-mentioned letter from the Presidents of Montenegro and Serbia dated 8 June 1992 as an additional basis of jurisdiction (see paragraph 4).

8. On 10 August 1993, the FRY also submitted a request for the indication of provisional measures and on 10 August and 23 August 1993, it filed written observations on Bosnia and Herzegovina's new request. By an Order dated 13 September 1993, the Court, after hearing the Parties, reaffirmed the measures indicated in its Order of 8 April 1993 and stated that those measures should be immediately and effectively implemented.

9. By an Order dated 7 October 1993, the Vice-President of the Court, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Memorial to 15 April 1994 and accordingly extended the time-limit for the filing of the Counter-Memorial to 15 April 1995. Bosnia and Herzegovina filed its Memorial within the time-limit thus extended. By a letter dated 9 May 1994, the Agent of the FRY submitted that the Memorial filed by Bosnia and Herzegovina failed to meet the requirements of Article 43 of the Statute and Articles 50 and 51 of the Rules of Court. By letter of 30 June 1994, the Registrar, acting on the instructions of the Court, requested Bosnia and Herzegovina, pursuant to Article 50, paragraph 2, of the Rules of Court, to file as annexes to its Memorial the extracts of the documents to which it referred therein. Bosnia and Herzegovina accordingly filed Additional Annexes to its Memorial on 4 January 1995.

10. By an Order dated 21 March 1995, the President of the Court, at the request of the FRY, extended the time-limit for the filing of the Counter-Memorial to 30 June 1995. Within the time-limit thus extended, the FRY, referring to Article 79, paragraph 1, of the Rules of Court of 14 April 1978, raised preliminary objections concerning the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 July 1995, the President of the Court noted that, by virtue of Article 79, paragraph 3, of the 1978 Rules of Court, the proceedings on the merits were suspended, and fixed 14 November 1995 as the time-limit within which Bosnia and Herzegovina might present a written statement of its observations and submissions on the preliminary objections raised by the FRY. Bosnia and Herzegovina filed such a statement within the time-limit thus fixed.

11. By a letter dated 2 February 1996, the Agent of the FRY submitted to the Court the text of the General Framework Agreement for Peace in Bosnia and Herzegovina and the annexes thereto, initialled in Dayton, Ohio, on 21 November 1995, and signed in Paris on 14 December 1995 (hereinafter the "Dayton Agreement").

12. Public hearings were held on preliminary objections between 29 April and 3 May 1996. By a Judgment of 11 July 1996, the Court dismissed the preliminary objections and found that it had jurisdiction to adjudicate on the dispute on the basis of Article IX of the Genocide Convention and that the Application was admissible.

13. By an Order dated 23 July 1996, the President fixed 23 July 1997 as the time-limit for the filing of the Counter-Memorial of the FRY. The Counter-Memorial, which was filed on 22 July 1997, contained counter-claims. By a letter dated 28 July 1997, Bosnia and Herzegovina, invoking Article 80 of the 1978 Rules of Court, challenged the admissibility of the counter-claims. On 22 September 1997, at a meeting held between the President of the Court and the Agents of the Parties, the Agents accepted that their respective Governments submit written observations on the question of the admissibility of the counter-claims. Bosnia and Herzegovina and the FRY submitted their observations to the Court on 10 October 1997 and 24 October 1997, respectively. By an Order dated 17 December 1997, the Court found that the counter-claims submitted by the FRY were admissible as such and formed part of the current proceedings since they fulfilled the conditions set out in Article 80, paragraphs 1 and 2, of the 1978 Rules of Court. The Court further directed Bosnia and Herzegovina to submit a Reply and the FRY to submit a Rejoinder relating to the claims of both Parties and fixed 23 January 1998 and 23 July 1998 as the respective time-limits for the filing of those pleadings. The Court also reserved the right of Bosnia and Herzegovina to present its views on the counter-claims of the FRY in an additional pleading.

14. By an Order dated 22 January 1998, the President, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Reply of Bosnia and Herzegovina to 23 April 1998 and accordingly extended the time-limit for the filing of the Rejoinder of the FRY to 22 January 1999.

15. On 15 April 1998, the Co-Agent of the FRY filed "Additional Annexes to the Counter-Memorial of the Federal Republic of Yugoslavia". By a letter dated 14 May 1998, the Deputy Agent of Bosnia and Herzegovina, referring to Articles 50 and 52 of the Rules of Court, objected to the admissibility of these documents in view of their late filing. On 22 September 1998, the Parties were informed that the Court had decided that the documents in question "[were] admissible as Annexes to the Counter-Memorial to the extent that they were established, in the original language, on or before the date fixed by the Order of 23 July 1996 for the filing of the Counter-Memorial" and that "[a]ny such document established after that date [would] have to be submitted as an Annex to the Rejoinder, if Yugoslavia so wishe[d]".

16. On 23 April 1998, within the time-limit thus extended, Bosnia and Herzegovina filed its Reply. By a letter dated 27 November 1998, the FRY requested the Court to extend the time-limit for the filing of its Rejoinder to 22 April 1999. By a letter dated 9 December 1998, Bosnia and

Herzegovina objected to any extension of the time-limit fixed for the filing of the Rejoinder. By an Order of 11 December 1998, the Court, having regard to the fact that Bosnia and Herzegovina had been granted an extension of the time-limit for the filing of its Reply, extended the time-limit for the filing of the Rejoinder of the FRY to 22 February 1999. The FRY filed its Rejoinder within the time-limit thus extended.

17. On 19 April 1999, the President of the Court held a meeting with the representatives of the Parties in order to ascertain their views with regard to questions of procedure. Bosnia and Herzegovina indicated that it did not intend to file an additional pleading concerning the counter-claims made by the FRY and considered the case ready for oral proceedings. The Parties also expressed their views about the organization of the oral proceedings.

18. By a letter dated 9 June 1999, the then Chairman of the Presidency of Bosnia and Herzegovina, Mr. Zivko Radisić, informed the Court of the appointment of a Co-Agent, Mr. Svetozar Miletić. By a letter dated 10 June 1999, the thus appointed Co-Agent informed the Court that Bosnia and Herzegovina wished to discontinue the case. By a letter of 14 June 1999, the Agent of Bosnia and Herzegovina asserted that the Presidency of Bosnia and Herzegovina had taken no action to appoint a Co-Agent or to terminate the proceedings before the Court. By a letter of 15 June 1999, the Agent of the FRY stated that his Government accepted the discontinuance of the proceedings. By a letter of 21 June 1999, the Agent of Bosnia and Herzegovina reiterated that the Presidency had not made any decision to discontinue the proceedings and transmitted to the Court letters from two members of the Presidency, including the new Chairman of the Presidency, confirming that no such decision had been made.

19. By letters dated 30 June 1999 and 2 September 1999, the President of the Court requested the Chairman of the Presidency to clarify the position of Bosnia and Herzegovina regarding the pendency of the case. By a letter dated 3 September 1999, the Agent of the FRY submitted certain observations on this matter, concluding that there was an agreement between the Parties to discontinue the case. By a letter dated 15 September 1999, the Chairman of the Presidency of Bosnia and Herzegovina informed the Court that at its 58th session held on 8 September 1999, the Presidency had concluded that: (i) the Presidency "did not make a decision to discontinue legal proceedings before the International Court of Justice"; (ii) the Presidency "did not make a decision to name a Co-Agent in this case"; (iii) the Presidency would "inform [the Court] timely about any further decisions concerning this case".

20. By a letter of 20 September 1999, the President of the Court informed the Parties that the Court intended to schedule hearings in the case beginning in the latter part of February 2000 and requested the Chairman of the Presidency of Bosnia and Herzegovina to confirm that Bosnia and Herzegovina's position was that the case should so proceed. By a letter of 4 October 1999, the Agent of Bosnia and Herzegovina confirmed that the position of his Government was that the case should proceed and he requested the Court to set a date for the beginning of the oral proceedings as soon as possible. By a letter dated 10 October 1999, the member of the Presidency of Bosnia and Herzegovina from the Republika Srpska informed the Court that the letter of 15 September 1999 from the Chairman of the Presidency was "without legal effects" *inter alia* because the National Assembly of the Republika Srpska, acting pursuant to the Constitution of Bosnia and Herzegovina, had declared the decision of 15 September "destructive of a vital interest" of the Republika Srpska. On 22 October 1999, the President informed the Parties that, having regard to the correspondence received on this matter, the Court had decided not to hold hearings in the case in February 2000.

21. By a letter dated 23 March 2000 transmitting to the Court a letter dated 20 March 2000 from the Chairman of the Presidency, the Agent of Bosnia and Herzegovina reaffirmed that the appointment of a Co-Agent by the former Chairman of the Presidency of Bosnia and Herzegovina on 9 June 1999 lacked any legal basis and that the communications of the Co-Agent did not reflect the position of Bosnia and Herzegovina. Further, the Agent asserted that, contrary to the claims of the member of the Presidency of Bosnia and Herzegovina from the Republic of Srpska, the letter of 15 September 1999 was not subject to the veto mechanism contained in the Constitution of Bosnia and Herzegovina. The Agent requested the Court to set a date for oral proceedings at its earliest convenience.

22. By a letter dated 13 April 2000, the Agent of the FRY transmitted to the Court a document entitled "Application for the Interpretation of the Decision of the Court on the Pendency of the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)", requesting an interpretation of the decision of the Court to which the President of the Court had referred in his letter dated 22 October 1999. By a letter dated 18 April 2000, the Registrar informed the Agent of the FRY that, according to Article 60 of the Statute, a request for interpretation could relate only to a judgment of the Court and therefore the document transmitted to the Court on 13 April 2000 could not constitute a request for interpretation and had not been entered on the Court's General List. The Registrar further explained that the sole decision to which reference was made in the letter of 22 October 1999 was that no hearings would be held in February 2000. The Registrar requested the Agent to transmit as soon as possible any comments he might have on the letter dated 23 March 2000 from the Agent of Bosnia and Herzegovina and the letter from the Chairman of the Presidency enclosed therewith. By a letter dated 25 April 2000, the Agent of the FRY submitted such comments to the Court and requested that the Court record and implement the agreement for the discontinuance of the case evidenced by the exchange of the letter of the Co-Agent of the Applicant dated 10 June 1999 and the letter of the Agent of the FRY dated 15 June 1999. By a letter dated 8 May 2000, the Agent of Bosnia and Herzegovina submitted certain observations regarding the letter dated 25 April 2000 from the Agent of the FRY and reiterated the wish of his Government to continue with the proceedings in the case. By letters dated 8 June, 26 June and 4 October 2000 from the FRY and letters dated 9 June and 21 September 2000 from Bosnia and Herzegovina, the Agents of the Parties restated their positions.

23. By a letter dated 29 September 2000, Mr. Svetozar Miletić, who had purportedly been appointed Co-Agent on 9 June 1999 by the then Chairman of the Presidency of Bosnia and Herzegovina, reiterated his position that the case had been discontinued. By a letter dated 6 October 2000, the Agent of Bosnia and Herzegovina stated that this letter and the recent communication from the Agent of the FRY had not altered the commitment of the Government of Bosnia and Herzegovina to continue the proceedings.

24. By letters dated 16 October 2000 from the President of the Court and from the Registrar, the Parties were informed that, at its meeting of 10 October 2000, the Court, having examined all the correspondence received on this question, had found that Bosnia and Herzegovina had not demonstrated its will to withdraw the Application in an unequivocal manner. The Court had thus concluded that there had been no discontinuance of the case by Bosnia and Herzegovina. Consequently, in accordance with Article 54 of the Rules, the Court, after having consulted the Parties, would, at an appropriate time, fix a date for the opening of the oral proceedings.

25. By a letter dated 18 January 2001, the Minister for Foreign Affairs of the FRY requested the Court to grant a stay of the proceedings or alternatively to postpone the opening of the oral proceedings for a period of 12 months due, *inter alia*, to the change of Government of the FRY and the resulting fundamental change in the policies and international position of that State. By a letter dated 25 January 2001, the Agent of Bosnia and Herzegovina communicated the views of his Government on the request made by the FRY and reserved his Government's final judgment on the matter, indicating that, in the intervening period, Bosnia and Herzegovina's position continued to be that there should be an expedited resolution of the case.

26. By a letter dated 20 April 2001, the Agent of the FRY informed the Court that his Government wished to withdraw the counter-claims submitted by the FRY in its Counter-Memorial. The Agent also informed the Court that his Government was of the opinion that the Court did not have jurisdiction *ratione personae* over the FRY and further that the FRY intended to submit an application for revision of the Judgment of 11 July 1996. On 24 April 2001, the FRY filed in the Registry of the Court an Application instituting proceedings whereby, referring to Article 61 of the Statute, it requested the Court to revise the Judgment delivered on Preliminary Objections on 11 July 1996 (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)*, hereinafter referred to as "the *Application for Revision case*"). In the present case the Agent of the FRY submitted, under cover of a letter dated 4 May 2001, a document entitled "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia", accompanied by one volume of annexes (hereinafter "the Initiative"). The Agent informed the Court that the Initiative was based on facts and arguments which were essentially identical to those submitted in the FRY's Application for revision of the Judgment of 11 July 1996 since his Government believed that these were both appropriate procedural avenues. In the Initiative, the FRY requested the Court to adjudge and declare that it had no jurisdiction *ratione personae* over the FRY, contending that it had not been a party to the Statute of the Court until its admission to the United Nations on 1 November 2000, that it had not been and still was not a party to the Genocide Convention; it added moreover that its notification of accession to that Convention dated 8 March 2001 contained a reservation to Article IX thereof. The FRY asked the Court to suspend the proceedings on the merits until a decision was rendered on the Initiative.

27. By a letter dated 12 July 2001 and received in the Registry on 15 August 2001, Bosnia and Herzegovina informed the Court that it had no objection to the withdrawal of the counter-claims by the FRY and stated that it intended to submit observations regarding the Initiative. By an Order dated 10 September 2001, the President of the Court placed on record the withdrawal by the FRY of the counter-claims submitted in its Counter-Memorial.

28. By a letter dated 3 December 2001, Bosnia and Herzegovina provided the Court with its views regarding the Initiative and transmitted a memorandum on "differences between the Application for Revision of 23 April 2001 and the 'Initiative' of 4 May 2001" as well as a copy of the written observations and annexes filed by Bosnia and Herzegovina on 3 December 2001 in the *Application for Revision* case. In that letter, Bosnia and Herzegovina submitted that "there [was] no basis in fact nor in law to honour this so-called 'Initiative'" and requested the Court *inter alia* to "respond in the negative to the request embodied in the 'Initiative'".

29. By a letter dated 22 February 2002 to the President of the Court, Judge *ad hoc* Lauterpacht resigned from the case.

30. Under cover of a letter of 18 April 2002, the Registrar, referring to Article 34, paragraph 3, of the Statute, transmitted copies of the written proceedings to the Secretary-General of the United Nations.

31. In its Judgment of 3 February 2003 in the *Application for Revision* case, the Court found that the FRY's Application for revision, under Article 61 of the Statute of the Court, of the Judgment of 11 July 1996 on preliminary objections was inadmissible.

32. By a letter dated 5 February 2003, the FRY informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro". The title of the case was duly changed and the name "Serbia and Montenegro" was used thereafter for all official purposes of the Court.

33. By a letter of 17 February 2003, Bosnia and Herzegovina reaffirmed its position with respect to the Initiative, as stated in the letter of 3 December 2001, and expressed its desire to proceed with the case. By a letter dated 8 April 2003, Serbia and Montenegro submitted that, due to major new developments since the filing of the last written pleading, additional written pleadings were necessary in order to make the oral proceedings more effective and less time-consuming. On 24 April 2003, the President of the Court held a meeting with the Agents of the Parties to discuss questions of procedure. Serbia and Montenegro stated that it maintained its request for the Court to rule on its Initiative while Bosnia and Herzegovina considered that there was no need for additional written pleadings. The possible dates and duration of the oral proceedings were also discussed.

34. By a letter dated 25 April 2003, Bosnia and Herzegovina chose Mr. Ahmed Mahiou to sit as judge *ad hoc* in the case.

35. By a letter of 12 June 2003, the Registrar informed Serbia and Montenegro that the Court could not accede to its request that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised in the Initiative; however, should it wish to do so, Serbia and Montenegro would be free to present further argument on jurisdictional questions during the oral proceedings on the merits. In further letters of the same date, the Parties were informed that the Court, having considered Serbia and Montenegro's request, had decided not to authorize the filing of further written pleadings in the case.

36. In an exchange of letters in October and November 2003, the Agents of the Parties made submissions as to the scheduling of the oral proceedings.

37. Following a further exchange of letters between the Parties in March and April 2004, the President held a meeting with the Agents of the Parties on 25 June 2004, at which the Parties presented their views on, *inter alia*, the scheduling of the hearings and the calling of witnesses and experts.

38. By letters dated 26 October 2004, the Parties were informed that, after examining the list of cases before it ready for hearing and considering all the relevant circumstances, the Court had decided to fix Monday 27 February 2006 for the opening of the oral proceedings in the case.

39. On 14 March 2005, the President met with the Agents of the Parties in order to ascertain their views with regard to the organization of the oral proceedings. At this meeting, both Parties indicated that they intended to call witnesses and experts.

40. By letters dated 19 March 2005, the Registrar, referring to Articles 57 and 58 of the Rules of Court, requested the Parties to provide, by 9 September 2005, details of the witnesses, experts and witness-experts whom they intended to call and indications of the specific point or points to which the evidence of the witness, expert or witness-expert would be directed. By a letter of 8 September 2005, the Agent of Serbia and Montenegro transmitted to the Court a list of eight witnesses and two witness-experts whom his Government wished to call during the oral proceedings. By a further letter of the same date, the Agent of Serbia and Montenegro communicated a list of five witnesses whose attendance his Government requested the Court to arrange pursuant to Article 62, paragraph 2, of the Rules of Court. By a letter dated 9 September 2005, Bosnia and Herzegovina transmitted to the Court a list of three experts whom it wished to call at the hearings.

41. By a letter dated 5 October 2005, the Deputy Agent of Bosnia and Herzegovina informed the Registry of Bosnia and Herzegovina's views with regard to the time that it considered necessary for the hearing of the experts it wished to call and made certain submissions, *inter alia*, with respect to the request made by Serbia and Montenegro pursuant to Article 62, paragraph 2, of the Rules of Court. By letters of 4 and 11 October 2005, the Agent and the Co-Agent of Serbia and Montenegro, respectively, informed the Registry of the views of their Government with respect to the time necessary for the hearing of the witnesses and witness-experts whom it wished to call.

42. By letters of 15 November 2005, the Registrar informed the Parties, *inter alia*, that the Court had decided that it would hear the three experts and ten witnesses and witness-experts that Bosnia and Herzegovina and Serbia and Montenegro respectively wished to call and, moreover, that it had decided not to arrange for the attendance, pursuant to Article 62, paragraph 2, of the Rules of Court, of the five witnesses proposed by Serbia and Montenegro. However, the Court reserved the right to exercise subsequently, if necessary, its powers under that provision to call persons of its choosing on its own initiative. The Registrar also requested the Parties to provide certain information related to the hearing of the witnesses, experts and witness-experts including, *inter alia*, the language in which each witness, expert or witness-expert would speak and, in respect of those speaking in a language other than English or French, the arrangements which the Party intended to make, pursuant to Article 70, paragraph 2, of the Rules of Court, for interpretation into one of the official languages of the Court. Finally the Registrar transmitted to the Parties the calendar for the oral proceedings as adopted by the Court.

43. By a letter dated 12 December 2005, the Agent of Serbia and Montenegro informed the Court, *inter alia*, that eight of the ten witnesses and witness-experts it wished to call would speak in Serbian and outlined the arrangements that Serbia and Montenegro would make for interpretation from Serbian to one of the official languages of the Court. By a letter dated 15 December 2005, the Deputy Agent of Bosnia and Herzegovina informed the Court, *inter alia*, that the three experts called by Bosnia and Herzegovina would speak in one of the official languages of the Court.

44. By a letter dated 28 December 2005, the Deputy Agent of Bosnia and Herzegovina, on behalf of the Government, requested that the Court call upon Serbia and Montenegro, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. By a letter dated 16 January 2006, the Agent of Serbia and Montenegro informed the Court of his Government's views on this request. By a letter dated 19 January 2006, the Registrar, acting on the instructions of the Court, asked Bosnia and Herzegovina to provide certain further information relating to its request under Article 49 of the Statute and Article 62, paragraph 2, of the Rules of Court. By letters dated 19 and 24 January 2006, the Deputy Agent of Bosnia and Herzegovina submitted additional information and informed the Court that Bosnia and Herzegovina had decided, for the time being, to restrict its request to the redacted sections of certain documents. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro communicated his Government's views regarding this modified request. By letters dated 2 February 2006, the Registrar informed the Parties that the Court had decided, at this stage of the proceedings, not to call upon Serbia and Montenegro to produce the documents in question. However, the Court reserved the right to exercise subsequently, if necessary, its powers under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to request, *proprio motu*, the production by Serbia and Montenegro of the documents in question.

45. By a letter dated 16 January 2006, the Deputy Agent of Bosnia and Herzegovina transmitted to the Registry copies of new documents that Bosnia and Herzegovina wished to produce pursuant to Article 56 of the Rules of Court. Under cover of the same letter and of a letter dated 23 January 2006, the Deputy Agent of Bosnia and Herzegovina also transmitted to the Registry copies of video material, extracts of which Bosnia and Herzegovina intended to present at the oral proceedings. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro informed the Court that his Government did not object to the production of the new documents by Bosnia and Herzegovina. Nor did it object to the video material being shown at the oral proceedings. By letters of 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objections had been raised by Serbia and Montenegro, the Court had decided to authorize the production of the new documents by Bosnia and Herzegovina pursuant to Article 56 of the Rules of Court and that it had further decided that Bosnia and Herzegovina could show extracts of the video material at the hearings.

46. Under cover of a letter dated 18 January 2006 and received on 20 January 2006, the Agent of Serbia and Montenegro provided the Registry with copies of new documents which his Government wished to produce pursuant to Article 56 of the Rules of Court. By a letter of 1 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not object to the production of the said documents by Serbia and Montenegro. By a letter dated 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objection had been raised by Bosnia and Herzegovina, the Court had decided to authorize the production of the new documents by Serbia and Montenegro. By a letter dated 9 February 2006,

the Co-Agent of Serbia and Montenegro transmitted to the Court certain missing elements of the new documents submitted on 20 January 2006 and made a number of observations concerning the new documents produced by Bosnia and Herzegovina. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not intend to make any observations regarding the new documents produced by Serbia and Montenegro.

47. Under cover of a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court a list of public documents that his Government would refer to in its first round of oral argument. By a further letter dated 14 February 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court copies of folders containing the public documents referred to in the list submitted on 31 January 2006 and informed the Court that Serbia and Montenegro had decided not to submit the video materials included in that list. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina had no observations to make regarding the list of public documents submitted by Serbia and Montenegro on 31 January 2006. He also stated that Bosnia and Herzegovina would refer to similar sources during its pleadings and was planning to provide the Court and the Respondent, at the end of the first round of its oral argument, with a CD-ROM containing materials it had quoted (see below, paragraph 54).

48. By a letter dated 26 January 2006, the Registrar informed the Parties of certain decisions taken by the Court with regard to the hearing of the witnesses, experts and witness-experts called by the Parties including, *inter alia*, that, exceptionally, the verbatim records of the sittings at which the witnesses, experts and witness-experts were heard would not be made available to the public or posted on the website of the Court until the end of the oral proceedings.

49. By a letter dated 13 February 2006, the Agent of Serbia and Montenegro informed the Court that his Government had decided not to call two of the witnesses and witness-experts included in the list transmitted to the Court on 8 September 2005 and that the order in which the remaining witnesses and witness-expert would be heard had been modified. By a letter dated 21 February 2006, the Agent of Serbia and Montenegro requested the Court's permission for the examination of three of the witnesses called by his Government to be conducted in Serbian (namely, Mr. Dušan Mihajlović, Mr. Vladimir Milićević, Mr. Dragoljub Mićunović). By a letter dated 22 February 2006, the Registrar informed the Agent of Serbia and Montenegro that there was no objection to such a procedure being followed, pursuant to the provisions of Article 39, paragraph 3, of the Statute and Article 70 of the Rules of Court.

50. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

51. Public sittings were held from 27 February to 9 May 2006, at which the Court heard the oral arguments and replies of:

For Bosnia and Herzegovina:

- Mr. Sakib Softić,
- Mr. Phon van den Biesen,
- Mr. Alain Pellet,
- Mr. Thomas M. Franck,
- Ms Brigitte Stern,
- Mr. Luigi Condorelli,
- Ms Magda Karagiannakis,
- Ms Joanna Korner,
- Ms Laura Dauban,
- Mr. Antoine Ollivier,
- Mr. Morten Torkildsen.

For Serbia and Montenegro:

- H.E. Mr. Radoslav Stojanović,
- Mr. Saša Obradović,
- Mr. Vladimir Cvetković,
- Mr. Tibor Varady,
- Mr. Ian Brownlie,
- Mr. Xavier de Roux,
- Ms Nataša Fauveau-Ivanović,
- Mr. Andreas Zimmerman,
- Mr. Vladimir Djerić,
- Mr. Igor Olujić.

52. On 1 March 2006, the Registrar, on the instructions of the Court, requested Bosnia and Herzegovina to specify the precise origin of each of the extracts of video material and of the graphics, charts and photographs shown or to be shown at the oral proceedings. On 2 March 2006 Bosnia and Herzegovina provided the Court with certain information regarding the extracts of video material shown at the sitting on 1 March 2006 and those to be shown at the sittings on 2 March 2006 including the source of such video material. Under cover of a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina transmitted to the Court a list detailing the origin of the extracts of video material, graphics, charts and photographs shown or to be shown by it during its first round of oral argument, as well as transcripts, in English and in French, of the above-mentioned extracts of video material.

53. By a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina informed the Court that it wished to withdraw one of the experts it had intended to call. In that letter, the Agent of Bosnia and Herzegovina also asked the Court to request each of the Parties to provide a one-page outline per witness, expert or witness-expert detailing the topics which would be covered in his evidence or statement. By letters dated 7 March 2006, the Parties were informed that the Court requested them to provide, at least three days before the hearing of each witness, expert or witness-expert, a one-page summary of the latter's evidence or statement.

54. On 7 March 2006, Bosnia and Herzegovina provided the Court and the Respondent with a CD-ROM containing "ICTY Public Exhibits and other Documents cited by Bosnia and Herzegovina during its Oral Pleadings (07/03/2006)". By a letter dated 10 March 2006, Serbia and Montenegro informed the Court that it objected to the production of the CD-ROM on the grounds that the submission at such a late stage of so many documents "raise[d] serious concerns related to

the respect for the Rules of Court and the principles of fairness and equality of the parties". It also pointed out that the documents included on the CD-ROM "appear[ed] questionable from the point of view of] Article 56, paragraph 4, of the Rules [of Court]". By a letter dated 13 March 2006, the Agent of Bosnia and Herzegovina informed the Court of his Government's views regarding the above-mentioned objections raised by Serbia and Montenegro. In that letter, the Agent submitted, *inter alia*, that all the documents on the CD-ROM had been referred to by Bosnia and Herzegovina in its oral argument and were documents which were in the public domain and were readily available within the terms of Article 56, paragraph 4, of the Rules of Court. The Agent added that Bosnia and Herzegovina was prepared to withdraw the CD-ROM if the Court found it advisable. By a letter of 14 March 2006, the Registrar informed Bosnia and Herzegovina that, given that Article 56, paragraph 4, of the Rules of Court did not require or authorize the submission to the Court of the full text of a document to which reference was made during the oral proceedings pursuant to that provision and since it was difficult for the other Party and the Court to come to terms, at the late stage of the proceedings, with such an immense mass of documents, which in any case were in the public domain and could thus be consulted if necessary, the Court had decided that it was in the interests of the good administration of justice that the CD-ROM be withdrawn. By a letter dated 16 March 2006, the Agent of Bosnia and Herzegovina withdrew the CD-ROM which it had submitted on 7 March 2006.

55. On 17 March 2006, Bosnia and Herzegovina submitted a map for use during the statement to be made by one of its experts on the morning of 20 March 2006. On 20 March 2006, Bosnia and Herzegovina produced a folder of further documents to be used in the examination of that expert. Serbia and Montenegro objected strongly to the production of the documents at such a late stage since its counsel would not have time to prepare for cross-examination. On 20 March 2006, the Court decided that the map submitted on 17 March 2006 could not be used during the statement of the expert. Moreover, having consulted both Parties, the Court decided to cancel the morning sitting and instead hear the expert during an afternoon sitting in order to allow Serbia and Montenegro to be ready for cross-examination.

56. On 20 March 2006, Serbia and Montenegro informed the Court that one of the witnesses it had intended to call finally would not be giving evidence.

57. The following experts were called by Bosnia and Herzegovina and made their statements at public sittings on 17 and 20 March 2006: Mr. Andráš J. Riedlmayer and General Sir Richard Dannatt. The experts were examined by counsel for Bosnia and Herzegovina and cross-examined by counsel for Serbia and Montenegro. The experts were subsequently re-examined by counsel for Bosnia and Herzegovina. Questions were put to Mr. Riedlmayer by Judges Kreča, Tomka, Simma and the Vice-President and replies were given orally. Questions were put to General Dannatt by the President, Judge Koroma and Judge Tomka and replies were given orally.

58. The following witnesses and witness-expert were called by Serbia and Montenegro and gave evidence at public sittings on 23, 24, 27 and 28 March 2006: Mr. Vladimir Lukić; Mr. Vitomir Popović; General Sir Michael Rose; Mr. Jean-Paul Sardon (witness-expert); Mr. Dušan Mihajlović; Mr. Vladimir Milićević; Mr. Dragoljub Mićunović. The witnesses and witness-expert were examined by counsel for Serbia and Montenegro and cross-examined by

counsel for Bosnia and Herzegovina. General Rose, Mr. Mihajlović and Mr. Milićević were subsequently re-examined by counsel for Serbia and Montenegro. Questions were put to Mr. Lukić by Judges Ranjeva, Simma, Tomka and Bennouna and replies were given orally. Questions were put to General Rose by the Vice-President and Judges Owada and Simma and replies were given orally.

59. With the exception of General Rose and Mr. Jean-Paul Sardon, the above-mentioned witnesses called by Serbia and Montenegro gave their evidence in Serbian and, in accordance with Article 39, paragraph 3, of the Statute and Article 70, paragraph 2, of the Rules of Court, Serbia and Montenegro made the necessary arrangements for interpretation into one of the official languages of the Court and the Registry verified this interpretation. Mr. Stojanović conducted his examination of Mr. Dragoljub Mićunović in Serbian in accordance with the exchange of correspondence between Serbia and Montenegro and the Court on 21 and 22 February 2006 (see paragraph 49 above).

60. In the course of the hearings, questions were put by Members of the Court, to which replies were given orally and in writing, pursuant to Article 61, paragraph 4, of the Rules of Court.

61. By a letter of 8 May 2006, the Agent of Bosnia and Herzegovina requested the Court to allow the Deputy Agent to take the floor briefly on 9 May 2006, in order to correct an assertion about one of the counsel of and one of the experts called by Bosnia and Herzegovina which had been made by Serbia and Montenegro in its oral argument. By a letter dated 9 May 2006, the Agent of Serbia and Montenegro communicated the views of his Government on that matter. On 9 May 2006, the Court decided, in the particular circumstances of the case, to authorize the Deputy Agent of Bosnia and Herzegovina to make a very brief statement regarding the assertion made about its counsel.

62. By a letter dated 3 May 2006, the Agent of Bosnia and Herzegovina informed the Court that there had been a number of errors in references included in its oral argument presented on 2 March 2006 and provided the Court with the corrected references. By a letter dated 8 May 2006, the Agent of Serbia and Montenegro, "in light of the belated corrections by the Applicant, and for the sake of the equality between the parties", requested the Court to accept a paragraph of its draft oral argument of 2 May 2006 which responded to one of the corrections made by Bosnia and Herzegovina but had been left out of the final version of its oral argument "in order to fit the schedule of [Serbia and Montenegro's] presentations". By a letter dated 7 June 2006, the Parties were informed that the Court had taken due note of both the explanation given by the Agent of Bosnia and Herzegovina and the observations made in response by the Agent of Serbia and Montenegro.

63. In January 2007, Judge Parra-Aranguren, who had attended the oral proceedings in the case, and had participated in part of the deliberation, but had for medical reasons been prevented from participating in the later stages thereof, informed the President of the Court, pursuant to Article 24, paragraph 1, of the Statute, that he considered that he should not take part in the decision of the case. The President took the view that the Court should respect and accept Judge Parra-Aranguren's position, and so informed the Court.

64. In its Application, the following requests were made by Bosnia and Herzegovina:

“Accordingly, while reserving the right to revise, supplement or amend this Application, and subject to the presentation to the Court of the relevant evidence and legal arguments, Bosnia and Herzegovina requests the Court to adjudge and declare as follows:

- (a) that Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V of the Genocide Convention;
- (b) that Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the People and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;
- (c) that Yugoslavia (Serbia and Montenegro) has violated and continues to violate Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;
- (d) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;
- (e) that in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1 (3), 55 and 56 of the United Nations Charter;
- (f) that Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4) and 33 (1), of the United Nations Charter;
- (g) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;
- (h) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:
 - armed attacks against Bosnia and Herzegovina by air and land;
 - aerial trespass into Bosnian airspace;
 - efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;

- (i) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;
- (j) that Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2 (4), of the United Nations Charter, as well as its obligations under general and customary international law;
- (k) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend itself and its People under United Nations Charter Article 51 and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;
- (l) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under United Nations Charter Article 51 and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment, supplies, troops, etc.);
- (m) that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;
- (n) that all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;
- (o) that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United Nations Charter and in accordance with the customary doctrine of *ultra vires*;
- (p) that pursuant to the right of collective self-defence recognized by United Nations Charter Article 51, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina — at its request — including by means of immediately providing it with weapons, military equipment and supplies, and armed forces (soldiers, sailors, air-people, etc.);

- (g) that Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:
 - from its systematic practice of so-called ‘ethnic cleansing’ of the citizens and sovereign territory of Bosnia and Herzegovina;
 - from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;
 - from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;
 - from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
 - from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
 - from the starvation of the civilian population in Bosnia and Herzegovina;
 - from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;
 - from all use of force — whether direct or indirect, overt or covert — against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;
 - from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;
 - from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;
- (r) that Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro).”

65. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Bosnia and Herzegovina,

in the Memorial:

“On the basis of the evidence and legal arguments presented in this Memorial, the Republic of Bosnia and Herzegovina,

Requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia (Serbia and Montenegro), directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population, by
 - killing members of the group;
 - causing deliberate bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - imposing measures intended to prevent births within the group;
2. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;
3. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;
4. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;
5. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;
6. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia (Serbia and Montenegro) is required to pay, and the Republic of Bosnia and Herzegovina is entitled to receive, in its own right and as *parents patriae* for its citizens, full compensation for the damages and losses caused, in the amount to be determined by the Court in a subsequent phase of the proceedings in this case.

The Republic of Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings.

The Republic of Bosnia and Herzegovina also respectfully draws the attention of the Court to the fact that it has not reiterated, at this point, several of the requests it made in its Application, on the formal assumption that the Federal Republic of Yugoslavia (Serbia and Montenegro) has accepted the jurisdiction of this Court under the terms of the Convention on the Prevention and Punishment of the Crime of Genocide. If the Respondent were to reconsider its acceptance of the jurisdiction of the Court under the terms of that Convention — which it is, in any event, not entitled to do — the Government of Bosnia and Herzegovina reserves its right to invoke also all or some of the other existing titles of jurisdiction and to revive all or some of its previous submissions and requests.”

On behalf of the Government of Serbia and Montenegro,

in the Counter-Memorial¹:

“The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,

— since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or

— if some have been committed, there was absolutely no intention of committing genocide, and/or

— they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group,

consequently, they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,

— since they have not been committed by the organs of the Federal Republic of Yugoslavia,

— since they have not been committed on the territory of the Federal Republic of Yugoslavia,

— since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,

— since there is no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

therefore the Court rejects all claims of the Applicant; and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

— because it has incited acts of genocide by the ‘Islamic Declaration’, and in particular by the position contained in it that ‘there can be no peace or coexistence between “Islamic faith” and “non-Islamic” social and political institutions’,

— because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth, and in particular by the verses of a ‘Patriotic Song’ which read as follows:

‘Dear mother, I’m going to plant willows,
We’ll hang Serbs from them.

Dear mother, I’m going to sharpen knives,
We’ll soon fill pits again’;

— because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that ‘Each Muslim must name a Serb and take oath to kill him’;

— because public calls for the execution of Serbs were broadcast on radio ‘Hajat’ and thereby acts of genocide were incited;

— because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;

— because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all consequences of the violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and provide adequate compensation.”

On behalf of the Government of Bosnia and Herzegovina,

in the Reply:

“Therefore the Applicant persists in its claims as presented to this Court on 14 April 1994, and recapitulates its Submissions in their entirety. Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia, directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of Bosnia and Herzegovina, including in particular the Muslim population, by

- killing members of the group;
- causing deliberate bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia is required to pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the amount to be determined by the Court in a subsequent phase of the proceedings in this case.

Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings;

8. On the very same grounds the conclusions and submissions of the Federal Republic of Yugoslavia with regard to the submissions of Bosnia and Herzegovina need to be rejected;

9. With regard to the Respondent’s counter-claims the Applicant comes to the following conclusion. There is no basis in fact and no basis in law for the proposition that genocidal acts have been committed against Serbs in Bosnia and Herzegovina. There is no basis in fact and no basis in law for the proposition that any such acts, if proven, would have been committed under the responsibility of Bosnia and Herzegovina or that such acts, if proven, would be attributable to Bosnia and Herzegovina. Also, there is no basis in fact and no basis in law for the proposition that Bosnia and Herzegovina has violated any of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. On the contrary, Bosnia and Herzegovina has continuously done everything within its possibilities to adhere to its obligations under the Convention, and will continue to do so;

10. For these reasons, Bosnia and Herzegovina requests the International Court of Justice to reject the counter-claims submitted by the Respondent in its Counter-Memorial of 23 July 1997.”

On behalf of the Government of Serbia and Montenegro,

in the Rejoinder:

“The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,

- since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or
- if some have been committed, there was absolutely no intention of committing genocide, and/or

— they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group,

consequently they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,

— since they have not been committed by the organs of the Federal Republic of Yugoslavia,

— since they have not been committed on the territory of the Federal Republic of Yugoslavia,

— since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,

— since there are no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

therefore the Court rejects all the claims of the Applicant, and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

— because it has incited acts of genocide by the ‘Islamic Declaration’, and in particular by the position contained in it that *‘there can be no peace or coexistence between “Islamic faith” and “non-Islamic” social and political institutions’*;

— because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth, and in particular by the verses of a ‘Patriotic Song’ which read as follows:

‘Dear mother, I’m going to plant willows,
We’ll hang Serbs from them.
Dear mother, I’m going to sharpen knives,
We’ll soon fill pits again’;

— because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that ‘Each Muslim’ must name a Serb and take oath to kill him;

— because public calls for the execution of Serbs were broadcast on radio ‘Hajat’ and thereby acts of genocide were incited;

— because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;

— because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all the consequences of violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and to provide adequate compensation.”

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

On behalf of the Government of Bosnia and Herzegovina,

at the hearing of 24 April 2006:

“Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare:

1. That Serbia and Montenegro, through its organs or entities under its control, has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying in part the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population, by

— killing members of the group;

— causing serious bodily or mental harm to members of the group;

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

— imposing measures intended to prevent births within the group;

— forcibly transferring children of the group to another group;

2. Subsidiarily:

- (i) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by complicity in genocide as defined in paragraph 1, above; and/or
- (ii) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals, groups and entities engaged in acts of genocide, as defined in paragraph 1 above;

3. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide and by inciting to commit genocide, as defined in paragraph 1 above;

4. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed to prevent genocide;

5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

6. That the violations of international law set out in submissions 1 to 5 constitute wrongful acts attributable to Serbia and Montenegro which entail its international responsibility, and, accordingly,

(a) that Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

(b) that Serbia and Montenegro must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused. That, in particular, the compensation shall cover any financially assessable damage which corresponds to:

- (i) damage caused to natural persons by the acts enumerated in Article III of the Convention, including non-material damage suffered by the victims or the surviving heirs or successors and their dependants;
- (ii) material damage caused to properties of natural or legal persons, public or private, by the acts enumerated in Article III of the Convention;
- (iii) material damage suffered by Bosnia and Herzegovina in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from the acts enumerated in Article III of the Convention;

(c) that the nature, form and amount of the compensation shall be determined by the Court, failing agreement thereon between the Parties one year after the Judgment of the Court, and that the Court shall reserve the subsequent procedure for that purpose;

(d) that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court;

7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court.”

On behalf of the Government of Serbia and Montenegro,

at the hearing of 9 May 2006:

“Serbia and Montenegro asks the Court to adjudge and declare:

— that this Court has no jurisdiction because the Respondent had no access to the Court at the relevant moment; or, in the alternative;

— that this Court has no jurisdiction over the Respondent because the Respondent never remained or became bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and because there is no other ground on which jurisdiction over the Respondent could be based.

In case the Court determines that jurisdiction exists Serbia and Montenegro asks the Court to adjudge and declare:

— That the requests in paragraphs 1 to 6 of the Submissions of Bosnia and Herzegovina relating to alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide be rejected as lacking a basis either in law or in fact.

— In any event, that the acts and/or omissions for which the respondent State is alleged to be responsible are not attributable to the respondent State. Such attribution would necessarily involve breaches of the law applicable in these proceedings.

— Without prejudice to the foregoing, that the relief available to the applicant State in these proceedings, in accordance with the appropriate interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide, is limited to the rendering of a declaratory judgment.

— Further, without prejudice to the foregoing, that any question of legal responsibility for alleged breaches of the Orders for the indication of provisional measures, rendered by the Court on 8 April 1993 and 13 September 1993, does not fall within the competence of the Court to provide appropriate remedies to an applicant State in the context of contentious proceedings, and, accordingly, the request in paragraph 7 of the Submissions of Bosnia and Herzegovina should be rejected.”

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II. Identification of the respondent party

362 67. The Court has first to consider a question concerning the identification of the Respondent party before it in these proceedings. After the close of the oral proceedings, by a letter dated 3 June 2006, the President of the Republic of Serbia informed the Secretary-General of the United Nations that, following the Declaration of Independence adopted by the National Assembly of Montenegro on 3 June 2006, “the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organisations of the United Nations system, [would be] continued by the Republic of Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro”. He further stated that “in the United Nations the name ‘Republic of Serbia’ [was] to be henceforth used instead of the name ‘Serbia and Montenegro’” and added that the Republic of Serbia “remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter”.

68. By a letter of 16 June 2006, the Minister for Foreign Affairs of the Republic of Serbia informed the Secretary-General, *inter alia*, that “[t]he Republic of Serbia continu[e]d to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro” and requested that “the Republic of Serbia be considered a party to all international agreements in force, instead of Serbia and Montenegro”. By a letter addressed to the Secretary-General dated 30 June 2006, the Minister for Foreign Affairs confirmed the intention of the Republic of Serbia to continue to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro. He specified that “all treaty actions undertaken by Serbia and Montenegro w[ould] continue in force with respect to the Republic of Serbia with effect from 3 June 2006”, and that, “all declarations, reservations and notifications made by Serbia and Montenegro w[ould] be maintained by the Republic of Serbia until the Secretary-General, as depositary, [were] duly notified otherwise”.

69. On 28 June 2006, by its resolution 60/264, the General Assembly admitted the Republic of Montenegro (hereinafter “Montenegro”) as a new Member of the United Nations.

70. By letters dated 19 July 2006, the Registrar requested the Agent of Bosnia and Herzegovina, the Agent of Serbia and Montenegro and the Foreign Minister of Montenegro to communicate to the Court the views of their Governments on the consequences to be attached to the above-mentioned developments in the context of the case. By a letter dated 26 July 2006, the Agent of Serbia and Montenegro explained that, in his Government’s opinion, “there [was] continuity between Serbia and Montenegro and the Republic of Serbia (on the grounds of Article 60 of the Constitutional Charter of Serbia and Montenegro)”. He noted that the entity which had been Serbia and Montenegro “ha[d] been replaced by two distinct States, one of them [was] Serbia, the other [was] Montenegro”. In those circumstances, the view of his Government was that “the Applicant ha[d] first to take a position, and to decide whether it wishe[d] to maintain its original claim encompassing both Serbia and Montenegro, or whether it [chose] to do otherwise”.

71. By a letter to the Registrar dated 16 October 2006, the Agent of Bosnia and Herzegovina referred to the letter of 26 July 2006 from the Agent of Serbia and Montenegro, and observed that Serbia’s definition of itself as the continuator of the former Serbia and Montenegro had been accepted both by Montenegro and the international community. He continued however as follows:

“this acceptance cannot have, and does not have, any effect on the applicable rules of state responsibility. Obviously, these cannot be altered bilaterally or retroactively. At the time when genocide was committed and at the time of the initiation of this case, Serbia and Montenegro constituted a single state. Therefore, Bosnia and Herzegovina is of the opinion that both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute the cause of action in this case.”

72. By a letter dated 29 November 2006, the Chief State Prosecutor of Montenegro, after indicating her capacity to act as legal representative of the Republic of Montenegro, referred to the letter from the Agent of Bosnia and Herzegovina dated 16 October 2006, quoted in the previous paragraph, expressing the view that “both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute[s] the cause of action in this case”. The Chief State Prosecutor stated that the allegation concerned the liability in international law of the sovereign State of Montenegro, and that Montenegro regarded it as an attempt to have it become a participant in this way, without its consent, “i.e. to become a respondent in this procedure”. The Chief State Prosecutor drew attention to the fact that, following the referendum held in Montenegro on 21 May 2006, the National Assembly of Montenegro had adopted a decision pronouncing the independence of the Republic of Montenegro. In the view of the Chief State Prosecutor, the Republic of Montenegro had become “an independent state with full international legal personality within its existing administrative borders”, and she continued:

“The issue of international-law succession of [the] State union of Serbia and Montenegro is regulated in Article 60 of [the] Constitutional Charter, and according to [that] Article the legal successor of [the] State union of Serbia and Montenegro is the Republic of Serbia, which, as a sovereign state, [has] become [the] follower of all international obligations and successor in international organizations.”

The Chief State Prosecutor concluded that in the dispute before the Court, “the Republic of Montenegro may not have [the] capacity of respondent, [for the] above mentioned reasons”.

73. By a letter dated 11 December 2006, the Agent of Serbia referred to the letters from the Applicant and from Montenegro described in paragraphs 71 and 72 above, and observed that there was “an obvious contradiction between the position of the Applicant on the one hand and the position of Montenegro on the other regarding the question whether these proceedings may or may not yield a decision which would result in the international responsibility of Montenegro” for the unlawful conduct invoked by the Applicant. The Agent stated that “Serbia is of the opinion that this issue needs to be resolved by the Court”.

74. The Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State.

75. The Court notes that Serbia has accepted “continuity between Serbia and Montenegro and the Republic of Serbia” (paragraph 70 above), and has assumed responsibility for “its commitments deriving from international treaties concluded by Serbia and Montenegro” (paragraph 68 above), thus including commitments under the Genocide Convention. Montenegro, on the other hand, does not claim to be the continuator of Serbia and Montenegro.

76. The Court recalls a fundamental principle that no State may be subject to its jurisdiction without its consent; as the Court observed in the case of *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Court’s “jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it . . .” (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 260, para. 53). In its Judgment of 11 July 1996 (see paragraph 12 above), the significance of which will be explained below, the Court found that such consent existed, for the purposes of the present case, on the part of the FRY, which subsequently assumed the name of Serbia and Montenegro, without however any change in its legal personality. The events related in paragraphs 67 to 69 above clearly show that the Republic of Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the present case. It is also clear from the letter of 29 November 2006 quoted in paragraph 72 above that it does not give its consent to the jurisdiction of the Court over it for the purposes of the present dispute. Furthermore, the Applicant did not in its letter of 16 October 2006 assert that Montenegro is still a party to the present case; it merely emphasized its views as to the joint and several liability of Serbia and of Montenegro.

77. The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. Accordingly, any findings that the Court may make in the operative part of the present Judgment are to be addressed to Serbia.

78. That being said, it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro.

79. The Court observes that the Republic of Montenegro is a party to the Genocide Convention. Parties to that Convention have undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.

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III. The Court’s jurisdiction

(I) Introduction: the jurisdictional objection of Serbia and Montenegro

80. Notwithstanding the fact that in this case the stage of oral proceedings on the merits has been reached, and the fact that in 1996 the Court gave a judgment on preliminary objections to its jurisdiction (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595, hereinafter “the 1996 Judgment”), an important issue of a jurisdictional character has since been raised by the Initiative, and the Court has been asked to rule upon it (see paragraphs 26-28 above). The basis of jurisdiction asserted by the Applicant, and found applicable by the Court by the 1996 Judgment, is Article IX of the Genocide Convention. The Socialist Federal Republic of Yugoslavia (hereinafter “the SFRY”) became a party to that Convention on 29 August 1950. In substance, the central question now raised by the Respondent is whether at the time of the filing of the Application instituting the present proceedings the Respondent was or was not the continuator of the SFRY. The Respondent now contends that it was not a continuator State, and that therefore not only was it not a party to the Genocide Convention when the present proceedings were instituted, but it was not then a party to the Statute of the Court by virtue of membership in the United Nations; and that, not being such a party, it did not have access to the Court, with the consequence that the Court had no jurisdiction *ratione personae* over it.

81. This contention was first raised, in the context of the present case, by the “Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia” filed by the Respondent on 4 May 2001 (paragraph 26 above). The circumstances underlying that Initiative will be examined in more detail below (paragraphs 88-99). Briefly stated, the situation was that the Respondent, after claiming that since the break-up of the SFRY in 1992 it was the continuator of that State, and

as such maintained the membership of the SFRY in the United Nations, had on 27 October 2000 applied, "in light of the implementation of the Security Council resolution 777 (1992)", to be admitted to the Organization as a new Member, thereby in effect relinquishing its previous claim. The Respondent contended that it had in 2000 become apparent that it had not been a Member of the United Nations in the period 1992-2000, and was thus not a party to the Statute at the date of the filing of the Application in this case; and that it was not a party to the Genocide Convention on that date. The Respondent concluded that "the Court has no jurisdiction over [the Respondent] *ratione personae*". It requested the Court "to suspend proceedings regarding the merits of the Case until a decision on this Initiative is rendered".

82. By a letter of 12 June 2003, the Registrar, acting on the instructions of the Court, informed the Respondent that the Court could not accede to the request made in that document, that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised therein. The Respondent was informed, nevertheless, that the Court "w[ould] not give judgment on the merits in the present case unless it [was] satisfied that it ha[d] jurisdiction" and that, "[s]hould Serbia and Montenegro wish to present further argument to the Court on jurisdictional questions during the oral proceedings on the merits, it w[ould] be free to do so". The Respondent accordingly raised, as an "issue of procedure", the question whether the Respondent had access to the Court at the date of the Application, and each of the parties has now addressed argument to the Court on that question. It has however at the same time been argued by the Applicant that the Court may not deal with the question, or that the Respondent is debarred from raising it at this stage of the proceedings. These contentions will be examined below.

83. Subsequently, on 15 December 2004, the Court delivered judgment in eight cases brought by Serbia and Montenegro against Member States of NATO (cases concerning the *Legality of Use of Force*). The Applications instituting proceedings in those cases had been filed on 29 April 1999, that is to say prior to the admission of Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. In each of these cases, the Court held that it had no jurisdiction to entertain the claims made in the Application (see, for example, *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 328, para. 129), on the grounds that "Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute" (*ibid.*, p. 327, para. 127). It held, "in light of the legal consequences of the new development since 1 November 2000", that "Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application . . ." (*ibid.*, p. 311, para. 79). No finding was made in those judgments on the question whether or not the Respondent was a party to the Genocide Convention at the relevant time.

84. Both Parties recognize that each of these Judgments has the force of *res judicata* in the specific case for the parties thereto; but they also recognize that these Judgments, not having been rendered in the present case, and involving as parties States not parties to the present case, do not constitute *res judicata* for the purposes of the present proceedings. In view however of the findings in the cases concerning the *Legality of Use of Force* as to the status of the FRY vis-à-vis the United Nations and the Court in 1999, the Respondent has invoked those decisions as supportive of its contentions in the present case.

85. The grounds upon which, according to Bosnia and Herzegovina, the Court should, at this late stage of the proceedings, decline to examine the questions raised by the Respondent as to the status of Serbia and Montenegro in relation to Article 35 of the Statute, and its status as a party to the Genocide Convention, are because the conduct of the Respondent in relation to the case has been such as to create a sort of *forum prorogatum*, or an estoppel, or to debar it, as a matter of good faith, from asserting at this stage of the proceedings that it had no access to the Court at the date the proceedings were instituted; and because the questions raised by the Respondent had already been resolved by the 1996 Judgment, with the authority of *res judicata*.

86. As a result of the Initiative of the Respondent (paragraph 81 above), and its subsequent argument on what it has referred to as an "issue of procedure", the Court has before it what is essentially an objection by the Respondent to its jurisdiction, which is preliminary in the sense that, if it is upheld, the Court will not proceed to determine the merits. The Applicant objects in turn to the Court examining further the Respondent's jurisdictional objection. These matters evidently require to be examined as preliminary points, and it was for this reason that the Court instructed the Registrar to write to the Parties the letter of 12 June 2003, referred to in paragraph 82 above. The letter was intended to convey that the Court would listen to any argument raised by the Initiative which might be put to it, but not as an indication of what its ruling might be on any such arguments.

87. In order to make clear the background to these issues, the Court will first briefly review the history of the relationship between the Respondent and the United Nations during the period from the break-up of the SFRY in 1992 to the admission of Serbia and Montenegro (then called the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. The previous decisions of the Court in this case, and in the *Application for Revision* case, have been briefly recalled above (paragraphs 4, 8, 12 and 31). They will be referred to more fully below (paragraphs 105-113) for the purpose of (in particular) an examination of the contentions of Bosnia and Herzegovina on the question of *res judicata*.

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(2) History of the status of the FRY with regard to the United Nations

88. In the early 1990s the SFRY, a founding Member State of the United Nations, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to disintegrate. On 25 June 1991 Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia were admitted as Members to the United Nations; as was the former Yugoslav Republic of Macedonia on 8 April 1993.

89. On 27 April 1992 the "participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" had adopted a declaration, stating in pertinent parts:

".....
1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,
.....

Remaining bound by all obligations to international organizations and institutions whose member it is..." (United Nations doc. A/46/915, Ann. II).

90. An official Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General of the United Nations, stated *inter alia* that:

"The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.

Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915, Ann. I.)

91. On 30 May 1992, the Security Council adopted resolution 757 (1992), in which, *inter alia*, it noted that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted".

92. On 19 September 1992, the Security Council adopted resolution 777 (1992) which read as follows:

"The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Considering that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

Recalling in particular resolution 757 (1992) which notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted',

1. Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. Decides to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."

The resolution was adopted by 12 votes in favour, none against, and 3 abstentions.

93. On 22 September 1992 the General Assembly adopted resolution 47/1, according to which:

"The General Assembly,

Having received the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,

1. Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. Takes note of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."

The resolution was adopted by 127 votes to 6, with 26 abstentions.

94. On 25 September 1992, the Permanent Representatives of Bosnia and Herzegovina and Croatia addressed a letter to the Secretary-General, in which, with reference to Security Council resolution 777 (1992) and General Assembly resolution 47/1, they stated their understanding as follows: "At this moment, there is no doubt that the Socialist Federal Republic of Yugoslavia is not a member of the United Nations any more. At the same time, the Federal Republic of Yugoslavia is clearly not yet a member." They concluded that "[t]he flag flying in front of the United Nations and the name-plaque bearing the name 'Yugoslavia' do not represent anything or anybody any more" and "kindly request[ed] that [the Secretary-General] provide a legal explanatory statement concerning the questions raised" (United Nations doc. A/47/474).

95. In response, on 29 September 1992, the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia, in which he stated that the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" was as follows:

"While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign 'Yugoslavia'. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1." (United Nations doc. A/47/485; emphasis in the original.)

96. On 29 April 1993, the General Assembly, upon the recommendation contained in Security Council resolution 821 (1993) (couched in terms similar to those of Security Council resolution 777 (1992)), adopted resolution 47/229 in which it decided that "the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council".

97. In its judgments in the cases concerning the *Legality of Use of Force* (paragraph 83 above), the Court commented on this sequence of events by observing that "all these events testify to the rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period" (*Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 308, para. 73), and earlier the Court, in another context, had referred to the "*sui generis* position which the FRY found itself in" during the period between 1992 to 2000 (*loc. cit.*, citing *I.C.J. Reports 2003*, p. 31, para. 71).

98. This situation, however, came to an end with a new development in 2000. On 24 September 2000, Mr. Koštunica was elected President of the FRY. In that capacity, on 27 October 2000 he sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations, in the following terms:

"In the wake of fundamental democratic changes that took place in the Federal Republic of Yugoslavia, in the capacity of President, I have the honour to request the admission of the Federal Republic of Yugoslavia to the United Nations *in light of the implementation of the Security Council resolution 777 (1992)*." (United Nations doc. A/55/528-S/2000/1043; emphasis added.)

99. Acting upon this application by the FRY for membership in the United Nations, the Security Council on 31 October 2000 "*recommended*" to the General Assembly that the Federal Republic of Yugoslavia be admitted to membership in the United Nations" (United Nations doc. S/RES/1326). On 1 November 2000, the General Assembly, by resolution 55/12, "[h]aving received the recommendation of the Security Council of 31 October 2000" and "[h]aving considered the application for membership of the Federal Republic of Yugoslavia", decided to "admit the Federal Republic of Yugoslavia to membership in the United Nations".

* * *

(3) The response of Bosnia and Herzegovina

100. The Court will now consider the Applicant's response to the jurisdictional objection raised by the Respondent, that is to say the contention of Bosnia and Herzegovina that the Court should not examine the question, raised by the Respondent in its Initiative (paragraph 81 above), of the status of the Respondent at the date of the filing of the Application instituting proceedings. It is first submitted by Bosnia and Herzegovina that the Respondent was under a duty to raise the issue of whether the FRY (Serbia and Montenegro) was a Member of the United Nations at the time of the proceedings on the preliminary objections, in 1996, and that since it did not do so, the principle of *res judicata*, attaching to the Court's 1996 Judgment on those objections, prevents it from reopening the issue. Secondly, the Applicant argues that the Court itself, having decided in 1996 that it had jurisdiction in the case, would be in breach of the principle of *res judicata* if it were now to decide otherwise, and that the Court cannot call in question the authority of its decisions as *res judicata*.

101. The first contention, as to the alleged consequences of the fact that Serbia did not raise the question of access to the Court under Article 35 at the preliminary objection stage, can be dealt with succinctly. Bosnia and Herzegovina has argued that to uphold the Respondent's objection "would mean that a respondent, after having asserted one or more preliminary objections, could still raise others, to the detriment of the effective administration of justice, the smooth conduct of proceedings, and, in the present case, the doctrine of *res judicata*". It should however be noted that if a party to proceedings before the Court chooses not to raise an issue of jurisdiction by way of the preliminary objection procedure under Article 79 of the Rules, that party is not necessarily thereby debarred from raising such issue during the proceedings on the merits of the case. As the Court stated in the case of *Avena and Other Mexican Nationals (Mexico v. United States of America)*,

"There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 52, para. 13*). However, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits." (*Judgment, I.C.J. Reports 2004, p. 29, para. 24*).

This first contention of Bosnia and Herzegovina must thus be understood as a claim that the Respondent, by its conduct in relation to the case, including the failure to raise the issue of the application of Article 35 of the Statute, by way of preliminary objection or otherwise, at an earlier stage of the proceedings, should be held to have acquiesced in jurisdiction. This contention is thus parallel to the argument mentioned above (paragraph 85), also advanced by Bosnia and Herzegovina, that the Respondent is debarred from asking the Court to examine that issue for reasons of good faith, including estoppel and the principle *allegans contraria nemo audietur*.

102. The Court does not however find it necessary to consider here whether the conduct of the Respondent could be held to constitute an acquiescence in the jurisdiction of the Court. Such acquiescence, if established, might be relevant to questions of consensual jurisdiction, and in particular jurisdiction *ratione materiae* under Article IX of the Genocide Convention, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court.

The latter question may be regarded as an issue prior to that of jurisdiction *ratione personae*, or as one constitutive element within the concept of jurisdiction *ratione personae*. Either way, unlike the majority of questions of jurisdiction, it is not a matter of the consent of the parties. As the Court observed in the cases concerning the *Legality of Use of Force*,

"a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent. The question is whether *as a matter of law* Serbia and Montenegro was entitled to seize the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were

now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent." (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 295, para. 36*, emphasis in the original.)

103. It follows that, whether or not the Respondent should be held to have acquiesced in the jurisdiction of the Court in this case, such acquiescence would in no way debar the Court from examining and ruling upon the question stated above. The same reasoning applies to the argument that the Respondent is estopped from raising the matter at this stage, or debarred from doing so by considerations of good faith. All such considerations can, at the end of the day, only amount to attributing to the Respondent an implied acceptance, or deemed consent, in relation to the jurisdiction of the Court; but, as explained above, *ad hoc* consent of a party is distinct from the question of its capacity to be a party to proceedings before the Court.

104. However Bosnia and Herzegovina's second contention is that, objectively and apart from any effect of the conduct of the Respondent, the question of the application of Article 35 of the Statute in this case has already been resolved as a matter of *res judicata*, and that if the Court were to go back on its 1996 decision on jurisdiction, it would disregard fundamental rules of law. In order to assess the validity of this contention, the Court will first review its previous decisions in the present case in which its jurisdiction, or specifically the question whether Serbia and Montenegro could properly appear before the Court, has been in issue.

* * *

(4) Relevant past decisions of the Court

105. On 8 April 1993, the Court made an Order in this case indicating certain provisional measures. In that Order the Court briefly examined the circumstances of the break-up of the SFRY, and the claim of the Respondent (then known as "Yugoslavia (Serbia and Montenegro)") to continuity with that State, and consequent entitlement to continued membership in the United Nations. It noted that "the solution adopted" within the United Nations was "not free from legal difficulties", but concluded that "the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 14 para. 18*). This conclusion was based in part on a provisional view taken by the Court as to the effect of the proviso to Article 35, paragraph 2, of the Statute (*ibid.*, para. 19). The Order contained the reservation, normally included in orders on requests for provisional measures, that "the decision

given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case... and leaves unaffected the right of the Governments of Bosnia-Herzegovina and Yugoslavia to submit arguments in respect of [that question]" (*ibid.*, p. 23, para. 51). It is therefore evident that no question of *res judicata* arises in connection with the Order of 8 April 1993. A further Order on provisional measures was made on 13 September 1993, but contained nothing material to the question now being considered.

106. In 1995 the Respondent raised seven preliminary objections (one of which was later withdrawn), three of which invited the Court to find that it had no jurisdiction in the case. None of these objections were however founded on a contention that the FRY was not a party to the Statute at the relevant time; that was not a contention specifically advanced in the proceedings on the preliminary objections. At the time of those proceedings, the FRY was persisting in the claim, that it was continuing the membership of the former SFRY in the United Nations; and while that claim was opposed by a number of States, the position taken by the various organs gave rise to a "confused and complex state of affairs... within the United Nations" (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 308, para. 73). Neither party raised the matter before the Court: Bosnia and Herzegovina as Applicant, while denying that the FRY was a Member of the United Nations as a continuator of the SFRY, was asserting before this Court that the FRY was nevertheless a party to the Statute, either under Article 35, paragraph 2, thereof, or on the basis of the declaration of 27 April 1992 (see paragraphs 89 to 90 above); and for the FRY to raise the issue would have involved undermining or abandoning its claim to be the continuator of the SFRY as the basis for continuing membership of the United Nations.

107. By the 1996 Judgment, the Court rejected the preliminary objections of the Respondent, and found that, "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 623, para. 47 (2) (a)). It also found that the Application was admissible, and stated that "the Court may now proceed to consider the merits of the case...:" (*ibid.*, p. 622, para. 46).

108. However, on 24 April 2001 Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) filed an Application instituting proceedings seeking revision, under Article 61 of the Statute, of the 1996 Judgment on jurisdiction in this case. That Article requires that there exist "some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court...". The FRY claimed in its Application that:

"The admission of the FRY to the United Nations as a new Member on 1 November 2000 is certainly a new fact..."

The admission of the FRY to the United Nations as a new Member clears ambiguities and sheds a different light on the issue of the membership of the FRY in the United Nations, in the Statute and in the Genocide Convention." (*Application for Revision, I.C.J. Reports 2003*, p. 12, para. 18.)

Essentially the contention of the FRY was that its admission to membership in 2000 necessarily implied that it was not a Member of the United Nations and thus not a party to the Statute in 1993, when the proceedings in the present case were instituted, so that the Court would have had no jurisdiction in the case.

109. The history of the relationship between the FRY and the United Nations, from the break-up of the SFRY in 1991-1992 up to the admission of the FRY as a new Member in 2000, has been briefly recalled in paragraphs 88 to 99 above. That history has been examined in detail on more than one occasion, both in the context of the Application for revision referred to in paragraph 108 and in the Court's Judgments in 2004 in the cases concerning the *Legality of Use of Force*. In its Judgment of 3 February 2003 on the Application for revision, the Court carefully studied that relationship; it also recalled the terms of its 1996 Judgment finding in favour of jurisdiction. The Court noted that

"the FRY claims that the facts which existed at the time of the 1996 Judgment and upon the discovery of which its request for revision of that Judgment is based 'are that the FRY was not a party to the Statute, and that it did not remain bound by the Genocide Convention continuing the personality of the former Yugoslavia'. It argues that these 'facts' were 'revealed' by its admission to the United Nations on 1 November 2000 and by [a letter from the United Nations Legal Counsel] of 8 December 2000."

In the final version of its argument, the FRY claims that its admission to the United Nations and the Legal Counsel's letter of 8 December 2000 simply 'revealed' two facts which had existed in 1996 but had been unknown at the time: that it was not then a party to the Statute of the Court and that it was not bound by the Genocide Convention." (*I.C.J. Reports 2003*, p. 30, paras. 66 and 69.)

110. The Court did not consider that the admission of the FRY to membership was itself a "new fact", since it occurred after the date of the Judgment of which the revision was sought (*ibid.*, para. 68). As to the argument that facts on which an application for revision could be based were "revealed" by the events of 2000, the Court ruled as follows:

"In advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61. The FRY's argument cannot accordingly be upheld." (*ibid.*, pp. 30-31, para. 69.)

111. The Court therefore found the Application for revision inadmissible. However, as the Court has observed in the cases concerning *Legality of Use of Force*, it did not, in its Judgment on the Application for revision,

“regard the alleged ‘decisive facts’ specified by Serbia and Montenegro as ‘facts that existed in 1996’ for the purpose of Article 61. The Court therefore did not have to rule on the question whether ‘the legal consequences’ could indeed legitimately be deduced from the later facts; in other words, it did not have to say whether it was correct that Serbia and Montenegro had not been a party to the Statute or to the Genocide Convention in 1996.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 313, para. 87.)

112. In a subsequent paragraph of the 2003 Judgment on the Application for revision of the 1996 Judgment, the Court had stated:

“It follows from the foregoing that it has not been established that the request of the FRY is based upon the discovery of ‘some fact’ which was ‘when the judgment was given, unknown to the Court and also to the party claiming revision’. The Court therefore concludes that one of the conditions for the admissibility of an application for revision prescribed by paragraph 1 of Article 61 of the Statute has not been satisfied.” (*I.C.J. Reports 2003*, p. 31, para. 72.)

In its 2004 decisions in the *Legality of Use of Force* cases the Court further commented on this finding:

“The Court thus made its position clear that there could have been no retroactive modification of the situation in 2000, which would amount to a new fact, and that therefore the conditions of Article 61 were not satisfied. This, however, did not entail any finding by the Court, in the revision proceedings, as to what that situation actually was.” (*Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 314, para. 89.)

113. For the purposes of the present case, it is thus clear that the Judgment of 2003 on the Application by the FRY for revision, while binding between the parties, and final and without appeal, did not contain any finding on the question whether or not that State had actually been a Member of the United Nations in 1993. The question of the status of the FRY in 1993 formed no part of the issues upon which the Court pronounced judgment when dismissing that Application.

* * *

(5) The principle of *res judicata*

114. The Court will now consider the principle of *res judicata*, and its application to the 1996 Judgment in this case. The Applicant asserts that the 1996 Judgment, whereby the Court found that it had jurisdiction under the Genocide Convention, “enjoys the authority of *res judicata* and is not susceptible of appeal” and that “any ruling whereby the Court reversed the 1996 Judgment . . . would be incompatible both with the *res judicata* principle and with Articles 59, 60 and 61 of the Statute”. The Applicant submits that, like its judgments on the merits, “the Court’s decisions on jurisdiction are *res judicata*”. It further observes that, pursuant to Article 60 of the Statute, the Court’s 1996 Judgment is “final and without appeal” subject only to

the possibility of a request for interpretation and revision; and the FRY’s request for revision was rejected by the Court in its Judgment of 3 February 2003. The Respondent contends that jurisdiction once upheld may be challenged by new objections; and considers that this does not contravene the principle of *res judicata* or the wording of Article 79 of the Rules of Court. It emphasizes “the right and duty of the Court to act *proprio motu*” to examine its jurisdiction, mentioned in the case of the *Appeal Relating to the Jurisdiction of the ICAC Council (India v. Pakistan)* (see paragraph 118 below), and contends that the Court cannot “forfeit” that right by not having itself raised the issue in the preliminary objections phase.

115. There is no dispute between the Parties as to the existence of the principle of *res judicata* even if they interpret it differently as regards judgments deciding questions of jurisdiction. The fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal; Article 61 places close limits of time and substance on the ability of the parties to seek the revision of the judgment. The Court stressed those limits in 2003 when it found inadmissible the application made by Serbia and Montenegro for revision of the 1996 Judgment in the *Application for Revision* case (*I.C.J. Reports 2003*, p. 12, para. 17).

116. Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court’s function, according to Article 38 of its Statute, is to “decide”, that is, to bring to an end, “such disputes as are submitted to it”. Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articulates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.

117. It has however been suggested by the Respondent that a distinction may be drawn between the application of the principle of *res judicata* to judgments given on the merits of a case, and judgments determining the Court’s jurisdiction, in response to preliminary objections; specifically, the Respondent contends that “decisions on preliminary objections do not and cannot have the same consequences as decisions on the merits”. The Court will however observe that the decision on questions of jurisdiction, pursuant to Article 36, paragraph 6, of the Statute, is given by a judgment, and Article 60 of the Statute provides that “[t]he judgment is final and without appeal”, without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits. In its Judgment of 25 March 1999 on the request for interpretation of the Judgment of 11 June 1998 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court expressly recognized that the 1998 Judgment, given on a number of preliminary objections to

jurisdiction and admissibility, constituted *res judicata*, so that the Court could not consider a submission inconsistent with that judgment (*Judgment, I.C.J. Reports 1999 (I)*, p. 39, para. 16). Similarly, in its Judgment of 3 February 2003 in the *Application for Revision* case, the Court, when it began by examining whether the conditions for the opening of the revision procedure, laid down by Article 61 of the Statute, were satisfied, undoubtedly recognized that an application could be made for revision of a judgment on preliminary objections; this could in turn only derive from a recognition that such a judgment is "final and without appeal". Furthermore, the contention put forward by the Respondent would signify that the principle of *res judicata* would not prevent a judgment dismissing a preliminary objection from remaining open to further challenge indefinitely, while a judgment upholding such an objection, and putting an end to the case, would in the nature of things be final and determinative as regards that specific case.

118. The Court recalls that, as it has stated in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, it "must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Judgment, I.C.J. Reports 1972*, p. 52, para. 13). That decision in its context (in a case in which there was no question of reopening a previous decision of the Court) does not support the Respondent's contention. It does not signify that jurisdictional decisions remain reviewable indefinitely, nor that the Court may, *proprio motu* or otherwise, reopen matters already decided with the force of *res judicata*. The Respondent has argued that there is a principle that "an international court may consider or reconsider the issue of jurisdiction at any stage of the proceedings". It has referred in this connection both to the dictum just cited from the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, and to the *Corfu Channel (United Kingdom v. Albania)* case. It is correct that the Court, having in the first phase of that case rejected Albania's preliminary objection to jurisdiction, and having decided that proceedings on the merits were to continue (*Preliminary Objection, Judgment, I.C.J. Reports 1947-1948*, p. 15), did at the merits stage consider and rule on a challenge to its jurisdiction, in particular whether it had jurisdiction to assess compensation (*I.C.J. Reports 1949*, pp. 23-26; 171). But no reconsideration at all by the Court of its earlier Judgment was entailed in this because, following that earlier Judgment, the Parties had concluded a special agreement submitting to the Court, *inter alia*, the question of compensation. The later challenge to jurisdiction concerned only the scope of the jurisdiction conferred by that subsequent agreement.

119. The Respondent also invokes certain international conventions and the rules of other international tribunals. It is true that the European Court of Human Rights may reject, at any stage of the proceedings, an application which it considers inadmissible; and the International Criminal Court may, in exceptional circumstances, permit the admissibility of a case or the jurisdiction of the Court to be challenged after the commencement of the trial. However, these specific authorizations in the instruments governing certain other tribunals reflect their particular admissibility procedures, which are not identical with the procedures of the Court in the field of jurisdiction. They thus do not support the view that there exists a general principle which would apply to the Court, whose Statute not merely contains no such provision, but declares, in Article 60, the *res judicata* principle without exception. The Respondent has also cited certain jurisprudence of the European Court of Human Rights, and an arbitral decision of the German-Polish Mixed Arbitral Tribunal (*von Tiedemann* case); but, in the view of the Court, these too, being based on their particular facts, and the nature of the jurisdictions involved, do not indicate the existence of a principle of sufficient generality and weight to override the clear provisions of the Court's Statute, and the principle of *res judicata*.

120. This does not however mean that, should a party to a case believe that elements have come to light subsequent to the decision of the Court which tend to show that the Court's conclusions may have been based on incorrect or insufficient facts, the decision must remain final, even if it is in apparent contradiction to reality. The Statute provides for only one procedure in such an event: the procedure under Article 61, which offers the possibility for the revision of judgments, subject to the restrictions stated in that Article. In the interests of the stability of legal relations, those restrictions must be rigorously applied. As noted above (paragraph 110) the FRY's Application for revision of the 1996 Judgment in this case was dismissed, as not meeting the conditions of Article 61. Subject only to this possibility of revision, the applicable principle is *res judicata pro veritate habetur*; that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events.

* * *

(6) Application of the principle of *res judicata* to the 1996 Judgment

121. In the light of these considerations, the Court reverts to the effect and significance of the 1996 Judgment. That Judgment was essentially addressed, so far as questions of jurisdiction were concerned, to the question of the Court's jurisdiction under the Genocide Convention. It resolved in particular certain questions that had been raised as to the status of Bosnia and Herzegovina in relation to the Convention; as regards the FRY, the Judgment stated simply as follows:

"the former Socialist Federal Republic of Yugoslavia... signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:

'The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'

This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17.)

122. Nothing was stated in the 1996 Judgment about the status of the FRY in relation to the United Nations, or the question whether it could participate in proceedings before the Court; for the reasons already mentioned above (paragraph 106), both Parties had chosen to refrain from asking for a decision on these matters. The Court however considers it necessary to emphasize that the question whether a State may properly come before the Court, on the basis of the provisions of the Statute, whether it be classified as a matter of capacity to be a party to the proceedings or as an aspect of jurisdiction *ratione personae*, is a matter which precedes that of jurisdiction *ratione materiae*, that is, whether that State has consented to the settlement by the Court of the specific dispute brought before it. The question is in fact one which the Court is bound to raise and examine, if necessary, *ex officio*, and if appropriate after notification to the parties. Thus if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits.

123. The operative part of a judgment of the Court possesses the force of *res judicata*. The operative part of the 1996 Judgment stated, in paragraph 47 (2) (a), that the Court found “that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to decide upon the dispute”. That jurisdiction is thus established with the full weight of the Court’s judicial authority. For a party to assert today that, at the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is, for the reason given in the preceding paragraph, to call in question the force as *res judicata* of the operative clause of the Judgment. At first sight, therefore, the Court need not examine the Respondent’s objection to jurisdiction based on its contention as to its lack of status in 1993.

124. The Respondent has however advanced a number of arguments tending to show that the 1996 Judgment is not conclusive on the matter, and the Court will now examine these. The passage just quoted from the 1996 Judgment is of course not the sole provision of the operative clause of that Judgment: as, the Applicant has noted, the Court first dismissed *seriatim* the specific preliminary objections raised (and not withdrawn) by the Respondent; it then made the finding quoted in paragraph 123 above; and finally it dismissed certain additional bases of jurisdiction invoked by the Applicant. The Respondent suggests that, for the purposes of applying the principle of *res judicata* to a judgment of this kind on preliminary objections, the operative clause (*dispositif*) to be taken into account and given the force of *res judicata* is the decision rejecting specified preliminary objections, rather than “the broad ascertainment upholding jurisdiction”. The Respondent has drawn attention to the provisions of Article 79, paragraph 7, of the 1978 Rules of Court, which provides that the judgment on preliminary objections shall, in respect of each objection “either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character”. The Respondent suggests therefore that only the clauses of a judgment on preliminary objections that are directed to these ends have the force of *res judicata*, which is, it contends, consistent with the view that new objections may be raised subsequently.

125. The Court does not however consider that it was the purpose of Article 79 of the Rules of Court to limit the extent of the force of *res judicata* attaching to a judgment on preliminary objections, nor that, in the case of such judgment, such force is necessarily limited to the clauses of

the *dispositif* specifically rejecting particular objections. There are many examples in the Court’s jurisprudence of decisions on preliminary objections which contain a general finding that the Court has jurisdiction, or that the application is admissible, as the case may be; and it would be going too far to suppose that all of these are necessarily superfluous conclusions. In the view of the Court, if any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given (cf. *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, *Judgment, I.C.J. Reports 1985*, pp. 218-219, para. 48).

126. For this purpose, in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all. Thus an application for interpretation of a judgment under Article 60 of the Statute may well require the Court to settle “[a] difference of opinion [between the parties] as to whether a particular point has or has not been decided with binding force” (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, *Judgment No. 11, 1927, P.C.I.J. Series A, No. 13*, pp. 11-12). If a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it.

127. In particular, the fact that a judgment may, in addition to rejecting specific preliminary objections, contain a finding that “the Court has jurisdiction” in the case does not necessarily prevent subsequent examination of any jurisdictional issues later arising that have not been resolved, with the force of *res judicata*, by such judgment. The Parties have each referred in this connection to the successive decisions in the *Corfu Channel* case, which the Court has already considered above (paragraph 118). Mention may also be made of the judgments on the merits in the two cases concerning *Fisheries Jurisdiction (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)* (*I.C.J. Reports 1974*, p. 20, para. 42; pp. 203-204, para. 74), which dealt with minor issues of jurisdiction despite an express finding of jurisdiction in previous judgments (*I.C.J. Reports 1973*, p. 22, para. 46; p. 66, para. 46). Even where the Court has, in a preliminary judgment, specifically reserved certain matters of jurisdiction for later decision, the judgment may nevertheless contain a finding that “the Court has jurisdiction” in the case, this being understood as being subject to the matters reserved (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 113 (1) (c)), and pp. 425-426, para. 76; cf. also, in connection with an objection to admissibility, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* (*Libyan Arab Jamahiriya v. United States of America*), *I.C.J. Reports 1998*, p. 29, para. 51 and pp. 30-31, paras. 53 (2) (b) and 53 (3); p. 134, para. 50 and p. 156, paras. 53 (2) (b) and 53 (3)).

128. On the other hand, the fact that the Court has in these past cases dealt with jurisdictional issues after having delivered a judgment on jurisdiction does not support the contention that such a judgment can be reopened at any time, so as to permit reconsideration of issues already settled with the force of *res judicata*. The essential difference between the cases mentioned in the previous

expressly declared that it would abide by the international commitments of the SFRY, it was nevertheless a party to the Statute. It is also essential, when examining the text of the 1996 Judgment, to take note of the context in which it was delivered, in particular as regards the contemporary state of relations between the Respondent and the United Nations, as recounted in paragraphs 88 to 99 above.

131. The “legal difficulties” referred to were finally dissipated when in 2000 the FRY abandoned its former insistence that it was the continuator of the SFRY, and applied for membership in the United Nations (paragraph 98 above). As the Court observed in its 2004 Judgments in the cases concerning the *Legality of Use of Force*,

“the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, pp. 310-311, para. 79.)

As the Court here recognized, in 1999 — and even more so in 1996 — it was by no means so clear as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations at the relevant time. The inconsistencies of approach expressed by the various United Nations organs are apparent from the passages quoted in paragraphs 91 to 96 above.

132. As already noted, the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment. The Court stated, as mentioned in paragraph 121 above, that “Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case” (*I.C.J. Reports 1996 (II)*, p. 610, para. 17), and found that “on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute” (*ibid.*, p. 623, para. 47 (2) (a)). Since, as observed above, the question of a State’s capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae*, and one which the Court must, if necessary, raise *ex officio* (see paragraph 122 above), this finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would

paragraph and the present case is this: the jurisdictional issues examined at a late stage in those cases were such that the decision on them would not contradict the finding of jurisdiction made in the earlier judgment. In the *Fisheries Jurisdiction* cases, the issues raised related to the extent of the jurisdiction already established in principle with the force of *res judicata*; in the *Military and Paramilitary Activities* case, the Court had clearly indicated in the 1984 Judgment that its finding in favour of jurisdiction did not extend to a definitive ruling on the interpretation of the United States reservation to its optional clause declaration. By contrast, the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment; that indeed is their purpose.

129. The Respondent has contended that the issue whether the FRY had access to the Court under Article 35 of the Statute has in fact never been decided in the present case, so that no barrier of *res judicata* would prevent the Court from examining that issue at the present stage of the proceedings. It has drawn attention to the fact that when commenting on the 1996 Judgment, in its 2004 Judgments in the cases concerning the *Legality of Use of Force*, the Court observed that “[t]he question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised and the Court saw no reason to examine it” (see, for example, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, I.C.J. Reports 2004, p. 311, para. 82), and that “in its pronouncements in incidental proceedings”, in the present case, the Court “did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute” (*ibid.*, pp. 308-309, para. 74).

130. That does not however signify that in 1996 the Court was unaware of the fact that the solution adopted in the United Nations to the question of continuation of the membership of the SFRY “[was] not free from legal difficulties”, as the Court had noted in its Order of 8 April 1993 indicating provisional measures in the case (*I.C.J. Reports 1993*, p. 14, para. 18; above, paragraph 105). The FRY was, at the time of the proceedings on its preliminary objections culminating in the 1996 Judgment, maintaining that it was the continuator State of the SFRY. As the Court indicated in its Judgments in the cases concerning the *Legality of Use of Force*,

“No specific assertion was made in the Application [of 1993, in the present case] that the Court was open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute of the Court, but it was later made clear that the Applicant claimed to be a Member of the United Nations and thus a party to the Statute of the Court, by virtue of Article 93, paragraph 1, of the Charter, at the time of filing of the Application . . . [T]his position was expressly stated in the Memorial filed by Serbia and Montenegro on 4 January 2000 . . .” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 299, para. 47.)

The question whether the FRY was a continuator or a successor State of the SFRY was mentioned in the Memorial of Bosnia and Herzegovina. The view of Bosnia and Herzegovina was that, while the FRY was not a Member of the United Nations, as a successor State of the SFRY which had

have the force of *res judicata*. The Court does not need, for the purpose of the present proceedings, to go behind that finding and consider on what basis the Court was able to satisfy itself on the point. Whether the Parties classify the matter as one of “access to the Court” or of “jurisdiction *ratione personae*”, the fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court.

133. In the view of the Court, the express finding in the 1996 Judgment that the Court had jurisdiction in the case *ratione materiae*, on the basis of Article IX of the Genocide Convention, seen in its context, is a finding which is only consistent, in law and logic, with the proposition that, in relation to both Parties, it had jurisdiction *ratione personae* in its comprehensive sense, that is to say, that the status of each of them was such as to comply with the provisions of the Statute concerning the capacity of States to be parties before the Court. As regards Bosnia and Herzegovina, there was no question but that it was a party to the Statute at the date of filing its application instituting proceedings; and in relation to the Convention, the Court found that it “could . . . become a party to the Convention” from the time of its admission to the United Nations (*I.C.J. Reports 1996 (II)*, p. 611, para. 19), and had in fact done so. As regards the FRY, the Court found that it “was bound by the provisions of the Convention”, i.e. was a party thereto, “on the date of the filing of the Application” (*ibid.*, p. 610, para 17); in this respect the Court took note of the declaration made by the FRY on 27 April 1992, set out in paragraph 89 above, whereby the FRY “continuing the State, international legal and political personality” of the SFRY, declared that it would “strictly abide by” the international commitments of the SFRY. The determination by the Court that it had jurisdiction under the Genocide Convention is thus to be interpreted as incorporating a determination that all the conditions relating to the capacity of the Parties to appear before it had been met.

134. It has been suggested by the Respondent that the Court’s finding of jurisdiction in the 1996 Judgment was based merely upon an assumption: an assumption of continuity between the SFRY and the FRY. It has drawn attention to passages, already referred to above (paragraph 129), in the Judgments in the *Legality of Use of Force* cases, to the effect that in 1996 the Court saw no reason to examine the question of access, and that, in its pronouncements in incidental proceedings, the Court did not commit itself to a definitive position on the issue of the legal status of the Respondent.

135. That the FRY had the capacity to appear before the Court in accordance with the Statute was an element in the reasoning of the 1996 Judgment which can — and indeed must — be read into the Judgment as a matter of logical construction. That element is not one which can at any time be reopened and re-examined, for the reasons already stated above. As regards the passages in the 2004 Judgments relied on by the Respondent, it should be borne in mind that the concern of the Court was not then with the scope of *res judicata* of the 1996 Judgment, since in any event such *res judicata* could not extend to the proceedings in the cases that were then before it, between different parties. It was simply appropriate in 2004 for the Court to consider whether there was an expressly stated finding in another case that would throw light on the matters before it. No such express finding having been shown to exist, the Court in 2004 did not, as it has in the present case, have to go on to consider what might be the unstated foundations of a judgment given in another case, between different parties.

136. The Court thus considers that the 1996 Judgment contained a finding, whether it be regarded as one of jurisdiction *ratione personae*, or as one anterior to questions of jurisdiction, which was necessary as a matter of logical construction, and related to the question of the FRY’s capacity to appear before the Court under the Statute. The force of *res judicata* attaching to that judgment thus extends to that particular finding.

137. However it has been argued by the Respondent that even were that so,

“the fundamental nature of access as a precondition for the exercise of the Court’s judicial function means that positive findings on access cannot be taken as definitive and final until the final judgment is rendered in proceedings, because otherwise it would be possible that the Court renders its final decision with respect to a party over which it cannot exercise [its] judicial function. In other words, access is so fundamental that, until the final judgment, it overrides the principle of *res judicata*. Thus, even if the 1996 Judgment had made a finding on access, *quod non*, that would not be a bar for the Court to re-examine this issue until the end of the proceedings.”

A similar argument advanced by the Respondent is based on the principle that the jurisdiction of the Court derives from a treaty, namely the Statute of the Court; the Respondent questions whether the Statute could have endowed the 1996 Judgment with any effects at all, since the Respondent was, it alleges, not a party to the Statute. Counsel for the Respondent argued that

“Today it is known that in 1996 when the decision on preliminary objections was rendered, the Respondent was not a party to the Statute. Thus, there was no foothold, Articles 36 (6), 59, and 60 did not represent a binding treaty provision providing a possible basis for deciding on jurisdiction with *res judicata* effects.”

138. It appears to the Court that these contentions are inconsistent with the nature of the principle of *res judicata*. That principle signifies that once the Court has made a determination, whether on a matter of the merits of a dispute brought before it, or on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case. However fundamental the question of the capacity of States to be parties in cases before the Court may be, it remains a question to be determined by the Court, in accordance with Article 36, paragraph 6, of the Statute, and once a finding in favour of jurisdiction has been pronounced with the force of *res judicata*, it is not open to question or re-examination, except by way of revision under Article 61 of the Statute. There is thus, *as a matter of law*, no possibility that the Court might render “its final decision with respect to a party over which it cannot exercise its judicial function”, because the question whether a State is or is not a party subject to the jurisdiction of the Court is one which is reserved for the sole and authoritative decision of the Court.

139. Counsel for the Respondent contended further that, in the circumstances of the present case, reliance on the *res judicata* principle “would justify the Court’s *ultra vires* exercise of its judicial functions contrary to the mandatory requirements of the Statute”. However, the operation

of the “mandatory requirements of the Statute” falls to be determined by the Court in each case before it; and once the Court has determined, with the force of *res judicata*, that it has jurisdiction, then for the purposes of that case no question of *ultra vires* action can arise, the Court having sole competence to determine such matters under the Statute. For the Court *res judicata pro veritate habetur*, and the judicial truth within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations.

* *

(7) Conclusion: jurisdiction affirmed

140. The Court accordingly concludes that, in respect of the contention that the Respondent was not, on the date of filing of the Application instituting proceedings, a State having the capacity to come before the Court under the Statute, the principle of *res judicata* precludes any reopening of the decision embodied in the 1996 Judgment. The Respondent has however also argued that the 1996 Judgment is not *res judicata* as to the further question whether the FRY was, at the time of institution of proceedings, a party to the Genocide Convention, and has sought to show that at that time it was not, and could not have been, such a party. The Court however considers that the reasons given above for holding that the 1996 Judgment settles the question of jurisdiction in this case with the force of *res judicata* are applicable *a fortiori* as regards this contention, since on this point the 1996 Judgment was quite specific, as it was not on the question of capacity to come before the Court. The Court does not therefore find it necessary to examine the argument of the Applicant that the failure of the Respondent to advance at the time the reasons why it now contends that it was not a party to the Genocide Convention might raise considerations of estoppel, or *forum prorogatum* (cf. paragraphs 85 and 101 above). The Court thus concludes that, as stated in the 1996 Judgment, it has jurisdiction, under Article IX of the Genocide Convention, to adjudicate upon the dispute brought before it by the Application filed on 20 March 1993. It follows from the above that the Court does not find it necessary to consider the questions, extensively addressed by the Parties, of the status of the Respondent under the Charter of the United Nations and the Statute of the Court, and its position in relation to the Genocide Convention at the time of the filing of the Application.

*

141. There has been some reference in the Parties’ arguments before the Court to the question whether Article 35, paragraphs 1 and 2, of the Statute apply equally to applicants and to respondents. This matter, being one of interpretation of the Statute, would be one for the Court to determine. However, in the light of the conclusion that the Court has reached as to the *res judicata* status of the 1996 decision, it does not find at present the necessity to do so.

*

IV. The applicable law: the Convention on the Prevention and Punishment of the Crime of Genocide

(1) The Convention in brief

142. The Contracting Parties to the Convention, adopted on 9 December 1948, offer the following reasons for agreeing to its text:

“The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided . . .”

143. Under Article I “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Article II defines genocide in these terms:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

Article III provides as follows:

“The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;

- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.”

144. According to Article IV, persons committing any of those acts shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. Article V requires the parties to enact the necessary legislation to give effect to the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or other acts enumerated in Article III. Article VI provides that “[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”. Article VII provides for extradition.

145. Under Article VIII

“Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.”

146. Article IX provides for certain disputes to be submitted to the Court:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

The remaining ten Articles are final clauses dealing with such matters as parties to the Convention and its entry into force.

147. The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (*I.C.J. Reports 1996 (II)*, pp. 617-621, paras. 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. The Parties disagree on whether the Court finally decided the scope and meaning of that provision in its 1996 Judgment and, if it did not, on the matters over which the Court has jurisdiction under that provision. The Court rules on those two matters in following sections of this Judgment. It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.

148. As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them (e.g. case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127).

149. The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those “relating to the interpretation, application or fulfilment” of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.

* * *

(2) The Court’s 1996 decision about the scope and meaning of Article IX

150. According to the Applicant, the Court in 1996 at the preliminary objections stage decided that it had jurisdiction under Article IX of the Convention to adjudicate upon the responsibility of the respondent State, as indicated in that Article, “for genocide or any of the other acts enumerated in article III”, and that that reference “does not exclude any form of State responsibility”. The issue, it says, is *res judicata*. The Respondent supports a narrower interpretation of the Convention: the Court’s jurisdiction is confined to giving a declaratory judgment relating to breaches of the duties to prevent and punish the commission of genocide by individuals.

151. The Respondent accepts that the first, wider, interpretation “was preferred by the majority of the Court in the preliminary objections phase” and quotes the following passage in the Judgment:

“The Court now comes to the second proposition advanced by Yugoslavia [in support of one of its preliminary objections], regarding the type of State responsibility envisaged in Article IX of the Convention. According to Yugoslavia, that Article would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.

The Court would observe that the reference to Article IX to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III', does not exclude any form of State responsibility.

Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'.

In the light of the foregoing, the Court considers that it must reject the fifth preliminary objection of Yugoslavia. It would moreover observe that it is sufficiently apparent from the very terms of that objection that the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions, including Article IX. For the Court, there is accordingly no doubt that there exists a dispute between them relating to 'the interpretation, application or fulfilment of the . . . Convention, including . . . the responsibility of a State for genocide . . .', according to the form of words employed by that latter provision (cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988, pp. 27-32*). (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 616-617, paras. 32-33; emphasis now added to 1996 text.)

The Applicant relies in particular on the sentences in paragraph 32 which have been emphasized in the above quotation. The Respondent submits that

"this expression of opinion is of marked brevity and is contingent upon the dismissal of the preliminary objection based upon the existence or otherwise of a dispute relating to the interpretation of the Genocide Convention. The interpretation adopted in this provisional mode by the Court is not buttressed by any reference to the substantial preparatory work of the Convention.

In the circumstances, there is no reason of principle or consideration of common sense indicating that the issue of interpretation is no longer open."

While submitting that the Court determined the issue and spoke emphatically on the matter in 1996 the Applicant also says that this present phase of the case

"will provide an additional opportunity for this Court to rule on [the] important matter, not only for the guidance of the Parties here before you, but for the benefit of future generations that should not have to fear the immunity of States from responsibility for their genocidal acts".

152. The Court has already examined above the question of the authority of *res judicata* attaching to the 1996 Judgment, and indicated that it cannot reopen issues decided with that authority. Whether or not the issue now raised by the Respondent falls in that category, the Court observes that the final part of paragraph 33 of that Judgment, quoted above, must be taken as indicating that "the meaning and legal scope" of Article IX and of other provisions of the

Convention remain in dispute. In particular a dispute "exists" about whether the only obligations of the Contracting Parties for the breach of which they may be held responsible under the Convention are to legislate, and to prosecute or extradite, or whether the obligations extend to the obligation not to commit genocide and the other acts enumerated in Article III. That dispute "exists" and was left by the Court for resolution at the merits stage. In these circumstances, and taking into account the positions of the Parties, the Court will determine at this stage whether the obligations of the Parties under the Convention do so extend. That is to say, the Court will decide "the meaning and legal scope" of several provisions of the Convention, including Article IX with its reference to "the responsibility of a State for genocide or any of the other acts enumerated in Article III".

* * *

(3) The Court's 1996 decision about the territorial scope of the Convention

153. A second issue about the *res judicata* effect of the 1996 Judgment concerns the territorial limits, if any, on the obligations of the States parties to prevent and punish genocide. In support of one of its preliminary objections the Respondent argued that it did not exercise jurisdiction over the Applicant's territory at the relevant time. In the final sentence of its reasons for rejecting this argument the Court said this: "[t]he Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention" (*I.C.J. Reports 1996 (II)*, p. 616, para. 31).

154. The Applicant suggests that the Court in that sentence ruled that the obligation extends without territorial limit. The Court does not state the obligation in that positive way. The Court does not say that the obligation is "territorially unlimited by the Convention". Further, earlier in the paragraph, it had quoted from Article VI (about the obligation of any State in the territory of which the act was committed to prosecute) as "the only provision relevant to" territorial "problems" related to the application of the Convention. The quoted sentence is therefore to be understood as relating to the undertaking stated in Article I. The Court did not in 1996 rule on the territorial scope of each particular obligation arising under the Convention. Accordingly the Court has still to rule on that matter. It is not *res judicata*.

* * *

(4) The obligations imposed by the Convention on the Contracting Parties

155. The Applicant, in the words of its Agent, contends that "[t]his case is about State responsibility and seeks to establish the responsibilities of a State which, through its leadership, through its organs, committed the most brutal violations of one of the most sacred instruments of

international law". The Applicant has emphasized that in its view, the Genocide Convention "created a universal, treaty-based concept of State responsibility", and that "[i]t is State responsibility for genocide that this legal proceeding is all about". It relies in this respect on Article IX of the Convention, which, it argues, "quite explicitly impose[s] on States a direct responsibility themselves not to commit genocide or to aid in the commission of genocide". As to the obligation of prevention under Article I, a breach of that obligation, according to the Applicant, "is established — it might be said is 'eclipsed' — by the fact that [the Respondent] is *itself* responsible for the genocide committed; . . . a State which commits genocide has not fulfilled its commitment to prevent it" (emphasis in the original). The argument moves on from alleged breaches of Article I to "violations [by the Respondent] of its obligations under Article III . . . to which express reference is made in Article IX, violations which stand at the heart of our case. This fundamental provision establishes the obligations whose violation engages the responsibility of States parties." It follows that, in the contention of the Applicant, the Court has jurisdiction under Article IX over alleged violations by a Contracting Party of those obligations.

156. The Respondent contends to the contrary that

"the Genocide Convention does not provide for the responsibility of States for acts of genocide as such. The duties prescribed by the Convention relate to 'the prevention and punishment of the crime of genocide' when this crime is committed by individuals: and the provisions of Articles V and VI [about enforcement and prescription] . . . make this abundantly clear."

It argues that the Court therefore does not have jurisdiction *ratione materiae* under Article IX; and continues:

"[t]hese provisions [Articles I, V, VI and IX] do not extend to the responsibility of a Contracting Party as such for acts of genocide but [only] to responsibility for failure to prevent or to punish acts of genocide committed by individuals within its territory or . . . its control".

The sole remedy in respect of that failure would, in the Respondent's view, be a declaratory judgment.

157. As a subsidiary argument, the Respondent also contended that

"for a State to be responsible under the Genocide Convention, the facts must first be established. As genocide is a crime, it can only be established in accordance with the rules of criminal law, under which the first requirement to be met is that of individual responsibility. The State can incur responsibility only when the existence of genocide has been established beyond all reasonable doubt. In addition, it must then be shown that the person who committed the genocide can engage the responsibility of the State . . ."

(This contention went on to mention responsibility based on breach of the obligation to prevent and punish, matters considered later in this Judgment.)

158. The Respondent has in addition presented what it refers to as "alternative arguments concerning solely State responsibility for breaches of Articles II and III". Those arguments addressed the necessary conditions, especially of intent, as well as of attribution. When presenting those alternative arguments, counsel for the Respondent repeated the principal submission set out above that "the Convention does not suggest in any way that States themselves can commit genocide".

159. The Court notes that there is no disagreement between the Parties that the reference in Article IX to disputes about "the responsibility of a State" as being among the disputes relating to the interpretation, application or fulfilment of the Convention which come within the Court's jurisdiction, indicates that provisions of the Convention do impose obligations on States in respect of which they may, in the event of breach, incur responsibility. Articles V, VI and VII requiring legislation, in particular providing effective penalties for persons guilty of genocide and the other acts enumerated in Article III, and for the prosecution and extradition of alleged offenders are plainly among them. Because those provisions regulating punishment also have a deterrent and therefore a preventive effect or purpose, they could be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide stated in Article I and mentioned in the title. On that basis, in support of the Respondent's principal position, that Article would rank as merely hortatory, introductory or purposive and as preambular to those specific obligations. The remaining specific provision, Article VIII about competent organs of the United Nations taking action, may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility.

160. The Court observes that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion. Those propositions, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, are well recognized as part of customary international law: see *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 174, para. 94; case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 48, para. 83; *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 501, para. 99; and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 645, para. 37, and the other cases referred to in those decisions.

161. To determine what are the obligations of the Contracting Parties under the Genocide Convention, the Court will begin with the terms of its Article I. It contains two propositions. The first is the affirmation that genocide is a crime under international law. That affirmation is to be read in conjunction with the declaration that genocide is a crime under international law, unanimously adopted by the General Assembly two years earlier in its resolution 96 (I), and referred to in the Preamble to the Convention (paragraph 142, above). The affirmation recognizes the existing requirements of customary international law, a matter emphasized by the Court in 1951:

“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention) . . .

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

Later in that Opinion, the Court referred to “the moral and humanitarian principles which are its basis” (*ibid.*, p. 24). In earlier phases of the present case the Court has also recalled resolution 96 (I) (*I.C.J. Reports 1993*, p. 23; see also pp. 348 and 440) and has quoted the 1951 statement (*I.C.J. Reports 1996 (II)*, p. 616). The Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)*, paragraph 64, when it added that the norm prohibiting genocide was assuredly a preemptory norm of international law (*ius cogens*).

162. Those characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I — the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent. Several features of that undertaking are significant. The ordinary meaning of the word “undertake” is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties (cf., for example, International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966), Article 2, para. 1; International Covenant on Civil and Political Rights (16 December 1966), Articles 2, para. 1, and 3, for example). It is not merely hortatory or purposive. The undertaking is unqualified (a matter considered later in relation to the scope of the obligation of prevention); and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

163. The conclusion is confirmed by two aspects of the preparatory work of the Convention and the circumstances of its conclusion as referred to in Article 32 of the Vienna Convention. In 1947 the United Nations General Assembly, in requesting the Economic and Social Council to

submit a report and a draft convention on genocide to the Third Session of the Assembly, declared “that genocide is an international crime entailing national and international responsibility on the part of individuals and States” (A/RES/180 (II)). That duality of responsibilities is also to be seen in two other associated resolutions adopted on the same day, both directed to the newly established International Law Commission (hereinafter “the ILC”): the first on the formulation of the Nuremberg principles, concerned with the rights (Principle V) and duties of individuals, and the second on the draft declaration on the rights and duties of States (A/RES/177 and A/RES/178 (II)). The duality of responsibilities is further considered later in this Judgment (paragraphs 173-174).

164. The second feature of the drafting history emphasizes the operative and non-preambular character of Article I. The Preamble to the draft Convention, prepared by the *Ad Hoc* Committee on Genocide for the Third Session of the General Assembly and considered by its Sixth Committee, read in part as follows:

“The High Contracting Parties

.....

Being convinced that the prevention and punishment of genocide requires international co-operation,

Hereby agree to prevent and punish the crime as hereinafter provided.”

The first Article would have provided “[g]enocide is a crime under international law whether committed in time of peace or in time of war” (report of the *Ad Hoc* Committee on Genocide, 5 April to 10 May 1948, United Nations, *Official Records of the Economic and Social Council, Seventh Session, Supplement No. 6*, doc. E/794, pp. 2, 18).

Belgium was of the view that the undertaking to prevent and punish should be made more effective by being contained in the operative part of the Convention rather than in the Preamble and proposed the following Article I to the Sixth Committee of the General Assembly: “The High Contracting Parties undertake to prevent and punish the crime of genocide.” (United Nations doc. A/C.6/217.) The Netherlands then proposed a new text of Article I combining the *Ad Hoc* Committee draft and the Belgian proposal with some changes: “The High Contracting Parties reaffirm that genocide is a crime under international law, which they undertake to prevent and to punish, in accordance with the following articles.” (United Nations docs. A/C.6/220; United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 68th meeting*, p. 45.) The Danish representative thought that Article I should be worded more effectively and proposed the deletion of the final phrase — “in accordance with the following articles” (*ibid.*, p. 47). The Netherlands representative agreed with that suggestion (*ibid.*, pp. 49-50). After the USSR’s proposal to delete Article I was rejected by 36 votes to 8 with 5 abstentions and its proposal to transfer its various points to the Preamble was rejected by 40 votes to 8, and the phrase “whether committed in time of peace or of war” was inserted by 30 votes to 7 with 6 abstentions, the amended text of Article I was adopted by 37 votes to 3 with 2 abstentions (*ibid.*, pp. 51 and 53).

165. For the Court both changes — the movement of the undertaking from the Preamble to the first operative Article and the removal of the linking clause (“in accordance with the following articles”) — confirm that Article I does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide.

166. The Court next considers whether the Parties are also under an obligation, by virtue of the Convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention. The Applicant has however advanced as its main argument that such an obligation is imposed by Article IX, which confers on the Court jurisdiction over disputes “including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III”. Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention. Under Article I the States parties are bound to prevent such an act, which it describes as “a crime under international law”, being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as “a crime under international law”: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.

167. The Court accordingly concludes that Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. That conclusion must also apply to the other acts enumerated in Article III. Those acts are forbidden along with genocide itself in the list included in Article III. They are referred to equally with genocide in Article IX and without being characterized as “punishable”; and the “purely humanitarian and civilizing purpose” of the Convention may be seen as being promoted by the fact that States are subject to that full set of obligations, supporting their undertaking to prevent genocide. It is true that the concepts used in paragraphs (b) to (e) of Article III, and particularly that of “complicity”, refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals. It would however not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State — even though quite different in nature from criminal responsibility — can be engaged through one of the acts, other than genocide itself, enumerated in Article III.

168. The conclusion that the Contracting Parties are bound in this way by the Convention not to commit genocide and the other acts enumerated in Article III is confirmed by one unusual feature of the wording of Article IX. But for that unusual feature and the addition of the word “fulfilment” to the provision conferring on the Court jurisdiction over disputes as to the “interpretation and application” of the Convention (an addition which does not appear to be significant in this case), Article IX would be a standard dispute settlement provision.

169. The unusual feature of Article IX is the phrase “including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III”. The word “including” tends to confirm that disputes relating to the responsibility of Contracting Parties for genocide, and the other acts enumerated in Article III to which it refers, are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention. The responsibility of a party for genocide and the other acts enumerated in Article III arises from its failure to comply with the obligations imposed by the other provisions of the Convention, and in particular, in the present context, with Article III read with Articles I and II. According to the English text of the Convention, the responsibility contemplated is responsibility “for genocide” (in French, “responsabilité . . . en matière de génocide”), not merely responsibility “for failing to prevent or punish genocide”. The particular terms of the phrase as a whole confirm that Contracting Parties may be responsible for genocide and the other acts enumerated in Article III of the Convention.

*

170. The Court now considers three arguments, advanced by the Respondent which may be seen as contradicting the proposition that the Convention imposes a duty on the Contracting Parties not to commit genocide and the other acts enumerated in Article III. The first is that, as a matter of general principle, international law does not recognize the criminal responsibility of the State, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility. On the matter of principle the Respondent calls attention to the rejection by the ILC of the concept of international crimes when it prepared the final draft of its Articles on State Responsibility, a decision reflecting the strongly negative reactions of a number of States to any such concept. The Applicant accepts that general international law does not recognize the criminal responsibility of States. It contends, on the specific issue, that the obligation for which the Respondent may be held responsible, in the event of breach, in proceedings under Article IX, is simply an obligation arising under international law, in this case the provisions of the Convention. The Court observes that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature. This argument accordingly cannot be accepted.

171. The second argument of the Respondent is that the nature of the Convention is such as to exclude from its scope State responsibility for genocide and the other enumerated acts. The Convention, it is said, is a standard international criminal law convention focussed essentially on

the criminal prosecution and punishment of individuals and not on the responsibility of States. The emphasis of the Convention on the obligations and responsibility of individuals excludes any possibility of States being liable and responsible in the event of breach of the obligations reflected in Article III. In particular, it is said, that possibility cannot stand in the face of the references, in Article III to punishment (of individuals), and in Article IV to individuals being punished, and the requirement, in Article V for legislation in particular for effective penalties for persons guilty of genocide, the provision in Article VI for the prosecution of persons charged with genocide, and requirement in Article VII for extradition.

172. The Court is mindful of the fact that the famous sentence in the Nuremberg Judgment that “[c]rimes against international law are committed by men, not by abstract entities . . .” (Judgment of the International Military Tribunal, Trial of the Major War Criminals, 1947, *Official Documents*, Vol. 1, p. 223) might be invoked in support of the proposition that only individuals can breach the obligations set out in Article III. But the Court notes that that Tribunal was answering the argument that “international law is concerned with the actions of sovereign States, and provides no punishment for individuals” (*ibid.*, p. 222), and that thus States alone were responsible under international law. The Tribunal rejected that argument in the following terms: “[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized” (*ibid.*, p. 223; the phrase “as well as upon States” is missing in the French text of the Judgment).

173. The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” The Court notes also that the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001), to be referred to hereinafter as “the ILC Articles on State Responsibility”, affirm in Article 58 the other side of the coin: “These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.” In its Commentary on this provision, the Commission said:

“Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.” (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.)

The Commission quoted Article 25, paragraph 4, of the Rome Statute, and concluded as follows:

“Article 58 . . . [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term ‘individual responsibility’ has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.”

174. The Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs (a) to (e) of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals. Furthermore, the fact that Articles V, VI and VII focus on individuals cannot itself establish that the Contracting Parties may not be subject to obligations not to commit genocide and the other acts enumerated in Article III.

175. The third and final argument of the Respondent against the proposition that the Contracting Parties are bound by the Convention not to commit genocide is based on the preparatory work of the Convention and particularly of Article IX. The Court has already used part of that work to confirm the operative significance of the undertaking in Article I (see paragraphs 164 and 165 above), an interpretation already determined from the terms of the Convention, its context and purpose.

176. The Respondent, claiming that the Convention and in particular Article IX is ambiguous, submits that the drafting history of the Convention, in the Sixth Committee of the General Assembly, shows that “there was no question of direct responsibility of the State for acts of genocide”. It claims that the responsibility of the State was related to the “key provisions” of Articles IV-VI: the Convention is about the criminal responsibility of individuals supported by the civil responsibility of States to prevent and punish. This argument against any wider responsibility for the Contracting Parties is based on the records of the discussion in the Sixth Committee, and is, it is contended, supported by the rejection of United Kingdom amendments to what became Articles IV and VI. Had the first amendment been adopted, Article IV, concerning the punishment of individuals committing genocide or any of the acts enumerated in Article III, would have been extended by the following additional sentence: “[Acts of genocide] committed by or on behalf of States or governments constitute a breach of the present Convention” (A/C.6/236 and Corr. 1). That amendment was defeated (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 96th meeting*, p. 355). What became Article VI would have been replaced by a provision conferring jurisdiction on the Court if an act of genocide is or is alleged to be the act of a State or government or its organs. The United Kingdom in response to objections that the proposal was out of order (because it meant going back on a decision already taken) withdrew the amendment in favour of the joint amendment to what became Article IX, submitted by the United Kingdom and Belgium (*ibid.*, 100th meeting, p. 394). In speaking to that joint amendment the United Kingdom delegate acknowledged that the debate had clearly shown the Committee’s decision to confine what is now Article VI to the responsibility of individuals (*ibid.*, 100th meeting, p. 430). The United Kingdom/Belgium amendment would have added the words “including disputes relating to the responsibility of a State for any of the acts

enumerated in Articles II and IV [as the Convention was then drafted]”. The United Kingdom delegate explained that what was involved was civil responsibility, not criminal responsibility (*ibid.*, 103rd meeting, p. 440). A proposal to delete those words failed and the provision was adopted (*ibid.*, 104th meeting, p. 447), with style changes being made by the Drafting Committee.

177. At a later stage a Belgium/United Kingdom/United States proposal which would have replaced the disputed phrase by including “disputes arising from a charge by a Contracting Party that the crime of genocide or any other of the acts enumerated in article III has been committed within the jurisdiction of another Contracting Party” was ruled by the Chairman of the Sixth Committee as a change of substance and the Committee did not adopt the motion (which required a two-thirds majority) for reconsideration (A/C.6/305). The Chairman gave the following reason for his ruling which was not challenged:

“it was provided in article IX that those disputes, among others, which concerned the responsibility of a State for genocide or for any of the acts enumerated in article III, should be submitted to the International Court of Justice. According to the joint amendment, on the other hand, the disputes would not be those which concerned the responsibility of the State but those which resulted from an accusation to the effect that the crime had been committed in the territory of one of the contracting parties.” (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 131st meeting*, p. 690.)

By that time in the deliberations of the Sixth Committee it was clear that only individuals could be held criminally responsible under the draft Convention for genocide. The Chairman was plainly of the view that the Article IX, as it had been modified, provided for State responsibility for genocide.

178. In the view of the Court, two points may be drawn from the drafting history just reviewed. The first is that much of it was concerned with proposals supporting the criminal responsibility of States; but those proposals were *not* adopted. The second is that the amendment which was adopted — to Article IX — is about jurisdiction in respect of the responsibility of States *simpliciter*. Consequently, the drafting history may be seen as supporting the conclusion reached by the Court in paragraph 167 above.

179. Accordingly, having considered the various arguments, the Court affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.

* * *

(5) Question whether the Court may make a finding of genocide by a State in the absence of a prior conviction of an individual for genocide by a competent court

180. The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph (b), and complicity under Article III, paragraph (e); and, as explained below (paragraph 431) for purposes of the obligation to prevent genocide. The Respondent has raised the question whether it is necessary, as a matter of law, for the Court to be able to uphold a claim of the responsibility of a State for an act of genocide, or any other act enumerated in Article III, that there should have been a finding of genocide by a court or tribunal exercising criminal jurisdiction. According to the Respondent, the condition *sine qua non* for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State’s responsibility.

181. The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity (paragraphs 209-210 below). Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction under Article IX to find a State responsible if genocide or other acts enumerated in Article III are committed by its organs, or persons or groups whose acts are attributable to it.

182. Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.

* * *

(6) The possible territorial limits of the obligations

183. The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question. The extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the Judgment concerned with that obligation (cf. paragraph 430 below). The significant relevant condition concerning the obligation not to commit genocide and the other acts enumerated in Article III is provided by the rules on attribution (paragraphs 379 ff. below).

184. The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed (cf. paragraph 442 below), or by an international penal tribunal with jurisdiction (paragraphs 443 ff. below).

* *

(7) The Applicant's claims in respect of alleged genocide committed outside its territory against non-nationals

185. In its final submissions the Applicant requests the Court to make rulings about acts of genocide and other unlawful acts allegedly committed against "non-Serbs" outside its own territory (as well as within it) by the Respondent. Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the *ius cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations. For the reasons explained in paragraphs 368 and 369 below, the Court will not however need to address those questions of law.

* *

(8) The question of intent to commit genocide

186. The Court notes that genocide as defined in Article II of the Convention comprises "acts" and an "intent". It is well established that the acts —

- “(a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group; [and]
- (e) Forcibly transferring children of the group to another group” —

themselves include mental elements. “Killing” must be intentional, as must “causing serious bodily or mental harm”. Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words “deliberately” and “intended”, quite apart from the implications of the words “inflicting” and “imposing”; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 44, para. 5).

187. In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the “intent to destroy, in whole or in part, . . . [the protected] group, as such”. It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; in the present Judgment it will usually be referred to as the “specific intent (*dolus specialis*)”. It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words “as such” emphasize that intent to destroy the protected group.

188. The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY” or “the Tribunal”) did in the *Kupreskić et al.* case:

“the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.” (IT-95-16-T, Judgment, 14 January 2000, para. 636.)

189. The specific intent is also to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.

* *

(9) Intent and “ethnic cleansing”

190. The term “ethnic cleansing” has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case; see, for example, Security Council resolution 787 (1992), para. 2; resolution 827 (1993), Preamble; and the Report with that title

attached as Annex IV to the Final Report of the United Nations Commission of Experts (S/1994/674/Add.2) (hereinafter "Report of the Commission of Experts"). General Assembly resolution 47/121 referred in its Preamble to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide", as being carried on in Bosnia and Herzegovina. It will be convenient at this point to consider what legal significance the expression may have. It is in practice used, by reference to a specific region or area, to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area" (S/5374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal during the drafting of the Convention to include in the definition "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" was not accepted (A/C.6/234). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'" (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide." (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts.

* * *

(10) Definition of the protected group

191. When examining the facts brought before the Court in support of the accusations of the commission of acts of genocide, it is necessary to have in mind the identity of the group against which genocide may be considered to have been committed. The Court will therefore next

consider the application in this case of the requirement of Article II of the Genocide Convention, as an element of genocide, that the proscribed acts be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The Parties disagreed on aspects of the definition of the "group". The Applicant in its final submission refers to "the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population" (paragraph 66 above). It thus follows what is termed the negative approach to the definition of the group in question. The Respondent sees two legal problems with that formulation:

"First, the group targeted is not sufficiently well defined as such, since, according to the Applicant's allegation, that group consists of the non-Serbs, thus an admixture of all the individuals living in Bosnia and Herzegovina except the Serbs, but more particularly the Muslim population, which accounts for only a part of the non-Serb population. Second, the intent to destroy concerned only a part of the non-Serb population, but the Applicant failed to specify which part of the group was targeted."

In addition to those issues of the negative definition of the group and its geographic limits (or their lack), the Parties also discussed the choice between subjective and objective approaches to the definition. The Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach. The issue is not in any event significant on the facts of this case and the Court takes it no further.

192. While the Applicant has employed the negative approach to the definition of a protected group, it places major, for the most part exclusive, emphasis on the Bosnian Muslims as the group being targeted. The Respondent, for instance, makes the point that the Applicant did not mention the Croats in its oral arguments relating to sexual violence, Srebrenica and Sarajevo, and that other groups including "the Jews, Roma and Yugoslavs" were not mentioned. The Applicant does however maintain the negative approach to the definition of the group in its final submissions and the Court accordingly needs to consider it.

193. The Court recalls first that the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics — national, ethnical, racial or religious — and not the lack of them. The intent must also relate to the group "as such". That means that the crime requires an intent to destroy a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not. The etymology of the word — killing a group — also indicates a positive definition; and Raphael Lemkin has explained that he created the word from the Greek *genos*, meaning race or tribe, and the termination "-cide", from the Latin *caedere*, to kill (*Axis Rule in Occupied Europe* (1944), p. 79). In 1945 the word was used in the Nuremberg indictment which stated that the defendants "conducted deliberate and systematic genocide, viz., the extermination of racial and national groups . . . in order to destroy particular races and classes of people and national, racial or religious groups . . ." (Indictment, Trial of the Major War Criminals before the International Military Tribunal, *Official Documents*, Vol. 1, pp. 43 and 44). As the Court explains below

(paragraph 198), when part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole. Further, each of the acts listed in Article II require that the proscribed action be against members of the “group”.

194. The drafting history of the Convention confirms that a positive definition must be used. Genocide as “the denial of the existence of entire human groups” was contrasted with homicide, “the denial of the right to live of individual human beings” by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of “the very existence of certain human groups” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way.

195. The Court observes that the ICTY Appeals Chamber in the *Stakić* case (IT-97-24-A, Judgment, 22 March 2006, paras. 20-28) also came to the conclusion that the group must be defined positively, essentially for the same reasons as the Court has given.

196. Accordingly, the Court concludes that it should deal with the matter on the basis that the targeted group must in law be defined positively, and thus not negatively as the “non-Serb” population. The Applicant has made only very limited reference to the non-Serb populations of Bosnia and Herzegovina other than the Bosnian Muslims, e.g. the Croats. The Court will therefore examine the facts of the case on the basis that genocide may be found to have been committed if an intent to destroy the Bosnian Muslims, as a group, in whole or in part, can be established.

197. The Parties also addressed a specific question relating to the impact of geographic criteria on the group as identified positively. The question concerns in particular the atrocities committed in and around Srebrenica in July 1995, and the question whether in the circumstances of that situation the definition of genocide in Article II was satisfied so far as the intent of destruction of the “group” “in whole or in part” requirement is concerned. This question arises because of a critical finding in the *Krstić* case. In that case the Trial Chamber was “ultimately satisfied that murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica” (IT-98-33, Judgment, 2 August 2001, para. 546). Those men were systematically targeted whether they were civilians or soldiers (*ibid.*). The Court addresses the facts of that particular situation later (paragraphs 278-297). For the moment, it considers how as a matter of law the “group” is to be defined, in territorial and other respects.

198. In terms of that question of law, the Court refers to three matters relevant to the determination of “part” of the “group” for the purposes of Article II. In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of *Kapishema*, *Byilishema*, and *Semanza* there referred to; and *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17).

199. Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, “it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe” (*ibid.*). The area of the perpetrator’s activity and control are to be considered. As the ICTY Appeals Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant (*Krstić*, IT-98-33-A, Judgment, 19 April 2004, para. 13). This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide (*Stakić*, IT-97-24-T, Judgment, 31 July 2003, para. 523). The Respondent, while not challenging this criterion, does contend that the limit militates against the existence of the specific intent (*dolus specialis*) at the national or State level as opposed to the local level — a submission which, in the view of the Court, relates to attribution rather than to the “group” requirement.

200. A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the *Krstić* case put the matter in these carefully measured terms:

“The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute which exactly reproduces Article II of the Convention].” (IT-98-33-A, Judgment, 19 April 2004, para. 12; footnote omitted.)

Establishing the “group” requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court’s opinion that the qualitative approach cannot stand alone. The Appeals Chamber in *Krstić* also expresses that view.

201. The above list of criteria is not exhaustive, but, as just indicated, the substantiality criterion is critical. They are essentially those stated by the Appeals Chamber in the *Krstić* case, although the Court does give this first criterion priority. Much will depend on the Court’s assessment of those and all other relevant factors in any particular case.

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V. Questions of proof: burden of proof, the standard of proof, methods of proof

202. When turning to the facts of the dispute, the Court must note that many allegations of fact made by the Applicant are disputed by the Respondent. That is so notwithstanding increasing agreement between the Parties on certain matters through the course of the proceedings. The disputes relate to issues about the facts, for instance the number of rapes committed by Serbs against Bosnian Muslims, and the day-to-day relationships between the authorities in Belgrade and the authorities in Pale, and the inferences to be drawn from, or the evaluations to be made of, facts, for instance about the existence or otherwise of the necessary specific intent (*dolus specialis*) and about the attributability of the acts of the organs of Republika Srpska and various paramilitary groups to the Respondent. The allegations also cover a very wide range of activity affecting many communities and individuals over an extensive area and over a long period. They have already been the subject of many accounts, official and non-official, by many individuals and bodies. The Parties drew on many of those accounts in their pleadings and oral argument.

203. Accordingly, before proceeding to an examination of the alleged facts underlying the claim in this case, the Court first considers, in this section of the Judgment, in turn the burden or onus of proof, the standard of proof, and the methods of proof.

204. On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, “it is the litigant seeking to establish a fact who bears the burden of proving it” (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). While the Applicant accepts that approach as a general proposition, it contends that in certain respects the onus should be reversed, especially in respect of the attributability of alleged acts of genocide to the Respondent, given the refusal of the Respondent to produce the full text of certain documents.

205. The particular issue concerns the “redacted” sections of documents of the Supreme Defence Council of the Respondent, i.e. sections in which parts of the text had been blacked out so as to be illegible. The documents had been classified, according to the Co-Agent of the Respondent, by decision of the Council as a military secret, and by a confidential decision of the

Council of Ministers of Serbia and Montenegro as a matter of national security interest. The Applicant contends that the Court should draw its own conclusions from the failure of the Respondent to produce complete copies of the documents. It refers to the power of the Court, which it had invoked earlier (paragraph 44 above), to call for documents under Article 49 of the Statute, which provides that “[f]ormal note shall be taken of any refusal”. In the second round of oral argument the Applicant’s Deputy Agent submitted that

“Serbia and Montenegro should not be allowed to respond to our quoting the redacted SDC reports if it does not provide at the very same time the Applicant and the Court with copies of entirely unredacted versions of *all* the SDC shorthand records and of *all* of the minutes of the same. Otherwise, Serbia and Montenegro would have an overriding advantage over Bosnia and Herzegovina with respect to documents, which are apparently, and not in the last place in the Respondent’s eyes, of direct relevance to winning or losing the present case. We explicitly, Madam President, request the Court to instruct the Respondent accordingly.” (Emphasis in the original.)

206. On this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records. It has made very ample use of it. In the month before the hearings it submitted what must be taken to have been a careful selection of documents from the very many available from the ICTY. The Applicant called General Sir Richard Dannatt, who, drawing on a number of those documents, gave evidence on the relationship between the authorities in the Federal Republic of Yugoslavia and those in the Republika Srpska and on the matter of control and instruction. Although the Court has not agreed to either of the Applicant’s requests to be provided with unedited copies of the documents, it has not failed to note the Applicant’s suggestion that the Court may be free to draw its own conclusions.

207. On a final matter relating to the burden of proof, the Applicant contends that the Court should draw inferences, notably about specific intent (*dolus specialis*), from established facts, i.e., from what the Applicant refers to as a “pattern of acts” that “speaks for itself”. The Court considers that matter later in the Judgment (paragraphs 370-376 below).

208. The Parties also differ on the second matter, the standard of proof. The Applicant, emphasizing that the matter is not one of criminal law, says that the standard is the balance of evidence or the balance of probabilities, inasmuch as what is alleged is breach of treaty obligations. According to the Respondent, the proceedings “concern the most serious issues of State responsibility and . . . a charge of such exceptional gravity against a State requires a proper degree of certainty. The proofs should be such as to leave no room for reasonable doubt.”

209. The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom v. Albania), Judgment, I.C.J. Reports 1949*, p. 17). The Court requires that it be fully

convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.

210. In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.

211. The Court now turns to the third matter — the method of proof. The Parties submitted a vast array of material, from different sources, to the Court. It included reports, resolutions and findings by various United Nations organs, including the Secretary-General, the General Assembly, the Security Council and its Commission of Experts, and the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Special Rapporteur on Human Rights in the former Yugoslavia; documents from other intergovernmental organizations such as the Conference for Security and Co-operation in Europe; documents, evidence and decisions from the ICTY; publications from governments; documents from non-governmental organizations; media reports, articles and books. They also called witnesses, experts and witness-experts (paragraphs 57-58 above).

212. The Court must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached. This case does however have an unusual feature. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY. The Court considers their significance later in this section of the Judgment.

213. The assessment made by the Court of the weight to be given to a particular item of evidence may lead to the Court rejecting the item as unreliable, or finding it probative, as appears from the practice followed for instance in the case concerning *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 9-10, paras. 11-13; *Military and Paramilitary Activities in and against Nicaragua v. United States of America, Merits, Judgment, I.C.J. Reports 1986*, pp. 39-41, paras. 59-73; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, pp. 200-201, paras. 57-61. In the most recent case the Court said this:

“The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activities in and against Nicaragua v. United States of America, Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the

correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties.” (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 35, para. 61. See also paras. 78-79, 114 and 237-242.)

214. The fact-finding process of the ICTY falls within this formulation, as “evidence obtained by examination of persons directly involved”, tested by cross-examination, the credibility of which has not been challenged subsequently. The Court has been referred to extensive documentation arising from the Tribunal's processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing judgments following a plea agreement and decisions of the Appeals Chamber.

215. By the end of the oral proceedings the Parties were in a broad measure of agreement on the significance of the ICTY material. The Applicant throughout has given and gives major weight to that material. At the written stage the Respondent had challenged the reliability of the Tribunal's findings, the adequacy of the legal framework under which it operates, the adequacy of its procedures and its neutrality. At the stage of the oral proceedings, its position had changed in a major way. In its Agent's words, the Respondent now based itself on the jurisprudence of the Tribunal and had “in effect” distanced itself from the opinions about the Tribunal expressed in its Rejoinder. The Agent was however careful to distinguish between different categories of material:

“[W]e do not regard all the material of the Tribunal for the former Yugoslavia as having the same relevance or probative value. We have primarily based ourselves upon the judgments of the Tribunal's Trial and Appeals Chambers, given that only the judgments can be regarded as establishing the facts about the crimes in a credible way.”

And he went on to point out that the Tribunal has not so far, with the exception of Srebrenica, held that genocide was committed in any of the situations cited by the Applicant. He also called attention to the criticisms already made by Respondent's counsel of the relevant judgment concerning General Krstić who was found guilty of aiding and abetting genocide at Srebrenica.

216. The Court was referred to actions and decisions taken at various stages of the ICTY processes:

- (1) The Prosecutor's decision to include or not certain changes in an indictment;
- (2) The decision of a judge on reviewing the indictment to confirm it and issue an arrest warrant or not;

- (3) If such warrant is not executed, a decision of a Trial Chamber (of three judges) to issue an international arrest warrant, provided the Chamber is satisfied that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged;
- (4) The decision of a Trial Chamber on the accused's motion for acquittal at the end of the prosecution case;
- (5) The judgment of a Trial Chamber following the full hearings;
- (6) The sentencing judgment of a Trial Chamber following a guilty plea.

The Court was also referred to certain decisions of the Appeals Chamber.

217. The Court will consider these stages in turn. The Applicant placed some weight on indictments filed by the Prosecutor. But the claims made by the Prosecutor in the indictments are just that — allegations made by one party. They have still to proceed through the various phases outlined earlier. The Prosecutor may, instead, decide to withdraw charges of genocide or they may be dismissed at trial. Accordingly, as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide.

218. The second and third stages, relating to the confirmation of the indictment, issues of arrest warrants and charges, are the responsibility of the judges (one in the second stage and three in the third) rather than the Prosecutor, and witnesses may also be called in the third, but the accused is generally not involved. Moreover, the grounds for a judge to act are, at the second stage, that a *prima facie* case has been established, and at the third, that reasonable grounds exist for belief that the accused has committed crimes charged.

219. The accused does have a role at the fourth stage — motions for acquittal made by the defence at the end of the prosecution's case and after the defence has had the opportunity to cross-examine the prosecution's witnesses, on the basis that "there is no evidence capable of supporting a conviction". This stage is understood to require a decision, not that the Chamber trying the facts *would* be satisfied beyond reasonable doubt by the prosecution's evidence (if accepted), but rather that it *could* be so satisfied (*Jelić*, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001, para. 37). The significance of that lesser standard for present purposes appears from one case on which the Applicant relied. The Trial Chamber in August 2005 in *Krajišnik* dismissed the defence motion that the accused who was charged with genocide and other crimes had no case to answer (IT-00-39-T, transcript of 19 August 2005, pp. 17112-17132). But following the full hearing the accused was found not guilty of genocide nor of complicity in genocide. While the *actus reus* of genocide was established, the specific intent (*dolus specialis*) was not (Trial Chamber

Judgment, 27 September 2006, paras. 867-869). Because the judge or the Chamber does not make definitive findings at any of the four stages described, the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met.

220. The processes of the Tribunal at the fifth stage, leading to a judgment of the Trial Chamber following the full hearing are to be contrasted with those earlier stages. The processes of the Tribunal leading to final findings are rigorous. Accused are presumed innocent until proved guilty beyond reasonable doubt. They are entitled to listed minimum guarantees (taken from the International Covenant on Civil and Political Rights), including the right to counsel, to examine witness against them, to obtain the examination of witness on their behalf, and not to be compelled to testify against themselves or to confess guilt. The Tribunal has powers to require Member States of the United Nations to co-operate with it, among other things, in the taking of testimony and the production of evidence. Accused are provided with extensive pre-trial disclosure including materials gathered by the prosecution and supporting the indictment, relevant witness statements and the pre-trial brief summarizing the evidence against them. The prosecutor is also to disclose exculpatory material to the accused and to make available in electronic form the collections of relevant material which the prosecution holds.

221. In practice, now extending over ten years, the trials, many of important military or political figures for alleged crimes committed over long periods and involving complex allegations, usually last for months, even years, and can involve thousands of documents and numerous witnesses. The Trial Chamber may admit any relevant evidence which has probative value. The Chamber is to give its reasons in writing and separate and dissenting opinions may be appended.

222. Each party has a right of appeal from the judgment of the Trial Chamber to the Appeals Chamber on the grounds of error of law invalidating the decision or error of fact occasioning a miscarriage of justice. The Appeals Chamber of five judges does not rehear the evidence, but it does have power to hear additional evidence if it finds that it was not available at trial, is relevant and credible and could have been a decisive factor in the trial. It too is to give a reasoned opinion in writing to which separate or dissenting opinions may be appended.

223. In view of the above, the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.

224. There remains for consideration the sixth stage, that of sentencing judgments given following a guilty plea. The process involves a statement of agreed facts and a sentencing judgment. Notwithstanding the guilty plea the Trial Chamber must be satisfied that there is

sufficient factual basis for the crime and the accused's participation in it. It must also be satisfied that the guilty plea has been made voluntarily, is informed and is not equivocal. Accordingly the agreed statement and the sentencing judgment may when relevant be given a certain weight.

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225. The Court will now comment in a general way on some of the other evidence submitted to it. Some of that evidence has been produced to prove that a particular statement was made so that the Party may make use of its content. In many of these cases the accuracy of the document as a record is not in doubt; rather its significance is. That is often the case for instance with official documents, such as the record of parliamentary bodies and budget and financial statements. Another instance is when the statement was recorded contemporaneously on audio or videotape. Yet another is the evidence recorded by the ICTY.

226. In some cases the account represents the speaker's own knowledge of the fact to be determined or evaluated. In other cases the account may set out the speaker's opinion or understanding of events after they have occurred and in some cases the account will not be based on direct observation but may be hearsay. In fact the Parties rarely disagreed about the authenticity of such material but rather about whether it was being accurately presented (for instance with contention that passages were being taken out of context) and what weight or significance should be given to it.

227. The Court was also referred to a number of reports from official or independent bodies, giving accounts of relevant events. Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).

228. One particular instance is the comprehensive report, "The Fall of Srebrenica", which the United Nations Secretary-General submitted in November 1999 to the General Assembly (United Nations doc. A/54/549). It was prepared at the request of the General Assembly, and covered the events from the establishing by the Security Council of the "safe area" on 16 April 1993 (Security Council resolution 819 (1993)) until the endorsement by the Security Council on 15 December 1995 of the Dayton Agreement. Member States and others concerned had been encouraged to provide relevant information. The Secretary-General was in a very good position to prepare a comprehensive report, some years after the events, as appears in part from this description of the method of preparation:

"This report has been prepared on the basis of archival research within the United Nations system, as well as on the basis of interviews with individuals who, in one capacity or another, participated in or had knowledge of the events in question. In the interest of gaining a clearer understanding of these events, I have taken the

exceptional step of entering into the public record information from the classified files of the United Nations. In addition, I would like to record my thanks to those Member States, organizations and individuals who provided information for this report. A list of persons interviewed in this connection is attached as annex I. While that list is fairly extensive, time, as well as budgetary and other constraints, precluded interviewing many other individuals who would be in a position to offer important perspectives on the subject at hand. In most cases, the interviews were conducted on a non-attribution basis to encourage as candid a disclosure as possible. I have also honoured the request of those individuals who provided information for this report on the condition that they not be identified." (A/54/549, para. 8.)

229. The chapter, "Fall of Srebrenica: 6-11 July 1995", is preceded by this note:

"The United Nations has hitherto not publicly disclosed the full details of the attack carried out on Srebrenica from 6 to 11 July 1995. The account which follows has now been reconstructed mainly from reports filed at that time by Dutchbat and the United Nations military observers. The accounts provided have also been supplemented with information contained in the Netherlands report on the debriefing of Dutchbat, completed in October 1995, and by information provided by Bosniac, Bosnian Serb and international sources. In order to independently examine the information contained in various secondary sources published over the past four years, as well to corroborate key information contained in the Netherlands debriefing report, interviews were conducted during the preparation of this report with a number of key personnel who were either in Srebrenica at the time, or who were involved in decision-making at higher levels in the United Nations chain of command." (A/54/549, Chap. VII, p. 57.)

The introductory note to the next chapter, "The Aftermath of the fall of Srebrenica: 12-20 July 1995", contains this description of the sources:

"The following section attempts to describe in a coherent narrative how thousands of men and boys were summarily executed and buried in mass graves within a matter of days while the international community attempted to negotiate access to them. It details how evidence of atrocities taking place gradually came to light, but too late to prevent the tragedy which was unfolding. In 1995, the details of the tragedy were told in piecemeal fashion, as survivors of the mass executions began to provide accounts of the horrors they had witnessed; satellite photos later gave credence to their accounts.

The first official United Nations report which signalled the possibility of mass executions having taken place was the report of the Special Rapporteur of the Commission on Human Rights, dated 22 August 1995 (E/CN.4/1996/9). It was followed by the Secretary-General's reports to the Security Council, pursuant to resolution 1010 (1995), of 30 August (S/1995/755) and 27 November 1995 (S/1995/988). Those reports included information obtained from governmental and

non-governmental organizations, as well as information that had appeared in the international and local press. By the end of 1995, however, the International Tribunal for the Former Yugoslavia had still not been granted access to the area to corroborate the allegations of mass executions with forensic evidence.

The Tribunal first gained access to the crime scenes in January 1996. The details of many of their findings were made public in July 1996, during testimony under rule 60 of the Tribunal's rules of procedure, in the case against Ratko [sic: Ratko] Mladić and Radovan Karadžić. Between that time and the present, the Tribunal has been able to conduct further investigations in the areas where the executions were reported to have taken place and where the primary and secondary mass graves were reported to have been located. On the basis of the forensic evidence obtained during those investigations, the Tribunal has now been able to further corroborate much of the testimony of the survivors of the massacres. On 30 October 1998, the Tribunal indicted Radislav Krstić, Commander of the BSA's Drina Corps, for his alleged involvement in those massacres. The text of the indictment provides a succinct summary of the information obtained to date on where and when the mass executions took place.

The aforementioned sources of information, coupled with certain additional confidential information that was obtained during the preparation of this report, form the basis of the account which follows. Sources are purposely not cited in those instances where such disclosure could potentially compromise the Tribunal's ongoing work." (*Ibid.*, Chap. VIII, p. 77.)

230. The care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. As will appear later in this Judgment, the Court has gained substantial assistance from this report.

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VI. The facts invoked by the Applicant, in relation to Article II

(1) The background

231. In this case the Court is seized of a dispute between two sovereign States, each of which is established in part of the territory of the former State known as the Socialist Federal Republic of Yugoslavia, concerning the application and fulfilment of an international convention to which they are parties, the Convention on the Prevention and Punishment of the Crime of Genocide. The task of the Court is to deal with the legal claims and factual allegations advanced by Bosnia and Herzegovina against Serbia and Montenegro; the counter-claim advanced earlier in the proceedings by Serbia and Montenegro against Bosnia and Herzegovina has been withdrawn.

232. Following the death on 4 May 1980 of President Tito, a rotating presidency was implemented in accordance with the 1974 Constitution of the SFRY. After almost ten years of economic crisis and the rise of nationalism within the republics and growing tension between different ethnic and national groups, the SFRY began to break up. On 25 June 1991, Slovenia and Croatia declared independence, followed by Macedonia on 17 September 1991. (Slovenia and Macedonia are not concerned in the present proceedings; Croatia has brought a separate case against Serbia and Montenegro, which is still pending on the General List.) On the eve of the war in Bosnia and Herzegovina which then broke out, according to the last census (31 March 1991), some 44 per cent of the population of the country described themselves as Muslims, some 31 per cent as Serbs and some 17 per cent as Croats (*Krajšnik*, IT-00-39-T and 40-T, Trial Chamber Judgment, 27 September 2006, para. 15).

233. By a "sovereignty" resolution adopted on 14 October 1991, the Parliament of Bosnia and Herzegovina declared the independence of the Republic. The validity of this resolution was contested at the time by the Serbian community of Bosnia and Herzegovina (Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia (the Badinter Commission), p. 3). On 24 October 1991, the Serb Members of the Bosnian Parliament proclaimed a separate Assembly of the Serb Nation/Assembly of the Serb People of Bosnia and Herzegovina. On 9 January 1992, the Republic of the Serb People of Bosnia and Herzegovina (subsequently renamed the Republika Srpska on 12 August 1992) was declared with the proviso that the declaration would come into force upon international recognition of the Republic of Bosnia and Herzegovina. On 28 February 1992, the Constitution of the Republic of the Serb People of Bosnia and Herzegovina was adopted. The Republic of the Serb People of Bosnia and Herzegovina (and subsequently the Republika Srpska) was not and has not been recognized internationally as a State; it has however enjoyed some *de facto* independence.

234. On 29 February and 1 March 1992, a referendum was held on the question of independence in Bosnia and Herzegovina. On 6 March 1992, Bosnia and Herzegovina officially declared its independence. With effect from 7 April 1992, Bosnia and Herzegovina was recognized by the European Community. On 7 April 1992, Bosnia and Herzegovina was recognized by the United States. On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia was adopted consisting of the Republic of Serbia and the Republic of Montenegro. As explained above (paragraph 67), Montenegro declared its independence on 3 June 2006. All three States have been admitted to membership of the United Nations: Bosnia and Herzegovina on 22 May 1992; Serbia and Montenegro, under the name of the Federal Republic of Yugoslavia on 1 November 2000; and the Republic of Montenegro on 28 June 2006.

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(2) The entities involved in the events complained of

235. It will be convenient next to define the institutions, organizations or groups that were the actors in the tragic events that were to unfold in Bosnia and Herzegovina. Of the independent sovereign States that had emerged from the break-up of the SFRY, two are concerned in the present proceedings: on the one side, the FRY (later to be called Serbia and Montenegro), which was

composed of the two constituent republics of Serbia and Montenegro; on the other, the Republic of Bosnia and Herzegovina. At the time when the latter State declared its independence (15 October 1991), the independence of two other entities had already been declared: in Croatia, the Republika Srpska Krajina, on 26 April 1991, and the Republic of the Serb People of Bosnia and Herzegovina, later to be called the Republika Srpska, on 9 January 1992 (paragraph 233 above). The Republika Srpska never attained international recognition as a sovereign State, but it had *de facto* control of substantial territory, and the loyalty of large numbers of Bosnian Serbs.

236. The Parties both recognize that there were a number of entities at a lower level the activities of which have formed part of the factual issues in the case, though they disagree as to the significance of those activities. Of the military and paramilitary units active in the hostilities, there were in April 1992 five types of armed formations involved in Bosnia: first, the Yugoslav People's Army (JNA), subsequently the Yugoslav Army (VJ); second, volunteer units supported by the JNA and later by the VJ, and the Ministry of the Interior (MUP) of the FR Y; third, municipal Bosnian Serb Territorial Defence (TO) detachments; and, fourth, police forces of the Bosnian Serb Ministry of the Interior. The MUP of the Republika Srpska controlled the police and the security services, and operated, according to the Applicant, in close co-operation and co-ordination with the MUP of the FR Y. On 15 April 1992, the Bosnian Government established a military force, based on the former Territorial Defence of the Republic, the Army of the Republic of Bosnia and Herzegovina (ARBiH), merging several non-official forces, including a number of paramilitary defence groups, such as the Green Berets, and the Patriotic League, being the military wing of the Muslim Party of Democratic Action. The Court does not overlook the evidence suggesting the existence of Muslim organizations involved in the conflict, such as foreign Mujahideen, although as a result of the withdrawal of the Respondent's counter-claims, the activities of these bodies are not the subject of specific claims before the Court.

237. The Applicant has asserted the existence of close ties between the Government of the Respondent and the authorities of the Republika Srpska, of a political and financial nature, and also as regards administration and control of the army of the Republika Srpska (VRS). The Court observes that insofar as the political sympathies of the Respondent lay with the Bosnian Serbs, this is not contrary to any legal rule. It is however argued by the Applicant that the Respondent, under the guise of protecting the Serb population of Bosnia and Herzegovina, in fact conceived and shared with them the vision of a "Greater Serbia", in pursuit of which it gave its support to those persons and groups responsible for the activities which allegedly constitute the genocidal acts complained of. The Applicant bases this contention first on the "Strategic Goals" articulated by President Karadžić at the 16th Session of the FR Y Assembly on 12 May 1992, and subsequently published in the *Official Gazette* of the Republika Srpska (paragraph 371), and secondly on the consistent conduct of the Serb military and paramilitary forces *vis-à-vis* the non-Serb Bosnians showing, it is suggested, an overall specific intent (*dolus specialis*). These activities will be examined below.

238. As regards the relationship between the armies of the FR Y and the Republika Srpska, the Yugoslav Peoples' Army (JNA) of the SFR Y had, during the greater part of the period of existence of the SFR Y, been effectively a federal army, composed of soldiers from all the

constituent republics of the Federation, with no distinction between different ethnic and religious groups. It is however contended by the Applicant that even before the break-up of the SFR Y arrangements were being made to transform the JNA into an effectively Serb army. The Court notes that on 8 May 1992, all JNA troops who were not of Bosnian origin were withdrawn from Bosnia-Herzegovina. However, JNA troops of Bosnian Serb origin who were serving in Bosnia and Herzegovina were transferred into, or joined, the army of the Republika Srpska (the VRS) which was established on 12 May 1992, or the VRS Territorial Defence. Moreover, Bosnian Serb soldiers serving in JNA units elsewhere were transferred to Bosnia and Herzegovina and subsequently joined the VRS. The remainder of the JNA was transformed into the Yugoslav army (VJ) and became the army of the Federal Republic of Yugoslavia. On 15 May 1992 the Security Council, by resolution 752, demanded that units of the JNA in Bosnia and Herzegovina "be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed". On 19 May 1992, the Yugoslav army was officially withdrawn from Bosnia and Herzegovina. The Applicant contended that from 1993 onwards, around 1,800 VRS officers were "administered" by the 30th Personnel Centre of the VJ in Belgrade; this meant that matters like their payment, promotions, pensions, etc., were handled, not by the Republika Srpska, but by the army of the Respondent. According to the Respondent, the importance of this fact was greatly exaggerated by the Applicant: the VRS had around 14,000 officers and thus only a small number of them was dealt with by the 30th Personnel Centre; this Centre only gave a certain degree of assistance to the VRS. The Applicant maintains that all VRS officers remained members of the FR Y army — only the label changed; according to the Respondent, there is no evidence for this last allegation. The Court takes note however of the comprehensive description of the processes involved set out in paragraphs 113 to 117 of the Judgment of 7 May 1997 of the ICTY Trial Chamber in the *Tadić* case (IT-94-I-T) quoted by the Applicant which mainly corroborate the account given by the latter. Insofar as the Respondent does not deny the fact of these developments, it insists that they were normal reactions to the threat of civil war, and there was no premeditated plan behind them.

239. The Court further notes the submission of the Applicant that the VRS was armed and equipped by the Respondent. The Applicant contends that when the JNA formally withdrew on 19 May 1992, it left behind all its military equipment which was subsequently taken over by the VRS. This claim is supported by the Secretary-General's report of 3 December 1992 in which he concluded that "[l]though the JNA has completely withdrawn from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the 'Serb Republic'" (A/47/747, para. 11). Moreover, the Applicant submits that Belgrade actively supplied the VRS with arms and equipment throughout the war in Bosnia and Herzegovina. On the basis of evidence produced before the ICTY, the Applicant contended that up to 90 per cent of the material needs of the VRS were supplied by Belgrade. General Dannatt, one of the experts called by the Applicant (paragraph 57 above), testified that, according to a "consumption review" given by General Mladić at the Bosnian Serb Assembly on 16 April 1995, 42.2 per cent of VRS supplies of infantry ammunition were inherited from the former JNA and 47 per cent of VRS requirements were supplied by the VJ. For its part, the Respondent generally denies that it supplied and equipped the VRS but maintains that, even if that were the case, such assistance "is very familiar and is an aspect of numerous treaties of mutual security, both bilateral and regional". The Respondent adds that moreover it is a matter of public knowledge that the armed forces of Bosnia and Herzegovina received external assistance from friendly sources.

However, one of the witnesses called by the Respondent, Mr. Vladimir Lukić, who was the Prime Minister of the Republika Srpska from 20 January 1993 to 18 August 1994 testified that the army of the Republika Srpska was supplied from different sources “including but not limited to the Federal Republic of Yugoslavia” but asserted that the Republika Srpska “mainly paid for the military materiel which it obtained” from the States that supplied it.

240. As regards effective links between the two governments in the financial sphere, the Applicant maintains that the economies of the FR Y, the Republika Srpska, and the Republika Srpska Krajina were integrated through the creation of a single economic entity, thus enabling the FR Y Government to finance the armies of the two other bodies in addition to its own. The Applicant argued that the National Banks of the Republika Srpska and of the Republika Srpska Krajina were set up as under the control of, and directly subordinate to, the National Bank of Yugoslavia in Belgrade. The national budget of the FR Y was to a large extent financed through primary issues from the National Bank of Yugoslavia, which was said to be entirely under governmental control, i.e. in effect through creating money by providing credit to the FR Y budget for the use of the JNA. The same was the case for the budgets of the Republika Srpska and the Republika Srpska Krajina, which according to the Applicant had virtually no independent sources of income; the Respondent asserts that income was forthcoming from various sources, but has not specified the extent of this. The National Bank of Yugoslavia was making available funds (80 per cent of those available from primary issues) for “special purposes”, that is to say “to avoid the adverse effects of war on the economy of the Serbian Republic of Bosnia and Herzegovina”. The Respondent has denied that the budget deficit of the Republika Srpska was financed by the FR Y but has not presented evidence to show how it was financed. Furthermore, the Respondent emphasizes that any financing supplied was simply on the basis of credits, to be repaid, and was therefore quite normal, particularly in view of the economic isolation of the FR Y, the Republika Srpska and the Republika Srpska Krajina; it also suggested that any funds received would have been under the sole control of the recipient, the Republika Srpska or the Republika Srpska Krajina.

241. The Court finds it established that the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities.

(3) Examination of factual evidence: introduction

242. The Court will therefore now examine the facts alleged by the Applicant, in order to satisfy itself, first, whether the alleged atrocities occurred; secondly, whether such atrocities, if established, fall within the scope of Article II of the Genocide Convention, that is to say whether the facts establish the existence of an intent, on the part of the perpetrators of those atrocities, to destroy, in whole or in part, a defined group (*dolus specialis*). The group taken into account for this purpose will, for the reasons explained above (paragraphs 191-196), be that of the Bosnian Muslims; while the Applicant has presented evidence said to relate to the wider group of non-Serb

Bosnians, the Bosnian Muslims formed such a substantial part of this wider group that that evidence appears to have equal probative value as regards the facts, in relation to the more restricted group. The Court will also consider the facts alleged in the light of the question whether there is persuasive and consistent evidence for a pattern of atrocities, as alleged by the Applicant, which would constitute evidence of *dolus specialis* on the part of the Respondent. For this purpose it is not necessary to examine every single incident reported by the Applicant, nor is it necessary to make an exhaustive list of the allegations; the Court finds it sufficient to examine those facts that would illuminate the question of intent, or illustrate the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent (*dolus specialis*).

243. The Court will examine the evidence following the categories of prohibited acts to be found in Article II of the Genocide Convention. The nature of the events to be described is however such that there is considerable overlap between these categories: thus, for example, the conditions of life in the camps to which members of the protected group were confined have been presented by the Applicant as violations of Article II, paragraph (c), of the Convention (the deliberate infliction of destructive conditions of life), but since numerous inmates of the camps died, allegedly as a result of those conditions, or were killed there, the camps fall to be mentioned also under paragraph (a), killing of members of the protected group.

244. In the evidentiary material submitted to the Court, and that referred to by the ICTY, frequent reference is made to the actions of “Serbs” or “Serb forces”, and it is not always clear what relationship, if any, the participants are alleged to have had with the Respondent. In some cases it is contended, for example, that the JNA, as an organ *de jure* of the Respondent, was involved; in other cases it seems clear that the participants were Bosnian Serbs, with no *de jure* link with the Respondent, but persons whose actions are, it is argued, attributable to the Respondent on other grounds. Furthermore, as noted in paragraph 238 above, it appears that JNA troops of Bosnian Serb origin were transformed into, or joined the VRS. At this stage of the present Judgment, the Court is not yet concerned with the question of the attributability to the Respondent of the atrocities described; it will therefore use the terms “Serb” and “Serb forces” purely descriptively, without prejudice to the status they may later, in relation to each incident, be shown to have had. When referring to documents of the ICTY, or to the Applicant’s pleadings or oral argument, the Court will use the terminology of the original.

(4) Article II (a): Killing members of the protected group

245. Article II (a) of the Convention deals with acts of killing members of the protected group. The Court will first examine the evidence of killings of members of the protected group in the principal areas of Bosnia and in the various detention camps, and ascertain whether there is evidence of a specific intent (*dolus specialis*) in one or more of them. The Court will then consider under this heading the evidence of the massacres reported to have occurred in July 1995 at Srebrenica.

Sarajevo

246. The Court notes that the Applicant refers repeatedly to killings, by shelling and sniping, perpetrated in Sarajevo. The Fifth Periodic Report of the United Nations Special Rapporteur is presented by the Applicant in support of the allegation that between 1992 and 1993 killings of Muslim civilians were perpetrated in Sarajevo, partly as a result of continuous shelling by Bosnian Serb forces. The Special Rapporteur stated that on 9 and 10 November 1993 mortar attacks killed 12 people (E/CN.4/1994/47, 17 November 1992, p. 4, para. 14). In his periodic Report of 5 July 1995, the Special Rapporteur observed that as from late February 1995 numerous civilians were killed by sniping activities of Bosnian Serb forces and that “one local source reported that a total of 41 civilians were killed . . . in Sarajevo during the month of May 1995” (Report of 5 July 1995, para. 69). The Report also noted that, in late June and early July 1995, there was further indiscriminate shelling and rocket attacks on Sarajevo by Bosnian Serb forces as a result of which many civilian deaths were reported (Report of 5 July 1995, para. 70).

247. The Report of the Commission of Experts gives a detailed account of the battle and siege of Sarajevo. The Commission estimated that over the course of the siege nearly 10,000 persons had been killed or were missing in the city of Sarajevo (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). According to the estimates made in a report presented by the Prosecution before the ICTY in the *Galić* case (IT-98-29-T, Trial Chamber Judgment, 5 December 2003, paras. 578 and 579), the monthly average of civilians killed fell from 105 in September to December 1992, to around 64 in 1993 and to around 28 in the first six months of 1994.

248. The Trial Chamber of the ICTY, in its Judgment of 5 December 2003 in the *Galić* case examined specific incidents in the area of Sarajevo, for instance the shelling of the Markale market on 5 February 1994 which resulted in the killing of 60 persons. The majority of the Trial Chamber found that “civilians in ABiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory during the Indictment Period, and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured” (*Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 591), the Trial Chamber further concluded that “[i]n sum, the Majority of the Trial Chamber finds that each of the crimes alleged in the Indictment — crime of terror, attacks on civilians, murder and inhumane acts — were committed by SRK forces during the Indictment Period” (*ibid.*, para. 600).

249. In this connection, the Respondent makes the general point that in a civil war it is not always possible to differentiate between military personnel and civilians. It does not deny that crimes were committed during the siege of Sarajevo, crimes that “could certainly be characterized as war crimes and certain even as crimes against humanity”, but it does not accept that there was a strategy of targeting civilians.

Drina River Valley

(a) Zvornik

250. The Applicant made a number of allegations with regard to killings that occurred in the area of Drina River Valley. The Applicant, relying on the Report of the Commission of Experts, claims that at least 2,500 Muslims died in Zvornik from April to May 1992. The Court notes that the findings of the Report of the Commission of Experts are based on individual witness statements and one declassified United States State Department document No. 94-11 (Vol. V, Ann. X, para. 387; Vol. IV, Ann. VIII, p. 342 and para. 2884; Vol. I, Ann. III.A, para. 578). Further, a video reporting on massacres in Zvornik was shown during the oral proceedings (excerpts from “The Death of Yugoslavia”, BBC documentary). With regard to specific incidents, the Applicant alleges that Serb soldiers shot 36 Muslims and mistreated 27 Muslim children in the local hospital of Zvornik in the second half of May 1992.

251. The Respondent contests those allegations and contends that all three sources used by the Applicant are based solely on the account of one witness. It considers that the three reports cited by the Applicant cannot be used as evidence before the Court. The Respondent produced the statement of a witness made before an investigating judge in Zvornik which claimed that the alleged massacre in the local hospital of Zvornik had never taken place. The Court notes that the Office of the Prosecutor of the ICTY had never indicted any of the accused for the alleged massacres in the hospital.

(b) Camps

(i) Sušica camp

252. The Applicant further presents claims with regard to killings perpetrated in detention camps in the area of Drina River Valley. The Report of the Commission of Experts includes the statement of an ex-guard at the Sušica camp who personally witnessed 3,000 Muslims being killed (Vol. IV, Ann. VIII, p. 334) and the execution of the last 200 surviving detainees (Vol. I, Ann. IV, pp. 31-32). In proceedings before the ICTY, the commander of that camp, Dragan Nikolić, pleaded guilty to murdering nine non-Serb detainees and, according to the Sentencing Judgment of 18 December 2003, “the Accused persecuted Muslim and other non-Serb detainees by subjecting them to murders, rapes and torture as charged specifically in the Indictment” (*Nikolić*, IT-94-2-S, para. 67).

(ii) Foča Kazneno-Popravni Dom camp

253. The Report of the Commission of Experts further mentions numerous killings at the camp of Foča Kazneno-Popravni Dom (Foča KP Dom). The Experts estimated that the number of prisoners at the camp fell from 570 to 130 over two months (Vol. IV, Ann. VIII, p. 129). The United States State Department reported one eye-witness statement of regular executions in July 1992 and mass graves at the camp.

254. The Trial Chamber of the ICTY made the following findings on several killings at this camp in its Judgment in the *Krnjelac* case:

“The Trial Chamber is satisfied beyond reasonable doubt that all but three of the persons listed in Schedule C to the Indictment were killed at the KP Dom. The Trial Chamber is satisfied that these persons fell within the pattern of events that occurred at the KP Dom during the months of June and July 1992, and that the only reasonable explanation for the disappearance of these persons since that time is that they died as a result of acts or omissions, with the relevant state of mind [sc. that required to establish murder], at the KP Dom.” (IT-97-25-T, Judgment, 15 March 2002, para. 330.)

(iii) Batković camp

255. As regards the detention camp of Batković, the Applicant claims that many prisoners died at this camp as a result of mistreatment by the Serb guards. The Report of the Commission of Experts reports one witness statement according to which there was a mass grave located next to the Batković prison camp. At least 15 bodies were buried next to a cow stable, and the prisoners neither knew the identity of those buried at the stable nor the circumstances of their deaths (Report of the Commission of Experts, Vol. V, Ann. X, p. 9). The Report furthermore stresses that

“[b]ecause of the level of mistreatment, many prisoners died. One man stated that during his stay, mid-July to mid-August, 13 prisoners were beaten to death. Another prisoner died because he had gangrene which went untreated. Five more may have died from hunger. Allegedly, 20 prisoners died prior to September.” (Vol. IV, Ann. VIII, p. 63.)

393 Killings at the Batković camp are also mentioned in the Dispatch of the United States State Department of 19 April 1993. According to a witness, several men died as a result of bad conditions and beatings at the camp (United States Dispatch, 19 April 1993, Vol. 4, No. 30, p. 538).

256. On the other hand, the Respondent stressed that, when the United Nations Special Rapporteur visited the Batković prison camp, he found that: “The prisoners did not complain of ill-treatment and, in general appeared to be in good health.” (Report of 17 November 1992, para. 29) However, the Applicant contends that “it is without any doubt that Mazowiecki was shown a ‘model’ camp”.

Prijedor

(a) Kozarac and Hambarine

257. With regard to the area of the municipality of Prijedor, the Applicant has placed particular emphasis on the shelling and attacks on Kozarac, 20 km east of Prijedor, and on Hambarine in May 1992. The Applicant contends that after the shelling, Serb forces shot people in their homes and that those who surrendered were taken to a soccer stadium of Kozarac where some men were randomly shot. The Report of the Commission of Experts (Vol. I, Ann. III, pp. 154-155) states that:

“The attack on Kozarac lasted three days and caused many villagers to flee to the forest while the soldiers were shooting at ‘every moving thing’. Survivors calculated that at least 2,000 villagers were killed in that period. The villagers’ defence fell on 26 May . . .

Serbs then reportedly announced that the villagers had 10 minutes to reach the town’s soccer stadium. However, many people were shot in their homes before given a chance to leave. One witness reported that several thousand people tried to surrender by carrying white flags, but three Serb tanks opened fire on them, killing many.”

The Respondent submits that the number of killings is exaggerated and that “there was severe fighting in Kozarac, which took place on 25 and 26 May, and naturally, it should be concluded that a certain number of the victims were Muslim combatants”.

258. As regards Hambarine, the Report of the Commission of Experts (Vol. I, p. 39) states that:

“Following an incident in which less than a handful of Serb[ian] soldiers were shot dead under unclear circumstances, the village of Hambarine was given an ultimatum to hand over a policeman who lived where the shooting had occurred. As it was not met, Hambarine was subjected to several hours of artillery bombardment on 23 May 1992. The shells were fired from the aerodrome Urije just outside Prijedor town. When the bombardment stopped, the village was stormed by infantry, including paramilitary units, which sought out the inhabitants in every home. Hambarine had a population of 2,499 in 1991.”

The Report of the Special Rapporteur of 17 November 1992, states that:

“Between 23 and 25 May, the Muslim village of Hambarine, 5 km south of Prijedor, received an ultimatum: all weapons must be surrendered by 11 a.m. Then, alleging that a shot was fired at a Serbian patrol, heavy artillery began to shell the village and tanks appeared, firing at homes. The villagers fled to Prijedor. Witnesses reported many deaths, probably as many as 1,000.” (Periodic Report of 17 November 1992, p. 8, para. 17 (c).)

The Respondent says, citing the indictment in the *Stakić* case, that “merely 11 names of the victims are known” and that it is therefore impossible that the total number of victims in Hambarine was “as many as 1,000”.

259. The Report of the Commission of Experts found that on 26, 27 or 28 May, the Muslim village of Kozarac, came under attack of heavy Serb artillery. It furthermore notes that: “The population, estimated at 15,000, suffered a great many summary executions, possibly as many as 5,000 persons according to some witnesses.” (Report of the Commission of Experts, Vol. IV, pt. 4.)

260. The Applicant also claimed that killings of members of the protected group were perpetrated in Prijedor itself. The Report of the Commission of Experts, as well as the United Nations Special Rapporteur collected individual witness statements on several incidents of killing in the town of Prijedor (Report of the Commission of Experts, Vol. I, Ann. V, pp. 54 *et seq.*). In particular, the Special Rapporteur received testimony “from a number of reliable sources” that 200 people were killed in Prijedor on 29 May 1992 (Report of 17 November 1992, para. 17).

261. In the *Stakić* case, the ICTY Trial Chamber found that “many people were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Prijedor municipality and several massacres of Muslims took place”, and that “a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 ha[d] been proved beyond reasonable doubt” (IT-97-24-T, Judgment, 31 July 2003, paras. 544 and 546). Further, in the *Brđanin* case, the Trial Chamber was satisfied that “at least 80 Bosnian Muslim civilians were killed when Bosnian Serb soldiers and police entered the villages of the Kozarac area” (IT-99-36, Judgment, 1 September 2004, para. 403).

(b) Camps

(i) Omarska camp

262. With respect to the detention camps in the area of Prijedor, the Applicant has stressed that the camp of Omarska was “arguably the cruellest camp in Bosnia and Herzegovina”. The Report of the Commission of Experts gives an account of seven witness statements reporting between 1,000 to 3,000 killings (Vol. IV, Ann. VIII, p. 222). The Report noted that

“[s]ome prisoners estimate that on an average there may have been 10 to 15 bodies displayed on the grass each morning, when the first prisoners went to receive their daily food rations. But there were also other dead bodies observed in other places at other times. Some prisoners died from their wounds or other causes in the rooms where they were detained. Constantly being exposed to the death and suffering of fellow prisoners made it impossible for anyone over any period of time to forget in what setting he or she was. Given the length of time Logor Omarska was used, the numbers of prisoners detained in the open, and the allegations that dead bodies were exhibited there almost every morning.”

The Report of the Commission of Experts concludes that “all information available . . . seems to indicate that [Omarska] was more than anything else a death camp” (Vol. I, Ann. V, p. 80). The United Nations Secretary-General also received submissions from Canada, Austria and the United States, containing witness statements about the killings at Omarska.

263. In the Opinion and Judgment of the Trial Chamber in the *Tadić* case, the ICTY made the following findings on Omarska: “Perhaps the most notorious of the camps, where the most horrific conditions existed, was the Omarska camp.” (IT-94-1-T, Judgment, 7 May 1997,

para. 155.) “The Trial Chamber heard from 30 witnesses who survived the brutality to which they were systematically subjected at Omarska. By all accounts, the conditions at the camp were horrendous; killings and torture were frequent.” (*Ibid.*, para. 157.) The Trial Chamber in the *Stakić* Judgment found that “over a hundred people were killed in late July 1992 in the Omarska camp” and that

“[a]round late July 1992, 44 people were taken out of Omarska and put in a bus. They were told that they would be exchanged in the direction of Bosanska Krupa; they were never seen again. During the exhumation in Jama Lisac, 56 bodies were found: most of them had died from gunshot injuries.” (IT-97-24-T, Judgment, 31 July 2003, paras. 208 and 210).

At least 120 people detained at Omarska were killed after having been taken away by bus.

“The corpses of some of those taken away on the buses were later found in Hrastova Glavica and identified. A large number of bodies, 126, were found in this area, which is about 30 kilometres away from Prijedor. In 121 of the cases, the forensic experts determined that the cause of death was gunshot wounds.” (*Ibid.*, para. 212.)

264. In the *Brđanin* case, the Trial Chamber, in its Judgment of 1 September 2004 held that between 28 May and 6 August, a massive number of people were killed at Omarska camp. The Trial Chamber went on to say specifically that “[a]s of late May 1992, a camp was set up at Omarska, where evidence shows that several hundred Bosnian Muslim and Bosnian Croat civilians from the Prijedor area were detained, and where killings occurred on a massive scale” (IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 441). “The Trial Chamber is unable to precisely identify all detainees that were killed at Omarska camp. It is satisfied beyond reasonable doubt however that, at a minimum, 94 persons were killed, including those who disappeared.” (*Ibid.*, para. 448.)

(ii) Keraterm camp

265. A second detention camp in the area of Prijedor was the Keraterm camp where, according to the Applicant, killings of members of the protected group were also perpetrated. Several corroborating accounts of a mass execution on the morning of 25 July 1992 in Room 3 at Keraterm camp were presented to the Court. This included the United States Dispatch of the State Department and a letter from the Permanent Representative of Austria to the United Nations dated 5 March 1993, addressed to the Secretary-General. The Report of the Commission of Experts cites three separate witness statements to the effect that ten prisoners were killed per day at Keraterm over three months (Vol. IV, para. 1932; see also Vol. I, Ann. V, para. 445).

266. The Trial Chamber of the ICTY, in the *Sikirica et al.* case, concerning the commander of Keraterm camp, found that 160 to 200 men were killed or wounded in the so-called Room 3 massacre (IT-95-8-S, Sentencing Judgment, 13 November 2001, para. 103). According to the

Judgment, Sikirica himself admitted that there was considerable evidence “concerning the murder and killing of other named individuals at Keraterm during the period of his duties”. There was also evidence that “others were killed because of their rank and position in society and their membership of a particular ethnic group or nationality” (*ibid.*, para. 122). In the *Stakić* case, the Trial Chamber found that “from 30 April 1992 to 30 September 1992 . . . killings occurred frequently in the Omarska, Keraterm and Trnopolje camps” (IT-97-24-T, Judgment, 31 July 2003, para. 544).

(iii) Trnopolje camp

267. The Applicant further contends that there is persuasive evidence of killing at Trnopolje camp, with individual eye-witnesses corroborating each other. The Report of the Commission of Experts found that “[i]n Trnopolje, the regime was far better than in Omarska and Keraterm. Nonetheless, harassment and malnutrition was a problem for all the inmates. Rapes, beatings and other kinds of torture, and even killings, were not rare.” (Report of the Commission of Experts, Vol. IV, Ann. V, p. 10.)

“The first period was allegedly the worst in Trnopolje, with the highest numbers of inmates killed, raped, and otherwise mistreated and tortured . . .

The people killed in the camp were usually removed soon after by some camp inmates who were ordered by the Serbs to take them away and bury them . . .

Albeit *Logor* Trnopolje was not a death camp like *Logor* Omarska or *Logor* Keraterm, the label ‘concentration camp’ is none the less justified for *Logor* Trnopolje due to the regime prevailing in the camp.” (Report of the Commission of Experts, Vol. I, Ann. V, pp. 88-90.)

268. With regard to the number of killings at Trnopolje, the ICTY considered the period between 25 May and 30 September 1992, the relevant period in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 226-227). The Trial Chamber came to the conclusion that “killings occurred frequently in the Omarska, Keraterm and Trnopolje camps and other detention centres” (*ibid.*, para. 544). In the Judgment in the *Brđanin* case, the Trial Chamber found that in the period from 28 May to October 1992,

“numerous killings occurred in Trnopolje camp. A number of detainees died as a result of the beatings received by the guards. Others were killed by camp guards with rifles. The Trial Chamber also [found] that at least 20 inmates were taken outside the camp and killed there.” (IT-99-36-T, Judgment, 1 September 2004, para. 450.)

269. In response to the allegations of killings at the detention camps in the area of Prijedor, the Respondent questions the number of victims, but not the fact that killings occurred. It contends that killings in Prijedor “were committed sporadically and against individuals who were not a significant part of the group”. It further observed that the ICTY had not characterized the acts committed in the Prijedor region as genocide.

Banja Luka

(i) Manjača camp

270. The Applicant further contends that killings were also frequent at Manjača camp in Banja Luka. The Court notes that multiple witness accounts of killings are contained in the Report of the Commission of Experts (Vol. IV, paras. 370-376) and a mass grave of 540 bodies, “presumably” from prisoners at Manjača, is mentioned in a report on missing persons submitted by Manfred Nowak, the United Nations Expert on Missing Persons:

“In September 1995, mass graves were discovered near Krasulje in northwest Bosnia and Herzegovina. The Government has exhumed 540 bodies of persons who were presumably detained at Manjača concentration camp in 1992. In January 1996, a mass grave containing 27 bodies of Bosnian Muslims was discovered near Sanski Most; the victims were reportedly killed in July 1992 during their transfer from Sanski Most to Manjača concentration camp (near Banja Luka).” (E/CN.4/1996/36 of 4 March 1996, para. 52.)

Brčko

(i) Luka camp

271. The Applicant claims that killings of members of the protected group were also perpetrated at Luka camp and Brčko. The Report of the Commission of Experts confirms these allegations. One witness reported that “[s]hootings often occurred at 4:00 a.m. The witness estimates that during his first week at Luka more than 2,000 men were killed and thrown into the Sava River.” (Report of the Commission of Experts Vol. IV, Ann. VIII, p. 93.) The Report further affirms that “[a]pparently, murder and torture were a daily occurrence” (*ibid.*, p. 96), and that it was reported that

“[t]he bodies of the dead or dying internees, were often taken to the camp dump or moved behind the prisoner hangars. Other internees were required to move the bodies. Sometimes the prisoners who carried the dead were killed while carrying such bodies to the dump. The dead were also taken and dumped outside the Serbian Police Station located on Majevička Brigada Road in Brčko.” (*ibid.*)

These findings are corroborated by evidence of a mass grave being found near the site (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 101 and United States State Department Dispatch).

272. In the *Jelišić* case, eight of the 13 murders to which the accused pleaded guilty were perpetrated at Luka camp and five were perpetrated at the Brčko police station (IT-95-10-T, Trial Chamber Judgment, 14 December 1999, paras. 37-38). The Trial Chamber further held that “[a]lthough the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelišić for the period in the indictment, it notes that, in this instance, the material element of the crime of genocide has been satisfied” (*ibid.*, para. 65).

273. In the *Milošević* Decision on Motion for Judgment of Acquittal, the Trial Chamber found that many Muslims were detained in Luka camp in May and June 1992 and that many killings were observed by witnesses (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras. 159, 160-168), it held that “[t]he conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings” (*ibid.*, para. 159). “At Luka Camp . . . The witness personally moved about 12 to 15 bodies and saw approximately 100 bodies stacked up like firewood at Luka Camp; each day a refrigerated meat truck from the local Bimeks Company in Brčko would come to take away the dead bodies.” (*ibid.*, para. 161.)

274. The Court notes that the *Brđanin* Trial Chamber Judgment of 1 September 2004 made a general finding as to killings of civilians in camps and municipalities at Banja Luka, Prijedor, Sanski Most, Klijuč, Kotor Varoš, Bosanski Novi. It held that:

“In sum, the Trial Chamber is satisfied beyond reasonable doubt that, considering all the incidents described in this section of the judgment, at least 1669 Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces, all of whom were non-combatants.” (IT-99-36-T, Judgment, 1 September 2004, para. 465.)

There are contemporaneous Security Council and General Assembly resolutions condemning the killing of civilians in connection with ethnic cleansing, or expressing alarm at reports of mass killings (Security Council resolution 819 (1993), Preamble, paras. 6 and 7; General Assembly resolution 48/153 (1993), paras. 5 and 6; General Assembly resolution 49/196 (1994), para. 6).

275. The Court further notes that several resolutions condemn specific incidents. These resolutions, *inter alia*, condemn “the Bosnian Serb forces for their continued offensive against the safe area of Goražde, which has resulted in the death of numerous civilians” (Security Council resolution 913 (1994), Preamble, para. 5); condemn ethnic cleansing “perpetrated in Banja Luka, Bijeljina and other areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces” (Security Council resolution 941 (1994), para. 2); express concern at “grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder” (Security Council resolution 1019 (1995), Preamble, para. 2); and condemn “the indiscriminate shelling of civilians in the safe areas of Sarajevo, Tuzla, Bihać and Goražde and the use of cluster bombs on civilian targets by Bosnian Serb and Croatian Serb forces” (General Assembly resolution 50/193 (1995) para. 5).

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276. On the basis of the facts set out above, the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the

evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings. The Court notes in fact that, while the Respondent contested the veracity of certain allegations, and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina. The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II (a) of the Convention, are fulfilled. At this stage of its reasoning, the Court is not called upon to list the specific killings, nor even to make a conclusive finding on the total number of victims.

277. The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such. The Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observes that none of those convicted were found to have acted with specific intent (*dolus specialis*). The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention. As to the Applicant’s contention that the specific intent (*dolus specialis*) can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide (violations of Article II, paragraphs (b) to (e)) (see paragraph 370 below).

* * *

(5) The massacre at Srebrenica

278. The atrocities committed in and around Srebrenica are nowhere better summarized than in the first paragraph of the Judgment of the Trial Chamber in the *Krstić* case:

“The events surrounding the Bosnian Serb take-over of the United Nations (‘UN’) ‘safe area’ of Srebrenica in Bosnia and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be ‘free from armed attack or any other hostile act’, units of the Bosnian Serb Army (‘VRS’) launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged

Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again.” (IT-98-33-T, Judgment, 2 August 2001, para. 1; footnotes omitted.)

While the Respondent raises a question about the number of deaths, it does not essentially question that account. What it does question is whether specific intent (*dolus specialis*) existed and whether the acts complained of can be attributed to it. It also calls attention to the attacks carried out by the Bosnian army from within Srebrenica and the fact that the enclave was never demilitarized. In the Respondent’s view the military action taken by the Bosnian Serbs was in revenge and part of a war for territory.

279. The Applicant contends that the planning for the final attack on Srebrenica must have been prepared quite some time before July 1995. It refers to a report of 4 July 1994 by the commandant of the Bratunac Brigade. He outlined the “final goal” of the VRS: “an entirely Serbian Podrinje. The enclaves of Srebrenica, Žepa and Goražde must be militarily defeated.” The report continued:

“We must continue to arm, train, discipline, and prepare the RS Army for the execution of this crucial task — the expulsion of Muslims from the Srebrenica enclave. There will be no retreat when it comes to the Srebrenica enclave, we must advance. The enemy’s life has to be made unbearable and their temporary stay in the enclave impossible so that they leave *en masse* as soon as possible, realising that they cannot survive there.”

The Chamber in the *Blagojević* case mentioned testimony showing that some “members of the Bratunac Brigade . . . did not consider this report to be an order. Testimony of other witnesses and documentary evidence show that the strategy was in fact implemented.” (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 104; footnotes omitted.) The Applicant sees the “final goal” described here as “an entirely Serbian Podrinje”, in conformity with the objective of a Serbian region 50 km to the west of the Drina river identified in an April or a May 1991 meeting of the political and State leadership of Yugoslavia. The Court observes that the object stated in the report, like the 1992 Strategic Objectives, does not envisage the destruction of the Muslims in Srebrenica, but rather their departure. The Chamber did not give the report any particular significance.

280. The Applicant, like the Chamber, refers to a meeting on 17 March 1995 between the Commander of the United Nations Protection Force (UNPROFOR) and General Mladić, at which the latter expressed dissatisfaction with the safe area régime and indicated that he might take military action against the eastern enclaves. He gave assurances however for the safety of the Bosnian Muslim population of those enclaves. On the following day, 8 March 1995, President Karadžić issued the Directive for Further Operations 7, also quoted by the Chamber and the Applicant: “‘Planned and well-thought-out combat operations’ were to create ‘an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves.’” The *Blagojević* Chamber continues as follows:

“The separation of the Srebrenica and Žepa enclaves became the task of the Drina Corps. As a result of this directive, General Ratko Mladić on 31 March 1995 issued Directive for Further Operations, Operative No. 7/1, which further directive specified the Drina Corps’ tasks.” (*Ibid.*, pp. 38-39, para. 106.)

281. Counsel for the Applicant asked in respect of the first of those directives “[w]hat could be a more clear-cut definition of the genocidal intent to destroy on the part of the authorities in Pale?” As with the July 1994 report, the Court observes that the expulsion of the inhabitants would achieve the purpose of the operation. That observation is supported by the ruling of the Appeals Chamber in the *Krstić* case that the directives were “insufficiently clear” to establish specific intent (*dolus specialis*) on the part of the members of the Main Staff who issued them. “Indeed, the Trial Chamber did not even find that those who issued Directives 7 and 7.1 had genocidal intent, concluding instead that the genocidal plan crystallized at a later stage.” (IT-98-33-A, Judgment, 19 April 2004, para. 90.)

282. A Netherlands Battalion (Dutchbat) was deployed in the Srebrenica safe area. Within that area in January 1995 it had about 600 personnel. By February and through the spring the VRS was refusing to allow the return of Dutch soldiers who had gone on leave, causing their numbers to drop by at least 150, and were restricting the movement of international convoys of aid and supplies to Srebrenica and to other enclaves. It was estimated that without new supplies about half of the population of Srebrenica would be without food after mid-June.

283. On 2 July the Commander of the Drina Corps issued an order for active combat operations; its stated objective on the Srebrenica enclave was to reduce “the enclave to its urban area”. The attack began on 6 July with rockets exploding near the Dutchbat headquarters in Potočari; 7 and 8 July were relatively quiet because of poor weather, but the shelling intensified around 9 July. Srebrenica remained under fire until 11 July when it fell, with the Dutchbat observation posts having been taken by the VRS. Contrary to the expectations of the VRS, the Bosnia and Herzegovina army showed very little resistance (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 125). The United Nations Secretary-General’s report quotes an assessment made by United Nations military observers on the afternoon of 9 July which concluded as follows:

“‘the BSA offensive will continue until they achieve their aims. These aims may even be widening since the United Nations response has been almost non-existent and the BSA are now in a position to overrun the enclave if they wish.’ Documents later obtained from Serb sources appear to suggest that this assessment was correct. Those documents indicate that the Serb attack on Srebrenica initially had limited objectives. Only after having advanced with unexpected ease did the Serbs decide to overrun the entire enclave. Serb civilian and military officials from the Srebrenica area have stated the same thing, adding, in the course of discussions with a United Nations official, that they decided to advance all the way to Srebrenica town when they assessed that UNPROFOR was not willing or able to stop them.” (A/54/549, para. 264.)

Consistently with that conclusion, the Chamber in the *Blagojević* case says this:

“As the operation progressed its military object changed from ‘reducing the enclave to the urban area’ [the objective stated in a Drina Corps order of 2 July] to the taking-over of Srebrenica town and the enclave as a whole. The Trial Chamber has heard no direct evidence as to the exact moment the military objective changed. The evidence does show that President Karadžić was ‘informed of successful combat operations around Srebrenica . . . which enable them to occupy the very town of Srebrenica’ on 9 July. According to Miroslav Deronjić, the President of the Executive Board of the Bratunac Municipality, President Karadžić told him on 9 July that there were two options in relation to the operation, one of which was the complete take-over of Srebrenica. Later on 9 July, President Karadžić ‘agreed with continuation of operations for the takeover of Srebrenica’. By the morning of 11 July the change of objective of the ‘Krivaja 95’ operation had reached the units in the field; and by the middle of the afternoon, the order to enter Srebrenica had reached the Bratunac Brigades’ IKM in Pribićevac and Colonel Blagojević. Miroslav Deronjić visited the Bratunac Brigade IKM in Pribićevac on 11 July. He briefly spoke with Colonel Blagojević about the Srebrenica operation. According to Miroslav Deronjić, the VRS had just received the order to enter Srebrenica town.” (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 130.)

284. The Chamber then begins an account of the dreadful aftermath of the fall of Srebrenica. A Dutchbat Company on 11 July started directing the refugees to the UNPROFOR headquarters in Potočari which was considered to be the only safe place for them. Not all the refugees went towards Potočari; many of the Bosnian Muslim men took to the woods. Refugees were soon shelled and shot at by the VRS despite attempts to find a safe route to Potočari where, to quote the ICTY, chaos reigned:

“The crowd outside the UNPROFOR compound grew by the thousands during the course of 11 July. By the end of the day, an estimated 20,000 to 30,000 Bosnian Muslims were in the surrounding area and some 4,000 to 5,000 refugees were in the UNPROFOR compound.

(b) Conditions in Potočari

The standards of hygiene within Potočari had completely deteriorated. Many of the refugees seeking shelter in the UNPROFOR headquarters were injured. Medical assistance was given to the extent possible; however, there was a dramatic shortage of medical supplies. As a result of the VRS having prevented aid convoys from getting through during the previous months, there was hardly any fresh food in the DutchBat headquarters. There was some running water available outside the compound. From 11 to 13 July 1995 the temperature was very high, reaching 35 degrees centigrade and this small water supply was insufficient for the 20,000 to 30,000 refugees who were outside the UNPROFOR compound.” (*Ibid.*, paras. 146-147.)

The Tribunal elaborates on those matters and some efforts made by Bosnian Serb and Serbian authorities, i.e., the local Municipal Assembly, the Bratunac Brigade and the Drina Corps, as well as UNHCR, to assist the Bosnian Muslim refugees (*Ibid.*, para. 148).

285. On 10 July at 10.45 p.m., according to the Secretary-General’s 1999 Report, the delegate in Belgrade of the Secretary-General’s Special Representative telephoned the Representative to say that he had seen President Milošević who had responded that not much should be expected of him because “the Bosnian Serbs did not listen to him” (A/54/549, para. 292). At 3 p.m. the next day, the President rang the Special Representative and, according to the same report, “stated that the Dutchbat soldiers in Serb-held areas had retained their weapons and equipment, and were free to move about. This was not true.” (*Ibid.*, para. 307.) About 20 minutes earlier two NATO aircraft had dropped two bombs on what were thought to be Serb vehicles advancing towards the town from the south. The Secretary-General’s report gives the VRS reaction:

“Immediately following this first deployment of NATO close air support, the BSA radioed a message to Dutchbat. They threatened to shell the town and the compound where thousands of inhabitants had begun to gather, and to kill the Dutchbat soldiers being held hostage, if NATO continued with its use of air power. The Special Representative of the Secretary-General recalled having received a telephone call from the Netherlands Minister of Defence at this time, requesting that the close air support action be discontinued, because Serb soldiers on the scene were too close to Netherlands troops, and their safety would be jeopardized. The Special Representative considered that he had no choice but to comply with this request.” (*Ibid.*, para. 306.)

286. The Trial Chamber in the *Blagojević* case recorded that on 11 July at 8 p.m. there was a meeting between a Dutch colonel and General Mladić and others. The former said that he had come to negotiate the withdrawal of the refugees and to ask for food and medicine for them. He sought assurances that the Bosnian Muslim population and Dutchbat would be allowed to withdraw from the area. General Mladić said that the civilian population was not the target of his actions and the goal of the meeting was to work out an arrangement. He then said “‘you can all leave, all stay, or all die here’ . . . ‘we can work out an agreement for all this to stop and for the issues of the civilian population, your soldiers and the Muslim military to be resolved in a peaceful way’” (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, paras. 150-152). Later that night at a meeting beginning at 11 p.m., attended by a representative of the Bosnian Muslim community, General Mladić said:

“‘Number one, you need to lay down your weapons and I guarantee that all those who lay down their weapon will live. I give you my word, as a man and a General, that I will use my influence to help the innocent Muslim population which is not the target of the combat operations carried out by the VRS . . . In order to make a decision as a man and a Commander, I need to have a clear position of the representatives of your people on whether you want to survive . . . stay or vanish. I am prepared to receive here tomorrow at 10 a.m. hrs. a

delegation of officials from the Muslim side with whom I can discuss the salvation of your people from . . . the former enclave of Srebrenica . . . Nesib [a Muslim representative], the future of your people is in your hands, not only in this territory . . . Bring the people who can secure the surrender of weapons and save your people from destruction.'

The Trial Chamber finds, based on General Mladić's comments, that he was unaware that the Bosnian Muslim men had left the Srebrenica enclave in the column.

General Mladić also stated that he would provide the vehicles to transport the Bosnian Muslims out of Potočari. The Bosnian Muslim and Bosnian Serb sides were not on equal terms and Nesib Mandžić felt his presence was only required to put up a front for the international public. Nesib Mandžić felt intimidated by General Mladić. There was no indication that anything would happen the next day." (*Ibid.*, paras. 156-158.)

287. A third meeting was held the next morning, 12 July. The Tribunal in the *Blagojević* case gives this account:

"After the Bosnian Muslim representatives had introduced themselves, General Mladić stated:

'I want to help you, but I want absolute co-operation from the civilian population because your army has been defeated. There is no need for your people to get killed, your husband, your brothers or your neighbours . . . As I told this gentleman last night, you can either survive or disappear. For your survival, I demand that all your armed men, even those who committed crimes, and many did, against our people, surrender their weapons to the VRS . . . You can choose to stay or you can choose to leave. If you wish to leave, you can go anywhere you like. When the weapons have been surrendered every individual will go where they say they want to go. The only thing is to provide the needed gasoline. You can pay for it if you have the means. If you can't pay for it, UNPROFOR should bring four or five tanker trucks to fill up trucks . . .'

Čamila Omanović [one of the Muslim representatives] interpreted this to mean that if the Bosnian Muslim population left they would be saved, but that if they stayed they would die. General Mladić did not give a clear answer in relation to whether a safe transport of the civilian population out of the enclave would be carried out. General Mladić stated that the male Bosnian Muslim population from the age of 16 to 65 would be screened for the presence of war criminals. He indicated that after this screening, the men would be returned to the enclave. This was the first time that the separation of men from the rest of the population was mentioned. The Bosnian Muslim representatives had the impression that 'everything had been prepared in advance, that there was a team of people working together in an organized manner' and that 'Mladić was the chief organizer.'

The third Hotel Fontana meeting ended with an agreement that the VRS would transport the Bosnian Muslim civilian population out of the enclave to ABiH-held territory, with the assistance of UNPROFOR to ensure that the transportation was carried out in a humane manner." (*Ibid.*, paras. 160-161.)

The Court notes that the accounts of the statements made at the meetings come from transcripts of contemporary video recordings.

288. The VRS and MUP of the Republika Srpska from 12 July separated men aged 16 to approximately 60 or 70 from their families. The Bosnian Muslim men were directed to various locations but most were sent to a particular house ("The White House") near the UNPROFOR headquarters in Potočari, where they were interrogated. During the afternoon of 12 July a large number of buses and other vehicles arrived in Potočari including some from Serbia. Only women, children and the elderly were allowed to board the buses bound for territory held by the Bosnia and Herzegovina military. Dutchbat vehicles escorted convoys to begin with, but the VRS stopped that and soon after stole 16-18 Dutchbat jeeps, as well as around 100 small arms, making further escorts impossible. Many of the Bosnian Muslim men from Srebrenica and its surroundings including those who had attempted to flee through the woods were detained and killed.

289. Mention should also be made of the activities of certain paramilitary units, the "Red Berets" and the "Scorpions", who are alleged by the Applicant to have participated in the events in and around Srebrenica. The Court was presented with certain documents by the Applicant, which were said to show that the "Scorpions" were indeed sent to the Trnovo area near Srebrenica and remained there through the relevant time period. The Respondent cast some doubt on the authenticity of these documents (which were copies of intercepts, but not originals) without ever formally denying their authenticity. There was no denial of the fact of the relocation of the "Scorpions" to Trnovo. The Applicant during the oral proceedings presented video material showing the execution by paramilitaries of six Bosnian Muslims, in Trnovo, in July 1995.

290. The Trial Chambers in the *Krstić* and *Blagojević* cases both found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of Srebrenica in July 1995 (*Krstić*, IT-98-33-T, Judgment, 2 August 2001, paras. 426-427 and *Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 643). Accordingly they found that the *actus reus* of killings in Article II (a) of the Convention was satisfied. Both also found that actions of Bosnian Serb forces also satisfied the *actus reus* of causing serious bodily or mental harm, as defined in Article II (b) of the Convention — both to those who where about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them (*Krstić*, *ibid.*, para. 543, and *Blagojević*, *ibid.*, paras. 644-654).

291. The Court is fully persuaded that both killings within the terms of Article II (a) of the Convention, and acts causing serious bodily or mental harm within the terms of Article II (b) thereof occurred during the Srebrenica massacre. Three further aspects of the ICTY decisions relating to Srebrenica require closer examination — the specific intent (*dolus specialis*), the date by

which the intent was formed, and the definition of the “group” in terms of Article II. A fourth issue which was not directly before the ICTY but which this Court must address is the involvement, if any, of the Respondent in the actions.

292. The issue of intent has been illuminated by the *Krstić* Trial Chamber. In its findings, it was convinced of the existence of intent by the evidence placed before it. Under the heading “A Plan to Execute the Bosnian Muslim Men of Srebrenica”, the Chamber “finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave” (IT-98-33-T, Judgment, 2 August 2001, para. 87). All the executions, the Chamber decided, “systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers” (*ibid.*, para. 546). While “[t]he VRS may have initially considered only targeting military men for execution, . . . [the] evidence shows, however, that a decision was taken, at some point, to capture and kill all the Bosnian Muslim men indiscriminately. No effort was made to distinguish the soldiers from the civilians.” (*ibid.*, para. 547.) Under the heading “Intent to Destroy”, the Chamber reviewed the Parties’ submissions and the documents, concluding that it would “adhere to the characterization of genocide which encompass[es] only acts committed with the goal of destroying all or part of a group” (*ibid.*, para. 571; original emphasis). The acts of genocide need not be premeditated and the intent may become the goal later in an operation (*ibid.*, para. 572).

“Evidence presented in this case has shown that the killings were planned: the number and nature of the forces involved, the standardized coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied, indicate that a decision was made to kill all the Bosnian Muslim military aged men.

The Trial Chamber is unable to determine the precise date on which the decision to kill all the military aged men was taken. Hence, it cannot find that the killings committed in Potočari on 12 and 13 July 1995 formed part of the plan to kill all the military aged men. Nevertheless, the Trial Chamber is confident that the mass executions and other killings committed from 13 July onwards were part of this plan.” (*Ibid.*, paras. 572-573; see also paras. 591-598.)

293. The Court has already quoted (paragraph 281) the passage from the Judgment of the Appeals Chamber in the *Krstić* case rejecting the Prosecutor’s attempted reliance on the Directives given earlier in July, and it would recall the evidence about the VRS’s change of plan in the course of the operation in relation to the complete takeover of the enclave. The Appeals Chamber also rejected the appeal by General Krstić against the finding that genocide occurred in Srebrenica. It held that the Trial Chamber was entitled to conclude that the destruction of such a sizeable number of men, one fifth of the overall Srebrenica community, “would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica” (IT-98-33-A, Appeals Chamber

Judgment, 19 April 2004, paras. 28-33); and the Trial Chamber, as the best assessor of the evidence presented at trial, was entitled to conclude that the evidence of the transfer of the women and children supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The Appeals Chamber concluded this part of its Judgment as follows:

“The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements — the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part — guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.

In concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber did not depart from the legal requirements for genocide. The Defence appeal on this issue is dismissed.” (*Ibid.*, paras. 37-38.)

294. On one view, taken by the Applicant, the *Blagojević* Trial Chamber decided that the specific intent (*dolus specialis*) was formed earlier than 12 or 13 July, the time chosen by the *Krstić* Chamber. The Court has already called attention to that Chamber’s statement that at some point (it could not determine “the exact moment”) the military objective in Srebrenica changed, from “reducing the enclave to the urban area” (stated in a Drina Corps order of 2 July 1995 referred to at times as the “Krivaja 95 operation”) to taking over Srebrenica town and the enclave as a whole. Later in the Judgment, under the heading “Findings: was genocide committed?”, the Chamber refers to the 2 July document:

“The Trial Chamber is convinced that the criminal acts committed by the Bosnian Serb forces were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica, as reflected in the ‘Krivaja 95 operation’, the ultimate objective of which was to eliminate the enclave and, therefore, the Bosnian Muslim community living there.” (*Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 674.)

The Chamber immediately goes on to refer only to the events — the massacres and the forcible transfer of the women and children — after the fall of Srebrenica, that is sometime after the change of military objective on 9 or 10 July. The conclusion on intent is similarly focussed:

“The Trial Chamber has no doubt that all these acts constituted a single operation executed with the intent to destroy the Bosnian Muslim population of Srebrenica. The Trial Chamber finds that the Bosnian Serb forces not only knew that the combination of the killings of the men with the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group.” (*Ibid.*, para. 677.) (See similarly all but the first item in the list in paragraph 786.)

295. The Court’s conclusion, fortified by the Judgments of the Trial Chambers in the *Krstić* and *Blagojević* cases, is that the necessary intent was not established until after the change in the military objective and after the takeover of Srebrenica, on about 12 or 13 July. This may be significant for the application of the obligations of the Respondent under the Convention (paragraph 423 below). The Court has no reason to depart from the Tribunal’s determination that the necessary specific intent (*dolus specialis*) was established and that it was not established until that time.

296. The Court now turns to the requirement of Article II that there must be the intent to destroy a protected “group” in whole or in part. It recalls its earlier statement of the law and in particular the three elements there discussed: substantiality (the primary requirement), relevant geographic factors and the associated opportunity available to the perpetrators, and emblematic or qualitative factors (paragraphs 197-201). Next, the Court recalls the assessment it made earlier in the Judgment of the persuasiveness of the ICTY’s findings of facts and its evaluation of them (paragraph 223). Against that background it turns to the findings in the *Krstić* case (IT-98-33-T, Trial Chamber Judgment, 2 August 2001, paras. 551-599 and IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 6-22), in which the Appeals Chamber endorsed the findings of the Trial Chamber in the following terms.

“In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size.” (IT-98-33-A, Judgment, 19 April 2004, para. 15; footnotes omitted.)

The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.

297. The Court concludes that the acts committed at Srebrenica falling within Article II (a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.

* * *

(6) Article II (b): Causing serious bodily or mental harm to members of the protected group

298. The Applicant contends that besides the massive killings, systematic serious harm was caused to the non-Serb population of Bosnia and Herzegovina. The Applicant includes the practice of terrorizing the non-Serb population, the infliction of pain and the administration of torture as well as the practice of systematic humiliation into this category of acts of genocide. Further, the Applicant puts a particular emphasis on the issue of systematic rapes of Muslim women, perpetrated as part of genocide against the Muslims in Bosnia during the conflict.

299. The Respondent does not dispute that, as a matter of legal qualification, the crime of rape may constitute an act of genocide, causing serious bodily or mental harm. It disputes, however, that the rapes in the territory of Bosnia and Herzegovina were part of a genocide perpetrated therein. The Respondent, relying on the Report of the Commission of Experts, maintains that the rapes and acts of sexual violence committed during the conflict, were not part of genocide, but were committed on all sides of the conflict, without any specific intent (*dolus specialis*).

300. The Court notes that there is no dispute between the Parties that rapes and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group. It notes also that the ICTR, in its Judgment of 2 September 1998 in the *Akayesu* case, addressed the issue of acts of rape and sexual violence as acts of genocide in the following terms:

“Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm” (ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 731).

The ICTY, in its Judgment of 31 July 2003 in the *Stakić* case, recognized that:

“Causing serious bodily and mental harm’ in subparagraph (b) [of Article 4 (2) of the Statute of the ICTY] is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable.” (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 516.)

301. The Court notes furthermore that Security Council and General Assembly resolutions contemporary with the facts are explicit in referring to sexual violence. These resolutions were in turn based on reports before the General Assembly and the Security Council, such as the Reports of the Secretary-General, the Commission of Experts, the Special Rapporteur for Human Rights, Tadeusz Mazowiecki, and various United Nations agencies in the field. The General Assembly stressed the “extraordinary suffering of the victims of rape and sexual violence” (General Assembly resolution 48/143 (1993), Preamble; General Assembly resolution 50/192 (1995), para. 8). In resolution 48/143 (1993), the General Assembly declared it was:

“Appalled at the recurring and substantiated reports of widespread rape and abuse of women and children in the areas of armed conflict in the former Yugoslavia, in particular its systematic use against the Muslim women and children in Bosnia and Herzegovina by Serbian forces” (Preamble, para. 4).

302. Several Security Council resolutions expressed alarm at the “massive, organised and systematic detention and rape of women”, in particular Muslim women in Bosnia and Herzegovina (Security Council resolutions 798 (1992), Preamble, para. 2; resolution 820 (1993), para. 6; 827 (1993), Preamble, para. 3). In terms of other kinds of serious harm, Security Council resolution 1034 (1995) condemned

“in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most as described in the report of the Secretary-General of 27 November 1995 and showing a consistent pattern of summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances” (para. 2).

The Security Council further referred to a “persistent and systematic campaign of terror” in Banja Luka, Bijeljina and other areas under the control of Bosnian Serb forces (Security Council resolution 941 (1994), Preamble, para. 4). It also expressed concern at reports of mass murder, unlawful detention and forced labour, rape, and deportation of civilians in Banja Luka and Sanski Most (Security Council resolution 1019 (1995), Preamble, para. 2).

303. The General Assembly also condemned specific violations including torture, beatings, rape, disappearances, destruction of houses, and other acts or threats of violence aimed at forcing individuals to leave their homes (General Assembly resolution 47/147 (1992), para. 4; see also General Assembly resolution 49/10 (1994), Preamble, para. 14 and General Assembly resolution 50/193 (1995), para. 2).

304. The Court will now examine the specific allegations of the Applicant under this heading, in relation to the various areas and camps identified as having been the scene of acts causing “bodily or mental harm” within the meaning of the Convention. As regards the events of Srebrenica, the Court has already found it to be established that such acts were committed (paragraph 291 above).

Drina River Valley

(a) Zvornik

305. As regards the area of the Drina River Valley, the Applicant has stressed the perpetration of acts and abuses causing serious bodily or mental harm in the events at Zvornik. In particular, the Court has been presented with a report on events at Zvornik which is based on eye-witness accounts and extensive research (Hannes Treter *et al.*, “‘Ethnic cleansing’ Operations in the Northeast Bosnian-City of Zvornik from April through June 1992”, Ludwig Boltzmann Institute of Human Rights (1994), p. 48). The report of the Ludwig Boltzmann Institute gives account of a policy of terrorization, forced relocation, torture, rape during the takeover of Zvornik in April-June 1992. The Report of the Commission of Experts received 35 reports of rape in the area of Zvornik in May 1992 (Vol. V, Ann. IX, p. 54).

(b) Foča

306. Further acts causing serious bodily and mental harm were perpetrated in the municipality of Foča. The Applicant, relying on the Judgment in the *Kunarac et al.* case (IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001, paras. 574 and 592), claims, in particular that many women were raped repeatedly by Bosnian Serb soldiers or policemen in the city of Foča.

(c) Camps

(i) Batković camp

307. The Applicant further claims that in Batković camp, prisoners were frequently beaten and mistreated. The Report of the Commission of Experts gives an account of a witness statement according to which “prisoners were forced to perform sexual acts with each other, and sometimes with guards”. The Report continues: “Reports of the frequency of beatings vary from daily beatings to beatings 10 times each day.” (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 62, para. 469.) Individual witness accounts reported by the Commission of Experts

(Report of the Commission of Experts, Vol. IV, Ann. VIII, pp. 62-63 and Ann. X, p. 9) provide second-hand testimony that beatings occurred and prisoners lived in terrible conditions. As already noted above (paragraph 256), however, the periodic Report of Special Rapporteur Mazowiecki of 17 November 1992 stated that “[t]he prisoners . . . appeared to be in good health” (p. 13); but according to the Applicant, Mazowiecki was shown a “model” camp and therefore his impression was inaccurate. The United States Department of State Dispatch of 19 April 1993 (Vol. 4, No. 16), alleges that in Batković camp, prisoners were frequently beaten and mistreated. In particular, the Dispatch records two witness statements according to which “[o]n several occasions, they and other prisoners were forced to remove their clothes and perform sex acts on each other and on some guards”.

(ii) Sušica camp

308. According to the Applicant, rapes and physical assaults were also perpetrated at Sušica camp; it pointed out that in the proceedings before the ICTY, in the “Rule 61 Review of the Indictment” and the Sentencing Judgment, in the *Nikolić* case, the accused admitted that many Muslim women were raped and subjected to degrading physical and verbal abuse in the camp and at locations outside of it (*Nikolić*, IT-94-2-T, Sentencing Judgment, 18 December 2003, paras. 87-90), and that several men were tortured in that same camp.

(iii) Foča Kazneno-Popravni Dom camp

309. With regard to the Foča Kazneno-Popravni Dom camp, the Applicant asserts that beatings, rapes of women and torture were perpetrated. The Applicant bases these allegations mainly on the Report of the Commission of Experts and the United States State Department Dispatch. The Commission of Experts based its findings on information provided by a Helsinki Watch Report. A witness claimed that some prisoners were beaten in Foča KP Dom (Report of the Commission of Experts, Vol. IV, pp. 128-132); similar accounts are contained in the United States State Department Dispatch. One witness stated that

“Those running the center instilled fear in the Muslim prisoners by selecting certain prisoners for beatings. From his window in Room 13, the witness saw prisoners regularly being taken to a building where beatings were conducted. This building was close enough for him to hear the screams of those who were being beaten.” (Dispatch of the United States Department of State, 19 April 1993, No. 16, p. 262.)

310. The ICTY Trial Chamber in its *Kumarac* Judgment of 22 February 2001, described the statements of several witnesses as to the poor and brutal living conditions in Foča KP Dom. These seem to confirm that the Muslim men and women from Foča, Gacko and Kalinovik municipalities were arrested, rounded up, separated from each other, and imprisoned or detained at several detention centres like the Foča KP Dom where some of them were killed, raped or severely beaten (*Kumarac et al*, IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001).

Prijedor

(a) Municipality

311. Most of the allegations of abuses said by the Applicant to have occurred in Prijedor have been examined in the section of the present Judgment concerning the camps situated in Prijedor. However, the Report of the Commission of Experts refers to a family of nine found dead in Stara Rijeka in Prijedor, who had obviously been tortured (Vol. V, Ann. X, p. 41). The Trial Chamber of the ICTY, in its Judgment in the *Tadić* case made the following factual finding as to an attack on two villages in the Kozarac area, Jaskići and Sivci:

“On 14 June 1992 both villages were attacked. In the morning the approaching sound of shots was heard by the inhabitants of Sivci and soon after Serb tanks and Serb soldiers entered the village . . . There they were made to run along that road, hands clasped behind their heads, to a collecting point in the yard of one of the houses. On the way there they were repeatedly made to stop, lie down on the road and be beaten and kicked by soldiers as they lay there, before being made to get up again and run some distance further, where the whole performance would be repeated . . . In all some 350 men, mainly Muslims but including a few Croats, were treated in this way in Sivci.

On arrival at the collecting point, beaten and in many cases covered with blood, some men were called out and questioned about others, and were threatened and beaten again. Soon buses arrived, five in all, and the men were made to run to them, hands again behind the head, and to crowd on to them. They were then taken to the Keraterm camp.

The experience of the inhabitants of the smaller village of Jaskići, which contained only 11 houses, on 14 June 1992 was somewhat similar but accompanied by the killing of villagers. Like Sivci, Jaskići had received refugees after the attack on Kozarac but by 14 June 1992 many of those refugees had left for other villages. In the afternoon of 14 June 1992 gunfire was heard and Serb soldiers arrived in Jaskići and ordered men out of their homes and onto the village street, their hands clasped behind their heads; there they were made to lie down and were severely beaten.” (IT-94-1-T, Judgment, 7 May 1997, paras. 346-348.)

(b) Camps

(i) Omarska camp

312. As noted above in connection with the killings (paragraph 262), the Applicant has been able to present abundant and persuasive evidence of physical abuses causing serious bodily harm in Omarska camp. The Report of the Commission of Experts contains witness accounts regarding the “white house” used for physical abuses, rapes, torture and, occasionally, killings, and the “red house” used for killings (Vol. IV, Ann. VIII, pp. 207-222). Those accounts of the sadistic methods of killing are corroborated by United States submissions to the Secretary-General. The most persuasive and reliable source of evidence may be taken to be the factual part of the Opinion and

Judgment of the ICTY in the *Tadić* case (IT-94-1-T, Trial Chamber Judgment, 7 May 1997). Relying on the statements of 30 witnesses, the *Tadić* Trial Judgment made findings as to interrogations, beatings, rapes, as well as the torture and humiliation of Muslim prisoners in Omarska camp (in particular: *ibid.*, paras. 155-158, 163-167). The Trial Chamber was satisfied beyond reasonable doubt of the fact that several victims were mistreated and beaten by Tadić and suffered permanent harm, and that he had compelled one prisoner to sexually mutilate another (*ibid.*, paras. 194-206). Findings of mistreatment, torture, rape and sexual violence at Omarska camp were also made by the ICTY in other cases; in particular, the Trial Judgment of 2 November 2001 in the *Kvočka et al.* case (IT-98-30/1-T, Trial Chamber Judgment, paras. 21-50, and 98-108) — upheld on appeal, the Trial Judgment of 1 September 2004 in the *Brđanin* case (IT-99-36-T, Trial Chamber Judgment, paras. 515-517) and the Trial Judgment of 31 July 2003 in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, paras. 229-336).

(ii) Keraterm camp

313. The Applicant also pointed to evidence of beatings and rapes at Keraterm camp. Several witness accounts are reported in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 225, 231, 233, 238) and corroborated by witness accounts reported by the Permanent Mission of Austria to the United Nations and Helsinki Watch. The attention of the Court has been drawn to several judgments of the ICTY which also document the severe physical abuses, rapes and sexual violence that occurred at this camp. The Trial Judgment of 1 September 2004 in the *Brđanin* case found that:

“At Keraterm camp, detainees were beaten on arrival . . . Beatings were carried out with wooden clubs, baseball bats, electric cables and police batons . . .

In some cases the beatings were so severe as to result in serious injury and death. Beatings and humiliation were often administered in front of other detainees. Female detainees were raped in Keraterm camp.” (IT-99-36-T, Trial Chamber Judgment, paras. 851-852.)

The Trial Chamber in its Judgment of 31 July 2003 in the *Stakić* case found that

“the detainees at the Keraterm camp were subjected to terrible abuse. The evidence demonstrates that many of the detainees at the Keraterm camp were beaten on a daily basis. Up until the middle of July, most of the beatings happened at night. After the detainees from Brdo arrived, around 20 July 1992, there were ‘no rules’, with beatings committed both day and night. Guards and others who entered the camp, including some in military uniforms carried out the beatings. There were no beatings in the rooms since the guards did not enter the rooms — people were generally called out day and night for beatings.” (IT-97-24-T, Trial Chamber Judgment, para. 237.)

The Chamber also found that there was convincing evidence of further beatings and rape perpetrated in Keraterm camp (*ibid.*, paras. 238-241).

In the Trial Judgment in the *Kvočka et al.* case, the Chamber held that, in addition to the “dreadful” general conditions of life, detainees at Keraterm camp were “mercilessly beaten” and “women were raped” (IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, para. 114).

(iii) Trnopolje camp

314. The Court has furthermore been presented with evidence that beatings and rapes occurred at Trnopolje camp. The rape of 30-40 prisoners on 6 June 1992 is reported by both the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 251-253) and a publication of the United States State Department. In the *Tadić* case the Trial Chamber of the ICTY concluded that at Trnopolje camp beatings occurred and that “[b]ecause this camp housed the largest number of women and girls, there were more rapes at this camp than at any other” (IT-94-1-T, Judgment, 7 May 1997, paras. 172-177, (para. 175)). These findings concerning beatings and rapes are corroborated by other Judgments of the ICTY, such as the Trial Judgment in the *Stakić* case where it found that,

“although the scale of the abuse at the Trnopolje camp was less than that in the Omarska camp, mistreatment was commonplace. The Serb soldiers used baseball bats, iron bars, rifle butts and their hands and feet or whatever they had at their disposal to beat the detainees. Individuals were who taken out for questioning would often return bruised or injured” (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 242);

and that, having heard the witness statement of a victim, it was satisfied beyond reasonable doubt “that rapes did occur in the Trnopolje camp” (*ibid.*, para. 244). Similar conclusions were drawn in the Judgment of the Trial Chamber in the *Brđanin* case (IT-99-36-T, 1 September 2004, paras. 513-514 and 854-857).

Banja Luka

(i) Manjača camp

315. With regard to the Manjača camp in Banja Luka, the Applicant alleges that beatings, torture and rapes were occurring at this camp. The Applicant relies mainly on the witnesses cited in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 50-54). This evidence is corroborated by the testimony of a former prisoner at the Joint Hearing before the Select Committee on Intelligence in the United States Senate on 9 August 1995, and a witness account reported in the Memorial of the Applicant (United States State Department Dispatch, 2 November 1992, p. 806). The Trial Chamber, in its Decision on Motion for Judgment of Acquittal of 16 June 2004, in the *Milošević* case reproduced the statement of a witness who testified that,

“at the Manjaca camp, they were beaten with clubs, cables, bats, or other similar items by the military police. The men were placed in small, bare stables, which were overcrowded and contained no toilet facilities. While at the camp, the detainees received inadequate food and water. Their heads were shaved, and they were severely beaten during interrogations.” (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 178.)

316. The Applicant refers to the Report of the Commission of Experts, which contains reports that the Manjača camp held a limited number of women and that during their stay they were “raped repeatedly”. Muslim male prisoners were also forced to rape female prisoners (Report of the Commission of Experts, Vol. IV, Annex VIII, pp. 53-54). The Respondent points out that the *Brđanin* Trial Judgment found no evidence had been presented that detainees were subjected to “acts of sexual degradation” in Manjača.

Brčko

(i) Luka camp

317. The Applicant alleges that torture, rape and beatings occurred at Luka camp (Brčko). The Report of the Commission of Experts contains multiple witness accounts, including the evidence of a local guard forced into committing rape (Vol. IV, Ann. VIII, pp. 93-97). The account of the rapes is corroborated by multiple sources (United States State Department Dispatch, 19 April 1993). The Court notes in particular the findings of the ICTY Trial Chamber in the *Češić* case, with regard to acts perpetrated in the Luka camp. In his plea agreement the accused admitted several grave incidents, such as beatings and compelling two Muslim brothers to perform sexual acts with each other (IT-95-10/1-S, Sentencing Judgment, 11 March 2004, paras. 8-17). These findings are corroborated by witness statements and the guilty plea in the *Jejić* case.

318. The Respondent does not deny that the camps in Bosnia and Herzegovina were “in breach of humanitarian law and, in most cases, in breach of the law of war”, but argues that the conditions in all the camps were not of the kind described by the Applicant. It stated that all that had been demonstrated was “the existence of serious crimes, committed in a particularly complex situation, in a civil and fratricidal war”, but not the requisite specific intent (*dolus specialis*).

*

319. Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The requirements of the material element, as defined by Article II (b) of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent (*dolus specialis*) to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.

* *

(7) Article II (c): Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

320. Article II (c) of the Genocide Convention concerns the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part. Under this heading, the Applicant first points to an alleged policy by the Bosnian Serb forces to encircle civilians of the protected group in villages, towns or entire regions and to subsequently shell those areas and cut off all supplies in order to starve the population. Secondly, the Applicant claims that Bosnian Serb forces attempted to deport and expel the protected group from the areas which those forces occupied. Finally, the Applicant alleges that Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property.

321. The Respondent argues that the events referred to by the Applicant took place in a context of war which affected the entire population, whatever its origin. In its view, “it is obvious that in any armed conflict the conditions of life of the civilian population deteriorate”. The Respondent considers that, taking into account the civil war in Bosnia and Herzegovina which generated inhuman conditions of life for the entire population in the territory of that State, “it is impossible to speak of the deliberate infliction on the Muslim group alone or the non-Serb group alone of conditions of life calculated to bring about its destruction”.

322. The Court will examine in turn the evidence concerning the three sets of claims made by the Applicant: encirclement, shelling and starvation; deportation and expulsion; destruction of historical, religious and cultural property. It will also go on to consider the evidence presented regarding the conditions of life in the detention camps already extensively referred to above (paragraphs 252-256, 262-273, 307-310 and 312-318).

Alleged encirclement, shelling and starvation

323. The principal incident referred to by the Applicant in this regard is the siege of Sarajevo by Bosnian Serb forces. Armed conflict broke out in Sarajevo at the beginning of April 1992 following the recognition by the European Community of Bosnia and Herzegovina as an independent State. The Commission of Experts estimated that, between the beginning of April 1992 and 28 February 1994, in addition to those killed or missing in the city (paragraph 247 above), 56,000 persons had been wounded (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). It was further estimated that, “over the course of the siege, the city [was] hit by an average of approximately 329 shell impacts per day, with a high of 3,777 shell impacts on 22 July 1993” (*ibid.*). In his report of 28 August 1992, the Special Rapporteur observed that:

“The city is shelled on a regular basis . . . Snipers shoot innocent civilians . . .

The civilian population lives in a constant state of anxiety, leaving their homes or shelters only when necessary . . . The public systems for distribution of electrical power and water no longer function. Food and other basic necessities are scarce, and depend on the airlift organized by UNHCR and protected by UNPROFOR.” (Report of 28 August 1992, paras. 17-18.)

324. The Court notes that, in resolutions adopted on 16 April and 6 May 1993, the Security Council declared Sarajevo, together with Tuzla, Zepa, Gorazde, Bihać and Srebrenica, to be "safe areas" which should be free from any armed attack or any other hostile act and fully accessible to UNPROFOR and international humanitarian agencies (resolutions 819 of 16 April 1993 and 824 of 6 May 1993). However, these resolutions were not adhered to by the parties to the conflict. In his report of 26 August 1993, the Special Rapporteur noted that

"Since May 1993 supplies of electricity, water and gas to Sarajevo have all but stopped . . . a significant proportion of the damage caused to the supply lines has been deliberate, according to United Nations Protection Force engineers who have attempted to repair them. Repair crews have been shot at by both Bosnian Serb and government forces . . ." (Report of 26 August 1993, para. 6).

He further found that UNHCR food and fuel convoys had been "obstructed or attacked by Bosnian Serb and Bosnian Croat forces and sometimes also by governmental forces" (Report of 26 August 1993, para. 15). The Commission of Experts also found that the "blockade of humanitarian aid ha[d] been used as an important tool in the siege" (Report of the Commission of Experts, Ann. VI, p. 17). According to the Special Rapporteur, the targeting of the civilian population by shelling and sniping continued and even intensified throughout 1994 and 1995 (Report of 4 November 1994, paras. 27-28; Report of 16 January 1995, para. 13; Report of 5 July 1995, paras. 67-70). The Special Rapporteur noted that

"[a]ll sides are guilty of the use of military force against civilian populations and relief operations in Sarajevo. However, one cannot lose sight of the fact that the main responsibility lies with the [Bosnian Serb] forces, since it is they who have adopted the tactic of laying siege to the city." (Report of 17 November 1992, para. 42.)

325. The Court notes that in the *Galić* case, the Trial Chamber of the ICTY found that the Serb forces (the SRK) conducted a campaign of sniping and shelling against the civilian population of Sarajevo (*Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 583). It was

"convinced by the evidence in the Trial Record that civilians in ABiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory . . . and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured" (*ibid.*, para. 591).

These findings were subsequently confirmed by the Appeals Chamber (*Galić*, IT-98-29-A, Judgment, 30 November 2006, paras. 107-109). The ICTY also found that the shelling which hit the Markale market on 5 February 1994, resulting in 60 persons killed and over 140 injured, came from behind Bosnian Serb lines, and was deliberately aimed at civilians (*ibid.*, paras. 333 and 335 and *Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 496).

326. The Respondent argues that the safe areas proclaimed by the Security Council had not been completely disarmed by the Bosnian army. For instance, according to testimony given in the *Galić* case by the deputy commander of the Bosnian army corps covering the Sarajevo area, the

Bosnian army had deployed 45,000 troops within Sarajevo. The Respondent also pointed to further testimony in that case to the effect that certain troops in the Bosnian army were wearing civilian clothes and that the Bosnian army was using civilian buildings for its bases and positioning its tanks and artillery in public places. Moreover, the Respondent observes that, in his book, *Fighting for Peace*, General Rose was of the view that military equipment was installed in the vicinity of civilians, for instance, in the grounds of the hospital in Sarajevo and that "[t]he Bosnians had evidently chosen this location with the intention of attracting Serb fire, in the hope that the resulting carnage would further tilt international support in their favour" (Michael Rose, *Fighting for Peace*, London, 1998, p. 254).

327. The Applicant also points to evidence of sieges of other towns in Bosnia and Herzegovina. For instance, with regard to Gorazde, the Special Rapporteur found that the enclave was being shelled and had been denied convoys of humanitarian aid for two months. Although food was being air-dropped, it was insufficient (Report of 5 May 1992, para. 42). In a later report, the Special Rapporteur noted that, as of spring 1994, the town had been subject to a military offensive by Bosnian Serb forces, during which civilian objects including the hospital had been targeted and the water supply had been cut off (Report of 10 June 1994, paras. 7-12). Humanitarian convoys were harassed including by the detention of UNPROFOR personnel and the theft of equipment (Report of 19 May 1994, paras. 17 *et seq.*). Similar patterns occurred in Bihać, Tuzla, Cerska and Maglaj (Bihać: Special Rapporteur's Report of 28 August 1992, para. 20; Report of the Secretary-General pursuant to resolution 959 (1994), para. 17; Special Rapporteur's Report of 16 January 1995, para. 12; Tuzla: Report of the Secretary-General pursuant to resolutions 844 (1993), 836 (1993) and 776 (1992), paras. 2-4; Special Rapporteur's Report of 5 July 1995; Cerska: Special Rapporteur's Report of 5 May 1993, paras. 8-17; Maglaj: Special Rapporteur's Report of 17 November 1993, para. 93).

328. The Court finds that virtually all the incidents recounted by the Applicant have been established by the available evidence. It takes account of the assertion that the Bosnian army may have provoked attacks on civilian areas by Bosnian Serb forces, but does not consider that this, even if true, can provide any justification for attacks on civilian areas. On the basis of a careful examination of the evidence presented by the Parties, the Court concludes that civilian members of the protected group were deliberately targeted by Serb forces in Sarajevo and other cities. However, reserving the question whether such acts are in principle capable of falling within the scope of Article II, paragraph (c), of the Convention, the Court does not find sufficient evidence that the alleged acts were committed with the specific intent to destroy the protected group in whole or in part. For instance, in the *Galić* case, the ICTY found that

"the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition . . . the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear" (*Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 593).

These findings were not overruled by the judgment of the Appeals Chamber of 30 November 2006 (*Galić*, IT-98-29-A, Judgment: see e.g., paras. 107-109, 335 and 386-390). The Special Rapporteur of the United Nations Commission on Human Rights was of the view that “[t]he siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croats to flee” (Report of 28 August 1992, para. 17). The Court thus finds that it has not been conclusively established that the acts were committed with the specific intent (*dolus specialis*) to destroy the protected group in whole or in part.

Deportation and expulsion

329. The Applicant claims that deportations and expulsions occurred systematically all over Bosnia and Herzegovina. With regard to Banja Luka, the Special Rapporteur noted that since late November 1993, there had been a “sharp rise in repossessions of apartments, whereby Muslim and Croat tenants [were] summarily evicted” and that “a form of housing agency ha[d] been established . . . which chooses accommodation for incoming Serb displaced persons, evicts Muslim or Croat residents and reputedly receives payment for its services in the form of possessions left behind by those who have been evicted” (Report of 21 February 1994, para. 8). In a report dated 21 April 1995 dedicated to the situation in Banja Luka, the Special Rapporteur observed that since the beginning of the war, there had been a 90 per cent reduction in the local Muslim population (Report of 21 April 1995, para. 4). He noted that a forced labour obligation imposed by the *de facto* authorities in Banja Luka, as well as “the virulence of the ongoing campaign of violence” had resulted in “practically all non-Serbs fervently wishing to leave the Banja Luka area” (Report of 21 April 1995, para. 24). Those leaving Banja Luka were required to pay fees and to relinquish in writing their claim to their homes, without reimbursement (Report of 21 April 1995, para. 26). The displacements were “often very well organized, involving the bussing of people to the Croatian border, and involve[d] large numbers of people” (Report of 4 November 1994, para. 23). According to the Special Rapporteur, “[o]n one day alone in mid-June 1994, some 460 Muslims and Croats were displaced” (*ibid.*).

330. As regards Bijeljina, the Special Rapporteur observed that, between mid-June and 17 September 1994, some 4,700 non-Serbs were displaced from the Bijeljina and Janja regions. He noted that many of the displaced, “whether forced or choosing to depart, were subject to harassment and theft by the Bosnian Serb forces orchestrating the displacement” (Report of 4 November 1994, para. 21). These reports were confirmed by those of non-governmental organizations based on witness statements taken on the ground (Amnesty International, “Bosnia and Herzegovina: Living for the Day— Forced expulsions from Bijeljina and Janja”, December 1994, p. 2).

331. As for Zvornik, the Commission of Experts, relying on a study carried out by the Ludwig Boltzmann Institute of Human Rights based on an evaluation of 500 interviews of individuals who had fled the area, found that a systematic campaign of forced deportation had occurred (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 55 *et seq.*). The study observed that Bosnian Muslims obtained an official stamp on their identity card indicating a change of domicile in exchange for transferring their property to an “agency for the exchange of houses” which was subsequently a prerequisite for being able to leave the town (Ludwig Boltzmann Institute of Human Rights, “Ethnic Cleansing Operations” in the northeast Bosnian city of Zvornik

from April through June 1992”, pp. 28-29). According to the study, forced deportations of Bosnian Muslims began in May/June 1992 by bus to Mali Zvornik and from there to the Bosnian town of Tuzla or to Subotica on the Serbian-Hungarian border (*ibid.*, pp. 28 and 35-36). The Special Rapporteur’s report of 10 February 1993 supports this account, stating that deportees from Zvornik had been “ordered, some at gunpoint, to board buses and trucks and later trains”, provided with Yugoslav passports and subsequently taken to the Hungarian border to be admitted as refugees (Report of 10 February 1993, para. 99).

332. According to the Trial Chamber of the ICTY in its review of the indictment in the cases against *Karađžić and Mladić*, “[t]housands of civilians were unlawfully expelled or deported to other places inside and outside the Republic of Bosnia and Herzegovina” and “[t]he result of these expulsions was the partial or total elimination of Muslims and Bosnian Croats in some of [the] Bosnian Serb-held regions of Bosnia and Herzegovina”. The Chamber further stated that “[i]n the municipalities of Prijedor, Foča, Vlasenica, Brčko and Bosanski Šamac, to name but a few, the once non-Serbian majority was systematically exterminated or expelled by force or intimidation” (*Karađžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 16).

333. The Respondent argues that displacements of populations may be necessary according to the obligations set down in Articles 17 and 49, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, for instance if the security of the population or imperative military reasons so demand. It adds that the displacement of populations has always been a way of settling certain conflicts between opposing parties and points to a number of examples of forced population displacements in history following an armed conflict. The Respondent also argues that the mere expulsion of a group cannot be characterized as genocide, but that, according to the ICTY Judgment in the *Stakić* case, “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group” and “[t]he expulsion of a group or part of a group does not in itself suffice for genocide” (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519).

334. The Court considers that there is persuasive and conclusive evidence that deportations and expulsions of members of the protected group occurred in Bosnia and Herzegovina. With regard to the Respondent’s argument that in time of war such deportations or expulsions may be justified under the Geneva Convention, or may be a normal way of settling a conflict, the Court would observe that no such justification could be accepted in the face of proof of specific intent (*dolus specialis*). However, even assuming that deportations and expulsions may be categorized as falling within Article II, paragraph (c), of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part (see paragraph 190 above).

Destruction of historical, religious and cultural property

335. The Applicant claims that throughout the conflict in Bosnia and Herzegovina, Serb forces engaged in the deliberate destruction of historical, religious and cultural property of the protected group in “an attempt to wipe out the traces of their very existence”.

336. In the *Tadić* case, the ICTY found that “[n]on-Serb cultural and religious symbols throughout the region were targeted for destruction” in the Banja Luka area (*Tadić*, IT-94-I-T, Trial Chamber Judgment, 7 May 1997, para. 149). Further, in reviewing the indictments of Karadžić and Mladić, the Trial Chamber stated that:

“Throughout the territory of Bosnia and Herzegovina under their control, Bosnian Serb forces . . . destroyed, quasi-systematically, the Muslim and Catholic cultural heritage, in particular, sacred sites. According to estimates provided at the hearing by an expert witness, Dr. Kaiser, a total of 1.123 mosques, 504 Catholic churches and five synagogues were destroyed or damaged, for the most part, in the absence of military activity or after the cessation thereof.

This was the case in the destruction of the entire Islamic and Catholic heritage in the Banja Luka area, which had a Serbian majority and the nearest area of combat to which was several dozen kilometres away. All of the mosques and Catholic churches were destroyed. Some mosques were destroyed with explosives and the ruins were then levelled and the rubble thrown in the public dumps in order to eliminate any vestige of Muslim presence.

Aside from churches and mosques, other religious and cultural symbols like cemeteries and monasteries were targets of the attacks.” (*Karadžić and Mladić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 15.)

In the *Brđanin* case, the Trial Chamber was “satisfied beyond reasonable doubt that there was wilful damage done to both Muslim and Roman Catholic religious buildings and institutions in the relevant municipalities by Bosnian Serb forces” (*Brđanin*, IT-99-36-T, Judgment, 1 September 2004, paras. 640 and 658). On the basis of the findings regarding a number of incidents in various regions of Bosnia and Herzegovina, the Trial Chamber concluded that a “campaign of devastation of institutions dedicated to religion took place throughout the conflict” but “intensified in the summer of 1992” and that this concentrated period of significant damage was “indicative that the devastation was targeted, controlled and deliberate” (*ibid.*, paras. 642-657). For instance, the Trial Chamber found that the Bosanska Krupa town mosque was mined by Bosnian Serb forces in April 1992, that two mosques in Bosanski Petrovac were destroyed by Bosnian Serb forces in July 1992 and that the mosques in Staro Šipovo, Bešnjevo and Pljeva were destroyed on 7 August 1992 (*ibid.*, paras. 644, 647 and 656).

337. The Commission of Experts also found that religious monuments especially mosques and churches had been destroyed by Bosnian Serb forces (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 5, 9, 21 ff.). In its report on the Prijedor region, the Commission found that at

least five mosques and associated buildings in Prijedor town had been destroyed and noted that it was claimed that all 16 mosques in the Kozarac area had been destroyed and that not a single mosque, or other Muslim religious building remained intact in the Prijedor region (Report of the Commission of Experts, Vol. I, Ann. V, p. 106). The report noted that those buildings were “allegedly not desecrated, damaged and destroyed for any military purpose nor as a side-effect of the military operations as such” but rather that the destruction “was due to later separate operations of dynamiting” (*ibid.*).

338. The Special Rapporteur found that, during the conflict, “many mosques, churches and other religious sites, including cemeteries and monasteries, have been destroyed or profaned” (Report of 17 November 1992, para. 26). He singled out the “systematic destruction and profanation of mosques and Catholic churches in areas currently or previously under [Bosnian Serb] control” (Report of 17 November 1992, para. 26).

339. Bosnia and Herzegovina called as an expert Mr. Andrés Riedlmayer, who had carried out a field survey on the destruction of cultural heritage in 19 municipalities in Bosnia and Herzegovina for the Prosecutor of the ICTY in the *Milošević* case and had subsequently studied seven further municipalities in two other cases before the ICTY (“Destruction of Cultural Heritage in Bosnia and Herzegovina, 1992-1996: A Post-war Survey of Selected Municipalities”, *Milošević*, IT-02-54-T, Exhibit Number P486). In his report prepared for the *Milošević* case, Mr. Riedlmayer documented 392 sites, 60 per cent of which were inspected first hand while for the other 40 per cent, his assessment was based on photographs and information obtained from other sources judged to be reliable and where there was corroborating documentation (Riedlmayer Report, p. 5).

340. The report compiled by Mr. Riedlmayer found that of the 277 mosques surveyed, none were undamaged and 136 were almost or entirely destroyed (Riedlmayer Report, pp. 9-10). The report found that:

“The damage to these monuments was clearly the result of attacks directed against them, rather than incidental to the fighting. Evidence of this includes signs of blast damage indicating explosives placed inside the mosques or inside the stairwells of minarets; many mosques [were] burnt out. In a number of towns, including Bijeljina, Janja (Bijeljina municipality), Foča, Banja Luka, Sanski Most, Zvornik and others, the destruction of mosques took place while the area was under the control of Serb forces, at times when there was no military action in the immediate vicinity.” (*ibid.*, p. 11.)

The report also found that, following the destruction of mosques:

“the ruins [of the mosques] were razed and the sites levelled with heavy equipment, and all building materials were removed from the site . . . Particularly well-documented instances of this practice include the destruction and razing of

5 mosques in the town of Bijeljina; of 2 mosques in the town of Janja (in Bijeljina municipality); of 12 mosques and 4 turbes in Banja Luka; and of 3 mosques in the city of Brčko.” (*Ibid.*, p. 12.)

Finally, the Report noted that the sites of razed mosques had been “turned into rubbish tips, bus stations, parking lots, automobile repair shops, or flea markets” (*ibid.*, p. 14), for example, a block of flats and shops had been erected on the site of the Zamlaz Mosque in Zvornik and a new Serbian Orthodox church was built on the site of the destroyed Divic Mosque (*ibid.*, p. 14).

341. Mr. Riedlmayer’s report together with his testimony before the Court and other corroborative sources detail the destruction of the cultural and religious heritage of the protected group in numerous locations in Bosnia and Herzegovina. For instance, according to the evidence before the Court, 12 of the 14 mosques in Mostar were destroyed or damaged and there are indications from the targeting of the minaret that the destruction or damage was deliberate (Council of Europe, *Information Report: The Destruction by War of the Cultural Heritage in Croatia and Bosnia and Herzegovina-Herzegovina*, Parliamentary Assembly doc. 6756, 2 February 1993, paras. 129 and 155). In Foča, the town’s 14 historic mosques were allegedly destroyed by Serb forces. In Banja Luka, all 16 mosques were destroyed by Serb forces including the city’s two largest mosques, the Ferhadija Mosque (built in 1578) and the Arnaudija Mosque (built in 1587) (United States Department of State, Bureau of Public Affairs, *Dispatch*, 26 July 1993, Vol. 4, No. 30, pp. 547-548; “War Crimes in Bosnia-Herzegovina: UN Cease-Fire Won’t Help Banja Luka”, Human Rights Watch/Helsinki Watch, June 1994, Vol. 6, No. 8, pp. 15-16; The Humanitarian Law Centre, *Spotlight Report*, No. 14, August 1994, pp. 143-144).

342. The Court notes that archives and libraries were also subjected to attacks during the war in Bosnia and Herzegovina. On 17 May 1992, the Institute for Oriental Studies in Sarajevo was bombed with incendiary munitions and burnt, resulting in the loss of 200,000 documents including a collection of over 5,000 Islamic manuscripts (Riedlmayer Report, p. 18; Council of Europe, Parliamentary Assembly, Second Information Report on War Damage to the Cultural Heritage in Croatia and Bosnia-Herzegovina, doc. 6869, 17 June 1993, p. 11, Ann. 38). On 25 August 1992, Bosnia’s National Library was bombed and an estimated 1.5 million volumes were destroyed (Riedlmayer Report, p. 19). The Court observes that, although the Respondent considers that there is no certainty as to who shelled these institutions, there is evidence that both the Institute for Oriental Studies in Sarajevo and the National Library were bombed from Serb positions.

343. The Court notes that, in cross-examination of Mr. Riedlmayer, counsel for the Respondent pointed out that the municipalities included in Mr. Riedlmayer’s report only amounted to 25 per cent of the territory of Bosnia and Herzegovina. Counsel for the Respondent also called into question the methodology used by Mr. Riedlmayer in compiling his report. However, having closely examined Mr. Riedlmayer’s report and having listened to his testimony, the Court considers that Mr. Riedlmayer’s findings do constitute persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia and Herzegovina albeit in a limited geographical area.

344. In light of the foregoing, the Court considers that there is conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question. The Court takes note of the submission of the Applicant that the destruction of such heritage was “an essential part of the policy of ethnic purification” and was “an attempt to wipe out the traces of [the] very existence” of the Bosnian Muslims. However, in the Court’s view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts. Moreover, the ILC subsequently confirmed this approach, stating that:

“As clearly shown by the preparatory work for the Convention . . . , the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.” (Report of the International Law Commission on the work of its Forty-eighth Session, *Yearbook of the International Law Commission 1996*, Vol. II, Part Two, pp. 45-46, para. 12.)

Furthermore, the ICTY took a similar view in the *Krstić* case, finding that even in customary law, “despite recent developments”, the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 580). The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention. At the same time, it also endorses the observation made in the *Krstić* case that “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group” (*ibid.*).

Camps

345. The Court notes that the Applicant has presented substantial evidence as to the conditions of life in the detention camps and much of this evidence has already been discussed in the sections regarding Articles II (a) and (b). The Court will briefly examine the evidence presented by the Applicant which relates specifically to the conditions of life in the principal camps.

(a) Drina River Valley

(i) Sušica camp

346. In the Sentencing Judgment in the case of Dragan Nikolić, the commander of Sušica camp, the ICTY found that he subjected detainees to inhumane living conditions by depriving them of adequate food, water, medical care, sleeping and toilet facilities (*Nikolić*, IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 69).

(ii) Foča Kazneno-Popravni Dom camp

347. In the *Krnjeljac* case, the ICTY Trial Chamber made the following findings regarding the conditions at the camp:

“the non-Serb detainees were forced to endure brutal and inadequate living conditions while being detained at the KP Dom, as a result of which numerous individuals have suffered lasting physical and psychological problems. Non-Serbs were locked in their rooms or in solitary confinement at all times except for meals and work duty, and kept in overcrowded rooms even though the prison had not reached its capacity. Because of the overcrowding, not everyone had a bed or even a mattress, and there were insufficient blankets. Hygienic conditions were poor. Access to baths or showers, with no hot water, was irregular at best. There were insufficient hygienic products and toiletries. The rooms in which the non-Serbs were held did not have sufficient heating during the harsh winter of 1992. Heaters were deliberately not placed in the rooms, windowpanes were left broken and clothes made from blankets to combat the cold were confiscated. Non-Serb detainees were fed starvation rations leading to severe weight loss and other health problems. They were not allowed to receive visits after April 1992 and therefore could not supplement their meagre food rations and hygienic supplies”. (*Krnjeljac*, IT-97-25-T, Judgment, 15 March 2002, para. 440.)

(b) Prijedor

(i) Omarska camp

348. In the Trial Judgment in the *Kvočka et al.* case, the ICTY Trial Chamber provided the following description of the poor conditions in the Omarska camp based on the accounts of detainees:

“Detainees were kept in inhuman conditions and an atmosphere of extreme mental and physical violence pervaded the camp. Intimidation, extortion, beatings, and torture were customary practices. The arrival of new detainees, interrogations, mealtimes, and use of the toilet facilities provided recurrent opportunities for abuse. Outsiders entered the camp and were permitted to attack the detainees at random and at will . . .

.....
The Trial Chamber finds that the detainees received poor quality food that was often rotten or inedible, caused by the high temperatures and sporadic electricity during the summer of 1992. The food was solely inadequate in quantity. Former detainees testified of the acute hunger they suffered in the camp: most lost 25 to 35 kilograms in body weight during their time at Omarska; some lost considerably more.” (*Kvočka et al.*, IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, paras. 45 and 55.)

(ii) Keraterm camp

349. The *Stakić* Trial Judgment contained the following description of conditions in the Keraterm camp based on multiple witness accounts:

“The detainees slept on wooden pallets used for the transport of goods or on bare concrete in a big storage room. The conditions were cramped and people often had to sleep on top of each other. In June 1992, Room 1, which according to witness statements was slightly larger than Courtroom 2 of this Tribunal (98.6 m²), held 320 people and the number continued to grow. The detainees were given one meal a day, made up of two small slices of bread and some sort of stew. The rations were insufficient for the detainees. Although families tried to deliver food and clothing every day they rarely succeeded. The detainees could see their families walking to the camp and leaving empty-handed, so in all likelihood someone at the gates of the camp took the food and prevented it from being distributed to the detainees.” (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 163.)

(iii) Trnopolje camp

350. With respect to the Trnopolje camp, the *Stakić* Trial Judgment described the conditions as follows, noting that they were slightly better than at Omarska and Keraterm:

“The detainees were provided with food at least once a day and, for some time, the families of detainees were allowed to bring food. However the quantity of food available was insufficient and people often went hungry. Moreover, the water supply was insufficient and the toilet facilities inadequate. The majority of the detainees slept in the open air. Some devised makeshift . . . shelters of blankets and plastic bags. While clearly inadequate, the conditions in the Trnopolje camp were not as appalling as those that prevailed in Omarska and Keraterm.” (*Ibid.*, para. 190.)

(c) Banja Luka

Manjača camp

351. According to ICTY Trial Chamber in the *Plasnić* Sentencing Judgment:

“the sanitary conditions in Manjača were ‘disastrous . . . inhuman and really brutal’: the concept of sanitation did not exist. The temperature inside was low, the inmates slept on the concrete floor and they relieved themselves in the compound or in a bucket placed by the door at night. There was not enough water, and any water that became available was contaminated. In the first three months of Adil Draganović’s detention, Manjača was a ‘camp of hunger’ and when there was food available, it was of a very poor quality. The inmates were given two small meals per day, which

usually consisted of half a cup of warm tea, which was more like warm water, and a small piece of thin, 'transparent' bread. Between two and a half thousand men there were only 90 loaves of bread, with each loaf divided into 20 or 40 pieces. Most inmates lost between 20 and 30 kilograms of body weight while they were detained at Manjača. The witness believes that had the ICRC and UNHCR not arrived, the inmates would have died of starvation." (*Plavšić*, IT-00-39-S and 40/1-S, Sentencing Judgment, 27 February 2003, para. 48.)

(d) Bosanski Šamac

352. In its Judgment in the *Simić* case, the Trial Chamber made the following findings: "the detainees who were imprisoned in the detention centres in Bosanski Šamac were confined under inhumane conditions. The prisoners were subjected to humiliation and degradation. The forced singing of 'Chetnik' songs and the verbal abuse of being called 'ustasha' or 'balija' were forms of such abuse and humiliation of the detainees. They did not have sufficient space, food or water. They suffered from unhygienic conditions, and they did not have appropriate access to medical care. These appalling detention conditions, the cruel and inhumane treatment through beatings and the acts of torture caused severe physical suffering, thus attacking the very fundamentals of human dignity . . . This was done because of the non-Serb ethnicity of the detainees." (*Simić*, IT-95-9-T, Judgment, 17 October 2003, para. 773.)

353. The Respondent does not deny that the camps in Bosnia and Herzegovina were in breach of humanitarian law and, in most cases, in breach of the law of war. However, it notes that, although a number of detention camps run by the Serbs in Bosnia and Herzegovina were the subject of investigation and trials at the ICTY, no conviction for genocide was handed down on account of any criminal acts committed in those camps. With specific reference to the Manjača camp, the Respondent points out that the Special Envoy of the United Nations Secretary-General visited the camp in 1992 and found that it was being run correctly and that a Muslim humanitarian organization also visited the camp and found that "material conditions were poor, especially concerning hygiene [b]ut there were no signs of maltreatment or execution of prisoners".

354. On the basis of the elements presented to it, the Court considers that there is convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps. However, the evidence presented has not enabled the Court to find that those acts were accompanied by specific intent (*dolus specialis*) to destroy the protected group, in whole or in part. In this regard, the Court observes that, in none of the ICTY cases concerning camps cited above, has the Tribunal found that the accused acted with such specific intent (*dolus specialis*).

* * *

(8) Article II (d): Imposing measures to prevent births within the protected group

355. The Applicant invoked several arguments to show that measures were imposed to prevent births, contrary to the provision of Article II, paragraph (d) of the Genocide Convention. First, the Applicant claimed that the

"forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces . . . in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months".

The Court notes that no evidence was provided in support of this statement.

356. Secondly, the Applicant submitted that rape and sexual violence against women led to physical trauma which interfered with victims' reproductive functions and in some cases resulted in infertility. However, the only evidence adduced by the Applicant was the indictment in the *Gagović* case before the ICTY in which the Prosecutor stated that one witness could no longer give birth to children as a result of the sexual abuse she suffered (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 7.10). In the Court's view, an indictment by the Prosecutor does not constitute persuasive evidence (see paragraph 217 above). Moreover, it notes that the *Gagović* case did not proceed to trial due to the death of the accused.

357. Thirdly, the Applicant referred to sexual violence against men which prevented them from procreating subsequently. In support of this assertion, the Applicant noted that, in the *Tadić* case, the Trial Chamber found that, in Omarska camp, the prison guards forced one Bosnian Muslim man to bite off the testicles of another Bosnian Muslim man (*Tadić*, IT-94-I-T, Judgment, 7 May 1997, para. 198). The Applicant also cited a report in the newspaper, *Le Monde*, on a study by the World Health Organization and the European Union on sexual assaults on men during the conflict in Bosnia and Herzegovina, which alleged that sexual violence against men was practically always accompanied by threats to the effect that the victim would no longer produce Muslim children. The article in *Le Monde* also referred to a statement by the President of a non-governmental organization called the Medical Centre for Human Rights to the effect that approximately 5,000 non-Serb men were the victims of sexual violence. However, the Court notes that the article in *Le Monde* is only a secondary source. Moreover, the results of the World Health Organization and European Union study were only preliminary, and there is no indication as to how the Medical Centre for Human Rights arrived at the figure of 5,000 male victims of sexual violence.

358. Fourthly, the Applicant argued that rape and sexual violence against men and women led to psychological trauma which prevented victims from forming relationships and founding a family. In this regard, the Applicant noted that in the *Alkapešu* case, the ICTR considered that "rape can be a measure intended to prevent births when the person raped refuses subsequently to

procreate” (*Akayesu*, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 508). However, the Court notes that the Applicant presented no evidence that this was the case for women in Bosnia and Herzegovina.

359. Fifthly, the Applicant considered that Bosnian Muslim women who suffered sexual violence might be rejected by their husbands or not be able to find a husband. Again, the Court notes that no evidence was presented in support of this statement.

360. The Respondent considers that the Applicant “alleges no fact, puts forward no serious argument, and submits no evidence” for its allegations that rapes were committed in order to prevent births within a group and notes that the Applicant’s contention that there was a decline in births within the protected group is not supported by any evidence concerning the birth rate in Bosnia and Herzegovina either before or after the war.

361. Having carefully examined the arguments of the Parties, the Court finds that the evidence placed before it by the Applicant does not enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II (d) of the Convention.

* * *

(9) Article II (e): Forcibly transferring children of the protected group to another group

362. The Applicant claims that rape was used “as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males” or, in other words, as “procreative rape”. The Applicant argues that children born as a result of these “forced pregnancies” would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.

363. As evidence for this claim, the Applicant referred to a number of sources including the following. In the indictment in the *Gagović et al.* case, the Prosecutor alleged that one of the witnesses was raped by two Bosnian Serb soldiers and that “[b]oth perpetrators told her that she would now give birth to Serb babies” (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 9.3). However, as in paragraph 356 above, the Court notes that an indictment cannot constitute persuasive evidence for the purposes of the case now before it and that the *Gagović* case did not proceed to trial. The Applicant further referred to the Report of the Commission of Experts which stated that one woman had been detained and raped daily by three or four soldiers and that “[s]he was told that she would give birth to a chetnik boy” (Report of the Commission of Experts, Vol. I, p. 59, para. 248).

364. The Applicant also cited the Review of the Indictment in the *Karadžić and Mladić* cases in which the Trial Chamber stated that “[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late to undergo an abortion” and that “[i]t would seem that the aim of many rapes was enforced impregnation” (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 64). However, the Court notes that this finding of the Trial Chamber was based only on the testimony of one *amicus curiae* and on the above-mentioned incident reported by the Commission of Experts (*ibid.*, para. 64, footnote 154).

365. Finally, the Applicant noted that in the *Kunarac* case, the ICTY Trial Chamber found that, after raping one of the witnesses, the accused had told her that “she would now carry a Serb baby and would not know who the father would be” (*Kunarac et al* cases, Nos. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 583).

366. The Respondent points out that Muslim women who had been raped gave birth to their babies in Muslim territory and consequently the babies would have been brought up not by Serbs but, on the contrary, by Muslims. Therefore, in its view, it cannot be claimed that the children were transferred from one group to the other.

367. The Court, on the basis of the foregoing elements, finds that the evidence placed before it by the Applicant does not establish that there was any form of policy of forced pregnancy, nor that there was any aim to transfer children of the protected group to another group within the meaning of Article II (e) of the Convention.

* * *

(10) Alleged genocide outside Bosnia and Herzegovina

368. In the submissions in its Reply, the Applicant has claimed that the Respondent has violated its obligations under the Genocide Convention “by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, *but not limited to*, the territory of Bosnia and Herzegovina, including in particular the Muslim population . . .” (emphasis added). The Applicant devoted a section in its Reply to the contention that acts of genocide, for which the Respondent was allegedly responsible, also took place on the territory of the FRY; these acts were similar to those perpetrated on Bosnian territory, and the constituent elements of “ethnic cleansing as a policy” were also found in the territory of the FRY. This question of genocide committed within the FRY was not actively pursued by the Applicant in the course of the oral argument before the Court; however, the submission quoted above was maintained in the final submissions presented at the hearings, and the Court must therefore address it. It was claimed by the Applicant

that the genocidal policy was aimed not only at citizens of Bosnia and Herzegovina, but also at Albanians, Sandžak Muslims, Croats, Hungarians and other minorities; however, the Applicant has not established to the satisfaction of the Court any facts in support of that allegation. The Court has already found (paragraph 196 above) that, for purposes of establishing genocide, the targeted group must be defined positively, and not as a “non-Serb” group.

369. The Applicant has not in its arguments dealt separately with the question of the nature of the specific intent (*dolus specialis*) alleged to accompany the acts in the FRY complained of. It does not appear to be contending that actions attributable to the Respondent, and committed on the territory of the FRY, were accompanied by a specific intent (*dolus specialis*), peculiar to or limited to that territory, in the sense that the objective was to eliminate the presence of non-Serbs in the FRY itself. The Court finds in any event that the evidence offered does not in any way support such a contention. What the Applicant has sought to do is to convince the Court of a pattern of acts said to evidence specific intent (*dolus specialis*) inspiring the actions of Serb forces in Bosnia and Herzegovina, involving the destruction of the Bosnian Muslims in that territory; and that same pattern lay, it is contended, behind the treatment of Bosnian Muslims in the camps established in the FRY, so that that treatment supports the pattern thesis. The Applicant has emphasized that the same treatment was meted out to those Bosnian Muslims as was inflicted on their compatriots in Bosnia and Herzegovina. The Court will thus now turn to the question whether the specific intent (*dolus specialis*) can be deduced, as contended by the Applicant, from the pattern of actions against the Bosnian Muslims taken as a whole.

* * *

(11) The question of pattern of acts said to evidence an intent to commit genocide

370. In the light of its review of the factual evidence before it of the atrocities committed in Bosnia and Herzegovina in 1991-1995, the Court has concluded that, save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident. The Applicant however relies on the alleged existence of an overall plan to commit genocide, indicated by the pattern of genocidal or potentially acts of genocide committed throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group. In the case, for example, of the conduct of Serbs in the various camps (described in paragraphs 252-256, 262-273, 307-310 and 312-318 above), it suggests that “[t]he genocidal intent of the Serbs becomes particularly clear in the description of camp practices, due to their striking similarity all over the territory of Bosnia and Herzegovina”. Drawing attention to the similarities between actions attributed to the Serbs in Croatia, and the later events at, for example, Kosovo, the Applicant observed that

“it is not surprising that the picture of the takeovers and the following human and cultural destruction looks indeed similar from 1991 through 1999. These acts were perpetrated as the expression of one single project, which basically and effectively

included the destruction in whole or in part of the non-Serb group, wherever this ethnically and religiously defined group could be conceived as obstructing the all-Serbs-in-one-State group concept.”

371. The Court notes that this argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of, to the intent of higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. In the absence of an official statement of aims reflecting such an intent, the Applicant contends that the specific intent (*dolus specialis*) of those directing the course of events is clear from the consistency of practices, particularly in the camps, showing that the pattern was of acts committed “within an organized institutional framework”. However, something approaching an official statement of an overall plan is, the Applicant contends, to be found in the Decision on Strategic Goals issued on 12 May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska, published in the *Official Gazette* of the Republika Srpska, and the Court will first consider what significance that Decision may have in this context. The English translation of the Strategic Goals presented by the Parties during the hearings, taken from the Report of Expert Witness Donia in the *Milošević* case before the ICTY, Exhibit No. 537, reads as follows:

“DECISION ON THE STRATEGIC GOALS OF THE SERBIAN PEOPLE
IN BOSNIA AND HERZEGOVINA

The Strategic Goals, i.e., the priorities, of the Serbian people in Bosnia and Herzegovina are:

1. Separation as a state from the other two ethnic communities.
2. A corridor between Semberija and Krajina.
3. The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states.
4. The establishment of a border on the Una and Neretva rivers.
5. The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part.
6. An outlet to the sea for the Republika Srpska.”

While the Court notes that this document did not emanate from the Government of the Respondent, evidence before the Court of intercepted exchanges between President Milošević of Serbia and President Karadžić of the Republika Srpska is sufficient to show that the objectives defined represented their joint view.

372. The Parties have drawn the Court’s attention to statements in the Assembly by President Karadžić which appear to give conflicting interpretations of the first and major goal of these objectives, the first on the day they were adopted, the second two years later. On that first

occasion, the Applicant contended, he said: “It would be much better to solve this situation by political means. It would be best if a truce could be established right away and the borders set up, even if we lose something”. Two years later he said (according to the translation of his speech supplied by the Applicant):

“We certainly know that we must give up something — that is beyond doubt in so far as we want to achieve our first strategic goal: to drive our enemies by the force of war from their homes, that is the Croats and Muslims, so that we will no longer be together [with them] in a State.”

The Respondent disputes the accuracy of the translation, claiming that the stated goal was not “to drive our enemies by the force of war from their homes” but “to free the homes from the enemy”. The 1992 objectives do not include the elimination of the Bosnian Muslim population. The 1994 statement even on the basis of the Applicant’s translation, however shocking a statement, does not necessarily involve the intent to destroy in whole or in part the Muslim population in the enclaves. The Applicant’s argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership — to create a larger Serb State, by a war of conquest if necessary — did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion. The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired, actions which the Respondent accepted (in the latter case at least) as being unlawful since they would be at variance with the inviolability of borders and the territorial integrity of a State which had just been recognized internationally. It is significant that in cases in which the Prosecutor has put the Strategic Goals in issue the ICTY has not characterized them as genocidal (see *Brdanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 303 and *Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 546-561 (in particular para. 548)). The Court does not see the 1992 Strategic Goals as establishing the specific intent.

373. Turning now to the Applicant’s contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focussed on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.

374. Furthermore, and again significantly, the proposition is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor, including decisions not to charge genocide offences in possibly relevant indictments, and to enter into plea agreements, as in the *Plavšić* and *Sikirica et al.* cases (IT-00-40 and IT-95-8), by which the genocide-related charges were withdrawn. Those actions of the Prosecution and the Tribunal can be conveniently enumerated here. Prosecutions for genocide and related crimes before the ICTY can be grouped in the following way:

(a) convictions in respect of charges involving genocide relating to Srebrenica in July 1995: *Krstić* (IT-98-33) (conviction of genocide at trial was reduced to aiding and abetting genocide on appeal) and *Blažević* (IT-02-60) (conviction of complicity in genocide “through aiding and abetting”, at trial is currently on appeal);

(b) plea agreements in which such charges were withdrawn, with the accused pleading guilty to crimes against humanity: *Obrenović* (IT-02-60/2) and *Momir Nikolić* (IT-02-60/1);

(c) acquittals on genocide-related charges in respect of events occurring elsewhere: *Krajišnik*, (paragraph 219 above) (on appeal), *Jelisić* (IT-95-10) (completed), *Stakić* (IT-97-24) (completed), *Brdanin* (IT-99-36) (on appeal) and *Sikirica* (IT-95-8) (completed);

(d) cases in which genocide-related charges in respect of events occurring elsewhere were withdrawn: *Plavšić* (IT-00-39 and 40/1) (plea agreement), *Župljanin* (IT-99-36) (genocide-related charges withdrawn) and *Mejakić* (IT-95-4) (genocide-related charges withdrawn);

(e) case in which the indictment charged genocide and related crimes in Srebrenica and elsewhere in which the accused died during the proceedings: *Milošević* (IT-02-54);

(f) cases in which indictments charge genocide or related crimes in respect of events occurring elsewhere, in which accused have died before or during proceedings: *Kovačević and Drlića* (IT-97-24) and *Talić* (IT-99-36/1);

(g) pending cases in which the indictments charge genocide and related crimes in Srebrenica and elsewhere: *Karađžić and Mladić* (IT-95-5/18); and

(h) pending cases in which the indictments charge genocide and related crimes in Srebrenica: *Popović, Beara, Drago Nikolić, Borovčanin and Pandurević*, *Trbić* (IT-05-88/1) and *Tolimir* (IT-05-88/2).

375. In the cases of a number of accused, relating to events in July 1995 in Srebrenica, charges of genocide or its related acts have not been brought: *Erdemović* (IT-96-22) (completed), *Jokić* (IT-02-60) (on appeal), *Miletić and Gvero* (IT-05-88, part of the *Popović et al.* proceeding referred to in paragraph 374 (h) above), *Perišić* (IT-04-81) (pending) and *Stanišić and Simatović* (IT-03-69) (pending).

376. The Court has already concluded above that — save in the case of Srebrenica — the Applicant has not established that any of the widespread and serious atrocities, complained of as constituting violations of Article II, paragraphs (a) to (e), of the Genocide Convention, were accompanied by the necessary specific intent (*dolus specialis*) on the part of the perpetrators. It also finds that the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent. Having however concluded (paragraph 297 above), in the specific case of the massacres at Srebrenica in July 1995, that acts of genocide were committed in operations led by members of the VRS, the Court now turns to the question whether those acts are attributable to the Respondent.

*
* * *

VII. The question of responsibility for events at Srebrenica under Article III, paragraph (a), of the Genocide Convention

(1) The alleged admission

377. The Court first notes that the Applicant contends that the Respondent has in fact recognized that genocide was committed at Srebrenica, and has accepted legal responsibility for it. The Applicant called attention to the following official declaration made by the Council of Ministers of the Respondent on 15 June 2005, following the showing on a Belgrade television channel on 2 June 2005 of a video-recording of the murder by a paramilitary unit of six Bosnian Muslim prisoners near Srebrenica (paragraph 289 above). The statement reads as follows:

“Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia nor Montenegro, but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance.

Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica.

Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime.”

415 The Applicant requests the Court to declare that this declaration “be regarded as a form of admission and as having decisive probative force regarding the attributability to the Yugoslav State of the Srebrenica massacre”.

378. It is for the Court to determine whether the Respondent is responsible for any acts of genocide which may be established. For purposes of a finding of this kind the Court may take into account any statements made by either party that appear to bear upon the matters in issue, and have been brought to its attention (cf. *Nuclear Tests (Australia v. France)*, *Judgments*, I.C.J. Reports 1974, pp. 263 ff., paras. 32 ff.; *(New Zealand v. France)*, *ibid.*, pp. 465 ff., paras. 27 ff.; *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, I.C.J. Reports 1986, pp. 573-574, paras. 38-39), and may accord to them such legal effect as may be appropriate. However, in the present case, it appears to the Court that the declaration of 15 June 2005 was of a political nature; it was clearly not intended as an admission, which would have had a legal effect in complete contradiction to the submissions made by the Respondent before this Court, both at the time of the declaration and subsequently. The Court therefore does not find the statement of 15 June 2005 of assistance to it in determining the issues before it in the case.

* * *

(2) The test of responsibility

379. In view of the foregoing conclusions, the Court now must ascertain whether the international responsibility of the Respondent can have been incurred, on whatever basis, in connection with the massacres committed in the Srebrenica area during the period in question. For the reasons set out above, those massacres constituted the crime of genocide within the meaning of the Convention. For this purpose, the Court may be required to consider the following three issues in turn. First, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility: that is to say, the acts referred to in Article III, paragraphs (b) to (e), one of these being complicity in genocide. Finally, it will be for the Court to rule on the issue as to whether the Respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.

380. These three issues must be addressed in the order set out above, because they are so interrelated that the answer on one point may affect the relevance or significance of the others. Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs (b) to (e), of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. (a)), conspiracy to commit genocide (Art. III, para. (b)), and direct and public incitement to commit genocide (Art. III, para. (c)), there would be little point, where the requirements for attribution are fulfilled under (a), in making a judicial finding that they are also satisfied under (b) and (c), since responsibility under (a) absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of “genocide” (Art. III, para. (a)), “attempt to commit genocide” (Art. III, para. (d)), and “complicity in genocide” (Art. III, para. (e)), in relation to the same actions, must be rejected as untenable both logically and legally.

381. On the other hand, there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph (a), of the Convention, can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent’s responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs (b) to (e). In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility, the content of which will be considered below.

382. Furthermore, the question whether the Respondent has complied with its obligations to prevent and punish genocide arises in different terms, depending on the replies to the two preceding questions. It is only if the Court answers the first two questions in the negative that it will have to consider whether the Respondent fulfilled its obligation of prevention, in relation to the whole accumulation of facts constituting genocide. If a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), or for one of the other acts referred to in Article III of the Convention (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated. On the other hand, it is self-evident, as the Parties recognize, that if a State is not responsible for any of the acts referred to in Article III, paragraphs (a) to (e), of the Convention, this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III.

383. Finally, it should be made clear that, while, as noted above, a State's responsibility deriving from any of those acts renders moot the question whether it satisfied its obligation of prevention in respect of the same conduct, it does not necessarily render superfluous the question whether the State complied with its obligation to punish the perpetrators of the acts in question. It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.

384. Having thus explained the interrelationship among the three issues set out above (paragraph 379), the Court will now proceed to consider the first of them. This is the question whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph (a), of the Convention, are attributable, in whole or in part, to the Respondent. This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.

* * *

(3) The question of attribution of the Srebrenica genocide to the Respondent on the basis of the conduct of its organs

385. The first of these two questions relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility as follows:

“Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

386. When applied to the present case, this rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by “persons or entities” having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. It must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica (see also paragraphs 278 to 297 above). Further, neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law.

387. The Applicant has however claimed that all officers in the VRS, including General Mladić, remained under FRY military administration, and that their salaries were paid from Belgrade right up to 2002, and accordingly contends that these officers “were *de jure* organs of [the FRY], intended by their superiors to serve in Bosnia and Herzegovina with the VRS”. On this basis it has been alleged by the Applicant that those officers, in addition to being officers of the VRS, remained officers of the VJ, and were thus *de jure* organs of the Respondent (paragraph 238 above). The Respondent however asserts that only some of the VRS officers were being

“administered” by the 30th Personnel Centre in Belgrade, so that matters like their payment, promotion, pension, etc., were being handled from the FRY (paragraph 238 above); and that it has not been clearly established whether General Mladić was one of them. The Applicant has shown that the promotion of Mladić to the rank of Colonel General on 24 June 1994 was handled in Belgrade, but the Respondent emphasizes that this was merely a verification for administrative purposes of a promotion decided by the authorities of the Republika Srpska.

388. The Court notes first that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of the army of the Respondent — a *de jure* organ of the Respondent. Nor has it been conclusively established that General Mladić was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY for the purposes of the application of the rules of State responsibility. There is no doubt that the FRY was providing substantial support, *inter alia*, financial support, to the Republika Srpska (cf. paragraph 241 above), and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinated to the political leadership of the Republika Srpska. In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. The expression “State organ”, as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC Commentary to Art. 4, para. (1)). The functions of the VRS officers, including General Mladić, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska. The particular situation of General Mladić, or of any other VRS officer present at Srebrenica who may have been being “administered” from Belgrade, is not therefore such as to lead the Court to modify the conclusion reached in the previous paragraph.

389. The issue also arises as to whether the Respondent might bear responsibility for the acts of the “Scorpions” in the Srebrenica area. In this connection, the Court will consider whether it has been proved that the Scorpions were a *de jure* organ of the Respondent. It is in dispute between the Parties as to when the “Scorpions” became incorporated into the forces of the Respondent. The Applicant has claimed that incorporation occurred by a decree of 1991 (which has not been produced as an Annex). The Respondent states that “these regulations [were] relevant exclusively for the war in Croatia in 1991” and that there is no evidence that they remained in force in 1992 in Bosnia and Herzegovina. The Court observes that, while the single State of Yugoslavia was disintegrating at that time, it is the status of the “Scorpions” in mid-1995 that is of relevance to the present case. In two of the intercepted documents presented by the Applicant (the authenticity of which was queried — see paragraph 289 above), there is reference to the “Scorpions” as “MUP of Serbia” and “a unit of Ministry of Interiors of Serbia”. The Respondent identified the senders of these communications, Ljubiša Borovčanin and Savo Cvjetinović, as being “officials of the police

forces of Republika Srpska”. The Court observes that neither of these communications was addressed to Belgrade. Judging on the basis of these materials, the Court is unable to find that the “Scorpions” were, in mid-1995, *de jure* organs of the Respondent. Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.

390. The argument of the Applicant however goes beyond mere contemplation of the status, under the Respondent’s internal law, of the persons who committed the acts of genocide; it argues that Republika Srpska and the VRS, as well as the paramilitary militias known as the “Scorpions”, the “Red Berets”, the “Tigers” and the “White Eagles” must be deemed, notwithstanding their apparent status, to have been “*de facto* organs” of the FRY, in particular at the time in question, so that all of their acts, and specifically the massacres at Srebrenica, must be considered attributable to the FRY, just as if they had been organs of that State under its internal law; reality must prevail over appearances. The Respondent rejects this contention, and maintains that these were not *de facto* organs of the FRY.

391. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons — or groups of persons — who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State’s responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in its Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (*Merits, Judgment, I.C.J. Reports 1986*, pp. 62-64). In paragraph 109 of that Judgment the Court stated that it had to

“determine . . . whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government” (p. 62).

Then, examining the facts in the light of the information in its possession, the Court observed that “there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf” (para. 109), and went on to conclude that “the evidence available to the Court . . . is insufficient to demonstrate [the *contras*]’ complete dependence on United States aid”, so that the Court was “unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States” (pp. 62-63, para. 110).

392. The passages quoted show that, according to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely

attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

393. However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as "complete dependence". It remains to be determined in the present case whether, at the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it; it is only if this condition is met that they can be equated with organs of the Respondent for the purposes of its international responsibility.

394. The Court can only answer this question in the negative. At the relevant time, July 1995, neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years (see paragraph 238 above), and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have "conduc[ed] its crucial or most significant military and paramilitary activities" (*I.C.J. Reports 1986*, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

395. The Court now turns to the question whether the "Scorpions" were in fact acting in complete dependence on the Respondent. The Court has not been presented with materials to indicate this. The Court also notes that, in giving his evidence, General Dannatt, when asked under whose control or whose authority the paramilitary groups coming from Serbia were operating, replied, "they would have been under the command of Mladić and part of the chain of the command of the VRS". The Parties referred the Court to the *Stanišić and Simatović* case (IT-03-69, pending); notwithstanding that the defendants are not charged with genocide in that case, it could have its relevance for illuminating the status of the "Scorpions" as Serbian MUP or otherwise. However, the Court cannot draw further conclusions as this case remains at the indictment stage. In this respect, the Court recalls that it can only form its opinion on the basis of the information which has been brought to its notice at the time when it gives its decision, and which emerges from the pleadings and documents in the case file, and the arguments of the Parties made during the oral exchanges.

The Court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility.

(4) The question of attribution of the Srebrenica genocide to the Respondent on the basis of direction or control

396. As noted above (paragraph 384), the Court must now determine whether the massacres at Srebrenica were committed by persons who, though not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control, as the Applicant argues in the alternative; the Respondent denies that such was the case.

397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs *de facto*, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FRY organs — incontestably having that status under the FRY's internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows:

"Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

399. This provision must be understood in the light of the Court’s jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the *contras* were to be equated with organs of the United States because they were “completely dependent” on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State” (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” (*Ibid.*, p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of “complete dependence” on the respondent State; it has to be proved that they acted in accordance with that State’s instructions or under its “effective control”. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the “effective control” of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (see paragraph 399 above). The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94-I-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion,

applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the “overall control” exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid.*, para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY’s instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the “overall control” test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the “overall control” test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs

under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.

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408. The Respondent has emphasized that in the final judgments of the Chambers of the ICTY relating to genocide in Srebrenica, none of its leaders have been found to have been implicated. The Applicant does not challenge that reading, but makes the point that that issue has not been before the ICTY for decision. The Court observes that the ICTY has indeed not up to the present been directly concerned in final judgments with the question whether those leaders might bear responsibility in that respect. The Court notes the fact that the report of the United Nations Secretary-General does not establish any direct involvement by President Milošević with the massacre. The Court has already recorded the contacts between Milošević and the United Nations on 10 and 11 July (paragraph 285). On 14 July, as recorded in the Secretary-General's Report,

"the European Union negotiator, Mr. Bildt, travelled to Belgrade to meet with President Milošević. The meeting took place at Dobanovci, the hunting lodge outside Belgrade, where Mr. Bildt had met President and General Mladić one week earlier. According to Mr. Bildt's public account of that second meeting, he pressed the President to arrange immediate access for UNHCR to assist the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war. He also insisted that the Netherlands soldiers be allowed to leave at will. Mr. Bildt added that the international community would not tolerate an attack on Gorazde, and that a 'green light' would have to be secured for free and unimpeded access to the enclaves. He also demanded that the road between Kiseljak and Sarajevo ('Route Swan') be opened to all non-military transport. President Milošević apparently acceded to the various demands, but also claimed that he did not have control over the matter. Milošević had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement.

A few hours into the meeting, General Mladić arrived at Dobanovci. Mr. Bildt noted that General Mladić readily agreed to most of the demands on Srebrenica, but remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular. Eventually, with President Milošević's intervention, it appeared that an agreement in principle had been reached. It was decided that another meeting would be held the next day in order to confirm the arrangements. Mr. Bildt had already arranged with Mr. Stoltenberg and Mr. Akashi [the Special Representative of the Secretary-General] that they would join him in Belgrade. He also requested that the UNPROFOR Commander also come to Belgrade in order to finalize some of the military details with Mladić." (A/54/549, paras. 372-373.)

409. By 19 July, on the basis of the Belgrade meeting, Mr. Akashi was hopeful that both President Milošević and General Mladić might show some flexibility. The UNPROFOR Commander met with Mladić on 19 July and throughout the meeting kept in touch with Mr. Bildt who was holding parallel negotiations with President Milošević in Belgrade. Mladić gave his version of the events of the preceding days (his troops had "finished [it] in a correct way"; some "unfortunate small incidents" had occurred"). The UNPROFOR Commander and Mladić then signed an agreement which provided for

"ICRC access to all 'reception centres' where the men and boys of Srebrenica were being held, by the next day;

UNHCR and humanitarian aid convoys to be given access to Srebrenica;

The evacuation of wounded from Potočari, as well as the hospital in Bratunac;

The return of Dutchbat weapons and equipment taken by the BSA;

The transfer of Dutchbat out of the enclave commencing on the afternoon of 21 July, following the evacuation of the remaining women, children and elderly who wished to leave.

Subsequent to the signing of this agreement, the Special Representative wrote to President Milošević, reminding him of the agreement, that had not yet been honoured, to allow ICRC access to Srebrenica. The Special Representative later also telephoned President Milošević to reiterate the same point." (*Ibid.*, para. 392.)

410. The Court was referred to other evidence supporting or denying the Respondent's effective control over, participation in, involvement in, or influence over the events in and around Srebrenica in July 1995. The Respondent quotes two substantial reports prepared seven years after the events, both of which are in the public domain, and readily accessible. The first, *Srebrenica — a "safe" area*, published in 2002 by the Netherlands Institute for War Documentation was prepared

over a lengthy period by an expert team. The Respondent has drawn attention to the fact that this report contains no suggestion that the FR Y leadership was involved in planning the attack or inciting the killing of non-Serbs; nor any hard evidence of assistance by the Yugoslav army to the armed forces of the Republika Srpska before the attack; nor any suggestion that the Belgrade Government had advance knowledge of the attack. The Respondent also quotes this passage from point 10 of the Epilogue to the Report relating to the “mass slaughter” and “the executions” following the fall of Srebrenica: “There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is highly improbable.” The Respondent further observes that the Applicant’s only response to this submission is to point out that “the report, by its own admission, is not exhaustive”, and that this Court has been referred to evidence not used by the authors.

411. The Court observes, in respect of the Respondent’s submissions, that the authors of the Report do conclude that Belgrade was aware of the intended attack on Srebrenica. They record that the Dutch Military Intelligence Service and another Western intelligence service concluded that the July 1995 operations were co-ordinated with Belgrade (Part III, Chap. 7, Sect. 7). More significantly for present purposes, however, the authors state that “there is no evidence to suggest participation in the preparations for executions on the part of Yugoslav military personnel or the security agency (RDB). In fact there is some evidence to support the opposite view . . .” (Part IV, Chap. 2, Sect. 20). That supports the passage from point 10 of the Epilogue quoted by the Respondent, which was preceded by the following sentence: “Everything points to a central decision by the General Staff of the VRS.”

412. The second report is *Balkan Battlegrounds*, prepared by the United States Central Intelligence Agency, also published in 2002. The first volume under the heading “The Possibility of Yugoslav involvement” arrives at the following conclusion:

“No basis has been established to implicate Belgrade’s military or security forces in the post-Srebrenica atrocities. While there are indications that the VJ or RDB [the Serbian State Security Department] may have contributed elements to the Srebrenica battle, there is no similar evidence that Belgrade-directed forces were involved in any of the subsequent massacres. Eyewitness accounts by survivors may be imperfect recollections of events, and details may have been overlooked. Narrations and other available evidence suggest that only Bosnian Serb troops were employed in the atrocities and executions that followed the military conquest of Srebrenica.” (*Balkan Battlegrounds*, p. 353.)

The response of the Applicant was to quote an earlier passage which refers to reports which “suggest” that VJ troops and possibly elements of the Serbian State Security Department may have been engaged in the battle in Srebrenica — as indeed the second sentence of the passage quoted by the Respondent indicates. It is a cautious passage, and significantly gives no indication of any involvement by the Respondent in the post-conflict atrocities which are the subject of

genocide-related convictions. Counsel for the Respondent also quoted from the evidence of the Deputy Commander of Dutchbat, given in the *Milošević* trial, in which the accused put to the officer the point quoted earlier from the Epilogue to the Netherlands report. The officer responded:

“At least for me, I did not have any evidence that it was launched in co-operation with Belgrade. And again, I read all kinds of reports and opinions and papers where all kinds of scenarios were analysed, and so forth. Again, I do not have any proof that the action, being the attack on the enclave, was launched in co-operation with Belgrade.”

The other evidence on which the Applicant relied relates to the influence, rather than the control, that President Milošević had or did not have over the authorities in Pale. It mainly consists of the evidence given at the *Milošević* trial by Lord Owen and General Wesley Clark and also Lord Owen’s publications. It does not establish a factual basis for finding the Respondent responsible on a basis of direction or control.

* * *

(5) Conclusion as to responsibility for events at Srebrenica under Article III, paragraph (a), of the Genocide Convention

413. In the light of the information available to it, the Court finds, as indicated above, that it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent (see paragraph 395 above). It finds also that it has not been established that those massacres were committed on the instructions, or under the direction of organs of the Respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which, as indicated in paragraph 297 above, constituted the crime of genocide, were perpetrated.

The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FR Y, to commit the massacres, still less that any such instructions were given with the specific intent (*dolus specialis*) characterizing the crime of genocide, which would have had to be present in order for the Respondent to be held responsible on this basis. All indications are to the contrary: that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FR Y.

As for the killings committed by the “Scorpions” paramilitary militias, notably at Trnovo (paragraph 289 above), even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY (see, in particular, the Trial Chamber’s decision of 12 April 2006 in the *Stanišić and Simatović* case, IT-03-69), it has not been proved that they took place either on the instructions or under the control of organs of the FR Y.

414. Finally, the Court observes that none of the situations, other than those referred to in Articles 4 and 8 of the ILC's Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent's disposal by another State (Art. 6), nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art. 9); finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).

415. The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis.

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VIII. The question of responsibility, in respect of Srebrenica, for acts enumerated in Article III, paragraphs (b) to (e), of the Genocide Convention

416. The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent's possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. These are: conspiracy to commit genocide (Art. III, para. (b)), direct and public incitement to commit genocide (Art. III, para. (c)), attempt to commit genocide (Art. III, para. (d))— though no claim is made under this head in the Applicant's final submissions in the present case — and complicity in genocide (Art. III, para. (e)). For the reasons already stated (paragraph 380 above), the Court must make a finding on this matter inasmuch as it has replied in the negative to the previous question, that of the Respondent's responsibility in the commission of the genocide itself.

417. It is clear from an examination of the facts of the case that subparagraphs (b) and (c) of Article III are irrelevant in the present case. It has not been proved that organs of the FRY, or persons acting on the instructions or under the effective control of that State, committed acts that could be characterized as "[c]onspiracy to commit genocide"(Art. III, para. (b)), or as "[d]irect and public incitement to commit genocide" (Art. III, para. (c)), if one considers, as is appropriate, only the events in Srebrenica. As regards paragraph (b), what was said above regarding the attribution to the Respondent of acts of genocide, namely that the massacres were perpetrated by persons and

groups of persons (the VRS in particular) who did not have the character of organs of the Respondent, and did not act on the instructions or under the effective control of the Respondent, is sufficient to exclude the latter's responsibility in this regard. As regards subparagraph (c), none of the information brought to the attention of the Court is sufficient to establish that organs of the Respondent, or persons acting on its instructions or under its effective control, directly and publicly incited the commission of the genocide in Srebrenica; nor is it proven, for that matter, that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina. In this respect, the Court must only accept precise and incontrovertible evidence, of which there is clearly none.

418. A more delicate question is whether it can be accepted that acts which could be characterized as "complicity in genocide", within the meaning of Article III, paragraph (e), can be attributed to organs of the Respondent or to persons acting under its instructions or under its effective control.

This question calls for some preliminary comment.

419. First, the question of "complicity" is to be distinguished from the question, already considered and answered in the negative, whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY. It is true that in certain national systems of criminal law, giving instructions or orders to persons to commit a criminal act is considered as the mark of complicity in the commission of that act. However, in the particular context of the application of the law of international responsibility in the domain of genocide, if it were established that a genocidal act had been committed on the instructions or under the direction of a State, the necessary conclusion would be that the genocide was attributable to the State, which would be directly responsible for it, pursuant to the rule referred to above (paragraph 398), and no question of complicity would arise. But, as already stated, that is not the situation in the present case.

However there is no doubt that "complicity", in the sense of Article III, paragraph (e), of the Convention, includes the provision of means to enable or facilitate the commission of the crime; it is thus on this aspect that the Court must focus. In this respect, it is noteworthy that, although "complicity", as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the "aid or assistance" furnished by one State for the commission of a wrongful act by another State.

420. In this connection, reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule, which reads as follows:

"Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.”

Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between “complicity in genocide”, within the meaning of Article III, paragraph (e), of the Convention, and the “aid or assistance” of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16— setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for “complicity in genocide” within the meaning of Article III, paragraph (e), which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished “aid or assistance” in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.

421. Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent (*dolus specialis*) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.

422. The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities

were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.

423. A point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken; the Court has found (paragraph 295 above) that that decision was taken shortly before it was actually carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.

424. The Court concludes from the above that the international responsibility of the Respondent is not engaged for acts of complicity in genocide mentioned in Article III, paragraph (e), of the Convention. In the light of this finding, and of the findings above relating to the other paragraphs of Article III, the international responsibility of the Respondent is not engaged under Article III as a whole.

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IX. The question of responsibility for breach of the obligations to prevent and punish genocide

425. The Court now turns to the third and last of the questions set out in paragraph 379 above: has the respondent State complied with its obligations to prevent and punish genocide under Article I of the Convention?

Despite the clear links between the duty to prevent genocide and the duty to punish its perpetrators, these are, in the view of the Court, two distinct yet connected obligations, each of which must be considered in turn.

426. It is true that, simply by its wording, Article I of the Convention brings out the close link between prevention and punishment: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” It is also true that one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent. Lastly, it

is true that, although in the subsequent Articles, the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a principle in Article I, only in Article VIII:

“Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.”

427. However, it is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court. The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.

This is the reason why the Court will first consider the manner in which the Respondent has performed its obligation to prevent before examining the situation as regards the obligation to punish.

(1) The obligation to prevent genocide

428. As regards the obligation to prevent genocide, the Court thinks it necessary to begin with the following introductory remarks and clarifications, amplifying the observations already made above.

429. First, the Genocide Convention is not the only international instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit. Many other instruments include a similar obligation, in various forms: see, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Article 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973 (Art. 4); the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (Art. 11); the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 (Art. 15). The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented.

The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law. The Court will therefore confine itself to determining the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a determination is necessary to the decision to be given on the dispute before it. This will, of course, not absolve it of the need to refer, if need be, to the rules of law whose scope extends beyond the specific field covered by the Convention.

430. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of “due diligence”, which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State’s capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State’s capacity to influence may vary depending on its particular legal position *vis-à-vis* the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.

431. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility:

“.....
 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.

In consequence, in the present case the Court will have to consider the Respondent’s conduct, in the light of its duty to prevent, solely in connection with the massacres at Srebrenica, because these are the only acts in respect of which the Court has concluded in this case that genocide was committed.

432. Fourth and finally, the Court believes it especially important to lay stress on the differences between the requirements to be met before a State can be held to have violated the obligation to prevent genocide — within the meaning of Article I of the Convention — and those to be satisfied in order for a State to be held responsible for “complicity in genocide” — within the meaning of Article III, paragraph (e) — as previously discussed. There are two main differences; they are so significant as to make it impossible to treat the two types of violation in the same way.

In the first place, as noted above, complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.

In the second place, as also noted above, there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts. By contrast, a State may be

found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed. As will be seen below, this latter difference could prove decisive in the present case in determining the responsibility incurred by the Respondent.

433. In light of the foregoing, the Court will now consider the facts of the case. For the reasons stated above (paragraph 431), it will confine itself to the FRY’s conduct *vis-à-vis* the Srebrenica massacres.

434. The Court would first note that, during the period under consideration, the FRY was in a position of influence, over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.

435. Secondly, the Court cannot but note that, on the relevant date, the FRY was bound by very specific obligations by virtue of the two Orders indicating provisional measures delivered by the Court in 1993. In particular, in its Order of 8 April 1993, the Court stated, *inter alia*, that although not able, at that early stage in the proceedings, to make “definitive findings of fact or of imputability” (*I.C.J. Reports 1993*, p. 22, para. 44) the FRY was required to ensure:

“that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide . . .” (*ibid.*, p. 24, para. 52 A.(2)).

The Court’s use, in the above passage, of the term “influence” is particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the Respondent maintained close links and on which it could exert a certain influence. Although in principle the two issues are separate, and the second will be examined below, it is not possible, when considering the way the Respondent discharged its obligation of prevention under the Convention, to fail to take account of the obligation incumbent upon it, albeit on a different basis, to implement the provisional measures indicated by the Court.

436. Thirdly, the Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave.

Among the documents containing information clearly suggesting that such an awareness existed, mention should be made of the above-mentioned report (see paragraphs 283 and 285 above) of the United Nations Secretary-General prepared pursuant to General Assembly resolution 53/35 on the “fall of Srebrenica” (United Nations doc. A/54/549), which recounts the visit to Belgrade on 14 July 1995 of the European Union negotiator Mr. Bildt to meet Mr. Milošević. Mr. Bildt, in substance, informed Mr. Milošević of his serious concern and

“pressed the President to arrange immediate access for the UNHCR to assist the people of Srebrenica, and for the ICRC to start to register those who were being treated by the BSA [Bosnian Serb Army] as prisoners of war”.

437. The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the *Milošević* case. General Clark referred to a conversation that he had had with Milošević during the negotiation of the Dayton Agreement. He stated that

“I went to Milošević and I asked him. I said, ‘If you have so much influence over these [Bosnian] Serbs, how could you have allowed General Mladić to have killed all those people at Srebrenica?’ And he looked to me — at me. His expression was very grave. He paused before he answered, and he said, ‘Well, General Clark, I warned him not to do this, but he didn’t listen to me.’ And it was in the context of all the publicity at the time about the Srebrenica massacre.” (*Milošević*, IT-02-54-T, Transcript, 16 December 2003, pp. 30494-30495).

426 General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be “a military operation combined with a massacre” (*ibid.*, p. 30497). The ICTY record shows that Milošević denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark’s testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal (*Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 280).

438. In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević’s own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there

was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

Such is the case here. In view of the foregoing, the Court concludes that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.

(2) The obligation to punish genocide

439. The Court now turns to the question of the Respondent’s compliance with its obligation to punish the crime of genocide stemming from Article I and the other relevant provisions of the Convention.

440. In its fifth final submission, Bosnia and Herzegovina requests the Court to adjudge and declare:

“5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal.”

441. This submission implicitly refers to Article VI of the Convention, according to which:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

442. The Court would first recall that the genocide in Srebrenica, the commission of which it has established above, was not carried out in the Respondent’s territory. It concludes from this that the Respondent cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices,

or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide. Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia's other international obligations, *inter alia* its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia's domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

443. It is thus to the obligation for States parties to co-operate with the "international penal tribunal" mentioned in the above provision that the Court must now turn its attention. For it is certain that once such a court has been established, Article VI obliges the Contracting Parties "which shall have accepted its jurisdiction" to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory — even if the crime of which they are accused was committed outside it — and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.

444. In order to determine whether the Respondent has fulfilled its obligations in this respect, the Court must first answer two preliminary questions: does the ICTY constitute an "international penal tribunal" within the meaning of Article VI? And must the Respondent be regarded as having "accepted the jurisdiction" of the tribunal within the meaning of that provision?

445. As regards the first question, the Court considers that the reply must definitely be in the affirmative. The notion of an "international penal tribunal" within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to "those Contracting Parties which shall have accepted [the] jurisdiction" of the international penal tribunal. Yet, it would be contrary to the object of the provision to interpret the notion of "international penal tribunal" restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter. The Court has found nothing to suggest that such a possibility was considered by the authors of the Convention, but no intention of seeking to exclude it can be imputed to them.

446. The question whether the Respondent must be regarded as having "accepted the jurisdiction" of the ICTY within the meaning of Article VI must consequently be formulated as follows: is the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of the Security Council resolution which established it, or of some other rule

of international law? If so, it would have to be concluded that, for the Respondent, co-operation with the ICTY constitutes both an obligation stemming from the resolution concerned and from the United Nations Charter, or from another norm of international law obliging the Respondent to co-operate, and an obligation arising from its status as a party to the Genocide Convention, this last clearly being the only one of direct relevance in the present case.

447. For the purposes of the present case, the Court only has to determine whether the FRY was under an obligation to co-operate with the ICTY, and if so, on what basis, from when the Srebrenica genocide was committed in July 1995. To that end, suffice it to note that the FRY was under an obligation to co-operate with the ICTY from 14 December 1995 at the latest, the date of the signing and entry into force of the Dayton Agreement between Bosnia and Herzegovina, Croatia and the FRY. Annex IA of that treaty, made binding on the parties by virtue of its Article II, provides that they must fully co-operate, notably with the ICTY. Thus, from 14 December 1995 at the latest, and at least on the basis of the Dayton Agreement, the FRY must be regarded as having "accepted [the] jurisdiction" of the ICTY within the meaning of Article VI of the Convention. This fact is sufficient for the Court in its consideration of the present case, since its task is to rule upon the Respondent's compliance with the obligation resulting from Article VI of the Convention in relation to the Srebrenica genocide, from when it was perpetrated to the present day, and since the Applicant has not invoked any failure to respect the obligation to co-operate alleged to have occurred specifically between July and December 1995. Similarly, the Court is not required to decide whether, between 1995 and 2000, the FRY's obligation to co-operate had any legal basis besides the Dayton Agreement. Needless to say, the admission of the FRY to the United Nations in 2000 provided a further basis for its obligation to co-operate: but while the legal basis concerned was thereby confirmed, that did not change the scope of the obligation. There is therefore no need, for the purposes of assessing how the Respondent has complied with its obligation under Article VI of the Convention, to distinguish between the period before and the period after its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.

448. Turning now to the facts of the case, the question the Court must answer is whether the Respondent has fully co-operated with the ICTY, in particular by arresting and handing over to the Tribunal any persons accused of genocide as a result of the Srebrenica genocide and finding themselves on its territory. In this connection, the Court would first observe that, during the oral proceedings, the Respondent asserted that the duty to co-operate had been complied with following the régime change in Belgrade in the year 2000, thus implicitly admitting that such had not been the case during the preceding period. The conduct of the organs of the FRY before the régime change however engages the Respondent's international responsibility just as much as it does that of its State authorities from that date. Further, the Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladić, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him. In particular, counsel for the

Applicant referred during the hearings to recent statements made by the Respondent's Minister for Foreign Affairs, reproduced in the national press in April 2006, and according to which the intelligence services of that State knew where Mladić was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive. The authenticity and accuracy of those statements has not been disputed by the Respondent at any time.

449. It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as a party to the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the Convention. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the "international penal tribunal", the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have "accepted [the] jurisdiction" of that "international penal tribunal"; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty. On this point, the Applicant's submissions relating to the violation by the Respondent of Articles I and VI of the Convention must therefore be upheld.

450. It follows from the foregoing considerations that the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged.

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X. The question of responsibility for breach of the Court's Orders indicating provisional measures

451. In its seventh submission Bosnia and Herzegovina requests the Court to adjudge and declare:

"7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

452. The Court observes that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109). Although the Court only had occasion to make such a finding in a judgment subsequent to the Orders that it made in the present dispute, this does not affect the binding nature of those Orders, since in the Judgment referred to the Court did no more than give the provisions of the Statute the meaning and scope that they had possessed from the outset. It notes that provisional measures are aimed at preserving the rights of each of the parties pending the final decision of the Court. The Court's Orders of 8 April and 13 September 1993 indicating provisional measures created legal obligations which both Parties were required to satisfy.

453. The Court indicated the following provisional measures in the *dispositif*, paragraph 52, of its Order of 8 April 1993:

"A. (1)

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;

(2)

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;

B.

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution."

454. The Court reaffirmed these measures in the *dispositif* of its Order of 13 September 1993.

455. From the Applicant's written and oral pleadings as a whole, it is clear that the Applicant is not accusing the Respondent of failing to respect measure B above, and that its submissions relate solely to the measures indicated in paragraph A, subparagraphs (1) and (2). It is therefore only to that extent that the Court will consider whether the Respondent has fully complied with its obligation to respect the measures ordered by the Court.

456. The answer to this question may be found in the reasoning in the present Judgment relating to the Applicant's other submissions to the Court. From these it is clear that in respect of the massacres at Srebrenica in July 1995 the Respondent failed to fulfil its obligation indicated in paragraph 52 A (1) of the Order of 8 April 1993 and reaffirmed in the Order of 13 September 1993 to "take all measures within its power to prevent commission of the crime of genocide". Nor did it comply with the measure indicated in paragraph 52 A (2) of the Order of 8 April 1993, reaffirmed in the Order of 13 September 1993, insofar as that measure required it to "ensure that any . . . organizations and persons which may be subject to its . . . influence . . . do not commit any acts of genocide".

457. However, the remainder of the Applicant's seventh submission claiming that the Respondent failed to comply with the provisional measures indicated must be rejected for the reasons set out above in respect of the Applicant's other submissions (paragraphs 415 and 424).

458. As for the request that the Court hold the Respondent to be under an obligation to the Applicant to provide symbolic compensation, in an amount to be determined by the Court, for the breach thus found, the Court observes that the question of compensation for the injury caused to the Applicant by the Respondent's breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations under the Genocide Convention. It will therefore be dealt with below, in connection with consideration of points (b) and (c) of the Respondent's sixth submission, which concern the financial compensation which the Applicant claims to be owed by the Respondent.

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XI. The question of reparation

459. Having thus found that the Respondent has failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, the Court turns to the question of reparation. The Applicant, in its final submissions, has asked the Court to decide that the Respondent

"must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for . . . violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parents patriae* for its citizens, full compensation for the damages and losses caused" (submission 6 (b)).

The Applicant also asks the Court to decide that the Respondent

"shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal" (submission 6 (a)).

and that the Respondent "shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court" (submission 6 (d)). These submissions, and in particular that relating to compensation, were however predicated on the basis that the Court would have upheld, not merely that part of the Applicant's claim as relates to the obligation of prevention and punishment, but also the claim that the Respondent has violated its substantive obligation not to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement, and the claim that the Respondent has aided and abetted genocide. The Court has now to consider what is the appropriate form of reparation for the other forms of violation of the Convention which have been alleged against the Respondent and which the Court has found to have been established, that is to say breaches of the obligations to prevent and punish.

460. The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that "reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J. Series A, No. 17, p. 47*; see also Article 31 of the ILC's Articles on State Responsibility). In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it" (*I.C.J. Reports 1997, p. 81, para. 152*; cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 198, paras. 152-153*; see also Article 36 of the ILC's Articles on State Responsibility). It is therefore appropriate to consider what were the consequences of the failure of the Respondent to comply with its obligations under the Genocide Convention to prevent and punish the crime of genocide, committed in Bosnia and Herzegovina, and what damage can be said to have been caused thereby.

461. The Court has found that the authorities of the Respondent could not have been unaware of the grave risk of genocide once the VRS forces had decided to take possession of the Srebrenica enclave, and that in view of its influence over the events, the Respondent must be held to have had the means of action by which it could seek to prevent genocide, and to have manifestly refrained from employing them (paragraph 438). To that extent therefore it failed to comply with its obligation of prevention under the Convention. The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. To make this finding, the Court did not have to decide whether the acts of genocide committed at Srebrenica would have occurred anyway even if the Respondent had done as it should have and employed the means available to it. This is because, as explained above, the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome. It therefore does not follow from the Court's reasoning above in finding a violation by the Respondent of its obligation of prevention that the atrocious suffering caused by the genocide committed at Srebrenica would not have occurred had the violation not taken place.

462. The Court cannot however leave it at that. Since it now has to rule on the claim for reparation, it must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the principle of customary international law stated above. In this context, the question just mentioned, whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant, for the definition of the extent of the obligation of reparation borne by the Respondent as a result of its wrongful conduct. The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.

463. It is however clear that the Applicant is entitled to reparation in the form of satisfaction, and this may take the most appropriate form, as the Applicant itself suggested, of a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the

Convention to prevent the crime of genocide. As in the *Corfu Channel (United Kingdom v. Albania)* case, the Court considers that a declaration of this kind is "in itself appropriate satisfaction" (*Merits, Judgment, I.C.J. Reports 1949*, pp. 35, 36), and it will, as in that case, include such a declaration in the operative clause of the present Judgment. The Applicant acknowledges that this failure is no longer continuing, and accordingly has withdrawn the request made in the Reply that the Court declare that the Respondent "has violated and is violating the Convention" (emphasis added).

464. The Court now turns to the question of the appropriate reparation for the breach by the Respondent of its obligation under the Convention to punish acts of genocide; in this respect, the Applicant asserts the existence of a continuing breach, and therefore maintains (*inter alia*) its request for a declaration in that sense. As noted above (paragraph 440), the Applicant includes under this heading the failure "to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal"; and the Court has found that in that respect the Respondent is indeed in breach of Article VI of the Convention (paragraph 449 above). A declaration to that effect is therefore one appropriate form of satisfaction, in the same way as in relation to the breach of the obligation to prevent genocide. However, the Applicant asks the Court in this respect to decide more specifically that

"Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal."

465. It will be clear from the Court's findings above on the question of the obligation to punish under the Convention that it is satisfied that the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under Articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić (paragraph 448). The Court will therefore make a declaration in these terms in the operative clause of the present Judgment, which will in its view constitute appropriate satisfaction.

466. In its final submissions, the Applicant also requests the Court to decide "that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court". As presented, this submission relates to all the wrongful acts, i.e. breaches of the Genocide Convention, attributed by the Applicant to the Respondent, thus including alleged breaches of the Respondent's obligation not itself to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement. Insofar as the Court has not upheld these claims, the submission falls. There remains however the question whether it is appropriate to direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide. The Court

notes the reasons advanced by counsel for the Applicant at the hearings in support of the submission, which relate for the most part to “recent events [which] cannot fail to cause concern as to whether movements in Serbia and Montenegro calling for genocide have disappeared”. It considers that these indications do not constitute sufficient grounds for requiring guarantees of non-repetition. The Applicant also referred in this connection to the question of non-compliance with provisional measures, but this matter has already been examined above (paragraphs 451 to 458), and will be mentioned further below. In the circumstances, the Court considers that the declaration referred to in paragraph 465 above is sufficient as regards the Respondent’s continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate.

467. Finally, the Applicant has presented the following submission:

“That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court.”

The provisional measures indicated by the Court’s Order of 8 April 1993, and reiterated by the Order of 13 September 1993, were addressed specifically to the Respondent’s obligation “to prevent commission of the crime of genocide” and to certain measures which should “in particular” be taken to that end (*I.C.J. Reports 1993*, p. 24, para. 52 (A) (1) and (2)).

468. Provisional measures under Article 41 of the Statute are indicated “pending [the] final decision” in the case, and the measures indicated in 1993 will thus lapse on the delivery of the present Judgment (cf. *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *Preliminary Objections, Judgment, I.C.J. Reports 1952*, p. 114; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 112). However, as already observed (paragraph 452 above), orders made by the Court indicating provisional measures under Article 41 of the Statute have binding effect, and their purpose is to protect the rights of either party, pending the final decision in the case.

469. The Court has found above (paragraph 456) that, in respect of the massacres at Srebrenica in July 1995, the Respondent failed to take measures which would have satisfied the requirements of paragraphs 52 (A) (1) and (2) of the Court’s Order of 8 April 1993 (reaffirmed in the Order of 13 September 1993). The Court however considers that, for purposes of reparation, the Respondent’s non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention. The Court does not therefore find it appropriate to give effect to the Applicant’s request for an order for symbolic compensation in this respect. The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court’s Orders indicating provisional measures.

470. The Court further notes that one of the provisional measures indicated in the Order of 8 April and reaffirmed in that of 13 September 1993 was addressed to both Parties. The Court’s findings in paragraphs 456 to 457 and 469 are without prejudice to the question whether the Applicant did not also fail to comply with the Orders indicating provisional measures.

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XII. Operative clause

471. For these reasons,

THE COURT,

(1) by ten votes to five,

Rejects the objections contained in the final submissions made by the Respondent to the effect that the Court has no jurisdiction; and *affirms* that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to adjudicate upon the dispute brought before it on 20 March 1993 by the Republic of Bosnia and Herzegovina;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;*

AGAINST: *Judges Ranjeva, Shi, Koroma, Skotnikov; Judge ad hoc Kreća;*

(2) by thirteen votes to two,

Finds that Serbia has not committed genocide, through its organs or persons whose acts engage its responsibility under customary international law, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;*

AGAINST: *Vice-President Al-Khasawneh; Judge ad hoc Mahiou;*

(3) by thirteen votes to two,

Finds that Serbia has not conspired to commit genocide, nor incited the commission of genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;*

AGAINST: *Vice-President Al-Khasawneh; Judge ad hoc Mahiou;*

(4) by eleven votes to four,

Finds that Serbia has not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Sepúlveda-Amor, Skotnikov; Judge ad hoc Kreća;*

AGAINST: *Vice-President Al-Khasawneh; Judges Keith, Bennouna; Judge ad hoc Mahiou;*

(5) by twelve votes to three,

Finds that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;*

AGAINST: *Judges Tomka, Skotnikov; Judge ad hoc Kreća;*

(6) by fourteen votes to one,

Finds that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;*

AGAINST: *Judge ad hoc Kreća;*

(7) by thirteen votes to two,

Finds that Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;*

AGAINST: *Judge Skotnikov; Judge ad hoc Kreća;*

(8) by fourteen votes to one,

Decides that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;*

AGAINST: *Judge ad hoc Kreća;*

(9) by thirteen votes to two,

Finds that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court's findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate.

IN FAVOUR: *President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;*

AGAINST: *Vice-President Al-Khasawneh; Judge ad hoc Mahiou.*

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of February, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Bosnia and Herzegovina and the Government of Serbia, respectively.

(Signed) Rosalyn HIGGINS,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judges RANJEVA, SHI and KOROMA append a joint dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a separate opinion to the Judgment of the Court; Judges SHI and KOROMA append a joint declaration to the Judgment of the Court; Judges OWADA and TOMKA append separate opinions to the Judgment of the Court; Judges KEITH, BENNOUNA and SKOTNIKOV append declarations to the Judgment of the Court; Judge *ad hoc* MAHIOU appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* KRECA appends a separate opinion to the Judgment of the Court.

(Initialled) R.H.

(Initialled) Ph.C.



INTERNATIONAL LAW
FELLOWSHIP PROGRAMME

Peace Palace – The Hague, the Netherlands
12 and 15 July 2011

PEACEFUL SETTLEMENT OF DISPUTES
JUDGE KENNETH KEITH

Codification Division of the United Nations Office of Legal Affairs

PEACEFUL SETTLEMENT OF DISPUTES
JUDGE KENNETH KEITH

Outline

For text, see *Study Materials Part I, State Responsibility*, page 299

Legal Instruments

1. Convention for the Pacific Settlement of International Disputes, 1899 440
2. International Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg Briand Pact), 1928 448
3. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex)
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4. Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10 of 15 November 1982, annex) 452
5. World Summit Outcome (General Assembly resolution 60/1 of 16 September 2005) 456

**Convention for the Pacific Settlement of
International Disputes, 1899**

Who, after having communicated their full powers, found in good and due form, have agreed on the following provisions:

CONVENTION for the Pacific Settlement of International Disputes*

His Majesty the German Emperor, King of Prussia; His Majesty the Emperor of Austria, King of Bohemia, etc. and Apostolic King of Hungary; His Majesty the King of the Belgians; His Majesty the Emperor of China, His Majesty the King of Denmark; His Majesty the King of Spain and in His Name Her Majesty the Queen Regent of the Kingdom; the President of the United States of America; the President of the United Mexican States; the President of the French Republic; Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India; His Majesty the King of the Hellenes; His Majesty the King of Italy; His Majesty the Emperor of Japan; His Royal Highness the Grand Duke of Luxembourg, Duke of Nassau; His Highness the Prince of Montenegro; Her Majesty the Queen of the Netherlands; His Imperial Majesty the Shah of Persia; His Majesty the King of Portugal and of the Algarves, etc.; His Majesty the King of Roumania; His Majesty the Emperor of all the Russias; His Majesty the King of Serbia; His Majesty the King of Siam; His Majesty the King of Sweden and Norway; the Swiss Federal Council; His Majesty the Emperor of the Ottomans and His Royal Highness the Prince of Bulgaria;

Animated by a strong desire to work for the maintenance of general peace;

Resolved to promote by their best efforts the friendly settlement of international disputes;

Recognizing the solidarity uniting the members of the society of civilized nations; Desirous of extending the empire of law, and of strengthening the appreciation of international justice;

Convinced that the permanent institution of a tribunal of arbitration, accessible to all, in the midst of the independent Powers, will contribute effectively to this result; Having regard to the advantages attending the general and regular organization of the procedure of arbitration;

Sharing the opinion of the august initiator of the International Peace Conference that it is expedient to record in an international agreement the principles of equity and right on which are based the security of States and the welfare of peoples;

Being desirous of concluding a Convention to this effect, have appointed as their plenipotentiaries, to wit:

(Here follow the names of plenipotentiaries.)

* The text of the Convention reproduced here is a translation of the French text adopted at the 1899 Peace Conference. The French-language version is authoritative.

TITLE I. ON THE MAINTENANCE OF THE GENERAL PEACE

Article 1

With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international differences.

TITLE II. ON GOOD OFFICES AND MEDIATION

Article 2

In case of serious disagreement or conflict, before an appeal to arms the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 3

Independently of this recourse, the Signatory Powers recommend that one or more Powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities.

The exercise of this right can never be regarded by one or the other of the parties in conflict as an unfriendly act.

Article 4

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

Article 5

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

Article 6

Good offices and mediation, either at the request of the parties at variance, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice, and never have binding force.

Article 7

The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If mediation occurs after the commencement of hostilities, it causes no interruption to the military operations in progress, unless there be an agreement to the contrary.

Article 8

The Signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

In case of a serious difference endangering the peace, the States at variance choose respectively a Power, to whom they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in conflict cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, who must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

TITLE III. ON INTERNATIONAL COMMISSIONS OF INQUIRY

Article 9

In differences of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the Signatory Powers recommend that the parties, who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

Article 10

The International Commissions of Inquiry are constituted by special agreement between the parties in conflict.

The Convention for an inquiry defines the facts to be examined and the extent of the Commissioners' powers.

It settles the procedure.

On the inquiry both sides must be heard.

The form and the periods to be observed, if not stated in the Inquiry Convention, are decided by the Commission itself.

Article 11

The International Commissions of Inquiry are formed, unless otherwise stipulated, in the manner fixed by Article 32 of the present Convention.

Article 12

The Powers in dispute engage to supply the International Commission of Inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to be completely acquainted with and to accurately understand the facts in question.

Article 13

The International Commission of Inquiry communicates its Report to the conflicting Powers, signed by all the members of the Commission.

Article 14

The Report of the International Commission of Inquiry is limited to a statement of facts, and has in no way the character of an Arbitral Award. It leaves the conflicting Powers entire freedom as to the effect to be given to this statement.

TITLE IV. ON INTERNATIONAL ARBITRATION

Chapter I. On the System of Arbitration*Article 15*

International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law.

Article 16

In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

Article 17

The Arbitration Convention is concluded for questions already existing or for questions which may arise eventually.
It may embrace any dispute or only disputes of a certain category.

Article 18

The Arbitration Convention implies the engagement to submit loyally to the Award.

Article 19

Independently of general or private Treaties expressly stipulating recourse to arbitration as obligatory on the Signatory Powers, these Powers reserve to themselves the right of concluding, either before the ratification of the present Act or later, new Agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.

Chapter II. On the Permanent Court of Arbitration*Article 20*

With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention.

Article 21

The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special Tribunal.

Article 22

An International Bureau, established at The Hague, serves as record office for the Court.

This Bureau is the channel for communications relative to the meetings of the Court. It has the custody of the archives and conducts all the administrative business.

The Signatory Powers undertake to communicate to the International Bureau at The Hague a duly certified copy of any conditions of arbitration arrived at between them, and of any award concerning them delivered by special Tribunals.

They undertake also to communicate to the Bureau the Laws, Regulations, and documents eventually showing the execution of the Awards given by the Court.

Article 23

Within the three months following its ratification of the present Act, each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators.

The persons thus selected shall be inscribed, as Members of the Court, in a list which shall be notified by the Bureau to all the Signatory Powers.

Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Signatory Powers.

Two or more Powers may agree on the selection in common of one or more Members.

The same person can be selected by different Powers.

The Members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a Member of the Court, his place shall be filled in accordance with the method of this appointment.

Article 24

When the Signatory Powers desire to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the Arbitrators called upon to form the competent Tribunal to decide this difference, must be chosen from the general list of Members of the Court.

Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:

Each party appoints two Arbitrators, and these together choose an Umpire.

If the votes are equal, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

The Tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court and the names of the Arbitrators.

The Tribunal of Arbitration assembles on the date fixed by the parties.

The Members of the Court, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities.

Article 25

The Tribunal of Arbitration has its ordinary seat at The Hague.

Except in cases of necessity, the place of session can only be altered by the Tribunal with the assent of the parties.

Article 26

The International Bureau at The Hague is authorized to place its premises and its staff at the disposal of the Signatory Powers for the operations of any special Board of Arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the Regulations, be extended to disputes between non-Signatory Powers, or between Signatory Powers and non-Signatory Powers, if the parties are agreed on recourse to this Tribunal.

Article 27

The Signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the conflicting parties of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

Article 28

A Permanent Administrative Council composed of the Diplomatic Representatives of the Signatory Powers accredited to The Hague and of the Netherlands Minister for Foreign Affairs, who will act as President, shall be instituted in this town as soon as possible after the ratification of the present Act by at least nine Powers.

This Council will be charged with the establishment and organization of the International Bureau, which will be under its direction and control.

It will notify to the Powers the constitution of the Court and will provide for its installation.

It will settle its Rules of Procedure and all other necessary Regulations.

It will decide all questions of administration which may arise with regard to the operations of the Court.

It will have entire control over the appointment, suspension or dismissal of the officials and employees of the Bureau.

It will fix the payments and salaries, and control the general expenditure.

At meetings duly summoned the presence of five members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the Signatory Powers without delay the Regulations adopted by it. It furnished them with an annual Report on the labours of the Court, the working of the administration, and the expenses.

Article 29

The expenses of the Bureau shall be borne by the Signatory Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

Chapter III. On Arbitral Procedure*Article 30*

With a view to encourage the development of arbitration, the Signatory Powers have agreed on the following Rules which shall be applicable to arbitral procedure, unless other Rules have been agreed on by the parties.

Article 31

The Powers who have recourse to arbitration sign a special Act ('Compromis'), in which the subject of the difference is clearly defined, as well as the extent of the Arbitrators' powers. This Act implies the undertaking of the parties to submit loyally to the Award.

Article 32

The duties of Arbitrator may be conferred on one Arbitrator alone or on several Arbitrators selected by the parties as they please, or chosen by them from the Members of the Permanent Court of Arbitration established by the present Act.

Failing the constitution of the Tribunal by direct agreement between the parties, the following course shall be pursued:

Each party appoints two Arbitrators, and these latter together choose an Umpire.

In case of equal voting, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

If no agreement is arrived at on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

Article 33

When a Sovereign or the Chief of a State is chosen as Arbitrator, the arbitral procedure is settled by him.

Article 34

The Umpire is by right President of the Tribunal.

When the Tribunal does not include an Umpire, it appoints its own President.

Article 35

In case of the death, retirement, or disability from any cause of one of the Arbitrators, his place shall be filled in accordance with the method of his appointment.

Article 36

The Tribunal's place of session is selected by the parties. Failing this selection the Tribunal sits at The Hague.

The place thus fixed cannot, except in case of necessity, be changed by the Tribunal without the assent of the parties.

Article 37

The parties have the right to appoint delegates or special agents to attend the Tribunal, for the purpose of serving as intermediaries between them and the Tribunal.

They are further authorized to retain, for the defence of their rights and interests before the Tribunal, counsel or advocates appointed by them for this purpose.

Article 38

The Tribunal decides on the choice of languages to be used by itself, and to be authorized for use before it.

Article 39

As a general rule the arbitral procedure comprises two distinct phases; preliminary examination and discussion.

Preliminary examination consists in the communication by the respective agents to the members of the Tribunal and to the opposite party of all printed or written Acts and of all documents containing the arguments invoked in the case. This communication shall be made in the form and within the periods fixed by the Tribunal in accordance with Article 49.

Discussion consists in the oral development before the Tribunal of the arguments of the parties.

Article 40

Every document produced by one party must be communicated to the other party.

Article 41

The discussions are under the direction of the President.

They are only public if it be so decided by the Tribunal, with the assent of the parties.

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They are recorded in the *procès-verbaux* drawn up by the Secretaries appointed by the President. These *procès-verbaux* alone have an authentic character.

Article 42

When the preliminary examination is concluded, the Tribunal has the right to refuse discussion of all fresh Acts or documents which one party may desire to submit to it without the consent of the other party.

Article 43

The Tribunal is free to take into consideration fresh Acts or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the Tribunal has the right to require the production of these Acts or documents, but is obliged to make them known to the opposite party.

Article 44

The Tribunal can, besides, require from the agents of the parties the production of all Acts, and can demand all necessary explanations. In case of refusal, the Tribunal takes note of it.

Article 45

The agents and counsel of the parties are authorized to present orally to the Tribunal all the arguments they may think expedient in defence of their case.

Article 46

They have the right to raise objections and points.

The decisions of the Tribunal on those points are final, and cannot form the subject of any subsequent discussion.

Article 47

The members of the Tribunal have the right to put questions to the agents and counsel of the parties, and to demand explanations from them on doubtful points.

Neither the questions put nor the remarks made by members of the Tribunal during the discussions can be regarded as an expression of opinion by the Tribunal in general, or by its members in particular.

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Article 48

The Tribunal is authorized to declare its competence in interpreting the ‘Compromis’ as well as the other Treaties which may be invoked in the case, and in applying the principles of international law.

Article 49

The Tribunal has the right to issue Rules of Procedure for the conduct of the case, to decide the forms and periods within which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

Article 50

When the agents and counsel of the parties have submitted all explanations and evidence in support of their case, the President pronounces the discussion closed.

Article 51

The deliberations of the Tribunal take place in private.
Every decision is taken by a majority of members of the Tribunal.
The refusal of a member to vote must be recorded in the *procès-verbal*.

Article 52

The Award, given by a majority of votes, is accompanied by a statement of reasons.
It is drawn up in writing and signed by each member of the Tribunal.
Those members who are in the minority may record their dissent when signing.

Article 53

The Award is read out at a public meeting of the Tribunal, the agents and counsel of the parties being present, or duly summoned to attend.

Article 54

The Award, duly pronounced and notified to the agents of the parties at variance, puts an end to the dispute definitively and without appeal.

Article 55

The parties can reserve in the ‘Compromis’ the right to demand the revision of the Award.
In this case, and unless there be an agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the Award. It can only be made on the

ground of the discovery of some new fact calculated to exercise a decisive influence on the Award, and which, at the time the discussion was closed, was unknown to the Tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognizing in it the character described in the foregoing paragraph, and declaring the demand admissible on this ground.

The ‘Compromis’ fixes the period within which the demand for revision must be made.

Article 56

The Award is only binding on the parties who concluded the ‘Compromis’.

When there is a question of interpreting a Convention to which Powers other than those concerned in the dispute are parties, the latter notify to the former the ‘Compromis’ they have concluded. Each of these Powers has the right to intervene in the case. If one or more of them avail themselves of this right, the interpretation contained in the Award is equally binding on them.

Article 57

Each party pays its own expenses and an equal share of those of the Tribunal.

GENERAL PROVISIONS

Article 58

The present Convention shall be ratified as speedily as possible.
The ratifications shall be deposited at The Hague.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all the Powers who were represented at the International Peace Conference at The Hague.

Article 59

The non-Signatory Powers who were represented at the International Peace Conference can adhere to the present Convention. For this purpose they must make known their adhesion to the Contracting Powers by a written notification addressed to the Netherlands Government, and communicated by it to all the other Contracting Powers.

Article 60

The conditions on which the Powers who were not represented at the International Peace Conference can adhere to the present Convention shall form the subject of a subsequent Agreement among the Contracting Powers.

Article 61

In the event of one of the High Contracting Parties denouncing the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherlands Government, and by it communicated at once to all the other Contracting Powers.

This denunciation shall only affect the notifying Power.

In faith of which the Plenipotentiaries have signed the present Convention and affixed their seals to it.

Done at The Hague, the 29th July, 1899, in a single copy, which shall remain in the archives of the Netherlands Government, and copies of it, duly certified, be sent through the diplomatic channel to the Contracting Powers.

**International Treaty for the Renunciation of War as
an Instrument of National Policy
(Kellogg Briand Pact), 1928**

No. 2137. — GENERAL TREATY¹ FOR RENUNCIATION OF WAR AS AN INSTRUMENT OF NATIONAL POLICY. . SIGNED AT PARIS, AUGUST 27, 1928.

French and English official texts communicated by the President of the Council, Minister for Foreign Affairs of the French Republic and the Belgian Minister for Foreign Affairs. The registration of this Treaty took place September 4, 1929.
This Treaty was transmitted to the Secretariat by the Department of State of the Government of the United States of America, August 9, 1929.

THE PRESIDENT OF THE GERMAN REICH, THE PRESIDENT OF THE UNITED STATES OF AMERICA, HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FRENCH REPUBLIC, HIS MAJESTY THE KING OF GREAT BRITAIN, IRELAND AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA, HIS MAJESTY THE KING OF ITALY, HIS MAJESTY THE EMPEROR OF JAPAN, THE PRESIDENT OF THE REPUBLIC OF POLAND, THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC, deeply sensible of their solemn duty to promote the welfare of mankind ;

48 Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated ;

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power

¹ Ratifications deposited at Washington by all the States signatories, July 25, 1929.

Accessions :

Afghanistan	...	...	...	April 5, 1929
Abyssinia	...	...	...	August 24, 1929
Albania	...	...	...	November 26, 1929
Austria	...	...	...	July 12, 1929
Bulgaria	...	...	...	May 13, 1929
Chile	...	...	...	March 26, 1929
China	...	...	...	February 25, 1929
Costa Rica	...	...	...	December 4, 1929
Cuba	...	...	...	July 23, 1929
Denmark	...	...	...	July 25, 1929
Free City of Danzig	...	...	...	March 1st, 1929
Dominican Republic	...	...	...	March 21, 1929
Egypt	...	...	...	February 20, 1929
Estonia	...	...	...	January 16, 1929
Finland	...	...	...	March 7, 1929
Greece	...	...	...	April 12, 1929
Guatemala	...	...	...	December 2, 1929
Haiti	...	...	...	July 8, 1929
Honduras	...	...	...	...
Hungary	...	...	...	September 27, 1928
Iceland	...	...	...	October 24, 1929
Latvia	...	...	...	...
Liberia	...	...	...	...

which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty ;

Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavour and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy ;

Have decided to conclude a Treaty and for that purpose have appointed as their respective Plenipotentiaries :

THE PRESIDENT OF THE GERMAN REICH :

Dr. Gustav STRESEMANN, Minister for Foreign Affairs ;

THE PRESIDENT OF THE UNITED STATES OF AMERICA :

The Honorable Frank B. KELLOGG, Secretary of State ;

HIS MAJESTY THE KING OF THE BELGIANS :

Mr. Paul HYMANS, Minister for Foreign Affairs, Minister of State ;

THE PRESIDENT OF THE FRENCH REPUBLIC :

Mr. Aristide BRIAND, Minister for Foreign Affairs ;

HIS MAJESTY THE KING OF GREAT BRITAIN, IRELAND AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA :

FOR GREAT BRITAIN AND NORTHERN IRELAND AND ALL PARTS OF THE BRITISH EMPIRE WHICH ARE NOT SEPARATE MEMBERS OF THE LEAGUE OF NATIONS :

The Right Honourable Lord CUSHENDUN, Chancellor of the Duchy of Lancaster, Acting Secretary of State for Foreign Affairs ;

FOR THE DOMINION OF CANADA :

The Right Honourable William Lyon MACKENZIE KING, Prime Minister and Minister for External Affairs ;

FOR THE COMMONWEALTH OF AUSTRALIA :

The Honourable Alexander John MCLACHLAN, Member of the Executive Federal Council ;

FOR THE DOMINION OF NEW ZEALAND :

The Honourable Sir Christopher James PARR, High Commissioner for New Zealand in Great Britain ;

FOR THE UNION OF SOUTH AFRICA :

The Honourable Jacobus Stephanus SMIT, High Commissioner for the Union of South Africa in Great Britain ;

FOR THE IRISH FREE STATE :

Mr. William Thomas COSGRAVE, President of the Executive Council ;

FOR INDIA

The Right Honourable Lord CUSHENDUN, Chancellor of the Duchy of Lancaster, Acting Secretary of State for Foreign Affairs.

HIS MAJESTY THE KING OF ITALY :

Count Gaetano MANZONI, His Ambassador Extraordinary and Plenipotentiary at Paris ;

HIS MAJESTY THE EMPEROR OF JAPAN :

Count UCHIDA, Privy Councillor ;

THE PRESIDENT OF THE REPUBLIC OF POLAND

Mr. A. ZALESKI, Minister for Foreign Affairs ;

THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC :

Dr. Eduard BENEŠ, Minister for Foreign Affairs ;

Who, having communicated to one another their full powers found in good and due form have agreed upon the following articles :

Article I.

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II.

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Article III.

The present Treaty shall be ratified by the High Contracting Parties named in the Preamble in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.

This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other Powers of the world. Every instrument evidencing the adherence of a Power shall be deposited at Washington and the Treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties hereto.

It shall be the duty of the Government of the United States to furnish each Government named in the Preamble and every Government subsequently adhering to this Treaty with a certified copy of the Treaty and of every instrument of ratification or adherence. It shall also be the duty of the Government of the United States telegraphically to notify such Governments immediately upon the deposit with it of each instrument of ratification or adherence.

En foi de quoi les plénipotentiaires respectifs ont signé le présent traité établi en langue française et anglaise, les deux textes ayant force égale, et y ont apposé leurs cachets.

In faith whereof the respective Plenipotentiaries have signed this Treaty in the French and English languages both texts having equal force, and hereunto affix their seals.

Fait à Paris, le vingt-sept août mil neuf cent vingt-huit.

Done at Paris, the twenty-seventh day of August in the year one thousand nine hundred and twenty-eight.

(L. S.)	(Signé)	Gustav STRESEMANN.
(L. S.)	(Signé)	Frank B. KELLOGG.
(L. S.)	(Signé)	Paul HYMANS.
(L. S.)	(Signé)	Aristide BRIAND.
(L. S.)	(Signé)	CUSHENDUN.
(L. S.)	(Signé)	W. L. MACKENZIE KING.
(L. S.)	(Signé)	A. J. MCLACHLAN.
(L. S.)	(Signé)	C. J. PARR.
(L. S.)	(Signé)	J. S. SMIT.
(L. S.)	(Signé)	William Thomas COSGRAVE.
(L. S.)	(Signé)	CUSHENDUN.
(L. S.)	(Signé)	G. MANZONI.
(L. S.)	(Signé)	UCHIDA.
(L. S.)	(Signé)	Auguste ZALESKI.
(L. S.)	(Signé)	Dr. Eduard BENEŠ.

Copie certifiée conforme :

Le Ministre plénipotentiaire,
Chef du Service du Protocole :

P. de Fouquières.

**Manila Declaration on the Peaceful Settlement
of International Disputes
(General Assembly resolution 37/10
of 15 November 1982)**

IX. RESOLUTIONS ADOPTED ON THE REPORTS OF THE SIXTH COMMITTEE¹

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37/10. Manila Declaration on the Peaceful Settlement of International Disputes²

The General Assembly,

Having examined the item entitled "Peaceful settlement of disputes between States",

Recalling its resolutions 34/102 of 14 December 1979, 35/160 of 15 December 1980 and 36/110 of 10 December 1981,

Reaffirming the need to exert utmost efforts in order to settle any conflicts and disputes between States exclusively

by peaceful means and to avoid any military action and hostilities, which can only make more difficult the solution of those conflicts and disputes,

Considering that the question of the peaceful settlement of disputes should represent one of the central concerns for States and for the United Nations and that the efforts to strengthen the process of the peaceful settlement of disputes should be continued,

Convinced that the adoption of the Manila Declaration on the Peaceful Settlement of International Disputes should enhance the observance of the principle of peaceful settlement of disputes in relations between States and contribute to the elimination of the danger of recourse to force or to the threat of force, to the relaxation of international tensions, to the promotion of a policy of co-operation and peace and

¹ For the decisions adopted on the reports of the Sixth Committee, see sect. X.B.8.

² See also sect. X.B.8, decision 37/407.

of respect for the independence and sovereignty of all States, to the enhancing of the role of the United Nations in preventing conflicts and settling them peacefully and, consequently, to the strengthening of international peace and security,

Considering the need to ensure a wide dissemination of the text of the Declaration,

1. *Approves* the Manila Declaration on the Peaceful Settlement of International Disputes, the text of which is annexed to the present resolution;

2. *Expresses its appreciation* to the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization for its important contribution to the elaboration of the text of the Declaration;

3. *Requests* the Secretary-General to inform the Governments of the States Members of the United Nations or members of specialized agencies, the Security Council and the International Court of Justice of the adoption of the Declaration;

4. *Urges* that all efforts be made so that the Declaration becomes generally known and fully observed and implemented.

68th plenary meeting
15 November 1982

ANNEX

Manila Declaration on the Peaceful Settlement of International Disputes

The General Assembly,

Reaffirming the principle of the Charter of the United Nations that all States shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered,

Conscious that the Charter of the United Nations embodies the means and an essential framework for the peaceful settlement of international disputes, the continuance of which is likely to endanger the maintenance of international peace and security,

Recognizing the important role of the United Nations and the need to enhance its effectiveness in the peaceful settlement of international disputes and the maintenance of international peace and security, in accordance with the principles of justice and international law, in conformity with the Charter of the United Nations,

Reaffirming the principle of the Charter of the United Nations that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Reiterating that no State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State,

Reaffirming the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,³

Bearing in mind the importance of maintaining and strengthening international peace and security and the development of friendly relations among States, irrespective of their political, economic and social systems or levels of economic development,

Reaffirming the principle of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations and referred to 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 and in other relevant resolutions of the General Assembly,

Stressing the need for all States to desist from any forcible action which deprives peoples, particularly peoples under colonial and racist régimes or other forms of alien domination, of their inalienable right to self-determination, freedom and independence, as referred to 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,

Mindful of existing international instruments as well as respective principles and rules concerning the peaceful settlement of international disputes, including the exhaustion of local remedies whenever applicable,

Determined to promote international co-operation in the political field and to encourage the progressive development of international law and its codification, particularly in relation to the peaceful settlement of international disputes,

Solemnly declares that:

I

1. All States shall act in good faith and in conformity with the purposes and principles enshrined in the Charter of the United Nations with a view to avoiding disputes among themselves likely to affect friendly relations among States, thus contributing to the maintenance of international peace and security. They shall live together in peace with one another as good neighbours and strive for the adoption of meaningful measures for strengthening international peace and security.

2. Every State shall settle its international disputes exclusively by peaceful means in such a manner that international peace and security, and justice, are not endangered.

3. International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means in conformity with obligations under the Charter of the United Nations and with the principles of justice and international law. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with the sovereign equality of States.

4. States parties to a dispute shall continue to observe in their mutual relations their obligations under the fundamental principles of international law concerning the sovereignty, independence and territorial integrity of States, as well as other generally recognized principles and rules of contemporary international law.

5. States shall seek in good faith and in a spirit of co-operation an early and equitable settlement of their international disputes by any of the following means: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or agencies or other peaceful means of their own choice, including good offices. In seeking such a settlement, the parties shall agree on such peaceful means as may be appropriate to the circumstances and the nature of their dispute.

6. States parties to regional arrangements or agencies shall make every effort to achieve pacific settlement of their local disputes through such regional arrangements or agencies before referring them to the Security Council. This does not preclude States from bringing any dispute to the attention of the Security Council or of the General Assembly in accordance with the Charter of the United Nations.

7. In the event of failure of the parties to a dispute to reach an early solution by any of the above means of settlement, they shall continue to seek a peaceful solution and shall consult forthwith on mutually agreed means to settle the dispute peacefully. Should the parties fail to settle by any of the above means a dispute the continuance of which is likely to endanger the maintenance of international peace and security, they shall refer it to the Security Council in accordance with the Charter of the United Nations and without prejudice to the functions and powers of the Council set forth in the relevant provisions of Chapter VI of the Charter.

8. States parties to an international dispute, as well as other States, shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute, and shall act in this respect in accordance with the purposes and principles of the United Nations.

9. States should consider concluding agreements for the peaceful settlement of disputes among them. They should also include in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation or application thereof.

10. States should, without prejudice to the right of free choice of means, bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes. When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties. States should be equally prepared to seek the settlement of their disputes by the other means mentioned in the present Declaration.

11. States shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes.

³ Resolution 2625 (XXV), annex.

12. In order to facilitate the exercise by the peoples concerned of the right to self-determination as referred to 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, the parties to a dispute may have the possibility, if they agree to do so and as appropriate, to have recourse to the relevant procedures mentioned in the present Declaration, for the peaceful settlement of the dispute.

13. Neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the States parties to the dispute.

II

1. Member States should make full use of the provisions of the Charter of the United Nations, including the procedures and means provided for therein, particularly Chapter VI, concerning the peaceful settlement of disputes.

2. Member States shall fulfil in good faith the obligations assumed by them in accordance with the Charter of the United Nations. They should, in accordance with the Charter, as appropriate, duly take into account the recommendations of the Security Council relating to the peaceful settlement of disputes. They should also, in accordance with the Charter, as appropriate, duly take into account the recommendations adopted by the General Assembly, subject to Articles 11 and 12 of the Charter, in the field of peaceful settlement of disputes.

3. Member States reaffirm the important role conferred on the General Assembly by the Charter of the United Nations in the field of peaceful settlement of disputes and stress the need for it to discharge effectively its responsibilities. Accordingly, they should:

(a) Bear in mind that the General Assembly may discuss any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations and, subject to Article 12 of the Charter, recommend measures for its peaceful adjustment;

(b) Consider making use, when they deem it appropriate, of the possibility of bringing to the attention of the General Assembly any dispute or any situation which might lead to international friction or give rise to a dispute;

(c) Consider utilizing, for the peaceful settlement of their disputes, the subsidiary organs established by the General Assembly in the performance of its functions under the Charter;

(d) Consider, when they are parties to a dispute brought to the attention of the General Assembly, making use of consultations within the framework of the Assembly, with a view to facilitating an early settlement of their dispute.

4. Member States should strengthen the primary role of the Security Council so that it may fully and effectively discharge its responsibilities, in accordance with the Charter of the United Nations, in the area of the settlement of disputes or of any situation the continuance of which is likely to endanger the maintenance of international peace and security. To this end they should:

(a) Be fully aware of their obligation to refer to the Security Council such a dispute to which they are parties if they fail to settle it by the means indicated in Article 33 of the Charter;

(b) Make greater use of the possibility of bringing to the attention of the Security Council any dispute or any situation which might lead to international friction or give rise to a dispute;

(c) Encourage the Security Council to make wider use of the opportunities provided for by the Charter in order to review disputes or situations the continuance of which is likely to endanger the maintenance of international peace and security;

(d) Consider making greater use of the fact-finding capacity of the Security Council in accordance with the Charter;

(e) Encourage the Security Council to make wider use, as a means to promote peaceful settlement of disputes, of the subsidiary organs established by it in the performance of its functions under the Charter;

(f) Bear in mind that the Security Council may, at any stage of a dispute of the nature referred to in Article 33 of the Charter or of a situation of like nature, recommend appropriate procedures or methods of adjustment;

(g) Encourage the Security Council to act without delay, in accordance with its functions and powers, particularly in cases where international disputes develop into armed conflicts.

5. States should be fully aware of the role of the International Court of Justice, which is the principal judicial organ of the United Nations. Their attention is drawn to the facilities offered by the International

Court of Justice for the settlement of legal disputes, especially since the revision of the Rules of the Court.

States may entrust the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

States should bear in mind:

(a) That legal disputes should as a general rule be referred by the parties to the International Court of Justice, in accordance with the provisions of the Statute of the Court;

(b) That it is desirable that they:

(i) Consider the possibility of inserting in treaties, whenever appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties;

(ii) Study the possibility of choosing, in the free exercise of their sovereignty, to recognize as compulsory the jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute;

(iii) Review the possibility of identifying cases in which use may be made of the International Court of Justice.

The organs of the United Nations and the specialized agencies should study the advisability of making use of the possibility of requesting advisory opinions of the International Court of Justice on legal questions arising within the scope of their activities, provided that they are duly authorized to do so.

Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States.

6. The Secretary-General should make full use of the provisions of the Charter of the United Nations concerning the responsibilities entrusted to him. The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. He shall perform such other functions as are entrusted to him by the Security Council or by the General Assembly. Reports in this connection shall be made whenever requested to the Security Council or the General Assembly.

Urges all States to observe and promote in good faith the provisions of the present Declaration in the peaceful settlement of their international disputes;

Declares that nothing in the present Declaration shall be construed as prejudicing in any manner the relevant provisions of the Charter or the rights and duties of States, or the scope of the functions and powers of the United Nations organs under the Charter, in particular those relating to the peaceful settlement of disputes;

Declares that nothing in the present Declaration could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to 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, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration;

Stresses the need, in accordance with the Charter, to continue efforts to strengthen the process of the peaceful settlement of disputes through progressive development and codification of international law, as appropriate, and through enhancing the effectiveness of the United Nations in this field.

37/11. United Nations Conference on Succession of States in respect of State Property, Archives and Debts

The General Assembly,

Recalling that, by its resolution 36/113 of 10 December 1981, it decided to convene a conference of plenipotentiaries in 1983 to consider the draft articles on succession of States in respect of State property, archives and debts, adopted by

**World Summit Outcome (General Assembly
resolution 60/1 of 16 September 2005)**



General Assembly

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Agenda items 46 and 120

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/60/L.1)]

60/1. 2005 World Summit Outcome

The General Assembly

Adopts the following 2005 World Summit Outcome:

2005 World Summit Outcome

I. Values and principles

1. We, Heads of State and Government, have gathered at United Nations Headquarters in New York from 14 to 16 September 2005.
2. We reaffirm our faith in the United Nations and our commitment to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterate our determination to foster strict respect for them.
3. We reaffirm the United Nations Millennium Declaration,¹ which we adopted at the dawn of the twenty-first century. We recognize the valuable role of the major United Nations conferences and summits in the economic, social and related fields, including the Millennium Summit, in mobilizing the international community at the local, national, regional and global levels and in guiding the work of the United Nations.
4. We reaffirm that our common fundamental values, including freedom, equality, solidarity, tolerance, respect for all human rights, respect for nature and shared responsibility, are essential to international relations.
5. We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, to uphold resolution of disputes by

peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion, international cooperation in solving international problems of an economic, social, cultural or humanitarian character and the fulfilment in good faith of the obligations assumed in accordance with the Charter.

6. We reaffirm the vital importance of an effective multilateral system, in accordance with international law, in order to better address the multifaceted and interconnected challenges and threats confronting our world and to achieve progress in the areas of peace and security, development and human rights, underlining the central role of the United Nations, and commit ourselves to promoting and strengthening the effectiveness of the Organization through the implementation of its decisions and resolutions.
7. We believe that today, more than ever before, we live in a global and interdependent world. No State can stand wholly alone. We acknowledge that collective security depends on effective cooperation, in accordance with international law, against transnational threats.
8. We recognize that current developments and circumstances require that we urgently build consensus on major threats and challenges. We commit ourselves to translating that consensus into concrete action, including addressing the root causes of those threats and challenges with resolve and determination.
9. We acknowledge that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being. We recognize that development, peace and security and human rights are interlinked and mutually reinforcing.
10. We reaffirm that development is a central goal in itself and that sustainable development in its economic, social and environmental aspects constitutes a key element of the overarching framework of United Nations activities.
11. We acknowledge that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.
12. We reaffirm that gender equality and the promotion and protection of the full enjoyment of all human rights and fundamental freedoms for all are essential to advance development and peace and security. We are committed to creating a world fit for future generations, which takes into account the best interests of the child.
13. We reaffirm the universality, indivisibility, interdependence and interrelatedness of all human rights.
14. Acknowledging the diversity of the world, we recognize that all cultures and civilizations contribute to the enrichment of humankind. We acknowledge the importance of respect and understanding for religious and cultural diversity throughout the world. In order to promote international peace and security, we commit ourselves to advancing human welfare, freedom and progress everywhere, as well as to encouraging tolerance, respect, dialogue and cooperation among different cultures, civilizations and peoples.

¹ See resolution 55/2.

15. We pledge to enhance the relevance, effectiveness, efficiency, accountability and credibility of the United Nations system. This is our shared responsibility and interest.

16. We therefore resolve to create a more peaceful, prosperous and democratic world and to undertake concrete measures to continue finding ways to implement the outcome of the Millennium Summit and the other major United Nations conferences and summits so as to provide multilateral solutions to problems in the four following areas:

- Development
- Peace and collective security
- Human rights and the rule of law
- Strengthening of the United Nations

II. Development

17. We strongly reiterate our determination to ensure the timely and full realization of the development goals and objectives agreed at the major United Nations conferences and summits, including those agreed at the Millennium Summit that are described as the Millennium Development Goals, which have helped to galvanize efforts towards poverty eradication.

18. We emphasize the vital role played by the major United Nations conferences and summits in the economic, social and related fields in shaping a broad development vision and in identifying commonly agreed objectives, which have contributed to improving human life in different parts of the world.

19. We reaffirm our commitment to eradicate poverty and promote sustained economic growth, sustainable development and global prosperity for all. We are encouraged by reductions in poverty in some countries in the recent past and are determined to reinforce and extend this trend to benefit people worldwide. We remain concerned, however, about the slow and uneven progress towards poverty eradication and the realization of other development goals in some regions. We commit ourselves to promoting the development of the productive sectors in developing countries to enable them to participate more effectively in and benefit from the process of globalization. We underline the need for urgent action on all sides, including more ambitious national development strategies and efforts backed by increased international support.

Global partnership for development

20. We reaffirm our commitment to the global partnership for development set out in the Millennium Declaration,¹ the Monterrey Consensus² and the Johannesburg Plan of Implementation.³

21. We further reaffirm our commitment to sound policies, good governance at all levels and the rule of law, and to mobilize domestic resources, attract international

flows, promote international trade as an engine for development and increase international financial and technical cooperation for development, sustainable debt financing and external debt relief and to enhance the coherence and consistency of the international monetary, financial and trading systems.

22. We reaffirm that each country must take primary responsibility for its own development and that the role of national policies and development strategies cannot be overemphasized in the achievement of sustainable development. We also recognize that national efforts should be complemented by supportive global programmes, measures and policies aimed at expanding the development opportunities of developing countries, while taking into account national conditions and ensuring respect for national ownership, strategies and sovereignty. To this end, we resolve:

- (a) To adopt, by 2006, and implement comprehensive national development strategies to achieve the internationally agreed development goals and objectives, including the Millennium Development Goals;
- (b) To manage public finances effectively to achieve and maintain macroeconomic stability and long-term growth and to make effective and transparent use of public funds and ensure that development assistance is used to build national capacities;
- (c) To support efforts by developing countries to adopt and implement national development policies and strategies through increased development assistance, the promotion of international trade as an engine for development, the transfer of technology on mutually agreed terms, increased investment flows and wider and deeper debt relief, and to support developing countries by providing a substantial increase in aid of sufficient quality and arriving in a timely manner to assist them in achieving the internationally agreed development goals, including the Millennium Development Goals;
- (d) That the increasing interdependence of national economies in a globalizing world and the emergence of rule-based regimes for international economic relations have meant that the space for national economic policy, that is, the scope for domestic policies, especially in the areas of trade, investment and industrial development, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space. It is particularly important for developing countries, bearing in mind development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments;
- (e) To enhance the contribution of non-governmental organizations, civil society, the private sector and other stakeholders in national development efforts, as well as in the promotion of the global partnership for development;
- (f) To ensure that the United Nations funds and programmes and the specialized agencies support the efforts of developing countries through the common country assessment and United Nations Development Assistance Framework process, enhancing their support for capacity-building;
- (g) To protect our natural resource base in support of development.

¹ Monterrey Consensus of the International Conference on Financing for Development (*Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (United Nations publication, Sales No. E.02.II.A.7), chap. I, resolution 1, annex).

² Plan of Implementation of the World Summit on Sustainable Development (*Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002* (United Nations publication, Sales No. E.03.II. A.1 and corrigendum), chap. I, resolution 2, annex).

Financing for development

23. We reaffirm the Monterrey Consensus² and recognize that mobilizing financial resources for development and the effective use of those resources in developing countries and countries with economies in transition are central to a global partnership for development in support of the achievement of the internationally agreed development goals, including the Millennium Development Goals. In this regard:

(a) We are encouraged by recent commitments to substantial increases in official development assistance and the Organization for Economic Cooperation and Development estimate that official development assistance to all developing countries will now increase by around 50 billion United States dollars a year by 2010, while recognizing that a substantial increase in such assistance is required to achieve the internationally agreed goals, including the Millennium Development Goals, within their respective time frames;

(b) We welcome the increased resources that will become available as a result of the establishment of timetables by many developed countries to achieve the target of 0.7 per cent of gross national product for official development assistance by 2015 and to reach at least 0.5 per cent of gross national product for official development assistance by 2010 as well as, pursuant to the Brussels Programme of Action for the Least Developed Countries for the Decade 2001–2010,⁴ 0.15 per cent to 0.20 per cent for the least developed countries no later than 2010, and urge those developed countries that have not yet done so to make concrete efforts in this regard in accordance with their commitments;

(c) We further welcome recent efforts and initiatives to enhance the quality of aid and to increase its impact, including the Paris Declaration on Aid Effectiveness, and resolve to take concrete, effective and timely action in implementing all agreed commitments on aid effectiveness, with clear monitoring and deadlines, including through further aligning assistance with countries' strategies, building institutional capacities, reducing transaction costs and eliminating bureaucratic procedures, making progress on untying aid, enhancing the absorptive capacity and financial management of recipient countries and strengthening the focus on development results;

(d) We recognize the value of developing innovative sources of financing, provided those sources do not unduly burden developing countries. In that regard, we take note with interest of the international efforts, contributions and discussions, such as the Action against Hunger and Poverty, aimed at identifying innovative and additional sources of financing for development on a public, private, domestic or external basis to increase and supplement traditional sources of financing. Some countries will implement the International Finance Facility. Some countries have launched the International Finance Facility for immunization. Some countries will implement in the near future, utilizing their national authorities, a contribution on airline tickets to enable the financing of development projects, in particular in the health sector, directly or through financing of the International Finance Facility. Other countries are considering whether and to what extent they will participate in these initiatives;

(e) We acknowledge the vital role the private sector can play in generating new investments, employment and financing for development;

(f) We resolve to address the development needs of low-income developing countries by working in competent multilateral and international forums, to help them meet, inter alia, their financial, technical and technological requirements;

(g) We resolve to continue to support the development efforts of middle-income developing countries by working, in competent multilateral and international forums and also through bilateral arrangements, on measures to help them meet, inter alia, their financial, technical and technological requirements;

(h) We resolve to operationalize the World Solidarity Fund established by the General Assembly and invite those countries in a position to do so to make voluntary contributions to the Fund;

(i) We recognize the need for access to financial services, in particular for the poor, including through microfinance and microcredit.

Domestic resource mobilization

24. In our common pursuit of growth, poverty eradication and sustainable development, a critical challenge is to ensure the necessary internal conditions for mobilizing domestic savings, both public and private, sustaining adequate levels of productive investment, increasing human capacity, reducing capital flight, curbing the illicit transfer of funds and enhancing international cooperation for creating an enabling domestic environment. We undertake to support the efforts of developing countries to create a domestic enabling environment for mobilizing domestic resources. To this end, we therefore resolve:

(a) To pursue good governance and sound macroeconomic policies at all levels and support developing countries in their efforts to put in place the policies and investments to drive sustained economic growth, promote small and medium-sized enterprises, promote employment generation and stimulate the private sector;

(b) To reaffirm that good governance is essential for sustainable development; that sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication and employment creation; and that freedom, peace and security, domestic stability, respect for human rights, including the right to development, the rule of law, gender equality and market-oriented policies and an overall commitment to just and democratic societies are also essential and mutually reinforcing;

(c) To make the fight against corruption a priority at all levels and we welcome all actions taken in this regard at the national and international levels, including the adoption of policies that emphasize accountability, transparent public sector management and corporate responsibility and accountability, including efforts to return assets transferred through corruption, consistent with the United Nations Convention against Corruption.⁵ We urge all States that have not done so to consider signing, ratifying and implementing the Convention;

(d) To channel private capabilities and resources into stimulating the private sector in developing countries through actions in the public, public/private and

⁴ A/CONF.191/13, chap. II.

⁵ Resolution 58/4, annex.

private spheres to create an enabling environment for partnership and innovation that contributes to accelerated economic development and hunger and poverty eradication;

(e) To support efforts to reduce capital flight and measures to curb the illicit transfer of funds.

Investment

25. We resolve to encourage greater direct investment, including foreign investment, in developing countries and countries with economies in transition to support their development activities and to enhance the benefits they can derive from such investments. In this regard:

(a) We continue to support efforts by developing countries and countries with economies in transition to create a domestic environment conducive to attracting investments through, *inter alia*, achieving a transparent, stable and predictable investment climate with proper contract enforcement and respect for property rights and the rule of law and pursuing appropriate policy and regulatory frameworks that encourage business formation;

(b) We will put into place policies to ensure adequate investment in a sustainable manner in health, clean water and sanitation, housing and education and in the provision of public goods and social safety nets to protect vulnerable and disadvantaged sectors of society;

(c) We invite national Governments seeking to develop infrastructure projects and generate foreign direct investment to pursue strategies with the involvement of both the public and private sectors and, where appropriate, international donors;

(d) We call upon international financial and banking institutions to consider enhancing the transparency of risk rating mechanisms. Sovereign risk assessments, made by the private sector should maximize the use of strict, objective and transparent parameters, which can be facilitated by high-quality data and analysis;

(e) We underscore the need to sustain sufficient and stable private financial flows to developing countries and countries with economies in transition. It is important to promote measures in source and destination countries to improve transparency and the information about financial flows to developing countries, particularly countries in Africa, the least developed countries, small island developing States and landlocked developing countries. Measures that mitigate the impact of excessive volatility of short-term capital flows are important and must be considered.

Debt

26. We emphasize the high importance of a timely, effective, comprehensive and durable solution to the debt problems of developing countries, since debt financing and relief can be an important source of capital for development. To this end:

(a) We welcome the recent proposals of the Group of Eight to cancel 100 per cent of the outstanding debt of eligible heavily indebted poor countries owed to the International Monetary Fund, the International Development Association and African Development Fund and to provide additional resources to ensure that the financing capacity of the international financial institutions is not reduced;

(b) We emphasize that debt sustainability is essential for underpinning growth and underline the importance of debt sustainability to the efforts to achieve national development goals, including the Millennium Development Goals, recognizing the key role that debt relief can play in liberating resources that can be directed towards activities consistent with poverty eradication, sustained economic growth and sustainable development;

(c) We further stress the need to consider additional measures and initiatives aimed at ensuring long-term debt sustainability through increased grant-based financing, cancellation of 100 per cent of the official multilateral and bilateral debt of heavily indebted poor countries and, where appropriate, and on a case-by-case basis, to consider significant debt relief or restructuring for low- and middle-income developing countries with an unsustainable debt burden that are not part of the Heavily Indebted Poor Countries Initiative, as well as the exploration of mechanisms to comprehensively address the debt problems of those countries. Such mechanisms may include debt for sustainable development swaps or multilateral debt swap arrangements, as appropriate. These initiatives could include further efforts by the International Monetary Fund and the World Bank to develop the debt sustainability framework for low-income countries. This should be achieved in a fashion that does not detract from official development assistance resources, while maintaining the financial integrity of the multilateral financial institutions.

Trade

27. A universal, rule-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can substantially stimulate development worldwide, benefitting countries at all stages of development. In that regard, we reaffirm our commitment to trade liberalization and to ensure that trade plays its full part in promoting economic growth, employment and development for all.

28. We are committed to efforts designed to ensure that developing countries, especially the least-developed countries, participate fully in the world trading system in order to meet their economic development needs, and reaffirm our commitment to enhanced and predictable market access for the exports of developing countries.

29. We will work towards the objective, in accordance with the Brussels Programme of Action,⁴ of duty-free and quota-free market access for all least developed countries' products to the markets of developed countries, as well as to the markets of developing countries in a position to do so, and support their efforts to overcome their supply-side constraints.

30. We are committed to supporting and promoting increased aid to build productive and trade capacities of developing countries and to taking further steps in that regard, while welcoming the substantial support already provided.

31. We will work to accelerate and facilitate the accession of developing countries and countries with economies in transition to the World Trade Organization consistent with its criteria, recognizing the importance of universal integration in the rules-based global trading system.

32. We will work expeditiously towards implementing the development dimensions of the Doha work programme.⁶

Commodities

33. We emphasize the need to address the impact of weak and volatile commodity prices and support the efforts of commodity-dependent countries to restructure, diversify and strengthen the competitiveness of their commodity sectors.

Quick-impact initiatives

34. Given the need to accelerate progress immediately in countries where current trends make the achievement of the internationally agreed development goals unlikely, we resolve to urgently identify and implement country-led initiatives with adequate international support, consistent with long-term national development strategies, that promise immediate and durable improvements in the lives of people and renewed hope for the achievement of the development goals. In this regard, we will take such actions as the distribution of malaria bed nets, including free distribution, where appropriate, and effective anti-malarial treatments, the expansion of local school meal programmes, using home-grown foods where possible, and the elimination of user fees for primary education and, where appropriate, health-care services.

Systemic issues and global economic decision-making

35. We reaffirm the commitment to broaden and strengthen the participation of developing countries and countries with economies in transition in international economic decision-making and norm-setting, and to that end stress the importance of continuing efforts to reform the international financial architecture, noting that enhancing the voice and participation of developing countries and countries with economies in transition in the Bretton Woods institutions remains a continuous concern.

36. We reaffirm our commitment to governance, equity and transparency in the financial, monetary and trading systems. We are also committed to open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial systems.

37. We also underscore our commitment to sound domestic financial sectors, which make a vital contribution to national development efforts, as an important component of an international financial architecture that is supportive of development.

38. We further reaffirm the need for the United Nations to play a fundamental role in the promotion of international cooperation for development and the coherence, coordination and implementation of development goals and actions agreed upon by the international community, and we resolve to strengthen coordination within the United Nations system in close cooperation with all other multilateral financial, trade and development institutions in order to support sustained economic growth, poverty eradication and sustainable development.

39. Good governance at the international level is fundamental for achieving sustainable development. In order to ensure a dynamic and enabling international

⁶ See A/C.2/56/7, annex.

economic environment, it is important to promote global economic governance through addressing the international finance, trade, technology and investment patterns that have an impact on the development prospects of developing countries. To this effect, the international community should take all necessary and appropriate measures, including ensuring support for structural and macroeconomic reform, a comprehensive solution to the external debt problem and increasing the market access of developing countries.

South-South cooperation

40. We recognize the achievements and great potential of South-South cooperation and encourage the promotion of such cooperation, which complements North-South cooperation as an effective contribution to development and as a means to share best practices and provide enhanced technical cooperation. In this context, we note the recent decision of the leaders of the South, adopted at the Second South Summit and contained in the Doha Declaration⁷ and the Doha Plan of Action,⁸ to intensify their efforts at South-South cooperation, including through the establishment of the New Asian-African Strategic Partnership and other regional cooperation mechanisms, and encourage the international community, including the international financial institutions, to support the efforts of developing countries, inter alia, through triangular cooperation. We also take note with appreciation of the launching of the third round of negotiations on the Global System of Trade Preferences among Developing Countries as an important instrument to stimulate South-South cooperation.

41. We welcome the work of the United Nations High-Level Committee on South-South Cooperation and invite countries to consider supporting the Special Unit for South-South Cooperation within the United Nations Development Programme in order to respond effectively to the development needs of developing countries.

42. We recognize the considerable contribution of arrangements such as the Organization of Petroleum Exporting Countries Fund initiated by a group of developing countries, as well as the potential contribution of the South Fund for Development and Humanitarian Assistance, to development activities in developing countries.

Education

43. We emphasize the critical role of both formal and informal education in the achievement of poverty eradication and other development goals as envisaged in the Millennium Declaration,⁹ in particular basic education and training for eradicating illiteracy, and strive for expanded secondary and higher education as well as vocational education and technical training, especially for girls and women, the creation of human resources and infrastructure capabilities and the empowerment of those living in poverty. In this context, we reaffirm the Dakar Framework for Action adopted at the World Education Forum in 2000⁹ and recognize the importance of the United Nations Educational, Scientific and Cultural Organization strategy for the eradication of poverty, especially extreme poverty, in supporting the Education for

⁷ A/60/111, annex I.

⁸ *Ibid.*, annex II.

⁹ See United Nations Educational, Scientific and Cultural Organization, *Final Report of the World Education Forum, Dakar, Senegal, 26-28 April 2000* (Paris, 2000).

All programmes as a tool to achieve the millennium development goal of universal primary education by 2015.

44. We reaffirm our commitment to support developing country efforts to ensure that all children have access to and complete free and compulsory primary education of good quality, to eliminate gender inequality and imbalance and to renew efforts to improve girls' education. We also commit ourselves to continuing to support the efforts of developing countries in the implementation of the Education for All initiative, including with enhanced resources of all types through the Education for All fast-track initiative in support of country-led national education plans.

45. We commit ourselves to promoting education for peace and human development.

Rural and agricultural development

46. We reaffirm that food security and rural and agricultural development must be adequately and urgently addressed in the context of national development and response strategies and, in this context, will enhance the contributions of indigenous and local communities, as appropriate. We are convinced that the eradication of poverty, hunger and malnutrition, particularly as they affect children, is crucial for the achievement of the Millennium Development Goals. Rural and agricultural development should be an integral part of national and international development policies. We deem it necessary to increase productive investment in rural and agricultural development to achieve food security. We commit ourselves to increasing support for agricultural development and trade capacity-building in the agricultural sector in developing countries. Support for commodity development projects, especially market-based projects, and for their preparation under the Second Account of the Common Fund for Commodities should be encouraged.

Employment

47. We strongly support fair globalization and resolve to make the goals of full and productive employment and decent work for all, including for women and young people, a central objective of our relevant national and international policies as well as our national development strategies, including poverty reduction strategies, as part of our efforts to achieve the Millennium Development Goals. These measures should also encompass the elimination of the worst forms of child labour, as defined in International Labour Organization Convention No. 182, and forced labour. We also resolve to ensure full respect for the fundamental principles and rights at work.

Sustainable development: managing and protecting our common environment

48. We reaffirm our commitment to achieve the goal of sustainable development, including through the implementation of Agenda 21¹⁰ and the Johannesburg Plan of Implementation.¹¹ To this end, we commit ourselves to undertaking concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles.¹¹ These efforts will also promote the integration of the

three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are overarching objectives of and essential requirements for sustainable development.

49. We will promote sustainable consumption and production patterns, with the developed countries taking the lead and all countries benefiting from the process, as called for in the Johannesburg Plan of Implementation. In that context, we support developing countries in their efforts to promote a recycling economy.

50. We face serious and multiple challenges in tackling climate change, promoting clean energy, meeting energy needs and achieving sustainable development, and we will act with resolve and urgency in this regard.

51. We recognize that climate change is a serious and long-term challenge that has the potential to affect every part of the globe. We emphasize the need to meet all the commitments and obligations we have undertaken in the United Nations Framework Convention on Climate Change¹² and other relevant international agreements, including, for many of us, the Kyoto Protocol.¹³ The Convention is the appropriate framework for addressing future action on climate change at the global level.

52. We reaffirm our commitment to the ultimate objective of the Convention: to stabilize greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system.

53. We acknowledge that the global nature of climate change calls for the widest possible cooperation and participation in an effective and appropriate international response, in accordance with the principles of the Convention. We are committed to moving forward the global discussion on long-term cooperative action to address climate change, in accordance with these principles. We stress the importance of the eleventh session of the Conference of the Parties to the Convention, to be held in Montreal in November 2005.

54. We acknowledge various partnerships that are under way to advance action on clean energy and climate change, including bilateral, regional and multilateral initiatives.

55. We are committed to taking further action through practical international cooperation, inter alia:

(a) To promote innovation, clean energy and energy efficiency and conservation; improve policy, regulatory and financing frameworks; and accelerate the deployment of cleaner technologies;

(b) To enhance private investment, transfer of technologies and capacity-building to developing countries, as called for in the Johannesburg Plan of Implementation, taking into account their own energy needs and priorities;

(c) To assist developing countries to improve their resilience and integrate adaptation goals into their sustainable development strategies, given that adaptation to the effects of climate change due to both natural and human factors is a high

¹⁰ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E.93.L8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution I, annex II.

¹¹ *Ibid.*, annex I.

¹² United Nations, *Treaty Series*, vol. 1771, No. 30822.

¹³ FCCC/CP/1997/7/Add.1, decision 1/CP.3, annex.

priority for all nations, particularly those most vulnerable, namely, those referred to in article 4.8 of the Convention;

(d) To continue to assist developing countries, in particular small island developing States, least developed countries and African countries, including those that are particularly vulnerable to climate change, in addressing their adaptation needs relating to the adverse effects of climate change.

56. In pursuance of our commitment to achieve sustainable development, we further resolve:

(a) To promote the United Nations Decade of Education for Sustainable Development and the International Decade for Action, "Water for Life";

(b) To support and strengthen the implementation of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa,¹⁴ to address causes of desertification and land degradation, as well as poverty resulting from land degradation, through, inter alia, the mobilization of adequate and predictable financial resources, the transfer of technology and capacity-building at all levels;

(c) That the States parties to the Convention on Biological Diversity¹⁵ and the Cartagena Protocol on Biosafety¹⁶ should support the implementation of the Convention and the Protocol, as well as other biodiversity-related agreements and the Johannesburg commitment for a significant reduction in the rate of loss of biodiversity by 2010. The States parties will continue to negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines,¹⁷ an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources. All States will fulfil commitments and significantly reduce the rate of loss of biodiversity by 2010 and continue ongoing efforts towards elaborating and negotiating an international regime on access to genetic resources and benefit-sharing;

(d) To recognize that the sustainable development of indigenous peoples and their communities is crucial in our fight against hunger and poverty;

(e) To reaffirm our commitment, subject to national legislation, to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity, promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from their utilization;

(f) To work expeditiously towards the establishment of a worldwide early warning system for all natural hazards with regional nodes, building on existing national and regional capacity such as the newly established Indian Ocean Tsunami Warning and Mitigation System;

(g) To fully implement the Hyogo Declaration¹⁸ and the Hyogo Framework for Action 2005–2015¹⁹ adopted at the World Conference on Disaster Reduction, in particular those commitments related to assistance for developing countries that are prone to natural disasters and disaster-stricken States in the transition phase towards sustainable physical, social and economic recovery, for risk-reduction activities in post-disaster recovery and for rehabilitation processes;

(h) To assist developing countries' efforts to prepare integrated water resources management and water efficiency plans as part of their national development strategies and to provide access to safe drinking water and basic sanitation in accordance with the Millennium Declaration²⁰ and the Johannesburg Plan of Implementation,³ including halving by 2015 the proportion of people who are unable to reach or afford safe drinking water and who do not have access to basic sanitation;

(i) To accelerate the development and dissemination of affordable and cleaner energy efficiency and energy conservation technologies, as well as the transfer of such technologies, in particular to developing countries, on favourable terms, including on concessional and preferential terms, as mutually agreed, bearing in mind that access to energy facilitates the eradication of poverty;

(j) To strengthen the conservation, sustainable management and development of all types of forests for the benefit of current and future generations, including through enhanced international cooperation, so that trees and forests may contribute fully to the achievement of the internationally agreed development goals, including those contained in the Millennium Declaration, taking full account of the linkages between the forest sector and other sectors. We look forward to the discussions at the sixth session of the United Nations Forum on Forests;

(k) To promote the sound management of chemicals and hazardous wastes throughout their life cycle, in accordance with Agenda 21 and the Johannesburg Plan of Implementation, aiming to achieve that by 2020 chemicals are used and produced in ways that lead to the minimization of significant adverse effects on human health and the environment using transparent and science-based risk assessment and risk management procedures, by adopting and implementing a voluntary strategic approach to international management of chemicals, and to support developing countries in strengthening their capacity for the sound management of chemicals and hazardous wastes by providing technical and financial assistance, as appropriate;

(l) To improve cooperation and coordination at all levels in order to address issues related to oceans and seas in an integrated manner and promote integrated management and sustainable development of the oceans and seas;

(m) To achieve significant improvement in the lives of at least 100 million slum-dwellers by 2020, recognizing the urgent need for the provision of increased resources for affordable housing and housing-related infrastructure, prioritizing slum prevention and slum upgrading, and to encourage support for the United Nations Habitat and Human Settlements Foundation and its Slum Upgrading Facility;

¹⁴ United Nations, *Treaty Series*, vol. 1954, No. 33480

¹⁵ *Ibid.*, vol. 1760, No. 30619.

¹⁶ UNEP/CBD/EXCOP/1/3 and Corr. 1, part two, annex.

¹⁷ UNEP/CBD/COP/6/20, annex I, decision VI/24A.

¹⁸ A/CONF.206/6 and Corr. 1, chap. I, resolution I.

¹⁹ Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6 and Corr. 1, chap. I, resolution 2).

(n) To acknowledge the invaluable role of the Global Environment Facility in facilitating cooperation with developing countries; we look forward to a successful replenishment this year along with the successful conclusion of all outstanding commitments from the third replenishment;

(o) To note that cessation of the transport of radioactive materials through the regions of small island developing States is an ultimate desired goal of small island developing States and some other countries and recognize the right of freedom of navigation in accordance with international law. States should maintain dialogue and consultation, in particular under the aegis of the International Atomic Energy Agency and the International Maritime Organization, with the aim of improved mutual understanding, confidence-building and enhanced communication in relation to the safe maritime transport of radioactive materials. States involved in the transport of such materials are urged to continue to engage in dialogue with small island developing States and other States to address their concerns. These concerns include the further development and strengthening, within the appropriate forums, of international regulatory regimes to enhance safety, disclosure, liability, security and compensation in relation to such transport.

HIV/AIDS, malaria, tuberculosis and other health issues

57. We recognize that HIV/AIDS, malaria, tuberculosis and other infectious diseases pose severe risks for the entire world and serious challenges to the achievement of development goals. We acknowledge the substantial efforts and financial contributions made by the international community, while recognizing that these diseases and other emerging health challenges require a sustained international response. To this end, we commit ourselves to:

(a) Increasing investment, building on existing mechanisms and through partnership, to improve health systems in developing countries and those with economies in transition with the aim of providing sufficient health workers, infrastructure, management systems and supplies to achieve the health-related Millennium Development Goals by 2015;

(b) Implementing measures to increase the capacity of adults and adolescents to protect themselves from the risk of HIV infection;

(c) Fully implementing all commitments established by the Declaration of Commitment on HIV/AIDS²⁰ through stronger leadership, the scaling up of a comprehensive response to achieve broad multisectoral coverage for prevention, care, treatment and support, the mobilization of additional resources from national, bilateral, multilateral and private sources and the substantial funding of the Global Fund to Fight AIDS, Tuberculosis and Malaria as well as of the HIV/AIDS component of the work programmes of the United Nations system agencies and programmes engaged in the fight against HIV/AIDS;

(d) Developing and implementing a package for HIV prevention, treatment and care with the aim of coming as close as possible to the goal of universal access to treatment by 2010 for all those who need it, including through increased resources, and working towards the elimination of stigma and discrimination, enhanced access to affordable medicines and the reduction of vulnerability of

²⁰ Resolution S-26/2, annex.

persons affected by HIV/AIDS and other health issues, in particular orphaned and vulnerable children and older persons;

(e) Ensuring the full implementation of our obligations under the International Health Regulations adopted by the fifty-eighth World Health Assembly in May 2005,²¹ including the need to support the Global Outbreak Alert and Response Network of the World Health Organization;

(f) Working actively to implement the "Three Ones" principles in all countries, including by ensuring that multiple institutions and international partners all work under one agreed HIV/AIDS framework that provides the basis for coordinating the work of all partners, with one national AIDS coordinating authority having a broad-based multisectoral mandate, and under one agreed country-level monitoring and evaluation system. We welcome and support the important recommendations of the Global Task Team on Improving AIDS Coordination among Multilateral Institutions and International Donors;

(g) Achieving universal access to reproductive health by 2015, as set out at the International Conference on Population and Development, integrating this goal in strategies to attain the internationally agreed development goals, including those contained in the Millennium Declaration, aimed at reducing maternal mortality, improving maternal health, reducing child mortality, promoting gender equality, combating HIV/AIDS and eradicating poverty;

(h) Promoting long-term funding, including public-private partnerships where appropriate, for academic and industrial research as well as for the development of new vaccines and microbicides, diagnostic kits, drugs and treatments to address major pandemics, tropical diseases and other diseases, such as avian flu and severe acute respiratory syndrome, and taking forward work on market incentives, where appropriate through such mechanisms as advance purchase commitments;

(i) Stressing the need to urgently address malaria and tuberculosis, in particular in the most affected countries, and welcoming the scaling up, in this regard, of bilateral and multilateral initiatives.

Gender equality and empowerment of women

58. We remain convinced that progress for women is progress for all. We reaffirm that the full and effective implementation of the goals and objectives of the Beijing Declaration and Platform for Action²² and the outcome of the twenty-third special session of the General Assembly is an essential contribution to achieving the internationally agreed development goals, including those contained in the Millennium Declaration, and we resolve to promote gender equality and eliminate pervasive gender discrimination by:

(a) Eliminating gender inequalities in primary and secondary education by the earliest possible date and at all educational levels by 2015;

(b) Guaranteeing the free and equal right of women to own and inherit property and ensuring secure tenure of property and housing by women;

²¹ World Health Assembly resolution 58.3.

²² Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (United Nations publication, Sales No. E.96.IV.13), chap. I, resolution 1, annexes I and II.

- (c) Ensuring equal access to reproductive health;
- (d) Promoting women's equal access to labour markets, sustainable employment and adequate labour protection;
- (e) Ensuring equal access of women to productive assets and resources, including land, credit and technology;
- (f) Eliminating all forms of discrimination and violence against women and the girl child, including by ending impunity and by ensuring the protection of civilians, in particular women and the girl child, during and after armed conflicts in accordance with the obligations of States under international humanitarian law and international human rights law;
- (g) Promoting increased representation of women in Government decision-making bodies, including through ensuring their equal opportunity to participate fully in the political process.

59. We recognize the importance of gender mainstreaming as a tool for achieving gender equality. To that end, we undertake to actively promote the mainstreaming of a gender perspective in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and social spheres, and further undertake to strengthen the capabilities of the United Nations system in the area of gender.

Science and technology for development

60. We recognize that science and technology, including information and communication technology, are vital for the achievement of the development goals and that international support can help developing countries to benefit from technological advancements and enhance their productive capacity. We therefore commit ourselves to:

- (a) Strengthening and enhancing existing mechanisms and supporting initiatives for research and development, including through voluntary partnerships between the public and private sectors, to address the special needs of developing countries in the areas of health, agriculture, conservation, sustainable use of natural resources and environmental management, energy, forestry and the impact of climate change;
- (b) Promoting and facilitating, as appropriate, access to and the development, transfer and diffusion of technologies, including environmentally sound technologies and corresponding know-how, to developing countries;
- (c) Assisting developing countries in their efforts to promote and develop national strategies for human resources and science and technology, which are primary drivers of national capacity-building for development;
- (d) Promoting and supporting greater efforts to develop renewable sources of energy, such as solar, wind and geothermal;
- (e) Implementing policies at the national and international levels to attract both public and private investment, domestic and foreign, that enhances knowledge, transfers technology on mutually agreed terms and raises productivity;
- (f) Supporting the efforts of developing countries, individually and collectively, to harness new agricultural technologies in order to increase agricultural productivity through environmentally sustainable means;

(g) Building a people-centred and inclusive information society so as to enhance digital opportunities for all people in order to help bridge the digital divide, putting the potential of information and communication technologies at the service of development and addressing new challenges of the information society by implementing the outcomes of the Geneva phase of the World Summit on the Information Society and ensuring the success of the second phase of the Summit, to be held in Tunis in November 2005; in this regard, we welcome the establishment of the Digital Solidarity Fund and encourage voluntary contributions to its financing.

Migration and development

61. We acknowledge the important nexus between international migration and development and the need to deal with the challenges and opportunities that migration presents to countries of origin, destination and transit. We recognize that international migration brings benefits as well as challenges to the global community. We look forward to the high-level dialogue of the General Assembly on international migration and development to be held in 2006, which will offer an opportunity to discuss the multidimensional aspects of international migration and development in order to identify appropriate ways and means to maximize their development benefits and minimize their negative impacts.

62. We reaffirm our resolve to take measures to ensure respect for and protection of the human rights of migrants, migrant workers and members of their families.

63. We reaffirm the need to adopt policies and undertake measures to reduce the cost of transferring migrant remittances to developing countries and welcome efforts by Governments and stakeholders in this regard.

Countries with special needs

64. We reaffirm our commitment to address the special needs of the least developed countries and urge all countries and all relevant organizations of the United Nations system, including the Bretton Woods institutions, to make concerted efforts and adopt speedy measures for meeting in a timely manner the goals and targets of the Brussels Programme of Action for the Least Developed Countries for the Decade 2001–2010.⁴

65. We recognize the special needs of and challenges faced by landlocked developing countries and therefore reaffirm our commitment to urgently address those needs and challenges through the full, timely and effective implementation of the *Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries*,²³ and the *São Paulo Consensus* adopted at the eleventh session of the United Nations Conference on Trade and Development.²⁴ We encourage the work undertaken by United Nations regional commissions and organizations towards establishing a time-cost methodology for indicators to measure the progress in implementation of the *Almaty Programme of Action*. We also recognize the special difficulties and concerns of landlocked developing countries in their efforts to integrate their economies into the

²³ *Report of the International Ministerial Conference of Landlocked and Transit Developing Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation, Almaty, Kazakhstan, 28 and 29 August 2003 (A/CONF.202/3)*, annex I.

²⁴ TD/412, part II.

multilateral trading system. In this regard, priority should be given to the full and timely implementation of the Almaty Declaration²⁵ and the Almaty Programme of Action.²³

66. We recognize the special needs and vulnerabilities of small island developing States and reaffirm our commitment to take urgent and concrete action to address those needs and vulnerabilities through the full and effective implementation of the Mauritius Strategy adopted by the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States,²⁶ the Barbados Programme of Action²⁷ and the outcome of the twenty-second special session of the General Assembly.²⁸ We further undertake to promote greater international cooperation and partnership for the implementation of the Mauritius Strategy through, inter alia, the mobilization of domestic and international resources, the promotion of international trade as an engine for development and increased international financial and technical cooperation.

67. We emphasize the need for continued, coordinated and effective international support for achieving the development goals in countries emerging from conflict and in those recovering from natural disasters.

Meeting the special needs of Africa

68. We welcome the substantial progress made by the African countries in fulfilling their commitments and emphasize the need to carry forward the implementation of the New Partnership for Africa's Development²⁹ to promote sustainable growth and development and deepen democracy, human rights, good governance and sound economic management and gender equality and encourage African countries, with the participation of civil society and the private sector, to continue their efforts in this regard by developing and strengthening institutions for governance and the development of the region, and also welcome the recent decisions taken by Africa's partners, including the Group of Eight and the European Union, in support of Africa's development efforts, including commitments that will lead to an increase in official development assistance to Africa of 25 billion dollars per year by 2010. We reaffirm our commitment to address the special needs of Africa, which is the only continent not on track to meet any of the goals of the Millennium Declaration by 2015, to enable it to enter the mainstream of the world economy, and resolve:

(a) To strengthen cooperation with the New Partnership for Africa's Development by providing coherent support for the programmes drawn up by African leaders within that framework, including by mobilizing internal and

external financial resources and facilitating approval of such programmes by the multilateral financial institutions;

(b) To support the African commitment to ensure that by 2015 all children have access to complete, free and compulsory primary education of good quality, as well as to basic health care;

(c) To support the building of an international infrastructure consortium involving the African Union, the World Bank and the African Development Bank, with the New Partnership for Africa's Development as the main framework, to facilitate public and private infrastructure investment in Africa;

(d) To promote a comprehensive and durable solution to the external debt problems of African countries, including through the cancellation of 100 per cent of multilateral debt consistent with the recent Group of Eight proposal for the heavily indebted poor countries, and, on a case-by-case basis, where appropriate, significant debt relief, including, inter alia, cancellation or restructuring for heavily indebted African countries not part of the Heavily Indebted Poor Countries Initiative that have unsustainable debt burdens;

(e) To make efforts to fully integrate African countries in the international trading system, including through targeted trade capacity-building programmes;

(f) To support the efforts of commodity-dependent African countries to restructure, diversify and strengthen the competitiveness of their commodity sectors and decide to work towards market-based arrangements with the participation of the private sector for commodity price-risk management;

(g) To supplement the efforts of African countries, individually and collectively, to increase agricultural productivity, in a sustainable way, as set out in the Comprehensive Africa Agriculture Development Programme of the New Partnership for Africa's Development as part of an African "Green Revolution";

(h) To encourage and support the initiatives of the African Union and subregional organizations to prevent, mediate and resolve conflicts with the assistance of the United Nations, and in this regard welcomes the proposals from the Group of Eight countries to provide support for African peacekeeping;

(i) To provide, with the aim of an AIDS-, malaria- and tuberculosis-free generation in Africa, assistance for prevention and care and to come as close as possible to achieving the goal of universal access by 2010 to HIV/AIDS treatment in African countries, to encourage pharmaceutical companies to make drugs, including antiretroviral drugs, affordable and accessible in Africa and to ensure increased bilateral and multilateral assistance, where possible on a grant basis, to combat malaria, tuberculosis and other infectious diseases in Africa through the strengthening of health systems.

III. Peace and collective security

69. We recognize that we are facing a whole range of threats that require our urgent, collective and more determined response.

70. We also recognize that, in accordance with the Charter, addressing such threats requires cooperation among all the principal organs of the United Nations within their respective mandates.

71. We acknowledge that we are living in an interdependent and global world and that many of today's threats recognize no national boundaries, are interlinked and

²³ *Report of the International Ministerial Conference of Landlocked and Transit Developing Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation, Almaty, Kazakhstan, 28 and 29 August 2003* (ACONF.202.3), annex II.

²⁴ *Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, Port Louis, Mauritius, 10-14 January 2005* (United Nations publication, Sales No. E.05.II.A.4 and corrigendum), chap. I, resolution I, annex II.

²⁵ *Report of the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados, 25 April-6 May 1994* (United Nations publication, Sales No. E.94.I.18 and corrigendum), chap. I, resolution I, annex II.

²⁶ Resolution S-22/2, annex.

²⁹ A/57/304, annex.

must be tackled at the global, regional and national levels in accordance with the Charter and international law.

72. We therefore reaffirm our commitment to work towards a security consensus based on the recognition that many threats are interlinked, that development, peace, security and human rights are mutually reinforcing, that no State can best protect itself by acting entirely alone and that all States need an effective and efficient collective security system pursuant to the purposes and principles of the Charter.

Pacific settlement of disputes

73. We emphasize the obligation of States to settle their disputes by peaceful means in accordance with Chapter VI of the Charter, including, when appropriate, by the use of the International Court of Justice. All States should act in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.³⁰

74. We stress the importance of prevention of armed conflict in accordance with the purposes and principles of the Charter and solemnly renew our commitment to promote a culture of prevention of armed conflict as a means of effectively addressing the interconnected security and development challenges faced by peoples throughout the world, as well as to strengthen the capacity of the United Nations for the prevention of armed conflict.

75. We further stress the importance of a coherent and integrated approach to the prevention of armed conflicts and the settlement of disputes and the need for the Security Council, the General Assembly, the Economic and Social Council and the Secretary-General to coordinate their activities within their respective Charter mandates.

76. Recognizing the important role of the good offices of the Secretary-General, including in the mediation of disputes, we support the Secretary-General's efforts to strengthen his capacity in this area.

Use of force under the Charter of the United Nations

77. We reiterate the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter. We reaffirm that the purposes and principles guiding the United Nations are, inter alia, to maintain international peace and security, to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace, and to that end we are determined to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, in conformity with the principles of justice and international law, the adjustment or settlement of international disputes or situations that might lead to a breach of the peace.

78. We reiterate the importance of promoting and strengthening the multilateral process and of addressing international challenges and problems by strictly abiding

³⁰ Resolution 2625 (XXV), annex.

by the Charter and the principles of international law, and further stress our commitment to multilateralism.

79. We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.

80. We also reaffirm that the Security Council has primary responsibility in the maintenance of international peace and security. We also note the role of the General Assembly relating to the maintenance of international peace and security in accordance with the relevant provisions of the Charter.

Terrorism

81. We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security.

82. We welcome the Secretary-General's identification of elements of a counter-terrorism strategy. These elements should be developed by the General Assembly without delay with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism, which also takes into account the conditions conducive to the spread of terrorism. In this context, we commend the various initiatives to promote dialogue, tolerance and understanding among civilizations.

83. We stress the need to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism during the sixtieth session of the General Assembly.

84. We acknowledge that the question of convening a high-level conference under the auspices of the United Nations to formulate an international response to terrorism in all its forms and manifestations could be considered.

85. We recognize that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.

86. We reiterate our call upon States to refrain from organizing, financing, encouraging, providing training for or otherwise supporting terrorist activities and to take appropriate measures to ensure that their territories are not used for such activities.

87. We acknowledge the important role played by the United Nations in combating terrorism and also stress the vital contribution of regional and bilateral cooperation, particularly at the practical level of law enforcement cooperation and technical exchange.

88. We urge the international community, including the United Nations, to assist States in building national and regional capacity to combat terrorism. We invite the Secretary-General to submit proposals to the General Assembly and the Security Council, within their respective mandates, to strengthen the capacity of the United

Nations system to assist States in combating terrorism and to enhance the coordination of United Nations activities in this regard.

89. We stress the importance of assisting victims of terrorism and of providing them and their families with support to cope with their loss and their grief.

90. We encourage the Security Council to consider ways to strengthen its monitoring and enforcement role in counter-terrorism, including by consolidating State reporting requirements, taking into account and respecting the different mandates of its counter-terrorism subsidiary bodies. We are committed to cooperating fully with the three competent subsidiary bodies in the fulfilment of their tasks, recognizing that many States continue to require assistance in implementing relevant Security Council resolutions.

91. We support efforts for the early entry into force of the International Convention for the Suppression of Acts of Nuclear Terrorism³¹ and strongly encourage States to consider becoming parties to it expeditiously and acceding without delay to the twelve other international conventions and protocols against terrorism and implementing them.

Peacekeeping

92. Recognizing that United Nations peacekeeping plays a vital role in helping parties to conflict end hostilities and commending the contribution of United Nations peacekeepers in that regard, noting improvements made in recent years in United Nations peacekeeping, including the deployment of integrated missions in complex situations, and stressing the need to mount operations with adequate capacity to counter hostilities and fulfil effectively their mandates, we urge further development of proposals for enhanced rapidly deployable capacities to reinforce peacekeeping operations in crises. We endorse the creation of an initial operating capability for a standing police capacity to provide coherent, effective and responsive start-up capability for the policing component of the United Nations peacekeeping missions and to assist existing missions through the provision of advice and expertise.

93. Recognizing the important contribution to peace and security by regional organizations as provided for under Chapter VIII of the Charter and the importance of forging predictable partnerships and arrangements between the United Nations and regional organizations, and noting in particular, given the special needs of Africa, the importance of a strong African Union:

- (a) We support the efforts of the European Union and other regional entities to develop capacities such as for rapid deployment, standby and bridging arrangements;
- (b) We support the development and implementation of a ten-year plan for capacity-building with the African Union.

³¹ Resolution 59/290, annex.

94. We support implementation of the 2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.³²

95. We urge States parties to the Anti-Personnel Mine Ban Convention³³ and Amended Protocol II to the Convention on Certain Conventional Weapons³⁴ to fully implement their respective obligations. We call upon States in a position to do so to provide greater technical assistance to mine-affected States.

96. We underscore the importance of the recommendations of the Adviser to the Secretary-General on Sexual Exploitation and Abuse by United Nations Peacekeeping Personnel,³⁵ and urge that those measures adopted in the relevant General Assembly resolutions based upon the recommendations be fully implemented without delay.

Peacebuilding

97. Emphasizing the need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, recognizing the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development, and recognizing the vital role of the United Nations in that regard, we decide to establish a Peacebuilding Commission as an intergovernmental advisory body.

98. The main purpose of the Peacebuilding Commission is to bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery. The Commission should focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and support the development of integrated strategies in order to lay the foundation for sustainable development. In addition, it should provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations, develop best practices, help to ensure predictable financing for early recovery activities and extend the period of attention by the international community to post-conflict recovery. The Commission should act in all matters on the basis of consensus of its members.

99. The Peacebuilding Commission should make the outcome of its discussions and recommendations publicly available as United Nations documents to all relevant bodies and actors, including the international financial institutions. The Peacebuilding Commission should submit an annual report to the General Assembly.

100. The Peacebuilding Commission should meet in various configurations. Country-specific meetings of the Commission, upon invitation of the Organizational

³² See Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15), chap. IV, para. 24.

³³ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction (United Nations, Treaty Series, vol. 2056, No. 35597).

³⁴ Amended Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW/CONF.II/16 (Part I), annex B).

³⁵ A/59/710, paras. 68-93.

Committee referred to in paragraph 101 below, should include as members, in addition to members of the Organizational Committee, representatives from:

- (a) The country under consideration;
- (b) Countries in the region engaged in the post-conflict process and other countries that are involved in relief efforts and/or political dialogue, as well as relevant regional and subregional organizations;
- (c) The major financial, troop and civilian police contributors involved in the recovery effort;
- (d) The senior United Nations representative in the field and other relevant United Nations representatives;
- (e) Such regional and international financial institutions as may be relevant.

101. The Peacebuilding Commission should have a standing Organizational Committee, responsible for developing its procedures and organizational matters, comprising:

- (a) Members of the Security Council, including permanent members;
- (b) Members of the Economic and Social Council, elected from regional groups, giving due consideration to those countries that have experienced post-conflict recovery;
- (c) Top providers of assessed contributions to the United Nations budgets and voluntary contributions to the United Nations funds, programmes and agencies, including the standing Peacebuilding Fund, that are not among those selected in (a) or (b) above;
- (d) Top providers of military personnel and civilian police to United Nations missions that are not among those selected in (a), (b) or (c) above.

102. Representatives from the World Bank, the International Monetary Fund and other institutional donors should be invited to participate in all meetings of the Peacebuilding Commission in a manner suitable to their governing arrangements, in addition to a representative of the Secretary-General.

103. We request the Secretary-General to establish a multi-year standing Peacebuilding Fund for post-conflict peacebuilding, funded by voluntary contributions and taking due account of existing instruments. The objectives of the Peacebuilding Fund will include ensuring the immediate release of resources needed to launch peacebuilding activities and the availability of appropriate financing for recovery.

104. We also request the Secretary-General to establish, within the Secretariat and from within existing resources, a small peacebuilding support office staffed by qualified experts to assist and support the Peacebuilding Commission. The office should draw on the best expertise available.

105. The Peacebuilding Commission should begin its work no later than 31 December 2005.

Sanctions

106. We underscore that sanctions remain an important tool under the Charter in our efforts to maintain international peace and security without recourse to the use of force, and resolve to ensure that sanctions are carefully targeted in support of clear

objectives, to comply with sanctions established by the Security Council and to ensure that sanctions are implemented in ways that balance effectiveness to achieve the desired results against the possible adverse consequences, including socioeconomic and humanitarian consequences, for populations and third States.

107. Sanctions should be implemented and monitored effectively with clear benchmarks and should be periodically reviewed, as appropriate, and remain for as limited a period as necessary to achieve their objectives and should be terminated once the objectives have been achieved.

108. We call upon the Security Council, with the support of the Secretary-General, to improve its monitoring of the implementation and effects of sanctions, to ensure that sanctions are implemented in an accountable manner, to review regularly the results of such monitoring and to develop a mechanism to address special economic problems arising from the application of sanctions in accordance with the Charter.

109. We also call upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.

110. We support efforts through the United Nations to strengthen State capacity to implement sanctions provisions.

Transnational crime

111. We express our grave concern at the negative effects on development, peace and security and human rights posed by transnational crime, including the smuggling of and trafficking in human beings, the world narcotic drug problem and the illicit trade in small arms and light weapons, and at the increasing vulnerability of States to such crime. We reaffirm the need to work collectively to combat transnational crime.

112. We recognize that trafficking in persons continues to pose a serious challenge to humanity and requires a concerted international response. To that end, we urge all States to devise, enforce and strengthen effective measures to combat and eliminate all forms of trafficking in persons to counter the demand for trafficked victims and to protect the victims.

113. We urge all States that have not yet done so to consider becoming parties to the relevant international conventions on organized crime and corruption and, following their entry into force, to implement them effectively, including by incorporating the provisions of those conventions into national legislation and by strengthening criminal justice systems.

114. We reaffirm our unwavering determination and commitment to overcome the world narcotic drug problem through international cooperation and national strategies to eliminate both the illicit supply of and demand for illicit drugs.

115. We resolve to strengthen the capacity of the United Nations Office on Drugs and Crime, within its existing mandates, to provide assistance to Member States in those tasks upon request.

Women in the prevention and resolution of conflicts

116. We stress the important role of women in the prevention and resolution of conflicts and in peacebuilding. We reaffirm our commitment to the full and effective implementation of Security Council resolution 1325 (2000) of 31 October 2000 on

women and peace and security. We also underline the importance of integrating a gender perspective and of women having the opportunity for equal participation and full involvement in all efforts to maintain and promote peace and security, as well as the need to increase their role in decision-making at all levels. We strongly condemn all violations of the human rights of women and girls in situations of armed conflict and the use of sexual exploitation, violence and abuse, and we commit ourselves to elaborating and implementing strategies to report on, prevent and punish gender-based violence.

Protecting children in situations of armed conflict

117. We reaffirm our commitment to promote and protect the rights and welfare of children in armed conflicts. We welcome the significant advances and innovations that have been achieved over the past several years. We welcome in particular the adoption of Security Council resolution 1612 (2005) of 26 July 2005. We call upon States to consider ratifying the Convention on the Rights of the Child³⁶ and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.³⁷ We also call upon States to take effective measures, as appropriate, to prevent the recruitment and use of children in armed conflict, contrary to international law, by armed forces and groups, and to prohibit and criminalize such practices.

118. We therefore call upon all States concerned to take concrete measures to ensure accountability and compliance by those responsible for grave abuses against children. We also reaffirm our commitment to ensure that children in armed conflicts receive timely and effective humanitarian assistance, including education, for their rehabilitation and reintegration into society.

IV. Human rights and the rule of law

119. We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates.

120. We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for and the observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter, the Universal Declaration of Human Rights³⁸ and other instruments relating to human rights and international law. The universal nature of these rights and freedoms is beyond question.

Human rights

121. We reaffirm that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their

political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms.

122. We emphasize the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or other status.

123. We resolve further to strengthen the United Nations human rights machinery with the aim of ensuring effective enjoyment by all of all human rights and civil, political, economic, social and cultural rights, including the right to development.

124. We resolve to strengthen the Office of the United Nations High Commissioner for Human Rights, taking note of the High Commissioner's plan of action, to enable it to effectively carry out its mandate to respond to the broad range of human rights challenges facing the international community, particularly in the areas of technical assistance and capacity-building, through the doubling of its regular budget resources over the next five years with a view to progressively setting a balance between regular budget and voluntary contributions to its resources, keeping in mind other priority programmes for developing countries and the recruitment of highly competent staff on a broad geographical basis and with gender balance, under the regular budget, and we support its closer cooperation with all relevant United Nations bodies, including the General Assembly, the Economic and Social Council and the Security Council.

125. We resolve to improve the effectiveness of the human rights treaty bodies, including through more timely reporting, improved and streamlined reporting procedures and technical assistance to States to enhance their reporting capacities and further enhance the implementation of their recommendations.

126. We resolve to integrate the promotion and protection of human rights into national policies and to support the further mainstreaming of human rights throughout the United Nations system, as well as closer cooperation between the Office of the United Nations High Commissioner for Human Rights and all relevant United Nations bodies.

127. We reaffirm our commitment to continue making progress in the advancement of the human rights of the world's indigenous peoples at the local, national, regional and international levels, including through consultation and collaboration with them, and to present for adoption a final draft United Nations declaration on the rights of indigenous peoples as soon as possible.

128. We recognize the need to pay special attention to the human rights of women and children and undertake to advance them in every possible way, including by bringing gender and child-protection perspectives into the human rights agenda.

129. We recognize the need for persons with disabilities to be guaranteed full enjoyment of their rights without discrimination. We also affirm the need to finalize a comprehensive draft convention on the rights of persons with disabilities.

130. We note that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to political and social stability and peace and enrich the cultural diversity and heritage of society.

131. We support the promotion of human rights education and learning at all levels, including through the implementation of the World Programme for Human Rights Education, as appropriate, and encourage all States to develop initiatives in this regard.

³⁶ United Nations, *Treaty Series*, vol. 1577, No. 27531.

³⁷ Resolution 54/263, annex I.

³⁸ Resolution 217 A (III).

Internally displaced persons

132. We recognize the Guiding Principles on Internal Displacement³⁹ as an important international framework for the protection of internally displaced persons and resolve to take effective measures to increase the protection of internally displaced persons.

Refugee protection and assistance

133. We commit ourselves to safeguarding the principle of refugee protection and to upholding our responsibility in resolving the plight of refugees, including through the support of efforts aimed at addressing the causes of refugee movement, bringing about the safe and sustainable return of those populations, finding durable solutions for refugees in protracted situations and preventing refugee movement from becoming a source of tension among States. We reaffirm the principle of solidarity and burden-sharing and resolve to support nations in assisting refugee populations and their host communities.

Rule of law

134. Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels, we:

- (a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States;
- (b) Support the annual treaty event;
- (c) Encourage States that have not yet done so to consider becoming parties to all treaties that relate to the protection of civilians;
- (d) Call upon States to continue their efforts to eradicate policies and practices that discriminate against women and to adopt laws and promote practices that protect the rights of women and promote gender equality;
- (e) Support the idea of establishing a rule of law assistance unit within the Secretariat, in accordance with existing relevant procedures, subject to a report by the Secretary-General to the General Assembly, so as to strengthen United Nations activities to promote the rule of law, including through technical assistance and capacity-building;

(f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court's work, including by supporting the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice on a voluntary basis.

Democracy

135. We reaffirm that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination. We stress that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing.

136. We renew our commitment to support democracy by strengthening countries' capacity to implement the principles and practices of democracy and resolve to strengthen the capacity of the United Nations to assist Member States upon their request. We welcome the establishment of a Democracy Fund at the United Nations. We note that the advisory board to be established should reflect diverse geographical representation. We invite the Secretary-General to help to ensure that practical arrangements for the Democracy Fund take proper account of existing United Nations activity in this field.

137. We invite interested Member States to give serious consideration to contributing to the Fund.

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.

³⁹ E/CN.4/1998/53/Add.2, annex.

Children's rights

141. We express dismay at the increasing number of children involved in and affected by armed conflict, as well as all other forms of violence, including domestic violence, sexual abuse and exploitation and trafficking. We support cooperation policies aimed at strengthening national capacities to improve the situation of those children and to assist in their rehabilitation and reintegration into society.

142. We commit ourselves to respecting and ensuring the rights of each child without discrimination of any kind, irrespective of the race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status of the child or his or her parent(s) or legal guardian(s). We call upon States to consider as a priority becoming a party to the Convention on the Rights of the Child.⁴⁰

Human security

143. We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end, we commit ourselves to discussing and defining the notion of human security in the General Assembly.

Culture of peace and initiatives on dialogue among cultures, civilizations and religions

144. We reaffirm the Declaration and Programme of Action on a Culture of Peace⁴⁰ as well as the Global Agenda for Dialogue among Civilizations and its Programme of Action⁴¹ adopted by the General Assembly and the value of different initiatives on dialogue among cultures and civilizations, including the dialogue on interfaith cooperation. We commit ourselves to taking action to promote a culture of peace and dialogue at the local, national, regional and international levels and request the Secretary-General to explore enhancing implementation mechanisms and to follow up on those initiatives. In this regard, we also welcome the Alliance of Civilizations initiative announced by the Secretary-General on 14 July 2005.

145. We underline that sports can foster peace and development and can contribute to an atmosphere of tolerance and understanding, and we encourage discussions in the General Assembly for proposals leading to a plan of action on sport and development.

V. Strengthening the United Nations

146. We reaffirm our commitment to strengthen the United Nations with a view to enhancing its authority and efficiency, as well as its capacity to address effectively, and in accordance with the purposes and principles of the Charter, the full range of challenges of our time. We are determined to reinvigorate the intergovernmental organs of the United Nations and to adapt them to the needs of the twenty-first century.

147. We stress that, in order to efficiently perform their respective mandates as provided under the Charter, United Nations bodies should develop good cooperation and coordination in the common endeavour of building a more effective United Nations.

148. We emphasize the need to provide the United Nations with adequate and timely resources with a view to enabling it to carry out its mandates. A reformed United Nations must be responsive to the entire membership, faithful to its founding principles and adapted to carrying out its mandate.

General Assembly

149. We reaffirm the central position of the General Assembly as the chief deliberative, policymaking and representative organ of the United Nations, as well as the role of the Assembly in the process of standard-setting and the codification of international law.

150. We welcome the measures adopted by the General Assembly with a view to strengthening its role and authority and the role and leadership of the President of the Assembly and, to that end, we call for their full and speedy implementation.

151. We call for strengthening the relationship between the General Assembly and the other principal organs to ensure better coordination on topical issues that require coordinated action by the United Nations, in accordance with their respective mandates.

Security Council

152. We reaffirm that Member States have conferred on the Security Council primary responsibility for the maintenance of international peace and security, acting on their behalf, as provided for by the Charter.

153. We support early reform of the Security Council - an essential element of our overall effort to reform the United Nations - in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the legitimacy and implementation of its decisions. We commit ourselves to continuing our efforts to achieve a decision to this end and request the General Assembly to review progress on the reform set out above by the end of 2005.

154. We recommend that the Security Council continue to adapt its working methods so as to increase the involvement of States not members of the Council in its work, as appropriate, enhance its accountability to the membership and increase the transparency of its work.

Economic and Social Council

155. We reaffirm the role that the Charter and the General Assembly have vested in the Economic and Social Council and recognize the need for a more effective Economic and Social Council as a principal body for coordination, policy review, policy dialogue and recommendations on issues of economic and social development, as well as for implementation of the international development goals agreed at the major United Nations conferences and summits, including the Millennium Development Goals. To achieve these objectives, the Council should:

(a) Promote global dialogue and partnership on global policies and trends in the economic, social, environmental and humanitarian fields. For this purpose, the Council should serve as a quality platform for high-level engagement among

⁴⁰ Resolutions 53/243 A and B.

⁴¹ See resolution 56/6.

Member States and with the international financial institutions, the private sector and civil society on emerging global trends, policies and action and develop its ability to respond better and more rapidly to developments in the international economic, environmental and social fields;

(b) Hold a biennial high-level Development Cooperation Forum to review trends in international development cooperation, including strategies, policies and financing, promote greater coherence among the development activities of different development partners and strengthen the links between the normative and operational work of the United Nations;

(c) Ensure follow-up of the outcomes of the major United Nations conferences and summits, including the internationally agreed development goals, and hold annual ministerial-level substantive reviews to assess progress, drawing on its functional and regional commissions and other international institutions, in accordance with their respective mandates;

(d) Support and complement international efforts aimed at addressing humanitarian emergencies, including natural disasters, in order to promote an improved, coordinated response from the United Nations;

(e) Play a major role in the overall coordination of funds, programmes and agencies, ensuring coherence among them and avoiding duplication of mandates and activities.

156. We stress that in order to fully perform the above functions, the organization of work, the agenda and the current methods of work of the Economic and Social Council should be adapted.

Human Rights Council

157. Pursuant to our commitment to further strengthen the United Nations human rights machinery, we resolve to create a Human Rights Council.

158. The Council will be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.

159. The Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote effective coordination and the mainstreaming of human rights within the United Nations system.

160. We request the President of the General Assembly to conduct open, transparent and inclusive negotiations, to be completed as soon as possible during the sixtieth session, with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council.

Secretariat and management reform

161. We recognize that in order to effectively comply with the principles and objectives of the Charter, we need an efficient, effective and accountable Secretariat. Its staff shall act in accordance with Article 100 of the Charter, in a culture of organizational accountability, transparency and integrity. Consequently we:

(a) Recognize the ongoing reform measures carried out by the Secretary-General to strengthen accountability and oversight, improve management

performance and transparency and reinforce ethical conduct, and invite him to report to the General Assembly on the progress made in their implementation;

(b) Emphasize the importance of establishing effective and efficient mechanisms for responsibility and accountability of the Secretariat;

(c) Urge the Secretary-General to ensure that the highest standards of efficiency, competence, and integrity shall be the paramount consideration in the employment of the staff, with due regard to the principle of equitable geographical distribution, in accordance with Article 101 of the Charter;

(d) Welcome the Secretary-General's efforts to ensure ethical conduct, more extensive financial disclosure for United Nations officials and enhanced protection for those who reveal wrongdoing within the Organization. We urge the Secretary-General to scrupulously apply the existing standards of conduct and develop a system-wide code of ethics for all United Nations personnel. In this regard, we request the Secretary-General to submit details on an ethics office with independent status, which he intends to create, to the General Assembly at its sixtieth session;

(e) Pledge to provide the United Nations with adequate resources, on a timely basis, to enable the Organization to implement its mandates and achieve its objectives, having regard to the priorities agreed by the General Assembly and the need to respect budget discipline. We stress that all Member States should meet their obligations with regard to the expenses of the Organization;

(f) Strongly urge the Secretary-General to make the best and most efficient use of resources in accordance with clear rules and procedures agreed by the General Assembly, in the interest of all Member States, by adopting the best management practices, including effective use of information and communication technologies, with a view to increasing efficiency and enhancing organizational capacity, concentrating on those tasks that reflect the agreed priorities of the Organization.

162. We reaffirm the role of the Secretary-General as the chief administrative officer of the Organization, in accordance with Article 97 of the Charter. We request the Secretary-General to make proposals to the General Assembly for its consideration on the conditions and measures necessary for him to carry out his managerial responsibilities effectively.

163. We commend the Secretary-General's previous and ongoing efforts to enhance the effective management of the United Nations and his commitment to update the Organization. Bearing in mind our responsibility as Member States, we emphasize the need to decide on additional reforms in order to make more efficient use of the financial and human resources available to the Organization and thus better comply with its principles, objectives and mandates. We call on the Secretary-General to submit proposals for implementing management reforms to the General Assembly for consideration and decision in the first quarter of 2006, which will include the following elements:

(a) We will ensure that the United Nations budgetary, financial and human resource policies, regulations and rules respond to the current needs of the Organization and enable the efficient and effective conduct of its work, and request the Secretary-General to provide an assessment and recommendations to the General Assembly for decision during the first quarter of 2006. The assessment and recommendations of the Secretary-General should take account of the measures already under way for the reform of human resources management and the budget process;

(b) We resolve to strengthen and update the programme of work of the United Nations so that it responds to the contemporary requirements of Member States. To this end, the General Assembly and other relevant organs will review all mandates older than five years originating from resolutions of the General Assembly and other organs, which would be complementary to the existing periodic reviews of activities. The General Assembly and the other organs should complete and take the necessary decisions arising from this review during 2006. We request the Secretary-General to facilitate this review with analysis and recommendations, including on the opportunities for programmatic shifts that could be considered for early General Assembly consideration;

(c) A detailed proposal on the framework for a one-time staff buyout to improve personnel structure and quality, including an indication of costs involved and mechanisms to ensure that it achieves its intended purpose.

164. We recognize the urgent need to substantially improve the United Nations oversight and management processes. We emphasize the importance of ensuring the operational independence of the Office of Internal Oversight Services. Therefore:

(a) The expertise, capacity and resources of the Office of Internal Oversight Services in respect of audit and investigations will be significantly strengthened as a matter of urgency;

(b) We request the Secretary-General to submit an independent external evaluation of the auditing and oversight system of the United Nations, including the specialized agencies, including the roles and responsibilities of management, with due regard to the nature of the auditing and oversight bodies in question. This evaluation will take place within the context of the comprehensive review of the governance arrangements. We ask the General Assembly to adopt measures during its sixtieth session at the earliest possible stage, based on the consideration of recommendations of the evaluation and those made by the Secretary-General;

(c) We recognize that additional measures are needed to enhance the independence of the oversight structures. We therefore request the Secretary-General to submit detailed proposals to the General Assembly at its sixtieth session for its early consideration on the creation of an independent oversight advisory committee, including its mandate, composition, selection process and qualification of experts;

(d) We authorize the Office of Internal Oversight Services to examine the feasibility of expanding its services to provide internal oversight to United Nations agencies that request such services in such a way as to ensure that the provision of internal oversight services to the Secretariat will not be compromised.

165. We insist on the highest standards of behaviour from all United Nations personnel and support the considerable efforts under way with respect to the implementation of the Secretary-General's policy of zero tolerance regarding sexual exploitation and abuse by United Nations personnel, both at Headquarters and in the field. We encourage the Secretary-General to submit proposals to the General Assembly leading to a comprehensive approach to victims' assistance by 31 December 2005.

166. We encourage the Secretary-General and all decision-making bodies to take further steps in mainstreaming a gender perspective in the policies and decisions of the Organization.

167. We strongly condemn all attacks against the safety and security of personnel engaged in United Nations activities. We call upon States to consider becoming parties to the Convention on the Safety of United Nations and Associated Personnel⁴² and stress the need to conclude negotiations on a protocol expanding the scope of legal protection during the sixtieth session of the General Assembly.

System-wide coherence

168. We recognize that the United Nations brings together a unique wealth of expertise and resources on global issues. We commend the extensive experience and expertise of the various development-related organizations, agencies, funds and programmes of the United Nations system in their diverse and complementary fields of activity and their important contributions to the achievement of the Millennium Development Goals and the other development objectives established by various United Nations conferences.

169. We support stronger system-wide coherence by implementing the following measures:

Policy

- Strengthening linkages between the normative work of the United Nations system and its operational activities
- Coordinating our representation on the governing boards of the various development and humanitarian agencies so as to ensure that they pursue a coherent policy in assigning mandates and allocating resources throughout the system
- Ensuring that the main horizontal policy themes, such as sustainable development, human rights and gender, are taken into account in decision-making throughout the United Nations

Operational activities

- Implementing current reforms aimed at a more effective, efficient, coherent, coordinated and better-performing United Nations country presence with a strengthened role for the senior resident official, whether special representative, resident coordinator or humanitarian coordinator, including appropriate authority, resources and accountability, and a common management, programming and monitoring framework
- Inviting the Secretary-General to launch work to further strengthen the management and coordination of United Nations operational activities so that they can make an even more effective contribution to the achievement of the internationally agreed development goals, including the Millennium Development Goals, including proposals for consideration by Member States for more tightly managed entities in the fields of development, humanitarian assistance and the environment

⁴² United Nations, *Treaty Series*, vol. 2051, No. 35457.

Humanitarian assistance

- Upholding and respecting the humanitarian principles of humanity, neutrality, impartiality and independence and ensuring that humanitarian actors have safe and unhindered access to populations in need in conformity with the relevant provisions of international law and national laws
- Supporting the efforts of countries, in particular developing countries, to strengthen their capacities at all levels in order to prepare for and respond rapidly to natural disasters and mitigate their impact
- Strengthening the effectiveness of the United Nations humanitarian response, *inter alia*, by improving the timeliness and predictability of humanitarian funding, in part by improving the Central Emergency Revolving Fund
- Further developing and improving, as required, mechanisms for the use of emergency standby capacities, under the auspices of the United Nations, for a timely response to humanitarian emergencies

Environmental activities

- Recognizing the need for more efficient environmental activities in the United Nations system, with enhanced coordination, improved policy advice and guidance, strengthened scientific knowledge, assessment and cooperation, better treaty compliance, while respecting the legal autonomy of the treaties, and better integration of environmental activities in the broader sustainable development framework at the operational level, including through capacity-building, we agree to explore the possibility of a more coherent institutional framework to address this need, including a more integrated structure, building on existing institutions and internationally agreed instruments, as well as the treaty bodies and the specialized agencies

Regional organizations

170. We support a stronger relationship between the United Nations and regional and subregional organizations, pursuant to Chapter VIII of the Charter, and therefore resolve:

- (a) To expand consultation and cooperation between the United Nations and regional and subregional organizations through formalized agreements between the respective secretariats and, as appropriate, involvement of regional organizations in the work of the Security Council;
- (b) To ensure that regional organizations that have a capacity for the prevention of armed conflict or peacekeeping consider the option of placing such capacity in the framework of the United Nations Standby Arrangements System;
- (c) To strengthen cooperation in the economic, social and cultural fields.

Cooperation between the United Nations and parliaments

171. We call for strengthened cooperation between the United Nations and national and regional parliaments, in particular through the Inter-Parliamentary Union, with a view to furthering all aspects of the Millennium Declaration in all fields of the work of the United Nations and ensuring the effective implementation of United Nations reform.

Participation of local authorities, the private sector and civil society, including non-governmental organizations

172. We welcome the positive contributions of the private sector and civil society, including non-governmental organizations, in the promotion and implementation of development and human rights programmes and stress the importance of their continued engagement with Governments, the United Nations and other international organizations in these key areas.

173. We welcome the dialogue between those organizations and Member States, as reflected in the first informal interactive hearings of the General Assembly with representatives of non-governmental organizations, civil society and the private sector.

174. We underline the important role of local authorities in contributing to the achievement of the internationally agreed development goals, including the Millennium Development Goals.

175. We encourage responsible business practices, such as those promoted by the Global Compact.

Charter of the United Nations

176. Considering that the Trusteeship Council no longer meets and has no remaining functions, we should delete Chapter XIII of the Charter and references to the Council in Chapter XII.

177. Taking into account General Assembly resolution 50/52 of 11 December 1995 and recalling the related discussions conducted in the General Assembly, bearing in mind the profound cause for the founding of the United Nations and looking to our common future, we resolve to delete references to "enemy States" in Articles 53, 77 and 107 of the Charter.

178. We request the Security Council to consider the composition, mandate and working methods of the Military Staff Committee.

*8th plenary meeting
16 September 2005*