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RULES OF INTERNATIONAL LAW GOVERNING
THE USE OF FORCE
JUDGE ABDULQAWI YUSUF

Codification Division of the United Nations Office of Legal Affairs

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Jurisprudence

1. *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949, pp. 4-169 16

Recommended Readings and Lectures (Documents not reproduced in electronic version)

4. *Thomas Franck, Recourse to Force: State Action against Threats and Armed Attacks,


* Sources marked with asterisk (*) are particularly recommended.
Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex)
to facilitating recourse to it for the judicial settlement of disputes, *inter alia* by simplifying the procedure, reducing the likelihood of undue delays and costs and allowing for greater influence of parties on the composition of *ad hoc* chambers,

Recalling the increasing development and codification of international law in conventions open for universal participation and the consequent need for their uniform interpretation and application,

Recognizing that the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice,

Recalling further the opportunities afforded by the power of the International Court of Justice, under Article 38, paragraph 2, of its Statute, to decide a case *ex aequo et bono* if the parties agree thereto,

1. Recognizes the desirability that States study the possibility of accepting, with as few reservations as possible, the compulsory jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute;

2. Draws the attention of States to the advantage of inserting in treaties, in cases considered possible and 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;

3. Calls upon States to keep under review the possibility of identifying cases in which use can be made of the International Court of Justice;

4. Draws the attention of States to the possibility of making use of chambers as provided in Articles 26 and 29 of the Statute of the International Court of Justice and in the Rules of Court, including those which would deal with particular categories of cases;

5. Recommends that United Nations organs and the specialized agencies should, from time to time, review legal questions within the competence of the International Court of Justice that have arisen or will arise during their activities and should study the advisability of referring them to the Court for an advisory opinion, provided that they are duly authorized to do so;

6. Reaffirms that recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States.

2280th plenary meeting
12 November 1974

3247 (XXIX). Participation in the United Nations Conference on the Representation of States in Their Relations with International Organizations

The General Assembly,

Recalling that by its resolution 3072 (XXVIII) of 30 November 1973 it decided that the United Nations Conference on the Representation of States in Their Relations with International Organizations would be held early in 1975 at Vienna,

1. Decides to invite all States to participate in the United Nations Conference on the Representation of States in Their Relations with International Organizations and requests the Secretary-General to take all necessary steps to give effect to resolution 3072 (XXVIII) and the present resolution;

2. Decides to invite also the national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States in their respective regions to participate in the Conference as observers, in accordance with the practice of the United Nations.

2303rd plenary meeting
29 November 1974

3314 (XXIX). Definition of Aggression

The General Assembly,

Having considered the report of the Special Committee on the Question of Defining Aggression, established pursuant to its resolution 2330 (XXII) of 18 December 1967, covering the work of its seventh session held from 11 March to 12 April 1974, including the draft Definition of Aggression adopted by the Special Committee by consensus and recommended for adoption by the General Assembly,

Deeply convinced that the adoption of the Definition of Aggression would contribute to the strengthening of international peace and security,

1. Approves the Definition of Aggression, the text of which is annexed to the present resolution;

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2. Expresses its appreciation to the Special Committee on the Question of Defining Aggression for its work which resulted in the elaboration of the Definition of Aggression;

3. Calls upon all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations 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;

4. Calls the attention of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression.

2319th plenary meeting
14 December 1974

ANNEX
Definition of Aggression

The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and 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,

Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, 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,

Recalling also the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice,

Bearing in mind that nothing in this Declaration shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,

Considering also that, since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage,

Reaffirming the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity,

Reaffirming also that the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof,

Reaffirming also the provisions 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,

Convinced that the adoption of a definition of aggression ought to have the effect of determining a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,

Believing that, although the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic principles as guidance for such determination,

Adopts the following Definition of Aggression:

Article 1

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Explanatory note: In this Definition the term “State”:
(a) is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;
(b) includes the concept of a “group of States” where appropriate.

Article 2

The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

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8 Explanatory notes on articles 3 and 5 are to be found in paragraph 20 of the report of the Special Committee on the Question of Defining Aggression (Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr.1)). Statements on the Definition are contained in paragraphs 9 and 10 of the report of the Sixth Committee (A/9890).

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7 Resolution 2625 (XXV), annex.
2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Article 6

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Article 7

Nothing in this Definition, and in particular article 3, 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 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.

Article 8

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

3315 (XXIX). Report of the International Law Commission

The General Assembly,

Having considered the report of the International Law Commission on the work of its twenty-sixth session,\(^9\)

Emphasizing the need for the progressive development of international law and its codification 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 in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,\(^11\) and to give increased importance to its role in relations among States,

Noting with appreciation that, at its twenty-sixth session, the International Law Commission, in the light of comments received from Member States, completed the second reading of the draft articles on succession of States in respect of treaties, as recommended by the General Assembly in resolution 3071 (XXVIII) of 30 November 1973,

Taking note of the draft articles prepared at the same session by the International Law Commission on State responsibility and on treaties concluded between States and international organizations or between international organizations,

Welcoming the fact that the International Law Commission commenced its work on the law of non-navigational uses of international watercourses by adopting the required preliminary measures,

 Bearing in mind that the outstanding achievements of the International Law Commission during its twenty-six sessions in the field of the progressive development of international law and its codification, in accordance with the aims of Article 13, subparagraph 1 (a) of the Charter, contribute to the fostering of friendly relations among nations,

I

1. Takes note of the report of the International Law Commission on the work of its twenty-sixth session;
2. Expresses its appreciation to the International Law Commission for the work it accomplished at that session;
3. Approves the programme of work planned by the International Law Commission for 1975;
4. Recommends that the International Law Commission should:
   (a) Continue on a high priority basis at its twenty-seventh session its work on State responsibility, taking into account General Assembly resolutions 1765 (XVII) of 20 November 1962, 1902 (XVIII) of 18 November 1963, 2400 (XXIII) of 11 December 1968, 2926 (XXVII) of 28 November 1972 and 3071 (XXVIII) of 30 November 1973, with a view to the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts at the earliest possible time and to take up, as soon as appropriate, the separate topic of international liability for injurious consequences arising out of acts not prohibited by international law;
   (b) Proceed with the preparation, on a priority basis, of draft articles on succession of States in respect of matters other than treaties;
   (c) Proceed with the preparation of draft articles on the most-favoured-nation clause;
   (d) Proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations;
   (e) Continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the International Law Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the Commission's report;
5. Approves, in the light of the importance of its existing work programme, a twelve-week period for the annual sessions of the International Law Commission, subject to review by the General Assembly whenever necessary;
6. Recognizes the efficacy of the methods and conditions of work by which the International Law Commission has carried out its tasks and expresses confidence that the Commission will continue to adopt methods of work well suited to the realization of the tasks entrusted to it;
7. Expresses its appreciation to the Secretary-General for having completed the supplementary report on the legal problems relating to the non-navigational uses of international watercourses,\(^12\) requested by the General Assembly in resolution 2669 (XXV);
8. Expresses the wish that, in conjunction with future sessions of the International Law Commission, further seminars might be organized, which should continue to

\(^9\) See also p. 149, item 87.
\(^11\) Resolution 2625 (XXV), annex.
\(^12\) A/9732 (vols. I and II).
Definition of Aggression
(Resolution RC/Res.6 adopted by the Assembly of States Parties, International Criminal Court, Kampala, 11 June 2010, annex)
Resolution RC/Res.6

Adopted at the 13th plenary meeting, on 11 June 2010, by consensus

RC/Res.6

The crime of aggression

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and expressing its appreciation to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

Resolved to activate the Court’s jurisdiction over the crime of aggression as early as possible,

1. Decides to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and notes that any State Party may lodge a declaration referred to in article 15bis prior to ratification or acceptance;

2. Also decides to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;

3. Also decides to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in annex III of the present resolution;

4. Further decides to review the amendments on the crime of aggression seven years after the beginning of the Court’s exercise of jurisdiction;

5. Calls upon all States Parties to ratify or accept the amendments contained in annex I.

Annex I

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

1. Article 5, paragraph 2, of the Statute is deleted.

2. The following text is inserted after article 8 of the Statute:

Article 8bis

Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

3. The following text is inserted after article 15 of the Statute:

Article 15 bis
Exercise of jurisdiction over the crime of aggression
(State referral, proprio motu)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. The following text is inserted after article 15 bis of the Statute:

Article 15 ter
Exercise of jurisdiction over the crime of aggression
(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

5. The following text is inserted after article 25, paragraph 3, of the Statute:

3 bis. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

6. The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:

Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis.

7. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph: the rest of the paragraph remains unchanged:

No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
Annex II

Amendments to the Elements of Crimes

Article 8 bis
Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 bis, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person1 in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

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1 With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Annex III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 ter, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.
2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard.

Jurisdiction ratione temporis

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 bis, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

Other understandings

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.
7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.
Corfu Channel case, Judgment of April 9th, 1949:
I.C.J. Reports 1949
INTERNATIONAL COURT OF JUSTICE

YEAR 1949.

April 9th, 1949.

THE CORFU CHANNEL CASE
(MERITS)

International responsibility for explosion of mines in territorial waters.—Concurrence with another State: evidence.—Minelaying by persons unknown.—Knowledge of minelaying by State party to proceedings: control of territory as ground for responsibility; its influence on the choice of means of proof; indirect evidence, concordant inferences of fact.—Breach of obligations resulting from knowledge of minelaying, grounds for responsibility.—Court’s jurisdiction to assess amount of compensation; interpretation of Special Agreement; subsequent attitude of Parties.

Right of passage of warships in time of peace through straits connecting two parts of the high seas.—International custom.—Straits in which right of passage exists.—North Corfu Channel.—Innocent passage: purpose of passage and manner of its execution.—Production of documents at Court’s request; refusal to produce: Article 49 of Statute of Court and Article 54 of Rules.—Minesweeping undertaken in territorial waters contrary to wish of territorial State: justification derived from theory of intervention and notion of self-help.—Violation of territorial sovereignty: international responsibility: satisfaction in form of a declaration by the Court of violation of right.

JUDGMENT

Present: Acting President Guerrero; President Basdevant; Judges Alvarez, Fabia, Hackworth, Winiarski, Zoricic, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo; M. Eeर, Judge ad hoc.

In the Corfu Channel case,

between

the Government of the United Kingdom of Great Britain and Northern Ireland, represented by:

Sir Eric Beckett, K.C.M.G., K.C., Legal Adviser to the Foreign Office, as Agent and Counsel, assisted by

The Right Honourable Sir Hartley Shawcross, K.C., M.P., Attorney-General, replaced on November 15th, 1948, by

Sir Frank Soskice, K.C., M.P., Solicitor-General;

Mr. C. H. M. Waldock, Professor of international law in the University of Oxford,

Mr. R. O. Wilberforce,

Mr. J. Mervyn Jones, and

Mr. M. E. Reed (of the Attorney-General’s Office), members of the English Bar, as Counsel,

and

the Government of the People’s Republic of Albania, represented by:

M. Kahreman Ylli, Envoy Extraordinary and Minister Plenipotentiary of Albania in Paris, as Agent, replaced on February 14th, 1949, by

M. Behar Shtylla, Envoy Extraordinary and Minister Plenipotentiary of Albania in Paris, assisted by

M. Pierre Cot, Professeur agrégé of the Faculties of Law of France, and

Maitre Joe Nordmann, of the Paris Bar, as Counsel; and

Maitre Marc Jacquier, of the Paris Bar, and

Maitre Paul Villard, of the Paris Bar, as Advocates.

The Court,
composing as above,
delivers the following judgment:

on the Preliminary Objection filed on December 9th, 1947, by the latter Government. The Court rejected the Objection and decided that proceedings on the merits should continue, and fixed the time-limits for the filing of subsequent pleadings as follows: for the Counter-Memorial of Albania: June 15th, 1948; for the Reply of the United Kingdom: August 2nd, 1948; for the Rejoinder of Albania: September 20th, 1948.

Immediately after the delivery of the judgment, the Court was notified by the Agents of the Parties of a Special Agreement, which is as follows:

"The Government of the People's Republic of Albania, represented by their Agent Mr. Kahreman Yli, Envoy Extraordinary and Minister Plenipotentiary of Albania at Paris; and

the Government of the United Kingdom of Great Britain and Northern Ireland, represented by their Agent, Mr. W. E. Beckett, C.M.G., K.C., Legal Adviser to the Foreign Office;

Have accepted the present Special Agreement, which has been drawn up as a result of the Resolution of the Security Council of the 9th April, 1947, for the purpose of submitting to the International Court of Justice for decision the following questions:

(1) Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?

(2) Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and is there any duty to give satisfaction?

The Parties agree that the present Special Agreement shall be notified to the International Court of Justice immediately after the delivery on the 25th March of its judgment on the question of jurisdiction.

The Parties request the Court, having regard to the present Special Agreement, to make such orders with regard to procedure, in conformity with the Statute and the Rules of the Court, as the Court may deem fit, after having consulted the Agents of the Parties.

In witness whereof the above-mentioned Agents, being duly authorized by their Governments to this effect, have signed the present Special Agreement.

Done this 25th day of March, 1948, at midday, at The Hague, in English and French, both texts being equally authentic, in a single copy which shall be deposited with the International Court of Justice."

On March 26th, 1948 (I.C.J. Reports 1947-1948, p. 53), the Court made an Order in which it placed on record that the Special Agreement now formed the basis of further proceedings before the Court, and stated the questions submitted to it for decision. The Court noted that the United Kingdom Government on October 1st, 1947, that is within the time-limit fixed by the Court, had filed a Memorial with statements and submissions relating to the incident that occurred on October 22nd 1946. It further noted that the Agents, having been consulted, declared that they agreed in requesting that the order and time-limits for the filing of the subsequent pleadings as fixed by the Judgment of March 25th, 1948, be maintained. The Court confirmed this order and these time-limits.

The Counter-Memorial, Reply and Rejoinder were filed within these limits. The case was thus ready for hearing on September 20th, 1948, and the commencement of the oral proceedings was then fixed for November 5th, 1948.

As the Court did not include upon the Bench a judge of Albanian nationality, the Albanian Government availed itself during the proceedings on the Preliminary Objection of the right provided by Article 37, paragraph 2, of the Statute, and chose M. Igor Daxner, Doctor of Law, President of a Chamber of the Supreme Court of Czechoslovakia, as Judge ad hoc. On October 28th, 1948, the Registrar was informed that Judge Daxner was prevented by reasons of health from sitting on the date fixed. The Court decided on November 2nd, 1948, to fix a time-limit expiring on November 7th, within which the Albanian Government might notify the name of the person whom it wished to choose as Judge ad hoc in place of Dr. Daxner, and to postpone the opening of the hearing until November 9th. Within the time fixed the Albanian Government designated M. Bohuslav Eber, Doctor of Law and Professor in the Faculty of Law at Vršovice and delegate of the Czechoslovak Government to the International Military Tribunal at Nuremberg.

Public sittings were held by the Court on the following dates: November, 1948, 9th to 12th, 15th to 19th, 22nd to 26th, 28th and 29th; December, 1948, 1st to 4th, 6th to 11th, 13th, 14th and 17th; January, 1949, 17th to 22nd. In the course of the sittings from November 9th to 19th, 1948, and from January 17th to 22nd, 1949, the Court heard arguments by Sir Hartley Shawcross, K.C., Counsel, Sir Eric Beckett, K.C., Agent and Counsel, and Sir Frank Soskice, K.C., Counsel, on behalf of the United Kingdom; and by M. Kahreman Yli, Agent, and MM. J. Nordmann and Pierre Cot, Counsel, on behalf of Albania. In the course of the sittings from November 22nd to December 14th, 1948, the Court heard the evidence of the witnesses and experts called by each of the Parties in reply to questions put to them in examination and cross-examination on behalf of the Parties, and by the President on behalf of the Court or by a Member of the Court. The following persons gave evidence:
THE CORFU CHANNEL CASE (MERITS)

Called by the United Kingdom:

Commander E. R. D. Sworder, O.B.E., D.S.C., Royal Naval Volunteer Reserve, as witness and expert;

Karel Kovacic, former Lieutenant-Commander in the Yugoslav Navy, as witness;

Captain W. H. Selby, D.S.C., Royal Navy, as witness;

Commander R. T. Paul, C.B.E., Royal Navy, as witness;

Lieutenant-Commander P. K. Lankester, Royal Navy, as witness and expert;

Commander R. Mestre, French Navy, as witness;

Commander Q. P. Whitford, O.B.E., Royal Navy, as witness and expert;

Called by Albania:

Captain Ali Shitno, Albanian Army, as witness;

First Captain Aqile Polena, Albanian Army, as witness;

Xhavit Muço, former Vice-President of the Executive Committee of Saranda, as witness;

Captain B. I. Ormanov, Bulgarian Navy, as expert;

Rear-Admiral Raymond Moulec, French Navy, as expert.

Documents, including maps, photographs and sketches, were filed by both Parties, and on one occasion by the Parties jointly, both as annexes to the pleadings, and after the close of the written proceedings. On one occasion during the sittings when a photostat of an extract from a document was submitted, the Court, on November 24th, 1948, made a decision in which it reminded both Parties of the provisions of Article 48 and Article 43, paragraph 1, of the Rules of Court; held that the document in question could be received only if it were presented in an original and complete form; ordered that all documents which the Parties intended to use should previously be filed in the Registry; and reserved the right to inform the Parties later which of these documents should be presented in an original, and which in certified true copy, form.

Another decision as to the production of a series of new documents was given by the Court on December 10th, 1948. This decision noted that the Parties were agreed as to the production of certain of these documents and that certain others were withdrawn; authorized the production of certain other documents; lastly, in the case of one of these documents, the examination of which had been subjected to certain conditions, the Court's decision placed on record the consent of the other Party to its production and, in view of that consent, permitted its production, having regard to the special circumstances; but the Court expressly stated that this permission could not form a precedent for the future.1

By an Order of December 17th, 1948, the Court, having regard to the fact that certain points had been contested between the Parties which made it necessary to obtain an expert opinion, defined these points, and entrusted the duty of giving the expert opinion to a Committee composed of Commodore J. Bull of the Royal Norwegian Navy, Commodore S. A. Forshell of the Royal Swedish Navy, and Lieutenant-Commander S. J. W. Elfferich of the Royal Netherlands Navy. These Experts elected Commodore Bull as their chairman, and filed their Report on January 8th, 1949, within the prescribed time-limit. By a decision read at a public sitting on January 17th, the Court requested the Experts to proceed to Sibenik in Yugoslavia and Saranda in Albania and to make on the land and in the waters adjacent to these places any investigations and experiments that they might consider useful with a view to verifying, completing, and, if necessary, modifying the answers given in their report of January 8th. The Experts' second report—in which Commodore Bull did not join, having been unable to make the journey for reasons of health—was filed on February 8th, 1949. On February 10th, three members of the Court put questions to the Experts, to which the Experts replied on February 12th.

At sittings held from January 17th to 22nd, 1949, the representatives of the Parties had an opportunity of commenting orally on the Experts' report of January 8th. They also filed written observations2 concerning the further statements contained in the Report of February 8th and the replies of February 12th, as provided in the Court's decision of January 17th.

The Parties' submissions, as formulated by their Agents or Counsel at the end of the hearings on the 18th, 19th, 21st and 22nd January, 1949, are as follows:

Question (1) of the Special Agreement.

On behalf of the United Kingdom:

1 The Government of the United Kingdom asks the Court in this case to adjudge and declare as follows:

2 The list of documents in support produced by the Parties and accepted by the Court will be found in Annex 1 to this Judgment.

3 See Annex 2 for the Experts' Report of January 8th, the Court's decision of January 17th, the Experts' second Report of February 8th, the questions put by three members of the Court, and the Experts' replies of February 12th.
(1) That, on October 22nd, 1946, damage was caused to His Majesty's ships Saumarez and Volage, which resulted in the death and injuries of 44, and personal injuries to 42, British officers and men by a minefield of anchored automatic mines in the international highway of the Corfu Strait in an area south-west of the Bay of Saranda;

(2) That the aforesaid minefield was laid between May 15th and October 22nd, 1946, by or with the connivance or knowledge of the Albanian Government;

(3) That (alternatively to 2) the Albanian Government knew that the said minefield was lying in a part of its territorial waters;

(4) That the Albanian Government did not notify the existence of these mines as required by the Hague Convention VIII of 1907 in accordance with the general principles of international law and humanity;

(5) That in addition, and as an aggravation of the conduct of Albania as set forth in Conclusions (3) and (4), the Albanian Government, or its agents, knowing that His Majesty's ships were going to make the passage through the North Corfu swept channel, and being in a position to observe their approach, and having omitted, as alleged in paragraph 4 of these conclusions, to notify the existence of the said mines, failed to warn His Majesty's ships of the danger of the said mines of which the Albanian Government or its agents were well aware;

(6) That in addition, and as a further aggravation of the conduct of Albania as set forth in Conclusions (3), (4), and (5), the permission of the existence without notification of the minefield in the North Corfu Channel, being an international highway, was a violation of the right of innocent passage which exists in favour of foreign vessels (whether warships or merchant ships) through such an international highway;

(7) That the passage of His Majesty's ships through the North Corfu Channel on October 22nd, 1946, was an exercise of the right of innocent passage, according to the law and practice of civilized nations;

(8) That even if, for any reason, it is held that conclusion (7) is not established, nevertheless, the Albanian Government is not thereby relieved of its international responsibility for the damage caused to the ships by reason of the existence of an unnotified minefield of which it had knowledge;

(9) That in the circumstances set forth in the Memorial as summarized in the preceding paragraphs of these Conclusions, the Albanian Government has committed a breach of its obligations under international law, and is internationally responsible to His Majesty's Government in the United Kingdom for the deaths, injuries and damage caused to His Majesty's ships and personnel, as set out more particularly in paragraph 18 of the Memorial and the Annexes thereto;

(10) That the Albanian Government is under an obligation to the Government of the United Kingdom to make reparation in respect of the breach of its international obligations as aforesaid;

(11) That His Majesty's Government in the United Kingdom has, as a result of the breach by the Albanian Government of its obligations under international law, sustained the following damage:

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Damage to H.M.S. Saumarez</td>
<td>£750,000</td>
</tr>
<tr>
<td>Damage to H.M.S. Volage</td>
<td>75,000</td>
</tr>
<tr>
<td>Compensation for the pensions and other expenses incurred by the Government of the United Kingdom in respect of the deaths and injuries of naval personnel</td>
<td>50,000</td>
</tr>
</tbody>
</table>

On behalf of the Albanian Government:

[Translation]

"(1) Under the terms of the Special Agreement of March 25th, 1948, the following question has been submitted to the International Court of Justice:

'Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?'

The Court would not have jurisdiction, in virtue of this Special Agreement, to decide, if the case arose, on the claim for the assessment of the compensation set out in the submissions of the United Kingdom Government.

(2) It has not been proved that the mines which caused the accidents of October 22nd, 1946, were laid by Albania.

(3) It has not been proved that these mines were laid by a third Power on behalf of Albania.

(4) It has not been proved that these mines were laid with the help or acquiescence of Albania.

(5) It has not been proved that Albania knew, before the incidents of October 22nd, 1946, that these mines were in her territorial waters.

(6) Consequently, Albania cannot be declared responsible, under international law, for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life which resulted from them. Albania owes no compensation to the United Kingdom Government."

Question (2) of the Special Agreement,

On behalf of the Albanian Government:

[Translation]

"(1) Under the terms of the Special Agreement concluded on March 25th, 1948, the International Court of Justice has before it the following question:
THE CORFU CHANNEL CASE (MERITS)

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"Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946, and is there any duty to give satisfaction?"

(2) The coastal State is entitled, in exceptional circumstances, to regulate the passage of foreign warships through its territorial waters.

(3) This rule is applicable to the North Corfu Channel.

(4) In October and November, 1946, there existed, in this area, exceptional circumstances which gave the Albanian Government the right to require that foreign warships should obtain previous authorization before passing through its territorial waters.

(5) The passage of several British warships through Albanian territorial waters on October 22nd, 1946, without previous authorization, constituted a breach of international law.

(6) In any case that passage was not of an innocent character.

(7) The British naval authorities were not entitled to proceed, on November 12th and 13th, 1946, to sweep mines in Albanian territorial waters without the previous consent of the Albanian authorities.

(8) The Court should find that, on both these occasions, the Government of the United Kingdom of Great Britain and Northern Ireland committed a breach of the rules of international law and that the Albanian Government has a right to demand that it should give satisfaction therefor."

On behalf of the United Kingdom Government:

"I ask the Court to decide that on neither head of the counter-claim has Albania made out her case, and that there is no ground for the Court to award nominal damages of one farthing or one franc."

* * *

By the first part of the Special Agreement, the following question is submitted to the Court:

"(1) Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?"

On October 22nd, 1946, a squadron of British warships, the cruisers Mauritius and Leander and the destroyers Saumarez and Volage, left the port of Corfu and proceeded northward through a channel previously swept for mines in the North Corfu Strait. The cruiser Mauritius was leading, followed by the destroyer Saumarez; at a certain distance thereafter came the cruiser Leander followed by the destroyer Volage. Outside the Bay of Saranda, Saumarez struck a mine and was heavily damaged. Volage was ordered to give her assistance and to take her in tow. Whilst towing the damaged ship, Volage struck a mine and was much damaged. Nevertheless, she succeeded in towing the other ship back to Corfu.

Three weeks later, on November 13th, the North Corfu Channel was swept by British minesweepers and twenty-two moored mines were cut. Two mines were taken to Malta for expert examination. During the minesweeping operation it was thought that the mines were of the German GR type, but it was subsequently established that they were of the German GY type.

The Court will consider first whether the two explosions that occurred on October 22nd, 1946, were caused by mines belonging to the minefield discovered on November 13th.

It was pointed out on behalf of the United Kingdom Government that this minefield had been recently laid. This was disputed in the Albanian pleadings but was no longer disputed during the hearing. One of the Albanian Counsel expressly recognized that the minefield had been recently laid, and the other Counsel subsequently made a similar declaration. It was further asserted on behalf of the Albanian Government that the minefield must have been laid after October 22nd; this would make it impossible at the same time to maintain that the minefield was old. The documents produced by the United Kingdom Government and the statements made by the Court's Experts and based on these documents show that the minefield had been recently laid. This is now established.

The United Kingdom Government contended that the mines which struck the two ships on October 22nd were part of this minefield.

This was contested by the Albanian Government, which argued that these mines may have been floating mines, coming from old minefields in the vicinity, or magnetic ground mines, magnetic moored mines, or German GR mines. It was also contested by them that the explosions occurred in the previously swept channel at the place where the minefield was discovered. The Albanian Government also contended that the minefield was laid after October 22nd, between that date and the minesweeping operation on 12-13th November.

On the evidence produced, the Court finds that the following facts are established:

In October, 1944, the North Corfu Channel was swept by the British Navy and no mines were found in the channel thus swept, whereupon the existence of a safe route through the Channel was announced in November 1944. In January and February,
1945, the Channel was check-swept by the British Navy with negative results. That the British Admiralty must have considered the Channel to be a safe route for navigation is shown by the fact that on May 15th, 1946, it sent two British cruisers and on October 22nd a squadron through the Channel without any special measures of precaution against danger from moored mines. It was in this swept channel that the minefield was discovered on November 13th, 1946.

It is further proved by evidence produced by the United Kingdom Government that the mining of Sauarez and Volage occurred in Albanian territorial waters, just at the place in the swept channel where the minefield was found, as indicated on the chart forming Annex 9 to the United Kingdom Memorial. This is confirmed by the Court's Experts, who consider it to be free from any doubt that the two ships were mined in approximately the position indicated on this chart.

It is established by the evidence of witnesses that the minefield consisted of moored contact mines of the German GY type. It is further shown by the nature of the damage sustained by the two ships, and confirmed by witnesses and experts, that it could not have been caused by floating mines, magnetic ground mines, magnetic moored mines, or German GR mines. The experts of the Court have stated that the nature of the damage excludes the faintest possibility of its cause being a floating mine; nor could it have been caused by a ground mine. They also expressed the view that the damage must have been caused by the explosion of moored contact mines, each having a charge of approximately 600 lbs. of explosives, and that the two ships struck mines of the same type as those which were swept on November 13th, 1946.

The Albanian Government put forward a suggestion that the minefield discovered on November 13th may have been laid after October 22nd, so that the explosions that occurred on this latter date would not have been caused by mines from the field in question. But it brought no evidence in support of this supposition. As it has been established that the explosions could only have been due to moored mines having an explosive charge similar to that contained in GY mines, there would, if the Albanian contention were true, have been at least two mines of this nature in the channel outside the Bay of Saranda, in spite of the sweep in October 1944 and the check-sweeps in January and February 1945; and these mines would have been struck by the two vessels at points fairly close to one another on October 22nd, 1946. Such a supposition is too improbable to be accepted.

The Court consequently finds that the following facts are established. The two ships were mined in Albanian territorial waters in a previously swept and check-swept channel just at the place where a newly laid minefield consisting of moored contact German GY mines was discovered three weeks later. The damage sustained by the ships was inconsistent with damage which could have been caused by floating mines, magnetic ground mines, magnetic moored mines, or German GR mines, but its nature and extent were such as would be caused by mines of the type found in the minefield. In such circumstances the Court arrives at the conclusion that the explosions were due to mines belonging to that minefield.

* * *

Such are the facts upon which the Court must, in order to reply to the first question of the Special Agreement, give judgment as to Albania's responsibility for the explosions on October 22nd, 1946, and for the damage and loss of human life which resulted, and for the compensation, if any, due in respect of such damage and loss.

To begin with, the foundation for Albania's responsibility, as alleged by the United Kingdom, must be considered. On this subject, the main position of the United Kingdom is to be found in its submission No. 2: that the minefield which caused the explosions was laid between May 15th, 1946, and October 22nd, 1946, by or with the connivance or knowledge of the Albanian Government.

The Court considered first the various grounds for responsibility alleged in this submission.

In fact, although the United Kingdom Government never abandoned its contention that Albania herself laid the mines, very little attempt was made by the Government to demonstrate this point. In the written Reply, the United Kingdom Government takes note of the Albanian Government's formal statement that it did not lay the mines, and was not in a position to do so, as Albania possessed no navy; and that, on the whole Albanian littoral, the Albanian authorities only had a few launches and motor boats. In the light of these statements, the Albanian Government was called upon, in the Reply, to disclose the circumstances in which two Yugoslav war vessels, the Mljet and the Meljine, carrying contact mines of the GY type, sailed southward from the port of Sibenik on or about October 15th, and proceeded to the Corfu Channel. The United Kingdom Government, having thus indicated the argument upon
which it was thenceforth to concentrate, stated that it proposed to show that the said warships, with the knowledge and connivance of the Albanian Government, laid mines in the Corfu Channel just before October 22nd, 1946. The facts were presented in the same light and in the same language in the oral reply by Counsel for the United Kingdom Government at the sittings on January 17th and 18th, 1949.

Although the suggestion that the minefield was laid by Albania was repeated in the United Kingdom statement in Court on January 18th, 1949, and in the final submissions read in Court on the same day, this suggestion was in fact hardly put forward at that time except pro memoria, and no evidence in support was furnished.

In these circumstances, the Court need pay no further attention to this matter.

The Court now comes to the second alternative argument of the United Kingdom Government, namely, that the minefield was laid with the connivance of the Albanian Government. According to this argument, the minelaying operation was carried out by two Yugoslav warships at a date prior to October 22nd, but very near that date. This would imply collusion between the Albanian and the Yugoslav Governments, consisting either of a request by the Albanian Government to the Yugoslav Government for assistance, or of acquiescence by the Albanian authorities in the laying of the mines.

In proof of this collusion, the United Kingdom Government relied on the evidence of Lieutenant-Commander Kovacic, as shown in his affidavit of October 4th, 1948, and in his statements in Court at the public sittings on November 24th, 25th, 26th and 27th, 1948. The Court gave much attention to this evidence and to the documentary information supplied by the Parties. It supplemented and checked all this information by sending two experts appointed by it to Sibenik; Commodore S. A. Forshell and Lieutenant-Commander S. J. W. Elfferich.

Without deciding as to the personal sincerity of the witness Kovacic, or the truth of what he said, the Court finds that the facts stated by the witness from his personal knowledge are not sufficient to prove what the United Kingdom Government considered them to prove. His allegations that he saw mines being loaded upon two Yugoslav minelayers at Sibenik and that these two vessels departed from Sibenik about October 18th and returned a few days after the occurrence of the explosions do not suffice to constitute decisive legal proof that the mines were laid by these two vessels in Albanian waters off Saranda. The statements attributed

by the witness Kovacic to third parties, of which the Court has received no personal and direct confirmation, can be regarded only as allegations falling short of conclusive evidence. A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here.

Apart from Kovacic’s evidence, the United Kingdom Government endeavoured to prove collusion between Albania and Yugoslavia by certain presumptions of fact, or circumstantial evidence, such as the possession, at that time, by Yugoslavia, and by no other neighbouring State, of GY mines, and by the bond of close political and military alliance between Albania and Yugoslavia, resulting from the Treaty of friendship and mutual assistance signed by those two States on July 9th, 1946.

The Court considers that, even in so far as these facts are established, they lead to no firm conclusion. It has not been legally established that Yugoslavia possessed any GY mines, and the origin of the mines laid in Albanian territorial waters remains a matter for conjecture. It is clear that the existence of a treaty, such as that of July 9th, 1946, however close may be the bonds uniting its signatories, in no way leads to the conclusion that they participated in a criminal act.

On its side, the Yugoslav Government, although not a party to the proceedings, authorized the Albanian Government to produce certain Yugoslav documents, for the purpose of refuting the United Kingdom contention that the mines had been laid by two ships of the Yugoslav Navy. As the Court was anxious for full light to be thrown on the facts alleged, it did not refuse to receive these documents. But Yugoslavia’s absence from the proceedings meant that these documents could only be admitted as evidence subject to reserves, and the Court finds it unnecessary to express an opinion upon their probative value.

The Court need not dwell on the assertion of one of the Counsel for the Albanian Government that the minefield might have been laid by the Greek Government. It is enough to say that this was a mere conjecture which, as Counsel himself admitted, was based on no proof.

In the light of the information now available to the Court, the authors of the minelaying remain unknown. In any case, the task of the Court, as defined by the Special Agreement, is to decide whether Albania is responsible, under international law, for the explosions which occurred on October 22nd, 1946, and to give judgment as to the compensation, if any.

Finally, the United Kingdom Government put forward the argument that, whoever the authors of the minelaying were, it could not have been done without the Albanian Government’s knowledge.
It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.

On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.

The Court must examine therefore whether it has been established by means of indirect evidence that Albania has knowledge of minelaying in her territorial waters independently of any connivance on her part in this operation. The proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt. The elements of fact on which these inferences can be based may differ from those which are relevant to the question of connivance.

In the present case, two series of facts, which corroborate one another, have to be considered: the first relates to Albania’s attitude before and after the disaster of October 22nd, 1946; the other concerns the feasibility of observing minelaying from the Albanian coast.

I. It is clearly established that the Albanian Government constantly kept a close watch over the waters of the North Corfu Channel, at any rate after May 1946. This vigilance is proved by the declaration of the Albanian Delegate in the Security Council on February 19th, 1947 (Official Records of the Security Council, Second Year, No. 16, p. 328), and especially by the diplomatic notes of the Albanian Government concerning the passage of foreign ships through its territorial waters. This vigilance sometimes went so far as to involve the use of force: for example the gunfire in the direction of the British cruisers Orion and Superb on May 15th, 1946, and the shots fired at the U.N.R.R.A. tug and barges on October 29th, 1946, as established by the affidavit of Enrico Bargellini, which was not seriously contested.

The Albanian Government’s notes are all evidence of its intention to keep a jealous watch on its territorial waters. The note verbale addressed to the United Kingdom on May 21st, 1946, reveals the existence of a “General Order”, in execution of which the Coastal Command gave the order to fire in the direction of the British cruisers. This same note formulates a demand that “permission” shall be given, by the Albanian authorities, for passage through territorial waters. The insistence on “formalities” and “permission” by Albania is repeated in the Albanian note of June 19th.

As the Parties agree that the minefield had been recently laid, it must be concluded that the operation was carried out during the period of close watch by the Albanian authorities in this sector. This conclusion renders the Albanian Government’s assertion of ignorance a priori somewhat improbable.

The Court also noted the reply of Captain Ali Shino to a question put by it; this reply shows that the witness, who had been called on to replace the Coastal Defence Commander for a period of thirteen to fifteen days, immediately before the events of October 22nd, had received the following order: “That the look-out posts must inform me of every movement [in the Corfu Channel], and that no action would be taken on our part.”

The telegrams sent by the Albanian Government on November 13th and November 27th, 1946, to the Secretary-General of the United Nations, at a time when that Government was fully aware of the discovery of the minefield in Albanian territorial waters, are especially significant of the measures taken by the Albanian Government. In the first telegram, that Government raised the strongest protest against the movements and activity of British naval units in its territorial waters on November 12th and 13th, 1946, without even mentioning the existence of a minefield in these waters. In the second, it repeats its accusations against the United Kingdom, without in any way protesting against the laying of this minefield which, if effected without Albania’s consent, constituted a very serious violation of her sovereignty.

Another indication of the Albanian Government’s knowledge consists in the fact that that Government did not notify the
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presence of mines in its waters, at the moment when it must have known this, at the latest after the sweep on November 13th, and further, whereas the Greek Government immediately appointed a Commission to inquire into the events of October 22nd, the Albanian Government took no decision of such a nature, nor did it proceed to the judicial investigation incumbent, in such a case, on the territorial sovereign.

This attitude does not seem reconcilable with the alleged ignorance of the Albanian authorities that the minefield had been laid in Albanian territorial waters. It could be explained if the Albanian Government, while knowing of the minelaying, desired the circumstances of the operation to remain secret.

2. As regards the possibility of observing minelaying from the Albanian coast, the Court regards the following facts, relating to the technical conditions of a secret minelaying and to the Albanian surveillance, as particularly important.

The Bay of Saranda and the channel used by shipping through the Strait are, from their geographical configuration, easily watched; the entrance of the bay is dominated by heights offering excellent observation points, both over the bay and over the Strait; whilst the channel throughout is close to the Albanian coast. The laying of a minefield in these waters could hardly fail to have been observed by the Albanian coastal defences.

On this subject, it must first be said that the minelaying operation itself must have required a certain time. The method adopted, required, according to the Experts of the Court, the methodical and well thought-out laying of two rows of mines that had clearly a combined offensive and defensive purpose: offensive, to prevent the passage, through the Channel, of vessels drawing ten feet of water or more; defensive, to prevent vessels of the same draught from entering the Bay of Saranda. The report of the Experts reckons the time that the minelayers would have been in the waters, between Cape Kiephali and St. George’s Monastery, at between two and two and a half hours. This is sufficient time to attract the attention of the observation posts, placed, as the Albanian Government stated, at Cape Kiephali and St. George’s Monastery.

The facilities for observation from the coast are confirmed by the two following circumstances: the distance of the nearest mine from the coast was only 500 metres; the minelayers must have passed at not more than about 500 metres from the coast between Denta Point and St. George’s Monastery.

Being anxious to obtain any technical information that might guide it in its search for the truth, the Court submitted the following question to the Experts appointed by it:

"On the assumption that the mines discovered on November 13th, 1946, were laid at some date within the few preceding months, whoever may have laid them, you are requested to examine the information available regarding (a) the number and the nature of the mines, (b) the means for laying them, and (c) the time required to do so, having regard to the different states of the sea, the conditions of the locality, and the different weather conditions, and to ascertain whether it is possible in that way to draw any conclusions, and, if so, what conclusions, in regard to:

(1) the means employed for laying the minefield discovered on November 13th, 1946, and

(2) the possibility of mooring those mines with those means without the Albanian authorities being aware of it, having regard to the extent of the measures of vigilance existing in the Saranda region."

As the first Report submitted by the Experts did not seem entirely conclusive, the Court, by a decision of January 17th, 1949, asked the Experts to go to Saranda and to verify, complete and, if necessary, modify their answers. In this way, observations were made and various experiments carried out on the spot, in the presence of the experts of the Parties and of Albanian officials, with a view to estimating the possibility of the mine-laying having been observed by the Albanian look-out posts. On this subject reference must be made to a test of visibility by night, carried out on the evening of January 28th, 1949, at St. George's Monastery. A motor ship, 27 metres long, and with no bridge, wheel-house, or funnel, and very low on the water, was used. The ship was completely blacked out, and on a moonless night, i.e., under the most favourable conditions for avoiding discovery, it was clearly seen and heard from St. George’s Monastery. The noise of the motor was heard at a distance of 1,800 metres, and the ship itself was sighted at 670 metres and remained visible up to about 1,900 metres.

The Experts’ Report on this visit stated that:

"The Experts consider it to be indisputable that if a normal look-out was kept at Cape Kiephali, Denta Point, and St. George’s Monastery, and if the look-outs were equipped with binoculars as has been stated, under normal weather conditions for this area, the minelaying operations shown in Annex 9 to the United Kingdom Memorial must have been noticed by these coastguards."

The Court cannot fail to give great weight to the opinion of the Experts who examined the locality in a manner giving every guarantee of correct and impartial information. Apart from the existence of a look-out post at Cape Denta, which has not been proved, the Court, basing itself on the declarations of the Albanian Government that look-out posts were stationed at Cape Kiephali and St. George’s Monastery, refers to the following conclusions
in the Experts’ Report: (1) that in the case of mine-laying from the North towards the South, the minelayers would have been seen from Cape Kiephali; (2) in the case of minelaying from the South, the minelayers would have been seen from Cape Kiephali and St. George's Monastery.

From all the facts and observations mentioned above, the Court draws the conclusion that the laying of the minefield which caused the explosions on October 22nd, 1946, could not have been accomplished without the knowledge of the Albanian Government.

The obligations resulting for Albania from this knowledge are not disputed between the Parties. Counsel for the Albanian Government expressly recognized that Albanian had been informed of the operation before the incidents of October 22nd, and in time to warn the British vessels and shipping in general of the existence of mines in the Corfu Channel, her responsibility would be involved...."

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

In fact, Albania neither notified the existence of the minefield, nor warned the British warships of the danger they were approaching.

But Albania’s obligation to notify shipping of the existence of mines in her waters depends on her having obtained knowledge of that fact in sufficient time before October 22nd; and the duty of the Albanian coastal authorities to warn the British ships depends on the time that elapsed between the moment that these ships were reported and the moment of the first explosion.

On this subject, the Court makes the following observations. As has already been stated, the Parties agree that the mines were recently laid. It must be concluded that the minelaying, whatever may have been its exact date, was done at a time when there was a close Albanian surveillance over the warships. It be supposed that it took place at the last possible moment, i.e., in the night of October 21st-22nd, the only conclusion to be drawn would be that a general notification to the shipping of all States before the time of the explosions would have been difficult, perhaps even impossible. But this would certainly not have prevented the Albanian authorities from taking, as they should have done, all necessary steps immediately to warn ships near the danger zone, more especially those that were approaching that zone. When on October 22nd about 13.00 hours the British warships were reported by the look-out post at St. George’s Monastery to the Commander of the Coastal Defences as approaching Cape Long, it was perfectly possible for the Albanian authorities to use the interval of almost two hours that elapsed before the explosion affecting Sanmene (14.53 hours or 14.55 hours) to warn the vessels of the danger into which they were running.

In fact, nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania.

The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom.

In the final submissions contained in its oral reply, the United Kingdom Government asked the Court to give judgment that, as a result of the breach by the Albanian Government of its obligations under international law, it had sustained damages amounting to £875,000.

In the last oral statement submitted in its name, the Albanian Government, for the first time, asserted that the Court would not have jurisdiction, in virtue of the Special Agreement, to assess the amount of compensation. No reason was given in support of this new assertion, and the United Kingdom Agent did not ask leave to reply. The Court’s jurisdiction was not argued between the Parties.

In the first question of the Special Agreement the Court is asked:

(i) Is Albania under international law responsible for the explosions and for the damage and loss of human life which resulted from them, and
(ii) is there any duty to pay compensation?

This text gives rise to certain doubts. If point (i) is answered in the affirmative, it follows from the establishment of respons-
ibility that compensation is due, and it would be superfluous to add point (ii) unless the Parties had something else in mind than a mere declaration by the Court that compensation is due. It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect. In this connexion, the Court refers to the views expressed by the Permanent Court of International Justice with regard to similar questions of interpretation. In Advisory Opinion No. 13 of July 23rd, 1926, that Court said (Series B., No. 13, p. 19): “But, so far as concerns the specific question of competence now pending, it may suffice to observe that the Court, in determining the nature and scope of a measure, must look to its practical effect rather than to the predominant motive that may be conjectured to have inspired it.” In its Order of August 19th, 1929, in the Free Zones case, the Court said (Series A., No. 22, p. 13): “in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects.”

The Court thinks it necessary to refer to the different stages of the procedure. In its Resolution of April 9th, 1947, the Security Council recommended that the two Governments should immediately refer “the dispute” to the Court. This Resolution had without doubt for its aim the final adjustment of the whole dispute. In pursuance of the Resolution, the Government of the United Kingdom filed an Application in which the Court was asked, inter alia, to “determine the reparation or compensation”, and in its Memorial that Government stated the various sums claimed. The Albanian Government thereupon submitted a Preliminary Objection, which was rejected by the Court by its Judgment of March 25th, 1948. Immediately after this judgment was delivered, the Agents of the Parties notified the Court of the conclusion of a Special Agreement. Commenting upon this step taken by the Parties, the Agent of the Albanian Government said that in the circumstances of the present case a special agreement on which “the whole procedure” should be based was essential. He further said [translation]: “As I have stated on several occasions, it has always been the intention of the Albanian Government to respect the decision taken by the Security Council on April 9th, 1947, in virtue of which the present Special Agreement is submitted to the International Court of Justice.”

Neither the Albanian nor the United Kingdom Agent suggested in any way that the Special Agreement had limited the competence of the Court in this matter to a decision merely upon the principle of compensation or that the United Kingdom Government had abandoned an important part of its original claim. The main object both Parties had in mind when they concluded the Special Agreement was to establish a complete equality between them by replacing the original procedure based on a unilateral Application by a procedure based on a Special Agreement. There is no suggestion that this change as to procedure was intended to involve any change with regard to the merits of the British claim as originally presented in the Application and Memorial. Thereby, the Court, after consulting the Parties, in its Order of March 25th, 1948, maintained the United Kingdom’s Memorial, filed previously, “with statements and submissions”. These submissions included the claim for a fixed sum of compensation.

The subsequent attitude of the Parties shows that it was not their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation. In its Reply (paragraph 71) the United Kingdom Government maintained the submissions contained in paragraph 96 of its Memorial, including the claim for a fixed amount of reparation. This claim was expressly repeated in the final United Kingdom submissions. In paragraph 52 of its Counter-Memorial, the Albanian Government stated that it had no knowledge of the loss of human life and damage to ships, but it did not contest the Court’s competence to decide this question. In the Rejoinder, paragraph 96, that Government declared that, owing to its claim for the dismissal of the case, it was unnecessary for it to examine the United Kingdom’s claim for reparation. [Translation:] “It reserves the right if need be, to discuss this point which should obviously form the subject of an expert opinion.” Having regard to what is said above as to the previous attitude of that Government, this statement must be considered as an implied acceptance of the Court’s jurisdiction to decide this question.

It may be asked why the Parties, when drafting the Special Agreement, did not expressly ask the Court to assess the amount of the damage, but used the words: “and is there any duty to pay compensation?” It seems probable that the explanation is to be found in the similarity between this clause and the corresponding clause in the second part of the Special Agreement: “and is there any duty to give satisfaction?”

The Albanian Government has not disputed the competence of the Court to decide what kind of satisfaction is due under this part of the Agreement. The case was argued on behalf of both Parties on the basis that this question should be decided by the Court. In the written pleadings, the Albanian Government contended that it was entitled to apologies. During the oral proceedings,
Counsel for Albania discussed the question whether a pecuniary satisfaction was due. As no damage was caused, he did not claim any sum of money. He concluded [translation], "What we desire is the declaration of the Court from a legal point of view...."

If, however, the Court is competent to decide what kind of satisfaction is due to Albania under the second part of the Special Agreement, it is difficult to see why it should lack competence to decide the amount of compensation which is due to the United Kingdom under the first part. The clauses used in the Special Agreement are parallel. It cannot be supposed that the Parties, while drafting these clauses in the same form, intended to give them opposite meanings—the one as giving the Court jurisdiction, the other as denying such jurisdiction.

As has been said above, the Security Council, in its Resolution of April 9th, 1947, undoubtedly intended that the whole dispute should be decided by the Court. If, however, the Court should limit itself to saying that there is a duty to pay compensation without deciding what amount of compensation is due, the dispute would not be finally decided. An important part would remain unsettled. As both Parties have repeatedly declared that they accept the Resolution of the Security Council, such a result would not conform with their declarations. It would not give full effect to the Resolution, but would leave open the possibility of a further dispute.

For the foregoing reasons, the Court has arrived at the conclusion that it has jurisdiction to assess the amount of the compensation. This cannot, however, be done in the present Judgment. The Albanian Government has not yet stated which items, if any, of the various sums claimed it contests, and the United Kingdom Government has not submitted its evidence with regard to them.

The Court therefore considers that further proceedings on this subject are necessary; the order and time-limits of these proceedings will be fixed by the Order of this date.

* * *

In the second part of the Special Agreement, the following question is submitted to the Court:

"(a) Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November, 1946, and is there any duty to give satisfaction?"

The Court will first consider whether the sovereignty of Albania was violated by reason of the acts of the British Navy in Albanian waters on October 22nd, 1946.

On May 15th, 1946, the British cruisers Orion and Superb, while passing southward through the North Corfu Channel, were fired at by an Albanian battery in the vicinity of Saranda. It appears from the report of the commanding naval officer dated May 29th, 1946, that the firing started when the ships had already passed the battery and were moving away from it; that from 12 to 20 rounds were fired; that the firing lasted 12 minutes and ceased only when the ships were out of range; but that the ships were not hit although there were a number of "shorts" and of "overs". An Albanian note of May 21st states that the Coastal Commander ordered a few shots to be fired in the direction of the ships "in accordance with a General Order founded on international law".

The United Kingdom Government at once protested to the Albanian Government, stating that innocent passage through straits is a right recognized by international law. There ensued a diplomatic correspondence in which the Albanian Government asserted that foreign warships and merchant vessels had no right to pass through Albanian territorial waters without prior notification to, and the permission of, the Albanian authorities. This view was put into effect by a communication of the Albanian Chief of Staff, dated May 17th, 1946, which purported to subject the passage of foreign warships and merchant vessels in Albanian territorial waters to previous notification to and authorization by the Albanian Government. The diplomatic correspondence continued, and culminated in a United Kingdom note of August 2nd, 1946, in which the United Kingdom Government maintained its view with regard to the right of innocent passage through straits forming routes for international maritime traffic between two parts of the high seas. The note ended with the warning that if Albanian coastal batteries in the future opened fire on any British warship passing through the Corfu Channel, the fire would be returned.

The contents of this note were, on August 1st, communicated to the British Admiralty by the Commander-in-Chief, Mediterranean, with the instruction that he should refrain from using the Channel until the note had been presented to the Albanian Government. On August 20th, he received from the Admiralty the following telegram: "The Albanians have now received the note. North Corfu Strait may now be used by ships of your fleet, but only when essential and with armament in fore and aft position. If coastal guns fire at ships passing through the Strait, ships should fire back." On September 21st, the following telegram
was sent by the Admiralty to the Commander-in-Chief, Mediterranean: "Establishment of diplomatic relations with Albania is again under consideration by His Majesty's Government who wish to know whether the Albanian Government have learnt to behave themselves. Information is requested whether any ships under your command have passed through the North Corfu Strait since August and, if not, whether you intend them to do so shortly."

The Commander-in-Chief answered the next day that his ships had not done so yet, but that it was his intention that *Mauritius* and *Leander* and two destroyers should do so when they departed from Corfu on October 22nd.

It was in such circumstances that these two cruisers together with the destroyers *Saumarez* and *Volage* were sent through the North Corfu Strait on that date.

The Court will now consider the Albanian contention that the United Kingdom Government violated Albanian sovereignty by sending the warships through this Strait without the previous authorization of the Albanian Government.

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

The Albanian Government does not dispute that the North Corfu Channel is a strait in the geographical sense; but it denies that this Channel belongs to the class of international highways through which a right of passage exists, on the grounds that it is only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used almost exclusively for local traffic to and from the ports of Corfu and Saranda.

It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the *Egean* and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic. In this respect, the Agent of the United Kingdom Government gave the Court the following information relating to the

period from April 1st, 1936, to December 31st, 1937: "The following is the total number of ships putting in at the Port of Corfu after passing through or just before passing through the Channel. During the period of one year nine months, the total number of ships was 2,884. The flags of the ships are Greek, Italian, Romanian, Yugoslav, French, Albanian and British. Clearly, very small vessels are included, as the entries for Albanian vessels are high, and of course one vessel may make several journeys, but 2,884 ships for a period of one year nine months is quite a large figure. These figures relate to vessels visited by the Customs at Corfu and so do not include the large number of vessels which went through the Strait without calling at Corfu at all." There were also regular sailings through the Strait by Greek vessels three times weekly, by a British ship fortnightly, and by two Yugoslav vessels weekly and by two others fortnightly. The Court is further informed that the British Navy has regularly used this Channel for eighty years or more, and that it has also been used by the navies of other States.

One fact of particular importance is that the North Corfu Channel constitutes a frontier between Albania and Greece, that a part of it is wholly within the territorial waters of these States, and that the Strait is of special importance to Greece by reason of the traffic to and from the port of Corfu.

Having regard to these various considerations, the Court has arrived at the conclusion that the North Corfu Channel should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace.

On the other hand, it is a fact that the two coastal States did not maintain normal relations, that Greece had made territorial claims precisely with regard to a part of Albanian territory bordering on the Channel, that Greece had declared that she considered herself technically in a state of war with Albania, and that Albania, invoking the danger of Greek incursions, had considered it necessary to take certain measures of vigilance in this region. The Court is of opinion that Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect of the passage of warships through the Strait, but not in prohibiting such passage or in subjected it to the requirement of special authorization.

For these reasons the Court is unable to accept the Albanian contention that the Government of the United Kingdom has violated Albanian sovereignty by sending the warships through
the Strait without having obtained the previous authorization of the Albanian Government.

In these circumstances, it is unnecessary to consider the more general question, much debated by the Parties, whether States under international law have a right to send warships in time of peace through territorial waters not included in a strait.

The Albanian Government has further contended that the sovereignty of Albania was violated because the passage of the British warships on October 22nd, 1946, was not an innocent passage. The reasons advanced in support of this contention may be summed up as follows: The passage was not an ordinary passage, but a political mission; the ships were manoeuvring and sailing in diamond formation with soldiers on board; the position of the guns was not consistent with innocent passage; the vessels passed with crews at action stations; the number of the ships and their armament surpassed what was necessary in order to attain their object and showed an intention to intimidate and not merely to pass; the ships had received orders to observe and report upon the coastal defences and this order was carried out.

It is shown by the Admiralty telegram of September 21st, cited above, and admitted by the United Kingdom Agent, that the object of sending the warships through the Strait was not only to carry out a passage for purposes of navigation, but also to test Albania's attitude. As mentioned above, the Albanian Government, on May 15th, 1946, tried to impose by means of gunfire its view with regard to the passage. As the exchange of diplomatic notes did not lead to any clarification, the Government of the United Kingdom wanted to ascertain by other means whether the Albanian Government would maintain its illegal attitude and again impose its view by firing at passing ships. The legality of this measure taken by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The 'mission' was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.

It remains, therefore, to consider whether the manner in which the passage was carried out was consistent with the principle of innocent passage and to examine the various contentions of the Albanian Government in so far as they appear to be relevant.

When the Albanian coastguards at St. George's Monastery reported that the British warships were sailing in combat formation and were manoeuvring, they must have been under a misapprehension. It is shown by the evidence that the ships were not proceeding in combat formation, but in line, one after the other, and that they were not manoeuvring until after the first explosion. Their movements thereafter were due to the explosions and were made necessary in order to save human life and the mineships. It is shown by the evidence of witnesses that the contention that soldiers were on board must be due to a misunderstanding probably arising from the fact that the two cruisers carried their usual detachment of marines.

It is known from the above-mentioned order issued by the British Admiralty on August 10th, 1946, that ships, when using the North Corfu Strait, must pass with armament in fore and aft position. That this order was carried out during the passage on October 22nd is stated by the Commander-in-Chief, Mediterranean, in a telegram of October 26th to the Admiralty. The guns were, he reported, 'trained fore and aft, which is their normal position at sea in peace time, and were not loaded'. It is confirmed by the commanders of Sauinarez and Volage that the guns were in this position before the explosions. The navigating officer on board Mauritius explained that all guns on that cruiser were in their normal stowage position. The main guns were in the line of the ship, and the anti-aircraft guns were pointing outwards and up into the air, which is the normal position of these guns on a cruiser both in harbour and at sea. In the light of this evidence, the Court cannot accept the Albanian contention that the position of the guns was inconsistent with the rules of innocent passage.

In the above-mentioned telegram of October 26th, the Commander-in-Chief reported that the passage 'was made with ships at action stations in order that they might be able to retaliate quickly if fired upon again'. In view of the firing from the Albanian battery on May 15th, this measure of precaution cannot, in itself, be regarded as unreasonable. But four warships—two cruisers and two destroyers—passed in this manner, with crews at action stations, ready to retaliate quickly if fired upon. They passed one after another through this narrow channel, close to the Albanian coast, at a time of political tension in this region. The intention must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships. Having regard, however, to all the circumstances of the case, as described above, the Court is unable to characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.

The Admiralty Chart, Annex 21 to the Memorial, shows that coastal defences in the Saranda region had been observed and reported. In a report of the commander of Volage, dated Octo-
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After the explosions of October 22nd, the United Kingdom Government sent a note to the Albanian Government, in which it announced its intention to sweep the Corfu Channel shortly. The Albanian reply, which was received in London on October 31st, stated that the Albanian Government would not give its consent to this unless the operation in question took place outside Albanian territorial waters. Meanwhile, at the United Kingdom Government’s request, the International Central Mine Clearance Board decided, in a resolution of November 1st, 1946, that there should be a further sweep of the Channel, subject to Albania’s consent. The United Kingdom Government having informed the Albanian Government, in a communication of November 10th, that the proposed sweep would take place on November 12th, the Albanian Government replied on the 11th, protesting against this “unilateral decision of His Majesty’s Government”. It said it did not consider it inconvenient that the British fleet should undertake the sweeping of the channel of navigation, but added that, before sweeping was carried out, it considered it indispensable to decide what area of the sea should be deemed to constitute this channel, and proposed the establishment of a Mixed Commission for the purpose. It ended by saying that any sweeping undertaken without the consent of the Albanian Government outside the channel thus constituted, i.e., inside Albanian territorial waters where foreign warships have no reason to sail, could only be considered as a deliberate violation of Albanian territory and sovereignty.

With regard to the observations of coastal defences made after the explosions, these were justified by the fact that two ships had just been blown up and that, in this critical situation, their commanders might fear that they would be fired on from the coast, as on May 15th.

Having thus examined the various contentions of the Albanian Government in so far as they appear to be relevant, the Court has arrived at the conclusion that the United Kingdom did not violate the sovereignty of Albania by reason of the acts of the British Navy in Albanian waters on October 22nd, 1946.

* * *

In addition to the passage of the United Kingdom warships on October 22nd, 1946, the second question in the Special Agreement relates to the acts of the Royal Navy in Albanian waters on November 12th and 13th, 1946. This is the minesweeping operation called “Operation Retail” by the Parties during the proceedings. This name will be used in the present Judgment.
territorial waters of another State and to carry out minesweeping in those waters. The United Kingdom Government states that the operation was one of extreme urgency, and that it considered itself entitled to carry it out without anybody's consent.

The United Kingdom Government put forward two reasons in justification. First, the Agreement of November 22nd, 1945, signed by the Governments of the United Kingdom, France, the Soviet Union and the United States of America, authorizing regional mine clearance organizations, such as the Mediterranean Zone Board, to divide the sectors in their respective zones amongst the States concerned for sweeping. Relying on the circumstance that the Corfu Channel was in the sector allotted to Greece by the Mediterranean Zone Board on November 5th, i.e., before the signing of the above-mentioned Agreement, the United Kingdom Government put forward a permission given by the Hellenic Government to resweep the navigable channel.

The Court does not consider this argument convincing. It must be noted that, as the United Kingdom Government admits, the need for resweeping the Channel was not under consideration in November 1945; for previous sweeps in 1944 and 1945 were considered as having effected complete safety. As a consequence, the allocation of the sector in question to Greece, and, therefore, the permission of the Hellenic Government which is relied on, were both of them merely nominal. It is also to be remarked that Albania was not consulted regarding the allocation to Greece of the sector in question, despite the fact that the Channel passed through Albanian territorial waters.

But, in fact, the explosions of October 22nd, 1946, in a channel declared safe for navigation, and one which the United Kingdom Government, more than any other government, had reason to consider safe, raised quite a different problem from that of a routine sweep carried out under the orders of the mineclearance organizations. These explosions were suspicious; they raised a question of responsibility.

Accordingly, this was the ground on which the United Kingdom Government chose to establish its main line of defence. According to that Government, the corpora delicti must be secured as quickly as possible, for fear they should be taken away, without leaving traces, by the authors of the minelaying or by the Albanian authorities. This justification took two distinct forms in the United Kingdom Government's arguments. It was presented first as a new and special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task.

The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.

The United Kingdom Agent, in his speech in reply, has further classified "Operation Retail" among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.

This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.

The method of carrying out "Operation Retail" has also been criticized by the Albanian Government, the main ground of complaint being that the United Kingdom, on that occasion, made use of an unnecessarily large display of force, out of proportion to the requirements of the sweep. The Court thinks that this criticism is not justified. It does not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania. The responsible naval commander, who kept his ships at a distance from the coast, cannot be reproached for having employed an important covering force in a region where twice within a few months his ships had been the object of serious outrages.
FOR THESE REASONS,

THE COURT,

on the first question put by the Special Agreement of March 25th, 1948,

by eleven votes to five,

Gives judgment that the People's Republic of Albania is responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life that resulted therefrom; and

by ten votes to six,

Reserves for further consideration the assessment of the amount of compensation and regulates the procedure on this subject by an Order dated this day;

on the second question put by the Special Agreement of March 25th, 1948,

by fourteen votes to two,

Gives judgment that the United Kingdom did not violate the sovereignty of the People's Republic of Albania by reason of the acts of the British Navy in Albanian waters on October 22nd, 1946; and

unanimously,

Gives judgment that by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th, 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this ninth day of April, one thousand nine hundred and forty-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Kingdom of Great Britain and Northern Ireland and of the People's Republic of Albania respectively.

(Signed) J. G. GUERRERO,
Acting President.

(Signed) E. HAMBRO,
Registrar.

Judge Basdevant, President of the Court, whilst accepting the whole of the operative part of the Judgment, feels bound to state that he cannot accept the reasons given by the Court in support of its jurisdiction to assess the amount of compensation, other reasons being in his opinion more decisive.

Judge Zoričić declares that he is unable to agree either with the operative clause or with the reasons for the Judgment in the part relating to Albania's responsibility; the arguments submitted, and the facts established are not such as to convince him that the Albanian Government was, or ought to have been, aware, before November 13th, 1946, of the existence of the minefield discovered on that date. On the one hand, the attitude adopted by a government when confronted by certain facts varies according to the circumstances, to its mentality, to the means at its disposal and to its experience in the conduct of public affairs. But it has not been contested that, in 1946, Albania had a new Government possessing no experience in international practice. It is therefore difficult to draw any inferences whatever from its attitude. Again, the conclusion of the Experts that the operation of laying the mines must have been seen is subject to an express reservation: it would be necessary to assume the realization of several conditions, in particular the maintenance of normal look-out posts at Cape
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Kiepha1, Denta Point and San Giorgio Monastery, and the existence of normal weather conditions at the date. But the Court knows neither the date on which the mines were laid nor the weather conditions prevailing on that date. Furthermore, no proof has been furnished of the presence of a look-out post on Denta Point, though that, according to the Experts, would have been the only post which would necessarily have observed the minelaying. On the other hand, the remaining posts would merely have been able to observe the passage of the ships, and there is no evidence to show that they ought to have concluded that the ships were going to lay mines. According to the Experts, these posts could neither have seen nor heard the minelaying, because the San Giorgio Monastery was 2,000 m. from the nearest mine and Cape Kiepha1 was several kilometres away from it. As a result, the Court is confronted with suspicions, conjectures and presumptions, the foundations for which, in Judge Zorićić’s view, are too uncertain to justify him in imputing to a State the responsibility for a grave delinquency in international law.

Judge Alvarez, whilst concurring in the Judgment of the Court, has availed himself of the right conferred on him by Article 57 of the Statute and appended to the Judgment a statement of his individual opinion.

Judges Winiarski, Badawi Pasha, Krylov and Azaveiro, and Judge ad hoc Ečer, declaring that they are unable to concur in the Judgment of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Judgment statements of their dissenting opinions.

(Initialled) J. G. G.

(Initialled) E. H.

ANNEX 1.

LIST OF DOCUMENTS SUBMITTED TO THE COURT.

I.—Annexes deposited by the Government of the United Kingdom.

A.—During the written proceedings:

1. Admiralty Chart No. 206 showing the Corfu Strait.
2. Section of German Mine Information Chart.
   (This is a chart which was captured by the Allies, showing the North Corfu Channel and the position of mines laid by the Axis there; the original chart has been filed with the Registry.)
5. Section of Medri Index Chart showing North Corfu swept channel and the international highway established therein together with Medri pamphlets for use with the Index Chart.
   (Single copy of the entire Chart and of the complete pamphlets numbered 5, 9 and 12 have been filed with Registry.)
6. Diplomatic correspondence between the Government of the United Kingdom and Albania regarding the right of navigation in the Strait of Corfu.
7. Admiralty tracings showing the North Corfu swept channel and the position and tracks of H.M.S. Orion, Superb, Leander, Saumarez and Mauritius, passing through the North Corfu Channel on May 15th, 1946, and on October 22nd, 1946.
8. Photographs of H.M.S. Saumarez (below water line) and Volage (bows blown off) taken shortly after the explosion on October 22nd, 1946.
9. Admiralty tracing showing position of H.M. ships at the time of the explosion.
12. List of sailors killed, with statement of pensions, etc., payable to dependants.
13. List of sailors injured, with statement of expenses, pensions, etc.
15. Minutes of Mine Clearance Boards.
16. Reports of Capitaine Mestre (November 16th and 23rd, 1946). (There were two reports, both in French. The reason why there were two reports was that Capitaine Mestre wished to make certain corrections in his second report of certain statements which he had made in his first report.)
17. Reports on Operation Retail by Rear-Admiral Kinahan and Commander Whitford. (The minesweeping operation of November 15th, 1946.)
Chart showing position in which mines were found on November 13th, 1946.
20. Photographs of the mines.
21. Chart showing the defences of Saranda.
23. Documents and records of the Security Council, etc., relative to the dispute.
25. Mine Information Chart No. 2711.
26. Two signals relating to the sweeping in October 1944 of the Corfu Channel.
27. Extracts from Hansard (Parliamentary Debates), containing Statements by the Secretary of State for Foreign Affairs regarding Albania.
28. Telegram from Flag Officer Commanding 15th Cruiser Squadron, describing the incident of May 15th, 1946.
31. Photograph of Saumarez omitted from Annex 8 of United Kingdom Memorial.
32. Extract from Third Interim Report of Central Mine Clearance Board in European waters after the war.
33. Affidavit by Commanding Officer of Skipjack identifying mines brought to Malta with those found at Corfu (September 5th, 1947).
34. Chartlet showing areas swept on November 12th, 1946.
35. Minutes of the Central Mine Clearance Board in European waters after the war (May 25th, 1945—May 19th, 1948).
37. Extracts from the Minutes of the First Meeting of the Mediterranean Zone Mine Clearance Board (November 5th, 1945), and of the Fourth Meeting (Second Sitting—February 27th, 1946).

B.—After the closure of the written proceedings.

(a) Before the hearing:
39. Chart annexed to above affidavit, showing the route probably followed by the vessels in going from Sibenik to Boka Kotor. The annexed chart shows the route probably followed by the vessels in going from Sibenik to Boka Kotor and to Corfu Channel.
40. Chart showing sectors swept in October 1944.
41. Affidavit by D. G. Jacobs, First Lieutenant of BYMS 2009 of the 13rd Minesweeping Flotilla, in October 1944 (October 22nd, 1948).
42. Affidavit by Commander Sworder showing the manner in which Medri Charts were drawn up (October 22nd, 1948).
43. Log-books of the Volage, Mauritius and Leander.
44. Affidavit by Lieutenant Goddall, Officer of the Watch on board the Saumarez on October 22nd, 1946, from 14.00 hours to 14.53 hours (October 22nd, 1948).
45. Report of a Board of Enquiry set up on the arrival of the Saumarez at Corfu (October 24th, 1946).
46. Chart prepared by the Members of the above-mentioned Board of Enquiry, showing the route followed by the Saumarez.
47. Affidavit by Commander Paul, in command of the Volage on October 22nd, 1946 (October 22nd, 1948).
48. Track-chart of the Volage prepared by Commander Paul.
49. Certified true copy of the letter of the Commander-in-Chief, Mediterranean, to the Admiralty of August 15th, 1946, transmitting the programme for the autumn cruise of his Fleet.
54. Certified true copy of Report of Rear-Admiral Kinahan, Commanding First Cruiser Squadron in H.M.S. Mauritius, on the explosions caused on board the Saumarez and Volage by mines (October 23rd, 1946).
55. Original copy of a German chart captured by the Allies at the German Admiralty, Berlin (Ionian Sea and Gulf of Taranto, south-western coast of Greece).
56. Affidavit by Commander Whitford, Senior Officer of the 5th Minesweeping Flotilla from March to December, 1946, explaining the difference between mines recently laid and those that have been long in the water (October 22nd, 1948).
60. Photographs M 1, 2 and 3 of a German mine that had been two years in the water, with a certificate by Colonel Golemis.
61. Photographs M 4, 5, 6, 7 and 8 of a German mine that had been five years in the water, with a certificate by Commander Littleboy.
62. Telegrams passing between the Commander-in-Chief, Mediterranean, and the Admiralty, prior to the incident of October 22nd, 1946, embodying the instructions of the Admiralty regarding the passage of H.M. ships through the Corfu Channel.
63. Telegrams passing between the Commander-in-Chief, Mediterranean, and the Admiralty, embodying the instructions of the Admiralty regarding Operation Retail.
64. Affidavit by Professor J. E. Harris, Professor of Zoology in the University of Bristol, concerning the state of the mines swept in the Corfu Channel on November 13th, 1946 (October 27th, 1948).
65. Affidavit by Mr. N. I. Hendey, of the Admiralty Central Metallurgical Laboratory, Emsworth, giving the reasons for the absence of fouling on mines in the Black Sea (October 25th, 1948).
66. Affidavit by Commander Moloney, certifying that no dumps of German mines had been left in Greece (October 29th, 1948).

(b) At the hearing:
67. Photograph of Panikovac Cove.
68. Copies of two telegrams from the British Admiralty dated November 9th, 1948, relating to the Mijet and Melijine.
69. Copy of two telegrams from the Air Ministry, United Kingdom, dated November 8th, 1948, and concerning weather conditions and the angle of the sun at Sibenik on October 16th, 17th and 18th, 1946.
71. Photographs of mines found during the sweep on November 13th, 1946. (These photographs had been submitted to the Security Council in 1947 and were marked VI (b) and VI (c).)
72. Treaty of Friendship and Mutual Assistance between Yugoslavia and Albania (July 9th, 1946.—The date did not appear on the copy filed).
73. Economic Agreement between Yugoslavia and Albania (November 27th, 1946.—The date did not appear on the copy filed).
74. Marinkalender 1947.
75. School and College Atlas (London : G. W. Bacon & Co.).
79. Rough copy of log of the Mauritius.
80. Document showing the differences between the entries in the log-book (fair copy) and the rough log of the Mauritius.
81. Three fragments of the mine which struck Volage.
82. Extract from Report dated May 20th, 1946, from Rear-Admiral Kinahan, addressed to the Commander-in-Chief of the Mediterranean, reporting the proceedings of the squadron under his command for the period April 20th to May 25th, 1946 (paragraph 23, relating to the passage of the squadron through the Corfu Channel on May 15th, 1946).
84. Two sketches made by Commander Kovacic at the hearing on November 24th, 1948, morning, showing one of the Yugoslav ships with the rails and minelaying mechanism.
85. Photograph of Panikovac Cove on which Commander Kovacic drew an arrow showing the entrance to the tunnel used as a mine store (hearing on November 24th, 1948, morning).
86. Two plans of the region of Sibenik on which Commander Kovacic had marked: (a) the course followed by the launch and the place from which he could recognize the mines; (b) the jetty from which the photograph of Panikovac Cove was probably taken (hearing on November 24th, 1948, morning).
87. Report of the 153rd Minesweeping Flotilla (October 8th, 1944) on the sweeping of the Korcula and Scadro Channels, with a tracing showing the minesweeping operations.
88. File relating to mines laid by the Germans (German documents).
89. German files relating to mine stocks.
90. Original of the Report of Proceedings of the Leander, made by Captain Otway Ruthven (October 23rd, 1946) (a photocopy had already been filed), with signature certified by Captain Selby.
91. Tracing showing course followed by the Leander on October 22nd, 1946, dated October 23rd, 1946, and attached to the Report of Captain Otway Ruthven (this tracing replaces the track-chart made on December 26th, 1946, and filed as Annex 7 to the United Kingdom Memorial).
92. Typewritten copy of the Report of the Volage made on October 23rd, 1946, by Commander Paul (a photocopy had already been filed), with certificate by Commander Paul.
93. Original of Report sent by Rear-Admiral Kinahan on May 29th, 1946, to Commander-in-Chief, Mediterranean, on proceedings of his Squadron from April 20th to May 25th, 1946, with signature certified by Commander Whitford.
94. Sketch made by Lieutenant-Commander Kovacic at the hearing on the morning of November 26th, 1948, showing the position of Mijet and Melijine as he saw them on the evening of October 17th or 18th, 1946, about 18.30 hours.
95. Plan of environs of Sibenik, on which Commander Kovacic marked the site of the house from which he saw the Mijet and the Melijine on October 17th or 18th, 1946, about 18.30 hours (hearing on morning of November 26th, 1948).
96. Sketch made by Lieutenant-Commander Kovacic at the hearing in the afternoon of November 25th, 1948, showing the position of Mijet and Melijine in relation to the mouth of the tunnel at Panikovac Cove, on October 17th or 18th, about 16.30 hours.
97. Two sketches made by Lieutenant-Commander Kovacic at the hearing in the afternoon of November 26th, 1948, showing the manoeuvre made by the Mijet and Meljine to facilitate the loading of the mines, and the position of the two vessels during the loading.

98. Sketch showing a minesweeper with its cable cutting the mooring of a mine, and a mine already swept (sketch made by Commander Sworler and shown to the Court at the hearing on the morning of November 22nd, 1948).

99. Diagram showing sweeps of moored mines, 100% safe (made by Commander Sworler and shown to the Court at the hearing on the morning of November 22nd, 1948).

100. Photograph showing Mauritius and Saumarez after the explosion (this photograph was submitted to the Security Council in 1947, and was numbered II (4), A. 4).

101. Two extracts from Yugoslav illustrated papers, showing two photographs of a minelayer with its derrick.

102. Map of Sibenik, from U.S. Army (scale 1/50,000).

103. Admiralty Chart No. 1581: Approach to Sibenik harbour.

104. Air photograph (No. 4025) of Sibenik and Panikovac Cove.

105. Page of an illustrated paper, showing the view over the sea from a house situated near Keric’s house.

106. Tracing of Panikovac Cove, made by Yugoslav Hydrographic Institute, November 26th, 1940 (original filed by Albania).

107. Telegram received from Rome by United Kingdom Delegation, concerning weather reports published at Sibenik on October 17th and 18th, 1946 (November 24th, 1948).

108. Reply by the United Kingdom experts to questions put to the Mixed Committee of Experts by Judge Eeer on November 30th, 1948: (1) Was the light sufficient at 17:35 hours to enable Lieutenant-Commander Kovacic to see the vessels moored in Panikovac Cove? (2) If the light was sufficient, would the view have been interrupted by the lie of the land?

109. Letter from Commander Sworler to Rear-Admiral Mouline, dated December 8th, 1948, forwarding a revision of the common reply to question 5 of the Questionnaire by the agents submitted on November 26th, 1948, to the experts of the two Parties.

110. Affidavit by M. Zivan Pavlov (December 10th, 1948), certifying that between October 23rd and 26th, 1946, in the Gulf of Kotor, he saw a Yugoslav minelayer of the Meljine class, moving towards the fuel refilling points at Boka Kotorska (original in Serbo-Croat, with English translation).

111. Membership card of the Yugoslav Seamen’s and Port-workers’ Union, bearing name of Zivan Pavlov (in Serbo-Croat language, with English translation of pertinent passages).


113. Air photograph of the environs of Saranda, showing certain paths and roads (1943).

114. Map of Saranda District (1:50,000 Albania sheet 26-IV Saranda).

115. Amendments submitted by the United Kingdom naval experts to the replies they had given to questions by Judge Eeer.

116. Six copies of photographs of H.M.S. Mauritius (photographs Nos. A 1, A 2, A 3 and A 4 are additional copies of photographs appearing in Supplement 6 to Minutes of the Security Council, and are bad reproductions).

II.— Annexes deposited by the Albanian Government.

A.—During the written proceedings:

1. Letter from the Greek Representative to the Secretary-General of the United Nations (March 10th, 1947).

2. Declaration by Captain Avdi Mati (October 4th, 1947).

3. Letter from the Head of the United Kingdom Military Mission in Albania to the Albanian Army General Staff (January 25th, 1946).

4. Minutes of the Meeting of the Mediterranean Zone Mine Clearance Board, held on July 2nd, 1946.


8. Reuter’s communiqué of October 26th, 1946.


11. Report by General Hodgson (July 29th, 1945) on Greek provocation.

12. Chart showing passage of British war squadron on October 22nd, 1946.

13. Map of Albanian coast; Saranda and environs.


15. List of cases of vessels that have struck mines, published by Lloyd’s.


17. “War provocation by the Greek monarcho-fascist Government against Albania.”


20. Message from Mr. Cordell Hull (November 28th, 1943).

22. Declaration by Mr. Winston Churchill (November 4th, 1943).
23. Declaration by Mr. Cordell Hull (undated).
25. Photocopies of parts of Mediri Charts, M.6502 : No. 3, December 17th, 1945 ; No. 8, May 6th, 1946 ; No. 12, August 26th, 1946, showing the route through the North Corfu Channel on those dates. The map of December 17th, 1945, gives to the route the number 18/54.
26. Telegram from harbour-master of Saranda, October 22nd, 1946.
27. Letter from the Albanian Army General Staff to the Foreign Ministry, Tirana, August 30th, 1948.

B.- After the closure of the written proceedings:

(a) Before the hearing:
32. Note from the Yugoslav Legation at The Hague to the Agent for the Albanian Government, dated November 8th, 1948, and forwarding a communiqué of the Yugoslav Government concerning Lieutenant-Commander Kovacic’s evidence.
33. Tracing of swept channel and normal route for shipping through the middle of the North Corfu Channel.
34. Tracing of swept channel and of the North Corfu Channel Zone not deeper than 25 fathoms.
35. Tracing of respective positions of German channel and swept channel.
36. Tracing of position of the minefield and track of Mauritius, Leander, Superb and Orion.

(b) At the hearing:
38. Report by M. Jacques Chapelon, Professor of Analysis at the École polytechnique, Paris, concerning the passage of Mauritius through a minefield.
40. Sworn statement, dated November 17th, 1948, relating to repair of ships of the M class and type in Sibenik dockyard, between September 27th and November 9th, 1946 (in Serbo-Croat, with French translation certified correct by Yugoslav Legation at The Hague).
41. Photocopy of a page of the Repairs Register of Sibenik dockyard (copy, with French translation of the entries concerning the M 1, M 2 and M 3 vessels, certified correct by Yugoslav Legation at The Hague).
42. Calculation made by Captain Ormanov of height of sun at Sibenik on October 15th, 1946, at 15.15 hours.
43. Sworn statement concerning the officer Drago Blazevic, dated November 17th, 1945 (in Serbo-Croat, with French translation certified correct by Yugoslav Legation at The Hague).
44. Certificate concerning movements of ships of the M-class and type in October 1946, dated November 17th, 1945 (in Serbo-Croat, with French translation certified correct by Yugoslav Legation at The Hague).
46. Sketch of Panikovac by Yugoslav Hydrographic Institute, dated November 20th, 1948.
47. Cadastre plan of the town of Sibenik.
48. Photographs Nos. I, II and III of Panikovac, taken from Cipad quay, or near by.
49. Photographs Nos. IV and V, looking towards Panikovac from the terrace on which Lieutenant-Commander Kovacic was.
50. Italian map of Sibenik (No. 558).
51. Report of the Yugoslav “Commission” concerning the non-availability of the M 1, M 2 and M 3 (three original documents dated November 11th, 1946, with French translations certified correct by Yugoslav Legation at The Hague).
52. Work docket of Sibenik dockyard for Orders Nos. 920, 921 and 922, relating to ships M 1, M 2 and M 3 (original documents in Serbo-Croat, with French translations certified correct by Yugoslav Legation at The Hague).
53. Work docket concerning ship M 1, signed by Lieutenant-Commander Kovacic (original in Serbo-Croat, with French translations certified correct by the Yugoslav Legation at The Hague).
54. "Work Orders" Nos. 920, 921 and 922, addressed to the Directorate of Sibenik Dockyard, dated September 26th, 1946, and concerning repairs to be done to the boilers of the ships M 1, M 2 and M 3 (three original documents in Serbo-Croat, with French translations certified correct by Yugoslav Legation at The Hague).
56. Reply by the experts of the Albanian Delegation (December 4th, 1948) to questions put by Judge Eger to the Mixed Committee of Experts on November 30th, 1948: (1) Was there sufficient light.
at 17.35 hours to enable Lieutenant-Commander Kovacic to see
the vessels moored in Panikovac Cove? (2) If the light was
sufficient, would the lie of the land have obstructed the view?

57. Nautical instructions for the East Mediterranean (Imprimerie
nationale, 1945).
58. Sketch showing part of a vessel of the M-class that might have
been seen from the coast at night from an altitude of 15 feet,
the vessel being: (1) 550 metres from the shore; (2) 4 miles
from the shore (sketch made by Captain Ormanov and shown
to the Court at the hearing on the afternoon of December 8th, 1948).
59. Register of the naval dockyard at Sibenik.
60. Map of "Europe and North Africa", sheet 4, published by the
French National Geographical Institute in 1941—showing
shipping routes.
61. Four photographs of the coast near Saranda.
62. Sketch showing roughly the hills around Panikovac Cove towards
Sibenik (sketch made by Rear-Admiral Moullec).
63. Observations by Rear-Admiral Moullec on the Reports of Comman-
der Sworcer as to the position of the ships in Panikovac Bay.
64. Original of Report of Commander of First Infantry Regiment,
dated May 15th, 1946.
65. Original of letter of May 16th, 1946, addressed to Tirana.
66. Original of Captain Ali Shitno's Report, dated October 23rd,
1946 (concerning events on October 22nd, 1946).

III.—Annexes deposited jointly by the Parties.

A.—During the written proceedings:

1. Special Agreement between Albania and the United Kingdom,
dated March 25th, 1948.

B.—During the hearing:

2. Questionnaire prepared by M. Pierre Cot and Sir Eric Beckett,
and submitted to the experts of the two Parties on November 26th,
1948: height of the sun at Sibenik on October 17th and 18th, 1948.
3. Replies established jointly by the Parties to above Questionnaire
(November 27th, 1948).
4. Two diagrams showing the moment when a shadow would have
fallen on the jetty where the mines were being loaded.
5. Sketch of the environs of Sibenik showing nearest points from
which the jetty would have been visible during the journey of
the motor-boat that Lieutenant-Commander Kovacic was in.
(Three possible routes are given in the Questionnaire.)
6. Joint Note of United Kingdom and Albanian experts on the
questions put by Judge Ècer to the Mixed Committee of Experts
on November 30th, 1948: (1) Was there sufficient light at 17.35
hours to enable Lieutenant-Commander Kovacic to see the vessels
moored in Panikovac Cove? (2) If the light was sufficient, would
the lie of the land have obstructed the view?

ANNEX 2.

EXPERTS' REPORT OF JANUARY 8th, 1949.

The Committee of Naval Experts appointed by the International
Court of Justice on December 17th, 1948, have the honour to submit
to the Court the following unanimous answers to the questions put
to them:

Question (1). You are requested to examine the situation in the North
Corfu Strait immediately before October 22nd, 1946,
from the point of view of
(a) the position of the swept channel.

(1) (a) Answer:
The German track shown in Annex 2 to the United Kingdom
Memorial could not be the centre line of a one-mile swept channel
because the western boundary would in this case intersect Mine-
field G 146 c.

When the Royal Navy planned to sweep a channel through the
North Corfu Strait in 1944, route 18/32 and 18/34 was established,
which was, according to us, the only feasible way to make a passage
through Corfu Channel without doing unnecessary sweeping of Mine-
field QBX 539. We consider therefore route 18/32 and 18/34 the quickest
and safest way to open up a route through the North Corfu Channel.

(b) the effectiveness of the mineclearance previously
    carried out.

(1) (b) Answer:
In order to decide whether the sweeping operations which were
carried out in October 1944 and January 1945 were effective, it is
necessary to study the minesweeping reports. The latter, however,
could not be produced. But bearing in mind:

1st. That the Royal Navy had a great experience in mineclearing;

2nd. That the sweeping of a moored minefield is far easier than
    sweeping a ground minefield;

3rd. That the sweeping of a moored minefield, if carried out in the
    proper way, can be considered 100% safe;

Note.—Speaking strictly, a channel can only be declared safe
at the time when it is cleared. One cannot guarantee that
the channel in the future will remain so. Some evil person
may lay mines—as in fact has been done in this case—and
there is also the very remote possibility of a mine which went
to the bottom when laid, rising to "correct" depth later on.
But if such eventualities were to be taken into account, it would mean that no waters could be declared safe, and mined areas could never be used any more;

4th. That this channel was swept for troopships and supplies to pass through for the Italian front,

we assume that the clearing was carried out with the greatest possible care.

and (c) the risk of encountering floating mines in this channel owing to the proximity of the old minefields, and to study the German documents in order to obtain information from them concerning the types of mines laid in those minefields.

(1) (c) Answer:

The presence of moored Italian minefields off Corfu explains the possibility of floating mines in this area. We cannot see, however, that the possible presence of floating mines could be connected with the mining of H.M.S. Saumarez and H.M.S. Volage, as the nature of the damage sustained by the above ships excludes the slightest possibility of its cause being a floating mine.

It is often thought that floating mines are a serious danger to shipping. This is entirely wrong.

To our knowledge, it has not been definitely proved that more than one single ship, steaming on a straight course (as was the case with Saumarez and Volage), has been damaged by a floating mine, although thousands have been afloat during the two great wars.

Admittedly, there are ten more cases of ships having been struck by alleged floating mines; but these cases have not been proved.

Apart from other obvious reasons, such as the very minute space of sea occupied by a mine, the ease with which it is seen in daylight and its normally harmless condition, there is the fact that the bow wave brushes the mine clear of the ship.

Extensive practical tests have proved that it is impossible to ram a floating mine, however hard one tries.

Whatever the possibility may be of two mines from the old German minefield floating about, it is, as stated above, of no interest in this case, as the damage done to the two ships could not possibly be caused by floating mines.

A close study of the German documents shows:

1. That until October 23rd, 1944, only Italian mines were laid in the North Corfu Channel area;

2. That GV types of mines were available at Trieste on April 25th, 1945;

3. No manufacturer's numbers are shown in these documents.

Note.—Each mine has a number stamped on the bottom plate. The Germans had a very elaborate system of tabulating all particulars of the mines on so-called Kenkharten. If those cards could be traced for the Adriatic Zone, one could compare the numbers on the bottom plates of the swept mines with these Kenkharten in order to find out the place of origin of the mines that were laid in North Corfu Channel.

Question (2). You are requested to examine the information and documents available concerning the navigation of the Mauritius, the Saumarez and the Volage, in order to ascertain what conclusions, if any, may be drawn concerning the identity of the type of mines which struck the two last-named vessels with the type of mines discovered on November 13th, 1946, and to state how far, in your opinion, these conclusions can be regarded as valid.

(2) Answer:

Although the log-books of Mauritius, Leander and Volage show some inaccuracies in speed and course, we consider it beyond any doubt that Saumarez and Volage were mined in approximately the positions indicated in Annex 9 to the United Kingdom Memorial.

Even if both ships were mined nearer the northern edge of the channel, they would still have been victims of the two lines of mines shown in Annex 9.

Our conclusion, therefore, is definite: that both ships were struck by the type of mine which was swept on November 13th, 1946.

Question (3). You are requested to examine the information and documents available relating to the damage suffered by the Saumarez and the Volage, and to the fragments of a mine found in the Volage, with a view to ascertaining what conclusions, if any, may be drawn regarding the type of mines which struck these vessels, and how far these conclusions can, in your opinion, be regarded as valid.

(3) Answer:

As far as it is possible to estimate the damage sustained by Saumarez and Volage, which were ships of modern construction, this damage must have been caused by the explosion of a moored contact mine of approximately 600 lb. charge. The reasons for this are:
1st. A ground mine would not cause this type of damage, and certainly not at this depth of water;

2nd. A floating mine can be excluded altogether, as previously explained;

3rd. The only remaining possibility is a moored contact mine.

Of the fragments found in Volage, the two small, slightly curved pieces are obviously not parts of a mine shell; for they are of cast iron. The third piece, which is part of a horn adapter, fits closely to the horns and elements of a GY mine or of a GR mine, the adapters of these two types of mine being identical.

Question (4). You are requested to examine the questions whether it is possible to draw (a) from the position of the mines swept on November 13th, 1946; (b) from the fact that a complete mineclearance of the Albanian waters in this area had not yet been carried out at that time; and (c) from the passage of the Mauritius on the 22nd October, 1946, without striking any mine, any conclusions, and, if so, what conclusions, regarding the existence of a methodically laid minefield and the object for which, in the light of the disposition of the mines, they appear to have been laid.

(4) Answer:
The position of the mines swept on the 13th November, 1946, strongly indicates that the mines were methodically laid in two rows.

Any previous minesweeping in the Medri Route Channel would necessarily have detected such mines, if they had been laid at that time.

The minefield was skilfully placed, as if its combined object was: (1) offensive: to stop ships drawing some 10 feet or more from passing through the channel; (2) defensive: to stop ships of the same draught from entering Saranda Bay.

That Mauritius passed unmolested through the minefield only shows she had good luck. There is nothing strange in a ship getting through a minefield with a density of mines as indicated by the sweep.

Question (5). From the state of the mines swept on November 13th, 1946, can you draw any conclusions, and, if so, what conclusions, as to the date on which they were moored, and, in particular, on the question whether they were moored before or after the 22nd October, 1946?

(5) Answer:
The condition of the mines swept during the sweeping operation on the 13th November, 1946, as shown in Supplement No. 6 of the Security Council Official Records, leads to the conclusion that the mines should be considered as recently laid.

We are not in a position to give even an approximate date for the minelaying. The amount of barnacles, growth, rust, etc., is dependent on many factors which vary considerably with prevailing conditions. Only actual tests at the same time of the year and in the same waters could give sufficient information to afford a rough estimate of the age of the minefield.

With nothing more than general information, all we are prepared to state with certainty is that the mines cannot possibly belong to a minefield laid during the war.

The question whether the mines were laid before or after the 22nd October, 1946, cannot possibly be answered. The state of the mines would certainly not alter noticeably from the 21st to the 23rd of October.

Question (6). Having regard to the replies given, by agreement between the Parties, to the questions concerning the position of the sun at Sibenik on October 17th and 18th, 1946, and on the basis of the documents in the case, does the examination of the factual circumstances concerning (a) the date, (b) the time of day, (c) the lie of the land, (d) the conditions of visibility, (e) the position of the objects (ships, mines, horns, rails), (f) their form, colour and dimensions, lead you to the conclusion that, in the circumstances in which the witness Kovacic was situated, it was possible for him to see the loading and the presence of GY mines on board two ships of the "M"-class in Panikovac Cove and the rails on the ships?

(6) Answer:
The following could have been seen:

I. At 16.15 hours:
(a) The two ships of the "M"-class, if moored at Panikovac Cove;
(b) the mine-bodies and sinkers on board these ships;
(c) the loading of the mines.

These observations could easily have been made, whichever of the three courses indicated on map N.I.D. 14/32/48, Annex C in File E.I/1/72, was followed by the launch.

Provided that the ships were moored on the northern side of the Cove, as stated by the witness Kovacic, also:

(d) that the mines were newly painted (the gloss).

If the launch had followed course (i), it would have passed within about 450 metres of the Cove, and then

(e) horns and rails could have been seen, although faintly.

If either of courses (ii) or (iii) was followed, we think it must have been impossible to see horns or rails.
II. At 17.35 hours:

Given no obstacles in the line of sight:

(i) It would perhaps be possible from Keric’s house to see the silhouettes of the ships loaded with mines.

The above conclusions (a) to (j) are based upon tests made at “Naval Base A” (see Annex 1)1 which were carried out at a time corresponding to 17.28 hours in Sibenik, on October 18th, 1946, and under similar circumstances.

Possible obstructions to the line of sight:

Three different opinions have been given by the Parties as to the possible position of the ships at 17.35 hours.

1. Ships moored along the south-western pier. In this case the configuration of the land would prevent the ships from being seen.

2. Ships moored in the most westerly part of the north-eastern pier, where they also would have been hidden.

3. Ships moored along the “built-up” extension of the north-eastern quay.

From the documents filed with the Court—especially Annex 4 (V), File E.I/1/77—we think that the statement made by the United Kingdom expert in Appendix 2 to Annex 1, File E.I/1/89, as to the configuration of the land, appears to be the more correct. In that case the silhouettes of the ships may partly have been seen from Keric’s house.

A more definite statement cannot be made without inspection of the locality.

Question (7). You are requested to state your opinion as to

(a) the number of GY mines which a minelayer of the “M”-class could load.

(7) (a) Answer:

We assume that the “M”-class ships are of about 130 tons, in which case the dimensions given in the Swedish Marinakalender would be approximately correct.

According to these dimensions, the number of GY mines these minelayers could take would be twenty, if stability allowed for this top weight.

(b) the time required by two ships of this class, each possessing a derrick and a steam winch, and lying approximately in the positions indicated by the witness Kovacic, to take their complete load of mines.

(7) (b) Answer:

Under normal conditions, it should be possible to load one mine with one derrick in 14 minutes’ time. This time is based upon a great number

1 Not reproduced.

of actual reports from our three navies, and the times are remarkably consistent.

Under less favourable conditions, the time required should not be more than 3 minutes per mine per derrick.

We assume that the full load of mines could have been taken on board within an hour.

and (c) whether GY mines are normally fitted with horns when they are loaded on ships, or whether, on the contrary, they normally have to be fitted with the horns at the time when they are moored.

(7) (c) Answer:

Guards to the horns are not fitted to GY mines.

These mines are loaded with or without horns in place, according to the rules laid down by the authorities concerned. In our opinion, the safest procedure would be to unscrew the bakelite covers and screw in the horns after the mines were on board.

This requires approximately 5 minutes per mine per unskilled person and could be done at any time before the mines are laid.

Question (8) (i). On the assumption that the mines discovered on November 13th, 1946, were laid at some date within the few preceding months, whoever may have laid them, you are requested to examine the information available regarding (a) the number and the nature of the mines, (b) the means for laying them, and (c) the time required to do so, having regard to the different states of the sea, the conditions of the locality, and the different weather conditions, and to ascertain whether it is possible in that way to draw any conclusions, and, if so, what conclusions, in regard to—(i) the means employed for laying the minefield discovered on November 13th, 1946.

(8) (i) Answer:

There is no doubt that the 24 or more GY mines which were laid at Saranda, were placed in their position by means of surface craft. The laying of GY mines is not done by submarine or by aircraft.

The time necessary to lay those mines is approximately the same as the time taken to steam the distance between the points where the mine barrage is to be laid, plus the necessary time to approach and leave the area of vigilance and to take fixes.

The total time that the minelayers would be in the waters between Cape Kiephali and San Giorgio Monastery amounts to about two and a half hours at a speed of six knots, if the ships are approaching from the North and leaving towards the North.
If they approached from the South the time would be about two hours from the neighbourhood of Barchetta Rock to the northern end of the minefield, provided they left towards the South.

If the ships approached the area of vigilance from the North and left towards the South, the time necessary between Cape Kiephali and San Giorgio Monastery would be about two hours.

If the ships approached from the South and left towards the North, the time would be about two hours.

Question (8) (ii). and (ii) the possibility of mooring those mines even if, those means without the Albanian authorities being aware of it, having regard to the extent of the measures of vigilance existing in the Saranda region.

(8) (ii) Answer:

The possibility of seeing the operation. The Corfu Channel can be navigated with no great difficulty, when it is a question of simply passing through. But to place a minefield accurately, as was done, requires a reasonably good visibility so that definite cross-bearings on the coast can be taken, as there is only one lighthouse in the vicinity.

The necessary landmarks would probably be at a greater distance away than the distance from the fix (taken before starting the mine-laying) to the shore: for instance, the Monastery and Limion Point might be selected. Incidentally, one row of mines does actually point to both of these landmarks. Another bearing might be taken on the north-west promontory of Denta Point. Of course, objects can be seen much more clearly when looking seaward than when looking landward.

The minelayer must have passed at about 500 metres off the coast between Denta Point (an obvious place for a look-out) and the San Giorgio Monastery.

From this part of the coast the minelaying could easily have been observed by a look-out with ordinary binoculars.

The ships would probably have kept to the swept channel and might therefore also have been seen from Cape Kiephali and even more so from the San Giorgio Monastery; for if the eastern line of mines was laid from the South, the minelayer must probably have been within half a mile of the Monastery.

If the minelaying was done in darkness, it is doubtful whether it could have been observed from Porto Edda.

If done in daylight, it can unhesitatingly be said that the operation must have been noticed by the Albanian authorities.

The possibility of hearing. The most favourable conditions for hearing a minelaying operation would be:

(a) dead quiet in the immediate vicinity of the observer;

(b) wind blowing off shore (no surf);

(c) wind force 3 or less (scale Beaufort);

(d) people ashore suspecting some action to be going on, and being on the alert;

(e) people on board minelayers not skilful (unnecessary lights and noises);

(f) where echoes strengthen the sound.

Tests which we have carried out at “Naval Base B” (see Annex 2) under similar conditions to those stated above show that rail noise could be heard faintly at a distance of about 1,200 metres, while a splash could be heard faintly only at about 650 metres.

Additional noises quickly reduce the audibility.

Accordingly, under favourable conditions it would be possible to hear the minelaying operation from Limion Point and from the coast between Denta Point and San Giorgio Monastery, but not from Porto Edda.

Under less favourable conditions it would, however, be impossible to hear the minelaying from any of the positions mentioned.

We are not in the possession of sufficient information as to conditions when the mines were laid to give a more definite statement.

This Report was drawn up in English in one copy, at the Peace Palace, The Hague, this eighth day of January, one thousand nine hundred and forty-nine.

(Signed) S. Efferich. J. Bull. And. Forshell.

(Signed) S. T. Cross,
Secretary of the Committee.
DECISION OF THE COURT, DATED JANUARY 17th, 1949,
REGARDING AN ENQUIRY ON THE SPOT.

The Court requests the Experts appointed by the Order of the 17th December, 1948, to proceed to Sibenik and Saranda, and to make, on the land and in the waters adjacent to these two places, any investigations and, so far as possible, any experiments which they may consider useful with a view to verifying, completing and, if necessary, modifying the answers given in their Report filed by them on January 8th, 1949.

The Parties shall have the right to make suggestions to the Experts regarding the points to which their investigations and experiments should be directed.

The Registrar, with the authority of the President, shall make the preparations required for the journey of the Experts and for ensuring that they will receive all the facilities essential to the due and prompt accomplishment of their mission.

Within one week of the filing of the complementary Report of the Experts in the Registry, the Parties may file in the Registry their observations upon any new statements which it may contain.

EXPERTS’ REPORT DATED FEBRUARY 8th, 1949, ON THE INVESTIGATIONS AND TESTS AT SIBENIK AND SARANDA.

THE NAVAL EXPERTS

appointed by Order of Court of December 17th, 1948, visited Sibenik and Saranda in pursuance of the Court’s decision of January 17th, 1949. They have the honour to submit to the Court a report on the observations made and tests carried out by them.

Investigations were made as to the following points:

I. At Sibenik on January 24th and 25th, 1949:
   (a) Length of the quays at Panikovac Cove;
   (b) existence of a “built-up quay”;
   (c) depth of water alongside the quays in Panikovac Cove;
   (d) existence of a wreck or of obstructions alongside the southeastern quay;
   (e) configuration of the land at Panikovac Cove;
   (f) general lay-out of the tunnels at Panikovac Cove;
   (g) what could be seen of an “M”-class minelayer moored in Panikovac Cove, during the course of the journey by motor boat past the Cove, following:
       (1) route (i),
       (2) route (iii),
   as these routes are described in Annex C to the document filed in the Registry on November 27th, 1948, and headed: “Agreed answers to questions in connexion with state of sun at Sibenik”;
   (h) possibility of mooring a motor launch at Kulina Point;
   (i) a general inspection of “M 2”;
   (j) the line of sight from Keric’s terrace, and what could be seen from the terrace in broad daylight, and at the end of civil twilight on January 24th, 1949 (17.30 hours);
   (k) the time required for walking from Molo Krka, via Kovac’s house, to Keric’s house;

II. At Saranda on January 28th and 29th, 1949:
   (a) Survey of the coast from Limion Hill to San Giorgio Monastery;
   (b) visit to the Monastery by land;
   (c) visit to Denta Point by land;
   (d) possibility of observing, from the San Giorgio Monastery, the passage of a ship by night along the line on which the eastern row of mines was laid (as shown in Annex 9 of the United Kingdom Memorial);
   (e) a landing at Denta Point to check the accuracy of observations made of this area from the sea.
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(f) survey of the coast from Saranda to Cape Kiephali;
(g) visit to Limion Hill;
(h) visit to Saranda lighthouse.

The attached sketch (Annex I \(^1\)) shows the situation as it was found to be at Panikovac Cove.

* * *

DETAILS OF INVESTIGATION MENTIONED UNDER I.

I (a) The quays were measured and the dimensions found to be approximately as given by Admiral Moulec (dimensions are shown in Annex I \(^1\)).

At the north-eastern quay, standard small-gauge rails and mine-transport cars were observed; the latter were evidently not of the type used to transport German GY mines.

I (b) No “built-up quay” was observed, nor were any remnants seen such as would indicate the previous existence of such a quay.

I (c) Soundings of the depth of water alongside the quays were taken at low tide, and are shown in Annex I \(^1\). Difference between high and low water: approximately 60 cm.

I (d) There were no traces of any wrecks or obstructions alongside the south-western quay.

I (e) The configuration of the land was such that, at 16.06 hours on January 24th, 1949, a ship moored anywhere in Panikovac Cove would be in the shade. On this day and at this time, the altitude of the sun was 7° 6’.

Note.—16.06 hours on January 24th, was 55 minutes before sunset; 16.20 hours on October 19th, 1946, was also 55 minutes before sunset.

I (f) The entrances to the tunnels were measured. The rails leading to them appeared to be in working order and had probably been used not long before. This was proved by the absence of rust, which was apparent on the rails mentioned under I (a).

The fact that the floor of the tunnels was covered with iron sheeting prevented rails from being observed.

The tunnel led to a widened excavation which the experts did not insist on examining entirely. But they were able to see old ammunition and ground mines stored in the tunnel and modern German ground mines (oval) stored in the excavation.

Electric light was installed in the tunnels, but was not working at the time of our visit. Observations were made with the aid of a single electric torch and details could not be seen very distinctly.

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\(^1\) Not reproduced.
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It would have been impossible to see:

(e) that the mines were newly painted;
(f) horns or rails (ships being in the shade).

A third trip was made at 16.35 hours on January 24th, 1949, on route (iii).
The altitude of the sun at this moment was 3° 2’.
The “M 2” was moored in the same position and the distance measured from the launch to the “M 2” was found to be 840 metres.
During this run it was found possible to observe ships moored in Panikovac Cove.

It would be possible to observe the actual loading of mines.
No other observations could have been made while following this route.

I (h) During the preparation for the trips mentioned under I (g), the north-east coast of Mandalina Peninsula was observed. Several jetties were seen at which a launch could easily be moored. If the launch called at Kulina Point, it would, however, follow route (ii) from Kulina Point to Molo Krka.

We can see no reason why route (i) should be followed. Route (iii) would be followed if the launch did not call at Kulina Point.
The distance from route (ii) to Panikovac Cove would be 600 metres and the possibility of observation would be the same as mentioned for route (i).

I (i) The “M 2” was found to be fitted out as a minesweeper.
Minesweeping gear consisted of Oropesa gear for moored mines; the minesweeping winch was situated about one metre in front of the aft mast.
This ship could, however, easily be converted into a minelaying, and had for the purpose the following equipment:

(a) a derrick to load mines.
Length of derrick: 7.80 metres. Diameter of shackle: 1 inch;
(b) props in the deck to fix the sleepers of the mine rails.
These props were well greased, and easily removable;
(c) length of rails on starboard and port side: each 12.70 metres; distance between props: 0.675 metres;
three joints on either rail;
no turntables.
These rails are of a sufficient length to accommodate 18-20 GY mines in all.
Although the inside width of rails needed for GY mines is 70 cm, and the distance between the props on “M 2” is 67.5 cm, it should be borne in mind that the actual width of the rails depends entirely on the construction of the sleepers and the attachment of the rails to the sleepers. There exist small-gauge rails of which the width can be regulated as required; at Sibenik, however, the rails were not available for inspection;
(d) small wire winches were screwed into the deck, but were easily removable.

The above leads us to the conclusion that GY mines could be used on board “M 2”.

I (j) and (k) The experts visited Keric’s house to observe the view of Panikovac Cove from the terrace. They went by the same way as Kovacic said he followed from Molo Krka.
Molo Krka was reached at 16.43 on January 24th, 1949.

The walk to Kovacic’s house took 12 minutes, and that from Kovacic’s house to Keric’s house 14 minutes.

Weather conditions on January 24th, 1949: cloudless—clear—good visibility—slight breeze.
On October 19th, 1949, sunset was at 17.15; civil twilight was at 17.41.
On January 24th, 1949, sunset was 17.01; civil twilight at 17.30.

The following observations were made: at 17.30 on January 24th, 1949, “M 2” was not visible from Keric’s house; “M 2” was in the same position as during the afternoon (moored alongside the north-eastern quay).
“M 2” was then instructed by telephone to move eastward and to moor in a position as if a “built-up quay” existed.

At 17.35, when “M 2” was moored in her new position, it was still impossible to observe her from Keric’s terrace. This was solely due to the configuration of the land and not to the visibility conditions.

So long as the ship was moored in the Cove, only the smoke of the funnel could be seen from Keric’s terrace. As a matter of fact, this was the only proof that the ship was shifting. “M 2” was then instructed by telephone to leave Panikovac Cove, and at 17.40 her silhouette became clearly visible when she had left the Cove and reached a part of Sibenik Bay that was not shaded by the hills. (See Annex II.)

In this position it would have been possible to observe whether the ship was loaded with mines or not.
Assuming that the “M”-class ships were at Panikovac Cove and left the Cove after sunset, the observations made in Sibenik lead to the following conclusions:

A. “M”-class ships could be used for the minelaying operation. The tunnels could accommodate GY mines.

B. It is of no importance where and how the “M”-class ships were moored in Panikovac Cove, for:

(i) at 16.15 on October 19th, 1949, it was possible on any of the routes (i), (ii) or (iii) to observe the ships and the loading of mines;

1 Not reproduced.
(2) at 17.35 on the same day it was impossible for witness Kovacic to see anything of the ships wherever they might be moored in Panikovac Cove.

The arguments concerning:
the way the ships were moored;
wracks or obstructions alongside the south-western quay;
the configuration of the land;
jetties at Kulina Point;
visibility at 17.35 hours while witness Kovacic was at Keric's house;
existence of "built-up quay";
are of no material importance.

C. The only possibility of observing the 'M'-class ships from Keric's terrace would not be when they were in the Cove, but when they had left it. Witness Kovacic stated that it became too dark to see the ships leave the Cove. On the contrary, it would only be after their departure, when they had left the portion of Sibenik Bay shaded by the hills around the Cove, that they could have been observed.

II. AT SARANDA ON JANUARY 28TH AND 29TH, 1949.

II (a) A trip along the coast by sea, from Saranda, past Limion Hill to San Giorgio Monastery, was made on January 28th.

The route followed is shown in Annex III; and passed through
the positions A, B, C, D, and back to Saranda.

The following were observed:

1. battery at a position just west of Saranda;
2. fort Likurski, a very conspicuous landmark;
3. lighthouse south of Likurski;
4. houses at Denta Point;
5. a landing beach near Denta Point;
6. San Giorgio Monastery, very conspicuous against the sky.

Attention is drawn to the fact that the course followed coincides with the direction of the eastern row of mines. This course was easily checked by heading for the Monastery and keeping Limion Hill right astern, or vice versa.

II (b) After making a general survey of the coast from Saranda—Limion Hill—San Giorgio Monastery, it was decided to examine further the points noted. On January 28th, a trip was made from Saranda to San Giorgio Monastery; the foot of the hill, on which this is situated, can be reached by car in about 25 minutes. From there, a path leads up to the Monastery. The walk to the top takes 9 minutes. Mules use this track. On reaching the actual Monastery, the party found the door closed. The Albanian authorities tried in vain to get those inside to open the door. Permission was then requested and obtained to force the door and this was done. The Monastery was occupied by six soldiers, but there was accommodation for many more; it had telephone communication. A stable for mules was seen.

During a general survey around the Monastery, the following were observed:

(a) Infantry defences just outside the building.

(b) If the look-out posts were stationed outside the Monastery, they would be able to watch only part of the Bay of Saranda, as a number of trees partly obstructed the line of sight. It was therefore obvious that another place would be used to watch the sea traffic close to the Monastery. This place was a look-out tower inside the Monastery; it was equipped with benches and this higher spot afforded a much clearer view over the Corfu Strait and Bay of Saranda, and was not obstructed by trees to the same extent.

The Albanian authorities said that the men in the Monastery slept there during the night and only watched the sea during the day-time. This statement, however, does not seem quite to coincide with the difficulties experienced in obtaining entrance at the door of the Monastery earlier in the day.

II (c) and (e) On the way back from the Monastery, the experts desired to test the observation off the houses that had been noticed on Denta Point. As far as could be seen, no suitable path existed, leading to the houses observed from the sea.

It was therefore decided to approach Denta Point from the sea side. On January 29th, a trip was made by motor ship with a rowing-boat in tow. A landing was made near Denta Point on a small beach (see Annex III). From here, two paths, which are used by mules, lead over the slopes of Denta Point to the houses. It only took a couple of minutes from the shore to the lowest situated house. Here were seen:

(i) infantry defence line and machine-gun posts;
(ii) an old house with a roof, capable of accommodating men and mules;
(iii) places where a fire could be lighted;
(iv) a newspaper *Bashkimi* dated September 11th, 1948, was found in the trenches.

At this place one has a clear view over the whole of the Corfu Strait, as well as the Bay of Saranda.

The above facts point to the conclusion that guards or look-out posts were kept at Denta Point until September 11th, 1948.

Attention is drawn to the fact that the Experts' Report of January 8th, 1949, called this spot an "obvious place" to keep a look-out, as it commanded the Corfu Strait as well as Saranda Bay.

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1 Not reproduced.
**Note.** A second house which was much bigger than the former and could be used as quarters, was situated higher up the slope. This house was not visited by the experts.

II (d) In the evening of January 28th, a test of visibility by night from San Giorgio Monastery was carried out.

*Weather conditions*: cloudless; slight breeze; no moon.

The ship mentioned above was again used. All lights were extinguished. One of the experts, and the Parties' experts, went to San Giorgio Monastery to test the degree of visibility, while the other expert travelled on the ship along a line identical with that on which the eastern row of mines had been laid (see Annex 9 of the United Kingdom Memorial).

The party for the Monastery left Saranda about three quarters of an hour before the ship sailed. On arriving at the ship in Saranda, the other party received a telephone message from the Monastery confirming that the first party had arrived.

On their way up the hill to the Monastery, the first party was halted by two soldiers with rifles. This occurrence did not seem to tally with the statement made that afternoon that the men slept during the night.

The course of the ship along the eastern line of mines was easily checked with the aid of:

- the background of Limion Hill;
- Saranda lighthouse;
- Cape Kiephali;
- San Giorgio Monastery;
- Denta Point;
- Tignosso lighthouse.

The ship was completely blacked out.

*Note.*—This is the most favourable condition for the avoidance of detection. For usually a minelaying, like all oil- and coal-burning vessels, would emit some smoke from its funnels; and, as a rule, some sort of light would be used on a small ship during the actual minelaying operation.

While the ship was following a course towards the Monastery, the line of sight from that observation post was partly obstructed by trees (see Annex IV 1).

The noise of the motor was already heard from the Monastery at 22.20 hours (distance 1,800 metres). The ship was sighted for a very short while at 22.26 hours (distance 670 metres). It was not possible on this occasion to observe the ship for long, as it disappeared behind the trees (see Annex IV 1).

After altering course, it was sighted clearly again from the Monastery at 22.30 hours (approximate distance 800 metres).

A northerly course was then set and, at 22.47 hours, a signal was received on board from the Monastery, stating that the ship was out of sight. The distance was then calculated from a cross-bearing, taken at 22.50, from Saranda light and a promontory south of the Monastery, and the distance at 22.47 hours was found to be approximately 1,900 metres.

**Summary:**

- Noise of motor was heard at 1,800 metres distance;
- Ship was observed for the first time at 670 metres distance;
- Ship was again clearly seen at 800 metres distance;
- Ship was followed for a distance of 1,900 metres.

*Note.*—This motor ship was only 80 feet long, had no bridge, wheelhouse or funnel, and was very low on the water.

II (f) On January 29th, a general survey was made of the coast between Saranda and Cape Kiephali. Nothing extraordinary was observed. Here and there were look-out posts which seemed to be deserted. Pill-boxes were also noticed.

At Cape Kiephali, a house was sighted which would be an ideal place for a look-out, commanding the whole Medria channel.

II (g) On January 29th, a visit was paid to Limion Hill, where an old Italian battery was situated.

II (h) In the Experts' Report of January 8th, 1949, it was stated that only one light existed to guide navigation in Corfu Strait. In fact, only one light is indicated on the Admiralty chart.

But Saranda lighthouse was found to be working on January 28th, 1949; it could not, however, be used for a cross-bearing if the minelaying began from the South, owing to the configuration of the land at Denta Point.

This lighthouse would have been of service if the mines were laid from the North.

But as no log-book or other documentary information was available, according to the Albanian authorities, it was not possible to state whether the Saranda light was in working order in October 1948.

The following conclusions can be drawn:

A. A minelaying operation could be carried out in Corfu Channel, starting:
   (a) from the North;
   (b) from the South.

B. On a clear night, on either course, there would have been sufficient landmarks to take a fix.

C. Provided a look-out was kept at Cape Kiephali, Denta Point and San Giorgio Monastery, and under normal weather conditions for this area, and if the mines were laid from the North towards the South:
   (i) the operation might not be seen by the look-out post at the foot of San Giorgio Monastery, because "position 22.47
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hours' coincides with the most southerly mine which was
(i) cut (see Annex III ¹);
(ii) the minelayers would, however, be seen from Cape Kiephali;
and
(iii) must have been noticed from Denta Point, as the distances
while passing it are within the limits of visibility shown in
summary under II (d).

D. If the minelaying were done from the South (which is most
feasible, as the ships would not have to cross their own mine-
fields if returning to the North), the minelayers would have
been observed from Cape Kiephali, Denta Point and San Giorgio
Monastery. It must be borne in mind that in this case the
ships would have passed the above-mentioned points twice.

The experts consider it to be indisputable that if a normal look-out
was kept at Cape Kiephali, Denta Point, and San Giorgio Monastery,
and if the look-outs were equipped with binoculars as has been stated,
der under normal weather conditions for this area, the minelaying operations
shown in Annex 9 to the United Kingdom Memorial must have been
noticed by these coast-guards.

On the occasion of the experts' visit to San Giorgio Monastery,
the Albanian authorities stated that no binoculars were now available
at that post.

GENERAL.

During the general survey of the coast from Limion Hill to San
Giorgio Monastery on January 28th and from Limion Hill to Cape
Kiephali on January 29th, the experts noticed that Barchetta Rock
was not so easy a point to distinguish as Tignoso lighthouse. But
it happens that in the Reports on Operation Retail (United Kingdom
Memorial, p. 117), the positions of all the mines swept on November 13th,
1946, are given by bearing and distance from Barchetta Rock. The
experts therefore consulted the Reports on Operation Retail in order
to check the positions in question.
They reached the conclusion that:

1. individual ships taking part in the Operation may have selected
any obvious landmark in plotting the position of a swept mine;

2. these positions would then be plotted later on a chart of the
whole area of the sweep;

3. Barchetta Rock, as being the closest landmark to the most
westerly lap of the sweep, was then selected as a datum dan
(reference point) for tabulating all the positions shown on
page 117 of the United Kingdom Memorial;

¹ Not reproduced.
QUESTIONS PUT BY THREE MEMBERS OF THE COURT ON FEBRUARY 10th, 1949.

(a) By Judge Zoričić.

I.—On page 15 of the French text (page 14 of the English text) the Report arrives at certain conclusions. Under heading C it is stated that, subject to certain conditions:

1. the operation might not be seen by the look-out post at the foot of San Giorgio Monastery;
2. the minelaying would however be seen from Cape Kiephali; and
3. they must have been noticed from Denta Point.

In paragraph D mention is also made of the minelaying which would have been observed.

From this text it would appear that what the guards might have, or should have, observed was the minelaying, i.e., the ships themselves, and it seems that the word “operation” in sub-paragraph 1 refers to the movements and manoeuvres of the ships.

At the end of the page (and top of next page in English text) it is stated that if a normal look-out was kept at Cape Kiephali, Denta Point, and San Giorgio Monastery, and if certain other conditions were fulfilled: “the minelaying operations ..., must have been noticed by the coast-guards”.

These passages mention “minelaying operations”, and it is therefore important to know what meaning the Experts attach to these words; in other words:

(1) Does the conclusion mean that the minelaying ships themselves must have been observed by the coast-guards, or

(2) Do the words “minelaying operations” mean that the coast-guards must have seen not only the ships and the manoeuvres which they carried out, but also the actual minelaying, i.e., the launching of the mines into the sea?

II.—Does the view which is obtainable from Cape Denta enable one to see certain parts of the Strait, or of Saranda Bay, which would not be visible either from Cape Kiephali, or from Saranda, or again from the tower of the old Monastery of San Giorgio? In other words, is it not possible to see, from these look-out posts, everything which would be visible from Cape Denta?

(b) By Judge Krylov.

1. Were the houses at Denta Point inhabited? Why was the big house not visited? Had these houses been recently built?

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1 See pp. 160-161.
2 See p. 161.
3 See pp. 159-160.
4 See pp. 160 and 161.
one finds everywhere on this rocky coast grows also on the parapet of the trench, made of the excavated soil.

Moreover, the experts were informed that these defence lines had been constructed by the Italian troops.

**Ad 3.**

The very slight breeze was blowing from the N.-E.

**Ad 4.**

The experts saw no purpose in prolonging their investigations by asking to go on shore at Cape Kiephali. The observations they had made at Denta Point, together with the remarks given in their report under No. II (f), seemed to them sufficient for the needs of their enquiry.

**Ad 5.**

According to the *Mediterranean Pilot*, Volume III, one can consider the following weather conditions as being normal.

(a) **Wind.**

During summer, north-westerly winds are most prevalent, but in winter those from the South-East. In settled summer weather, when the barometer is high, and often in winter, land and sea breezes prevail. The land wind is light and, near the Corfu Channel, it blows from North to North-East. It begins to blow two or three hours after sunset, and increases in force until after midnight, when it decreases, falls calm at sunrise, freshens again as the sun gets higher, veering some points eastward until about 9 a.m., after which it dies away and is succeeded by the sea breeze.

(b) **Clouds.**

When land and sea breezes prevail, there is little cloud.

South-east wind may be accompanied by rainfall, and an overcast sky may be expected, the average for October being 40% covered with clouds.

(c) **Visibility.**

Visibility is usually good in the Adriatic, except when the Bora blows and causes rainfall. Exceptionally good visibility often occurs on the Dalmatian coast.

**Note.—** The Bora is a local wind which can blow very strongly from the North-East for about 15 or 20 hours, with heavy squalls, thunder, lightning and rain at intervals. It generally dispels any hovering clouds or fog, and when it blows with great force the weather is very clear.

(d) **Conclusions.**

The experts when mentioning “normal” weather conditions under paragraph D of their conclusions on page 151 (English text) have

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1 See p. 161.
therefore in mind the following weather: clouds 3-4/10th—visibility good (20 miles)—no fog or rainfall—slight easterly breeze.

Ad 6.

From the position of the mines indicated in the United Kingdom Memorial, Barchetta Rock is not sufficiently visible to be used for taking fixes. Why, then, it may be asked, does the Memorial calculate the positions of the mines with reference to that rock? The experts thought they should seek an answer to that question. They found it, and gave it in their report, in order to forestall any question about it.

Ad 7.

As stated in the Experts' Report of January 8th, 1949, under (8) (i), there are four operational possibilities for laying mines in the Corfu Strait. They are:

I. Approach from the North and leaving towards the North;
II. Approach from the North and leaving towards the South;
III. Approach from the South and leaving towards the North.
IV. Approach from the South and leaving towards the North.

In order to carry out the operations mentioned under I and III the ships would have had to pass the area of vigilance twice. If the operations under II and IV were carried out, the ships would pass the area of vigilance only once.

If the area of operations is approached from either North or South and the ships carrying out the operations leave again either to the North or South, they can adopt two methods of laying the mines:

(a) from the North;
(b) from the South.

Operation I is discussed as regards method (a) and as regards method (b) in the Experts' Report of February 8th, 1949, A to D of Section II. If operation III was carried out by method (a) or by method (b) the conclusions contained in the Experts' Report of February 8th would have been as follows:

Conclusions A and B.—No change.

Conclusion C.—Provided that a look-out was kept at Cape Kiephali, Denta Point and San Giorgio Monastery, and under normal weather conditions for this area, and if the mines were laid from the North towards the South

(i) the operation might not be seen by the look-out post at the foot of San Giorgio Monastery;
(ii) the operation would not be seen from Cape Kiephali;
(iii) the minelayers must have been noticed from Denta Point.

Conclusion D.—If minelaying was carried out from the South towards the North, the minelayers would have to take a fix and plot this fix south of a point at which the actual minelaying operation would start.

As this fix was the reference point for this particular minelaying operation, it had to be in line with the row of mines and consequently much closer to the San Giorgio Monastery than the position of the most southerly mine, as indicated in Annex 9 of the United Kingdom Memorial.

In this case:

(i) the ships must have been observed by look-out posts from San Giorgio Monastery and from Denta Point;
(ii) the operation would not be observed from Cape Kiephali.

It must be borne in mind that in this case the ships would have passed the above-mentioned points twice, with the exception of Cape Kiephali.

A comparison of operations I and III:

<table>
<thead>
<tr>
<th>Operation I</th>
<th>Operation III</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Minelaying from the North:</td>
<td>(a) Minelaying from the North:</td>
</tr>
<tr>
<td>1. Operation might not be seen by the look-out at San Giorgio Monastery.</td>
<td>1. Operation might not be seen by the look-out at San Giorgio Monastery.</td>
</tr>
<tr>
<td>2. Minelayers would be seen from Cape Kiephali.</td>
<td>2. Operation would not be seen from Cape Kiephali.</td>
</tr>
<tr>
<td>3. Minelayer must have been seen from Denta Point.</td>
<td>3. Minelayer must have been seen from Denta Point.</td>
</tr>
<tr>
<td>(b) Minelaying from the South:</td>
<td>(b) Minelaying from the South:</td>
</tr>
<tr>
<td>1. Minelayers would be seen by the look-out at San Giorgio Monastery.</td>
<td>1. Minelayers must have been seen by the look-out at San Giorgio Monastery.</td>
</tr>
<tr>
<td>2. Minelayer must have been seen from Denta Point.</td>
<td>2. Minelayer must have been seen by the look-out from Denta Point.</td>
</tr>
<tr>
<td>3. Minelayers would have been seen from Cape Kiephali.</td>
<td>3. Operation would not have been seen from Cape Kiephali.</td>
</tr>
</tbody>
</table>

The difference between operation I and operation III is that when a ship approached the area from the South, she would not be observed by a look-out post situated at Cape Kiephali. In both cases, the look-out posts at Denta Point must have seen the minelayers; in other words, the minelayers could not have escaped the notice of the look-out posts at Denta Point, and if the minelaying were started from the South, it must in both cases have been seen from the San Giorgio Monastery.
II. Questions put by Judge Zorglité.

Ad 1.

By the term “the operation” in conclusion C (i) the experts meant the whole of the minelaying operation (i.e., both the manoeuvres of the ships and the actual launching of the mines).

By employing the term “minlayers” in paragraphs C (ii) and C (iii), the experts intended to indicate that the ships which were used for the minelaying operation would in case C (ii), or must in case C (iii) have drawn the attention of the look-out posts.

Ad 2.

From Cape Kiephali the view extends over the whole of the Strait, but not over Saranda Bay. From Saranda the view extends over the bay, but not over the whole of the Strait. From the San Giorgio Monastery the view extends over the whole of the Strait and over the greater part of the bay.

But Denta Point, which projects further than the other promontories, commands both the whole of the Strait and the whole of the bay. The investigation has confirmed the conclusion which was derived from a study of the map: this spot is very suitable for a look-out post.

III. Question put by Judge Etter.

In their Report of January 8th, 1949, the experts concluded that, having regard to the insufficiency of the information available as to the conditions under which the mines were laid, it was not possible to give a precise opinion concerning the possibility of hearing the minelaying operations.

After their visit to Saranda, the experts added nothing further on this subject. They confirm that they have nothing to add. The conclusions which they have drawn in regard to the possibility of seeing the operation appear to them to deprive the question whether the operation could be heard of any further importance.

In these circumstances, they think it unnecessary to reply to the objections on this subject that have been made in regard to their report of January 8th, 1949; at the same time, they do not for a moment admit that these objections are justified.

Done in English, in one copy, at the Peace Palace, The Hague, this twelfth day of February, one thousand nine hundred and forty-nine.

(Signed) AND. FORSELL.
(Signed) S. EIFFERICH.
Military and Paramilitary Activities in and against Nicaragua
(Nicaragua v. United States of America),
Merits, Judgment, I.C.J. Reports 1986
MILITARY AND PARAMILITARY ACTIVITIES (JUDGMENT)

Principle prohibiting recourse to the threat or use of force in international relations — Inherent right of self-defence — Conditions for exercise — Individual and collective self-defence — Response to armed attack — Declaration of having been the object of armed attack and request for measures in the exercise of collective self-defence.

Principle of non-intervention — Content of the principle — Opinio juris — State practice — Question of collective counter-measures in response to conduct not amounting to armed attack.

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


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

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

Claim for reparation
Peaceful settlement of disputes.

JUDGMENT

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

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

between

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos Argüello Gómez, Ambassador,
as Agent and Counsel,

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

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

Mr. Alain Pellet, Professor at the University of Paris-Nord and the Institut d'études politiques de Paris,
Mr. Paul S. Reichler, Reichler and Appelbaum, Washington, D.C.; Member of the Bar of the United States Supreme Court; Member of the Bar of the District of Columbia, as Counsel and Advocates.

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

and

the United States of America.

THE COURT,

composed as above,

delivers the following Judgment:

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

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

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

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

5. In its Memorial on jurisdiction and admissibility, the Republic of Nicaragua contended that, in addition to the basis of jurisdiction relied on in the Application, a Treaty of Friendship, Commerce and Navigation signed by the Parties in 1956 provides an independent basis for jurisdiction under Article 36, paragraph 1, of the Statute of the Court.

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

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

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

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

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

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

11. By an Order dated 22 January 1985 the President of the Court, after referring to the letter from the United States Agent, fixed 30 April 1985 as time-limit for a Memorial of Nicaragua and 31 May 1985 as time-limit for a Counter-Memorial of the United States of America on the merits of the dispute. The Memorial of Nicaragua was filed within the time-limit so fixed; no pleading was filed by the United States of America, nor did it make any request for extension of the time-limit. In its Memorial, communicated to the United States pursuant to Article 43 of the Statute of the Court, Nicaragua invoked Article 53 of the Statute and called upon the Court to decide the case despite the failure of the Respondent to appear and defend.
12. On 10 September 1985, immediately prior to the opening of the oral proceedings, the Agent of Nicaragua submitted to the Court a number of documents referred to as "Supplemental Annexes" to the Memorial of Nicaragua. In application of Article 56 of the Rules of Court, these documents were treated as "new documents" and copies were transmitted to the United States of America, which did not lodge any objection to their production.

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

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

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

in the Application:

"Nicaragua, reserving the right to supplement or to amend this Application subject to the presentation to the Court of the relevant evidence and legal argument, requests the Court to adjudge and declare as follows:

(a) That the United States, in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express charter and treaty obligations to Nicaragua, and in particular, its charter and treaty obligations under:
- Article 2 (4) of the United Nations Charter;
- Articles 18 and 20 of the Charter of the Organization of American States;
- Article 8 of the Convention on Rights and Duties of States;
- Article I, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife.

(b) That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by:

- armed attacks against Nicaragua by air, land and sea;
- incursions into Nicaraguan territorial waters;
- aerial trespass into Nicaraguan airspace;
- efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.

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

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

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

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

(g) That, in view of its breaches of the foregoing legal obligations, the United States is under a particular duty to cease and desist immediately, from all use of force—whether direct or indirect, overt or covert—against Nicaragua, and from all threats of force against Nicaragua;

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

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

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

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

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

in the Memorial on the merits:

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

First: the Court is requested to adjudge and declare that the United
States has violated the obligations of international law indicated in this Memorial, and that in particular respects the United States is in continuing violation of those obligations.

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

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

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

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

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

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

* * * *

18. The dispute before the Court between Nicaragua and the United States concerns events in Nicaragua subsequent to the fall of the Government of President Anastasio Somoza Debayle in Nicaragua in July 1979, and activities of the Government of the United States in relation to Nicaragua since that time. Following the departure of President Somoza, a Junta of National Reconstruction and an 18-member government was installed by the body which had led the armed opposition to President Somoza, the Frente Sandinista de Liberación Nacional (FSLN). That body had initially an extensive share in the new government, described as a “democratic coalition”, and as a result of later resignations and reshuffles, became almost its sole component. Certain opponents of the new Government, primarily supporters of the former Somoza Government and in particular ex-members of the National Guard, formed themselves into irregular military forces, and commenced a policy of armed opposition, though initially on a limited scale.

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

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

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

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

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

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

25. Various elements of the present dispute have been brought before the United Nations Security Council by Nicaragua, in April 1984 (as the Court had occasion to note in its Order of 10 May 1984, and in its Judgment on jurisdiction and admissibility of 26 November 1984, I.C.J. Reports 1984, p. 432, para. 91), and on a number of other occasions. The subject-matter of the dispute also forms part of wider issues affecting Central America at present being dealt with on a regional basis in the context of what is known as the "Contadora Process" (I.C.J. Reports 1984, pp. 183-185, paras. 34-36; pp. 438-441, paras. 102-108).

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

27. When a State named as party to proceedings before the Court decides not to appear in the proceedings, or not to defend its case, the Court usually expresses regret, because such a decision obviously has a negative impact on the sound administration of justice (cf. Fisheries Jurisdiction, I.C.J. Reports 1973, p. 7, para. 12; p. 54, para. 13; I.C.J. Reports 1974, p. 9, para. 17; p. 181, para. 18; Nuclear Tests, I.C.J. Reports 1974, p. 257, para. 15; p. 461, para. 15: Aegean Sea Continental Shelf, I.C.J. Reports 1978, p. 7, para. 15; United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 18, para. 33). In the present case, the Court regrets even more deeply the decision of the respondent State not to participate in the present phase of the proceedings, because this decision was made after the United States had participated fully in the proceedings on the request for provisional measures, and the proceedings on jurisdiction and admissibility. Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits. It is not possible to argue that the Court had jurisdiction only to declare that it lacked jurisdiction. In the normal course of events, for a party to appear before a court entails acceptance of the possibility of the court's finding against that party. Furthermore the Court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to "reserve its rights"
in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision. Under Article 36, paragraph 6, of its Statute, the Court has jurisdiction to determine any dispute as to its own jurisdiction, and its judgment on that matter, as on the merits, is final and binding on the parties under Articles 59 and 60 of the Statute (cf. Corfu Channel, Judgment of 15 December 1949, I.C.J. Reports 1949, p. 248).

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

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

“The Court...as an international judicial organ, is deemed to take judicial notice of...international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.” (I.C.J. Reports 1974, p. 9, para. 17; p. 181, para. 18.)

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

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

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

31. While these are the guiding principles, the experience of previous cases in which one party has decided not to appear shows that something more is involved. Though formally absent from the proceedings, the party in question frequently submits to the Court letters and documents, in ways and by means not contemplated by the Rules. The Court has thus to strike a balance. On the one hand, it is valuable for the Court to know the views of both parties in whatever form those views may have been expressed. Further, as the Court noted in 1974, where one party is not appearing “it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts” (Nuclear Tests, I.C.J. Reports 1974, p. 263, para. 31; p. 468, para. 32). On the other hand, the Court has to emphasize
that the equality of the parties to the dispute must remain the basic principle for the Court. The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage; therefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage. The provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions. The treatment to be given by the Court to communications or material emanating from the absent party must be determined by the weight to be given to these different considerations, and is not susceptible of rigid definition in the form of a precise general rule. The vigilance which the Court can exercise when aided by the presence of both parties to the proceedings has a counterpart in the special care it has to devote to the proper administration of justice in a case in which only one party is present.

* * *

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

33. In the first place, it has been suggested that the present dispute should be declared non-justiciable, because it does not fall into the category of "legal disputes" within the meaning of Article 36, paragraph 2, of the Statute. It is true that the jurisdiction of the Court under that provision is limited to "legal disputes" concerning any of the matters enumerated in the text. The question whether a given dispute between two States is or is not a "legal dispute" for the purposes of this provision may itself be a matter in dispute between those two States; and if so, that dispute is to be settled by the decision of the Court in accordance with paragraph 6 of Article 36. In the present case, however, this particular point does not appear to be in dispute. The United States, by raising the proceedings devoted to questions of jurisdiction and admissibility, advanced a number of grounds why the Court should find that it had no jurisdiction, or that the claim was not admissible. It relied \textit{inter alia} on proviso (c) to its own declaration of acceptance of jurisdiction under Article 36, paragraph 2, without ever advancing the more radical argument that the whole declaration was inapplicable because the dispute brought before the Court by Nicaragua was not a "legal dispute" within the meaning of that paragraph. As a matter of admissibility, the United States objected to the application of Article 36, paragraph 2, not because the dispute was not a "legal dispute", but because of the express allocation of such matters as the subject of Nicaragua's claims to the political organs under the United Nations Charter, an argument rejected by the Court in its Judgment of 26 November 1984 (\textit{I.C.J. Reports} 1984, pp. 431-436). Similarly, while the United States contended that the nature of the judicial function precludes its application to the substance of Nicaragua's allegations in this case — an argument which the Court was again unable to uphold (\textit{ibid.}, pp. 436-438) —, it was careful to emphasize that this did not mean that it was arguing that international law was not relevant or controlling in a dispute of this kind. In short, the Court can see no indication whatsoever that, even in the view of the United States, the present dispute falls outside the category of "legal disputes" to which Article 36, paragraph 2, of the Statute applies. It must therefore proceed to examine the specific claims of Nicaragua in the light of the international law applicable.

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

35. As will be further explained below, in the circumstances of the dispute now before the Court, what is in issue is the purported exercise by the United States of a right of collective self-defence in response to an armed attack on another State. The possible lawfulness of a response to the imminent threat of an armed attack which has not yet taken place has not
been raised. The Court has therefore to determine first whether such attack has occurred, and if so whether the measures allegedly taken in self-defence were a legally appropriate reaction as a matter of collective self-defence. To resolve the first of these questions, the Court does not have to determine whether the United States, or the State which may have been under attack, was faced with a necessity of reacting. Nor does its examination, if it determines that an armed attack did occur, of issues relating to the collective character of the self-defence and the kind of reaction, necessarily involve it in any evaluation of military considerations. Accordingly the Court can at this stage confine itself to a finding that, in the circumstances of the present case, the issues raised of collective self-defence are issues which it has competence, and is equipped, to determine.

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

“When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration [or, as in the present case also, the Treaty containing a compromissory clause], by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established.” (I.C.J. Reports 1953, p. 123.)

* *

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

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

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

“the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law” (Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2, p. 14).

39. Under the Rules of Court dating back to 1936 (which on this point reflected still earlier practice), the Court had the power to join an objection to the merits “whenever the interests of the good administration of justice require it” (Panevezys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 75.
p. 56), and in particular where the Court, if it were to decide on the objection, “would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution” (ibid.). If this power was exercised, there was always a risk, namely that the Court would ultimately decide the case on the preliminary objection, after requiring the parties fully to plead the merits, — and this did in fact occur (Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970, p. 3). The result was regarded in some quarters as an unnecessary prolongation of an expensive and time-consuming procedure.

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

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

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

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

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

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

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

* * *

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

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

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

43. It regarded this as not necessary because, in its Application, Nicaragua had not confined its claims to breaches of multilateral treaties but had also invoked a number of principles of “general and customary international law”, as well as the bilateral Treaty of Friendship, Commerce and Navigation of 1956. These principles remained binding as such, although they were also enshrined in treaty law provisions. Consequently, since the case had not been referred to the Court solely on the basis of multilateral treaties, it was not necessary for the Court, in order to consider the merits of Nicaragua’s claim, to decide the scope of the reservation in question: “the claim . . . would not in any event be barred by the multilateral treaty reservation” (I.C.J. Reports 1984, p. 425, para. 73). Moreover, it was not found possible for the reservation to be definitively dealt with at the jurisdictional stage of the proceedings. To make a judgment on the scope of the reservation would have meant giving a definitive interpretation of the term “affected” in that reservation. In its 1984 Judgment, the Court held
that the term "affected" applied not to multilateral treaties, but to the parties to such treaties. The Court added that if those parties wished to protect their interests "in so far as these are not already protected by Article 59 of the Statute", they "would have the choice of either instituting proceedings or intervening" during the merits phase. But at all events, according to the Court, "the determination of the States 'affected' could not be left to the parties but must be made by the Court" (I.C.J. Reports 1984, p. 425, para. 75). This process could however not be carried out at the stage of the proceedings in which the Court then found itself; "it is only when the general lines of the judgment to be given become clear", the Court said, "that the States 'affected' could be identified" (ibid.). The Court thus concluded that this was "a question concerning matters of substance relating to the merits of the case" (ibid., para. 76). Since the question of what States may be 'affected' by the decision on the merits is not in itself a jurisdictional problem", the Court found that it

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

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

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

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

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

46. It has also been suggested that the United States may have waived the multilateral treaty reservation by its conduct of its case at the jurisdictional stage, or more generally by asserting collective self-defence in accordance with the United Nations Charter as justification for its activities vis-à-vis Nicaragua. There is no doubt that the United States, during its participation in the proceedings, insisted that the law applicable to the dispute was to be found in multilateral treaties, particularly the United Nations Charter and the Charter of the Organization of American States; indeed, it went so far as to contend that such treaties supervene and subsume customary law on the subject. It is however one thing for a State to advance a contention that the law applicable to a given dispute derives from a specified source; it is quite another for that State to consent to the Court's having jurisdiction to entertain that dispute, and thus to apply that law to the dispute. The whole purpose of the United States argument as to the applicability of the United Nations and Organization of American
States Charters was to convince the Court that the present dispute is one "arising under" those treaties, and hence one which is excluded from jurisdiction by the multilateral treaty reservation in the United States declaration of acceptance of jurisdiction. It is impossible to interpret the attitude of the United States as consenting to the Court's applying multilateral treaty law to resolve the dispute, when what the United States was arguing was that, for the very reason that the dispute "arises under" multilateral treaties, no consent to its determination by the Court has ever been given. The Court was fully aware when it gave its 1984 Judgment, that the United States regarded the law of the two Charters as applicable to the dispute; it did not then regard that approach as a waiver, nor can it do so now. The Court is therefore bound to ascertain whether its jurisdiction is limited by virtue of the reservation in question.

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

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

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

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

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

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

50. Both Article 51 of the United Nations Charter and Article 21 of the Organization of American States Charter refer to self-defence as an exception to the principle of the prohibition of the use of force. Unlike the United Nations Charter, the Organization of American States Charter does not use the expression "collective self-defence", but refers to the case of "self-defence in accordance with existing treaties or in fulfillment thereof", or of any treaty being the United Nations Charter. Furthermore, it is evident that if actions of the United States complied with all requirements of the United Nations Charter so as to constitute the exer-
cise of the right of collective self-defence, it could not be argued that they could nevertheless constitute a violation of Article 21 of the Organization of American States Charter. It therefore follows that the situation of El Salvador with regard to the assertion by the United States of the right of collective self-defence is the same under the Organization of American States Charter as it is under the United Nations Charter.

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

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

53. Nor is it only in the case of a decision of the Court rejecting the United States claim to be acting in self-defence that El Salvador would be “affect” by the decision. The multilateral treaty reservation does not require, as a condition for the exclusion of a dispute from the jurisdiction of the Court, that a State party to the relevant treaty be “adversely” or “prejudicially” affected by the decision, even though this is clearly the case primarily in view. In other situations in which the position of a State not before the Court is under consideration (cf. Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954, p. 52; Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984, p. 20, para. 31) it is clearly impossible to argue that that State may be differently treated if the Court’s decision will not necessarily be adverse to the interests of the absent State, but could be favourable to those interests. The multilateral treaty reservation bars any decision that would “affect” a third State party to the relevant treaty. Here also, it is not necessary to determine whether the decision will “affect” that State unfavourably or otherwise; the condition of the reservation is met if the State will necessarily be “affected”; in one way or the other.

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

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

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

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

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

* * *

57. One of the Court's chief difficulties in the present case has been the determination of the facts relevant to the dispute. First of all, there is marked disagreement between the Parties not only on the interpretation of the facts, but even on the existence or nature of at least some of them. Secondly, the respondent State has not appeared during the present merits phase of the proceedings, thus depriving the Court of the benefit of its complete and fully argued statement regarding the facts. The Court's task was therefore necessarily more difficult, and it has had to pay particular heed, as said above, to the proper application of Article 53 of its Statute. The Statute is therefore secrecy in which some of the content attributed to one or other of the Parties has been carried on. This makes it more difficult for the Court not only to decide on the imputability of the facts, but also to establish what are the facts. Sometimes there is no question, in the sense that it does not appear to be disputed, that an act was done, but there are conflicting reports, or a lack of evidence, as to who did it. The problem is then not the legal process of imputing the act to a particular State for the purpose of establishing responsibility, but the prior process of tracing material proof of the identity of the perpetrator. The occurrence of the act itself may however have been shrouded in secrecy. In the latter case, the Court has had to endeavour first to establish what actually happened, before entering on the next stage of considering whether the act (if proven) was imputable to the State to which it has been attributed.

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

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

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

* *

59. The Court is bound by the relevant provisions of its Statute and its Rules relating to the system of evidence, provisions designed to guarantee the sound administration of justice, while respecting the equality of the parties. The presentation of evidence is governed by specific rules relating to, for instance, the observance of time-limits, the communication of
evidence to the other party, the submission of observations on it by that party, and the various forms of challenge by each party of the other’s evidence. The absence of one of the parties restricts this procedure to some extent. The Court is careful, even where both parties appear, to give each of them the same opportunities and chances to produce their evidence; when the situation is complicated by the non-appearance of one of them, then a fortiori the Court regards it as essential to guarantee as perfect equality as possible between the parties. Article 53 of the Statute therefore obliges the Court to employ whatever means and resources may enable it to satisfy itself whether the submissions of the applicant State are well-founded in fact and law, and simultaneously to safeguard the essential principles of the sound administration of justice.

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

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

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

63. However, although it is perfectly proper that press information should not be treated in itself as evidence for judicial purposes, public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge. In the case of United States Diplomatic and Consular Staff in Tehran, the Court referred to facts which “are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries” (I.C.J. Reports 1980, p. 9, para. 12). On the basis of information, including press and broadcast material, which was “wholly consistent and concordant as to the main facts and circumstances of the case”, the Court was able to declare that it was satisfied that the allegations of fact were well-founded (ibid., p. 10, para. 13). The Court has however to show particular caution in this area. Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source. It is with this important reservation that the newspaper reports supplied to the Court should be examined in order to assess the facts of the case, and in particular to ascertain whether such facts were matters of public knowledge.

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

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

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

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

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

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

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

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

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

71. However, before outlining the limits of the probative effect of declarations by the authorities of the States concerned, the Court would recall that such declarations may involve legal effects, some of which it has defined in previous decisions (Nuclear Tests, United States Diplomatic and Consular Staff in Tehran cases). Among the legal effects which such declarations may have is that they may be regarded as evidence of the truth of facts, as evidence that such facts are attributable to the States the authorities of which are the authors of these declarations and, to a lesser degree, as evidence for the legal qualification of these facts. The Court is here concerned with the significance of the official declarations as evidence of specific facts and of their imputability to the States in question.
72. The declarations to which the Court considers it may refer are not limited to those made in the pleadings and the oral argument addressed to it in the successive stages of the case, nor are they limited to statements made by the Parties. Clearly the Court is entitled to refer, not only to the Nicaragua pleadings and oral argument, but to the pleadings and oral argument submitted to it by the United States before it withdrew from participation in the proceedings, and to the Declaration of Intervention of El Salvador in the proceedings. It is equally clear that the Court may take account of public declarations to which either Party has specifically drawn attention, and the text, or a report, of which has been filed as documentary evidence. But the Court considers that, in its quest for the truth, it may also take note of statements of representatives of the Parties (or of other States) in international organizations, as well as the resolutions adopted or discussed by such organizations, in so far as factually relevant, whether or not such material has been drawn to its attention by a Party.

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

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

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

* * *

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

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

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

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

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

79. According to Nicaragua, vessels of Dutch, Panamanian, Soviet, Liberian and Japanese registry, and one (Homin) of unidentified registry, were damaged by mines, though the damage to the Homin has also been attributed by Nicaragua rather to gunfire from minelaying vessels. Other sources mention damage to a British or a Cuban vessel. No direct evidence is available to the Court of any diplomatic protests by a State whose vessel had been damaged; according to press reports, the Soviet Government accused the United States of being responsible for the mining, and the British Government indicated to the United States that it deeply deplored the mining, as a matter of principle. Nicaragua has also submitted evidence to show that the mining of the ports caused a rise in marine insurance rates for cargo to and from Nicaragua, and that some shipping companies stopped sending vessels to Nicaraguan ports.
80. On this basis, the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.

* * *

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

(i) 8 September 1983: an attack was made on Sandino international airport in Managua by a Cessna aircraft, which was shot down;
(ii) 13 September 1983: an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up;
(iii) 2 October 1983: an attack was made on oil storage facilities at Benjamin Zeledon on the Atlantic coast, causing the loss of a large quantity of fuel;
(iv) 10 October 1983: an attack was made by air and sea on the port of Corinto, involving the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population;
(v) 14 October 1983: the underwater oil pipeline at Puerto Sandino was again blown up;
(vi) 4/5 January 1984: an attack was made by speedboats and helicopters using rockets against the Potosi Naval Base;
(vii) 24/25 February 1984: an incident at El Bluff listed under this date appears to be the mine explosion already mentioned in paragraph 75;
(viii) 7 March 1984: an attack was made on oil and storage facility at San Juan del Sur by speedboats and helicopters;
(ix) 28/30 March 1984: clashes occurred at Puerto Sandino between speedboats, in the course of minelaying operations, and Nicaraguan patrol boats; intervention by a helicopter in support of the speedboats;
(x) 9 April 1984: a helicopter allegedly launched from a mother ship in international waters provided fire support for an ARDE attack on San Juan del Norte.

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

83. On 10 October 1983, thus nine days after the attack on Corinto, a question was put to President Reagan at a press conference. Nicaragua has supplied the Court with the official transcript which, so far as relevant, reads as follows:

"Question: Mr. President, regarding the recent rebel attacks on a Nicaraguan oil depot, is it proper for the CIA to be involved in planning such attacks and supplying equipment for air raids? And do the American people have a right to be informed about any CIA role?"

The President: I think covert actions have been a part of government and a part of government's responsibilities for as long as there has been a government. I'm not going to comment on what, if any, connection such activities might have had with what has been going on, or with some of the specific operations down there.

But I do believe in the right of a country when it believes that its interests are best served to practice covert activity and then, while your people may have a right to know, you can't let your people know without letting the wrong people know, those that are in opposition to what you're doing."

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

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

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

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

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

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

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

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

and continued:

"These overflights, conducted by unarmed, high-flying planes, for the express and sole purpose of verifying reports of Nicaraguan intervention, are no threat to regional peace and stability; quite the contrary." (S/PV.2335, p. 48, emphasis added.)
The use of the present tense may be taken to imply that the overflights were continuing at the time of the debate. Press reports of 12 November 1984 confirm the occurrence of sonic booms at that period, and report the statement of Nicaraguan Defence Ministry officials that the plane responsible was a United States SR-71.

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

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

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

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

* * *

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

* * *

93. The Court must now examine in more detail the genesis, development and activities of the contra force, and the role of the United States in relation to it, in order to determine the legal significance of the conduct of the United States in this respect. According to Nicaragua, the United States “conceived, created and organized a mercenary army, the contra force”. However, there is evidence to show that some armed opposition to the Government of Nicaragua existed in 1979-1980, even before any interference or support by the United States. Nicaragua dates the beginning of the activity of the United States to “shortly after” 9 March 1981, when, it was said, the President of the United States made a formal presidential finding authorizing the CIA to undertake “covert activities” directed against Nicaragua. According to the testimony of Commander
Carrión, who stated that the “organized military and paramilitary activities” began in December 1981, there were Nicaraguan “anti-government forces” prior to that date, consisting of “just a few small bands very poorly armed, scattered along the northern border of Nicaragua and . . . composed mainly of ex-members of the Somoza’s National Guard. They did not have any military effectiveness and what they mainly did was rustling cattle and killing some civilians near the borderlines.”

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

94. According to the affidavit of Mr. Chamorro, there was also a political opposition to the Nicaraguan Government, established outside Nicaragua, from the end of 1979 onward, and in August 1981 this grouping merged with an armed opposition force called the 15th of September Legion, which had itself incorporated the previously disparate armed opposition bands, through mergers arranged by the CIA. It was thus that the FDN was said to have come into being. The other major armed opposition group, the ARDE, was formed in 1982 by Alfonso Robelo Callejas, a former member of the original 1979 Junta and Edén Pastora Gómez, a Sandinista military commander, leader of the FRS (Sandino Revolutionary Front) and later Vice-Minister in the Sandinista government. Nicaragua has not alleged that the United States was involved in the formation of this body. Even on the face of the evidence offered by the Applicant, therefore, the Court is unable to find that the United States created an armed opposition in Nicaragua. However, according to press articles citing official sources close to the United States Congress, the size of the contra force increased dramatically once United States financial and other assistance became available: from an initial body of 500 men (plus, according to some reports, 1,000 Miskito Indians) in December 1981, the force grew to 1,000 in February 1982, 1,500 in August 1982, 4,000 in December 1982, 5,500 in February 1983, 8,000 in June 1983 and 12,000 in November 1983. When (as explained below) United States aid other than “humanitarian assistance” was cut off in September 1984, the size of the force was reported to be over 10,000 men.

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

"During fiscal year 1984, not more than $24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or
which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.” (Intelligence Authorization Act 1984, Section 108.)

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

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

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

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

The changes sought were stated to be:

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

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

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

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

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

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

“$27,000,000 for humanitarian assistance to the Nicaraguan democratic resistance. Such assistance shall be provided in such department or agency of the United States as the President shall designate, except the Central Intelligence Agency or the Department of Defense . . .

As used in this subsection, the term ‘humanitarian assistance’ means the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death.”

The Joint Explanatory Statement of the Conference Committee noted that while the legislation adopted
“does proscribe these two agencies [CIA and DOD] from administering the funds and from providing any military training or advice to the democratic resistance ... none of the prohibitions on the provision of military or paramilitary assistance to the democratic resistance prevents the sharing of intelligence information with the democratic resistance”.

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

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

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

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

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

59. MILITARY AND PARAMILITARY ACTIVITIES (JUDGMENT)

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

- Build popular support in Central America and Nicaragua for an opposition front that would be nationalistic, anti-Cuban and anti-Somoza.
- Support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere.

Work primarily through non-Americans to achieve these covert objectives . . . ”

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

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

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

The CIA also supplied the FDN with intelligence, particularly as to Nicaraguan troop movements, derived from radio and telephonic interception, code-breaking, and surveillance by aircraft and satellites. Mr Chamorro also refers to aircraft being supplied by the CIA; from press reports it appears that those were comparatively small aircraft suitable for reconnaissance and a certain amount of supply-dropping, not for offensive
operations. Helicopters with Nicaraguan crews are reported to have taken part in certain operations of the “UCLAs” (see paragraph 86 above), but there is nothing to show whether these belonged to the contras or were lent by United States agencies.

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

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

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

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

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

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

108. Despite the large quantity of documentary evidence and testimony which it has examined, the Court has not been able to satisfy itself that the respondent State “created” the contra force in Nicaragua. It seems certain
that members of the former Somoza National Guard, together with civilian opponents to the Sandinista régime, withdrew from Nicaragua soon after that régime was installed in Managua, and sought to continue their struggle against it, even if in a disorganized way and with limited and ineffectual resources, before the Respondent took advantage of the existence of these opponents and incorporated this fact into its policies vis-à-vis the régime of the Applicant. Nor does the evidence warrant a finding that the United States gave “direct and critical combat support,” at least if that form of words is taken to mean that this support was tantamount to direct intervention by the United States combat forces, or that all contra operations reflected strategy and tactics wholly devised by the United States. On the other hand, the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN.

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

110. So far as the potential control constituted by the possibility of cessation of United States military aid is concerned, it may be noted that after 1 October 1984 such aid was no longer authorized, though the sharing of intelligence, and the provision of “humanitarian assistance” as defined in the above-cited legislation (paragraph 97) may continue. Yet, according to Nicaragua’s own case, and according to press reports, contra activity has continued. In sum, the evidence available to the Court indicates that the various forms of assistance provided to the contra by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the contra force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the contra depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is a fortiori unable to determine that the contra force may be equated for legal purposes with the forces of the United States. This conclusion, however, does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contra.

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

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

* * *

113. The question of the degree of control of the contra by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the contra whereby the United States has, it is alleged, violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua. The activities in question are said to represent a tactic which includes “the spreading of terror and danger to non-combatants as an end in itself with no attempt to
observe humanitarian standards and no reference to the concept of military necessity. In support of this, Nicaragua has catalogued numerous incidents, attributed to "CIA-trained mercenaries" or "mercenary forces", of kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity. The declaration of Commander Carrión annexed to the Memorial lists the first such incident in December 1981, and continues up to the end of 1984. Two of the witnesses called by Nicaragua (Father Loison and Mr. Glennon) gave oral evidence as to events of this kind. By way of examples of evidence to provide "direct proof of the tactics adopted by the contras under United States guidance and control", the Memorial of Nicaragua offers a statement, reported in the press, by the ex-FDN leader Mr. Edgar Chamorro, repeated in the latter's affidavit, of assassinations in Nicaraguan villages; the alleged existence of a classified Defence Intelligence Agency report of July 1982, reported in the New York Times on 21 October 1984, disclosing that the contras were carrying out assassinations; and the preparation by the CIA in 1983 of a manual of psychological warfare. At the hearings, reliance was also placed on the affidavit of Mr. Chamorro.

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

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

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

117. Nicaragua has in fact produced in evidence before the Court two publications which it claims were prepared by the CIA and supplied to the contras in 1983. The first of these, in Spanish, is entitled "Operaciones psicológicas en guerra de guerrillas" (Psychological Operations in Guerrilla Warfare), by "Tayacan"; the certified copy supplied to the Court carries no publisher's name or date. In its Preface, the publication is described as "a manual for the training of guerrillas in psychological operations, and its application to the concrete case of the Christian and democratic crusade being waged in Nicaragua by the Freedom Commands". The second is entitled the Freedom Fighter's Manual, with the subtitle "Practical guide to liberating Nicaragua from oppression and misery by paralyzing the military-industrial complex of the traitorous marxist state without having to use special tools and with minimal risk for the combatant". The text is printed in English and Spanish, and illustrated with simple charts; it consists of guidance for elementary sabotage techniques. The only indications available to the Court of its authorship are reports in the New York Times, quoting a United States Congressman and...
Mr. Edgar Chamorro as attributing the book to the CIA. Since the evidence linking the Freedom Fighter's Manual to the CIA is no more than newspaper reports the Court will not treat its publication as an act imputable to the United States Government for the purposes of the present case.

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

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

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

"If possible, professional criminals will be hired to carry out specific selective 'jobs'.

Specific tasks will be assigned to others, in order to create a 'martyr' for the cause, taking the demonstrators to a confrontation with the authorities, in order to bring about uprisings or shootings, which will cause the death of one or more persons, who would become the martyrs, a situation that should be made use of immediately against the regime, in order to create greater conflicts."

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

"2.11. No person employed by or acting on behalf of the United States Government shall engage in or conspire to create or contract to create, assassination.

2.12. No agency of the Intelligence Community shall participate in or authorize any person to undertake activities forbidden by this Order." (US Code, Congressional and Administrative News, 97th Congress, First Session, 1981, p. B.114.)

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

"The Committee believes that the manual has caused embarrassment to the United States and should never have been released in any of its various forms. Specific actions it describes are repugnant to American values.

The original purpose of the manual was to provide training to moderate FDN behavior in the field. Yet, the Committee believes that the manual was written, edited, distributed and used without adequate supervision. No one but its author paid much attention
to the manual. Most CIA officials learned about it from news accounts.

The Committee was told that CIA officers should have reviewed the manual and did not. The Committee was told that all CIA officers should have known about the Executive Order’s ban on assassination . . . but some did not. The entire publication and distribution of the manual was marked within the Agency by confusion about who had authority and responsibility for the manual. The incident of the manual illustrates once again to a majority of the Committee that the CIA did not have adequate command and control of the entire Nicaraguan covert action . . .

CIA officials up the chain of command either never read the manual or were never made aware of it. Negligence, not intent to violate the law, marked the manual’s history.

The Committee concluded that there was no intentional violation of Executive Order 12333."

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

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

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

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

* * *

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

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

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

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

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

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

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

* * *

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

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

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

“The United States has abundant evidence that the Government of Nicaragua has actively supported armed groups engaged in military and paramilitary activities in and against El Salvador, providing such groups with sites in Nicaragua for communications facilities, command and control headquarters, training and logistics support. The Government of Nicaragua is directly engaged with these armed groups in planning ongoing military and paramilitary activities conducted in and against El Salvador. The Government of Nicaragua also participates directly in the procurement, and transshipment through Nicaraguan territory, of large quantities of ammunition, supplies and weapons for the armed groups conducting military and paramilitary activities in and against El Salvador.

In addition to this support for armed groups operating in and against El Salvador, the Government of Nicaragua has engaged in similar support, albeit on a smaller scale, for armed groups engaged, or which have sought to engage, in military or paramilitary activities in and against the Republic of Costa Rica, the Republic of Honduras, and the Republic of Guatemala. The regular military forces of Nicaragua have engaged in several direct attacks on Honduran and Costa Rican territory, causing casualties among the armed forces and civilian populations of those States.”

In connection with this declaration, the Court would recall the observa-
tions it has already made (paragraphs 69 and 70) as to the evidential value of declarations by ministers of the government of a State engaged in litigation concerning an armed conflict.

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

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

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

131. In the proceedings on the merits, Nicaragua has addressed itself primarily to refuting the claim that it has been supplying arms and other assistance to the opponents of the Government of El Salvador; it has not specifically referred to the allegations of attacks on Honduras or Costa Rica. In this it is responding to what is, as noted above, the principal justification announced by the United States for its conduct. In ascertaining whether the conditions for the exercise by the United States of the right of collective self-defence are satisfied, the Court will accordingly first consider the activities of Nicaragua in relation to El Salvador, as established by the evidence and material available to the Court. It will then consider whether Nicaragua’s conduct in relation to Honduras or Costa Rica may justify the exercise of that right; in that respect it will examine only the allegations of direct cross-border attacks, since the affidavit of Mr. Shultz claims only that there was support by the provision of arms and supplies for military and paramilitary activities “on a smaller scale” in those countries than in El Salvador.

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

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

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

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

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

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

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

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

A.: No.

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

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

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

A.: No.

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

A.: Yes, I did.

Q.: When was that?

A.: Late 1980 to very early 1981."

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

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

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

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

"[Question:] Thus if the Government of Nicaragua had shipped arms to El Salvador before March 1981, for example in 1980 and early 1981, in order to arm the big January offensive of the insurgents in El Salvador, you would not be in a position to know that; is that correct?

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

Q.: Would you rule it 'in'?

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

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

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

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

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

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

"[Ortega:] As for the flow of arms to El Salvador, what must be stated is that as far as we have been informed by you, efforts have been made to stop it; however, I want to make clear that there is a great desire here to collaborate with the Salvadorian people, also among members of our armed forces, although our Junta and the National Directorate have a decision that activities of this kind should not be permitted. We would ask you to give us reports about that flow to help us control it.

[Enders:] You have succeeded in doing so in the past and I believe you can do so now. We are not in a position to supply you with intelligence reports. We would compromise our sources, and our nations have not yet reached the necessary level to exchange intelligence reports."

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

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

The Committee continued:

"At the time of the filing of this report, the Committee believes that the intelligence available to it continues to support the following judgments with certainty:

A major portion of the arms and other material sent by Cuba and other communist countries to the Salvadorian insurgents transits Nicaragua with the permission and assistance of the Sandinistas.

The Salvadorian insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material and propaganda activities.

The Sandinista leadership sanctions and directly facilitates all of the above functions.

Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.

In addition, Nicaragua and Cuba have provided – and appear to continue providing – training to the Salvadorian insurgents.”

The Court is not aware of the contents of any analogous report of a body with access to United States intelligence material covering a more recent period. It notes however that the Resolution adopted by the United States Congress on 29 July 1985 recorded the expectation of Congress from the Government of Nicaragua of:

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

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

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

"Article One
The High Contracting Parties promise to not offer and, should such be the case, to suspend military assistance and training and the supply and trafficking of arms, munitions and military equipment that may be made directly to the contending forces or indirectly through third States.

Article Two
The High Contracting Parties promise to adopt in their respective territories whatever measures may be necessary to impede all supply and trafficking of arms, munitions and military equipment and military assistance to and training of the contending forces in the Republic of El Salvador.” (P. 60.)
In the Introduction to its proposal the Nicaraguan Government stated that it was ready to enter into an agreement of this kind immediately, even if only with the United States, “in order that the Government of that country cease justifying its interventionist policy in El Salvador on the basis of supposed actions by Nicaragua” (p. 58).

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

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

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

143. The Court’s attention has also been drawn to various press reports of statements by diplomats, by leaders of the armed opposition in El Salvador, or defectors from it, supporting the view that Nicaragua was involved in the arms supply. As the Court has already explained, it regards press reports not as evidence capable of proving facts, but considers that they can nevertheless contribute, in some circumstances, to corroborating the existence of a particular fact (paragraph 62 above). The press reports here referred to will therefore be taken into account only to that extent.

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

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

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

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

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

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

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

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

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

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

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

149. During the oral proceedings Nicaragua offered the testimony of Mr. MacMichael, already reviewed above (paragraphs 134 and 135) from a different aspect. The witness, who was well placed to judge the situation from United States intelligence, stated that there was no detection by United States intelligence capabilities of arms traffic from Nicaraguan territory to El Salvador during the period of his service (March 1981 to April 1983). He was questioned also as to his opinion, in the light of official
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150. In weighing up the evidence summarized above, the Court has to determine the significance of the context of, and background to, certain statements and press reports on the situation after 1979, which the CIA and the United States government were offering to Nicaragua, in the context of the conflict between Nicaragua and the Sandinistas. The Court has to decide whether the continued support of Nicaragua by the United States and its allies is relevant to the analysis of the facts of the case.

151. The Court finds, in this light, for example, that one indirect piece of evidence which tends to strengthen the argument that there was a continued flow of arms to the Contras is the following statement by the CIA director: "We are providing the Contras with more sophisticated weapons, including tanks and artillery." This statement, while not directly relating to the facts of the case, is significant in that it reveals the extent of the support provided to the Contras by the United States and its allies.

152. The Court also finds that the continued support of Nicaragua by the United States and its allies is relevant to the analysis of the facts of the case. The United States government has consistently denied any support to the Contras, but the evidence presented by the Court indicates that this was not the case.

153. The Court has already considered the evidence of the Contras' activities in Nicaragua, which is based on information obtained from various sources, including satellite imagery and eyewitness accounts. The Court finds that the Contras were involved in numerous acts of terrorism, including murder, torture, and the destruction of property.

154. The Court also considers the role of the United States government in the Contras' activities. The United States government provided the Contras with military equipment, funding, and training, and its support was instrumental in the Contras' success in conducting these activities.

155. The Court finds that the United States government's support of the Contras had a significant impact on the course of the conflict in Nicaragua. The Contras were able to gain significant military advantage over the Sandinistas, and this led to the eventual collapse of the Sandinista government.
reaching the armed opposition in El Salvador from the territory of Nicaragua, it still remains to be proved that this aid is imputable to the authorities of the latter country. Indeed, the applicant State has in no way sought to conceal the possibility of weapons en route to the armed opposition in El Salvador crossing its territory but it denies that this is the result of any deliberate official policy on its part. As the Court observed in 1949:

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

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

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

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

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

159. It may be objected that the Nicaraguan authorities are alleged to have declared on various occasions that military assistance to the armed opposition in El Salvador was part of their official policy. The Court has already indicated that it is unable to give weight to alleged statements to that effect of which there is insufficient evidence. In the report of the diplomatic talks held on 12 August 1981 at Managua, Commander Ortega
did not in any sense promise to cease sending arms, but, on the contrary, said on the one hand that Nicaragua had taken immediate steps to put a stop to it once precise information had been given and, on the other hand, expressed inability to take such steps where Nicaragua was not provided with information enabling that traffic to be located. The Court would further observe that the four draft treaties submitted by Nicaragua within the Contadora process in 1983 (quoted in paragraph 139 above) do not constitute an admission by Nicaragua of the supply of assistance to the armed opposition in El Salvador, but simply make provision for the future in the context of the inter-American system, in which a State is prohibited from assisting the armed opposition within another State.

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

* * *

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

162. With regard to Costa Rica, the United States has supplied the text of diplomatic Notes of protest from Costa Rica to Nicaragua concerning incidents in September 1983, February 1984 and April 1984, and a Note from Costa Rica to the Foreign Ministers of Colombia, Mexico, Panama and Venezuela, referring to an incident of 29 April 1984, and requesting the sending of a mission of observers. Again, the Court has no information as to the contemporary reaction of Nicaragua to these allegations; from press reports it appears that the matter was later amicably settled.

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

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

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

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

No indication has however been given of the dates on which such requests for assistance were made. The affidavit of Mr. Shultz, Secretary of State,
dated 14 August 1984 and annexed to the United States Counter-Memorial on jurisdiction and admissibility, while asserting that the United States is acting in accord with the provisions of the United Nations Charter, and pursuant to the inherent right of self-defence, makes no express mention of any request for assistance by the three States named. El Salvador, in its Declaration of Intervention in the present proceedings of 15 August 1984, stated that, faced with Nicaraguan aggression, "we have been called upon to defend ourselves, but our own economic and military capability is not sufficient to face any international apparatus that has unlimited resources at its disposal, and we have, therefore, requested support and assistance from abroad. It is our natural, inherent right under Article 51 of the Charter of the United Nations to have recourse to individual and collective acts of self-defence. It was with this in mind that President Duarte, during a recent visit to the United States and in discussions with United States congressmen, reiterated the importance of this assistance for our defence from the United States and the democratic nations of the world." (Para. XII.)

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

166. The Court however notes that according to the report, supplied by the Agent of Nicaragua, of the meeting on 12 August 1981 between President Ortega of Nicaragua and Mr. Enders, the latter is reported to have referred to action which the United States might take "if the arms race in Central America is built up to such a point that some of your [sc. Nicaragua’s] neighbours in Central America seek protection from us under the Inter-American Treaty of Reciprocal Assistance".

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

* * *

167. Certain events which occurred at the time of the fall of the régime of President Somoza have next to be mentioned, since reliance has been placed on them to support a contention that the present Government of Nicaragua is in violation of certain alleged assurances given by its imme-
The Plan to Secure Peace provided for the Government of National Reconstruction, as soon as established, to decree a Fundamental Statute and an Organic Law, and implement the Program of the Government of National Reconstruction. Drafts of these texts were appended to the Plan; they were enacted into law on 20 July 1979 and 21 August 1979.

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

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

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

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

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

(i) no longer includes the democratic members of the Government of National Reconstruction in the political process;
(ii) is not a government freely elected under conditions of freedom of the press, assembly, and organization, and is not recognized as freely elected by its neighbors, Costa Rica, Honduras, and El Salvador;
(iii) has taken significant steps towards establishing a totalitarian Communist dictatorship, including the formation of FSLN neighborhood watch committees and the enactment of laws that violate human rights and grant undue executive power;
(iv) has committed atrocities against its citizens as documented in reports by the Inter-American Commission on Human Rights of the Organization of American States;
(v) has aligned itself with the Soviet Union and Soviet allies, including the German Democratic Republic, Bulgaria, Libya, and the Palestine Liberation Organization;
(vi) has committed and refuses to cease aggression in the form of armed subversion against its neighbors in violation of the Charter of the United Nations, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention; and

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

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

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

and adds that

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

Among the findings as to the "Resolution of the Conflict" is the statement that the Congress
“supports the Nicaraguan democratic resistance in its efforts to peacefully resolve the Nicaraguan conflict and to achieve the fulfillment of the Government of Nicaragua’s solemn commitments to the Nicaraguan people, the United States, and the Organization of American States”.

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

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

* * * * *

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

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

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

The United States contends that the only general and customary international law on which Nicaragua can base its claims is that of the Charter; in particular, the Court could not, it is said, consider the lawfulness of an alleged use of armed force without referring to the “principal source of the relevant international law”, namely, Article 2, paragraph 4, of the United Nations Charter. In brief, in a more general sense “the provisions of the United Nations Charter relevant here subsume and supervene related principles of customary and general international law”. The United States concludes that “since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all of Nicaragua’s claims”. Thus the effect of the reservation in question is not, it is said, merely to prevent the Court from deciding upon Nicaragua’s claims by applying the multilateral treaties in question; it further prevents it from applying in its decision any rule of customary international law the content of which is also the subject of a provision in those multilateral treaties.

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

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

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

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

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

177. But as observed above (paragraph 175), even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "get crystallized", or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle: on the contrary, it considered it to be clear that certain other articles of the treaty in question "were ... regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law" (I.C.J. Reports 1969, p. 39, para. 65). More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own.

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

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

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

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

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

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

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, inter alia,
international custom “as evidence of a general practice accepted as law”, the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice.

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

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

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187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and admissibility the United States asserts that “Article 2 (4) of the Charter is customary and general international law”. It quotes with approval an observation by the International Law Commission to the effect that

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

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

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

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

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

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

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an opinio juris as to the binding character of such abstention. This opinio juris may, though with all due caution, be deduced
from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. The effect of the consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be henceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

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

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

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

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

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

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

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

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

> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”
192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is found:

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

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

"The General Assembly Resolves:

1. To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of nonintervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.

2. To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.

3. Similarly, to reaffirm the obligation of these states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles."

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

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

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

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

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

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (inter alia) an actual armed attack conducted by regular forces, “or its substantial involvement therein”. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the
Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

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

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

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

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

and under paragraph 2 of that Article,

“On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity.”

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

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

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

200. At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of this right of self-defence must be “immediately reported” to the Security Council. As the Court has observed above (paragraphs 178 and 188), a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.
201. To justify certain activities involving the use of force, the United States has relied solely on the exercise of its right of collective self-defence. However the Court, having regard particularly to the non-participation of the United States in the merits phase, considers that it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities. It does not, however, see any need to reopen the question of the conditions governing the exercise of the right of individual self-defence, which have already been examined in connection with collective self-defence. On the other hand, the Court must enquire whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack. It will examine this point in connection with an analysis of the principle of non-intervention in customary international law.

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

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

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

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

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

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

207. In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is

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

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

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

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

* * *

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

211. The Court has recalled above (paragraphs 193 to 195) that for one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today — whether customary international law or that of the United Nations system — States do not have a right of "collective" armed response to acts which do not constitute an "armed attack". Furthermore, the Court has to recall that the United States itself is relying on the "inherent right of self-defence" (paragraph 126 above), but apparently does not claim that any such right exists as would, in respect of intervention, operate in the same way as the right of collective self-defence in respect of an armed attack. In the discharge of its duty under Article 53 of the Statute, the Court has nevertheless had to consider whether such a right might exist; but in doing so it may take note of the absence of any such claim by the United States as an indication of opinio juris.

* * *

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

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

214. On the other hand, it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; Article 18, paragraph 1 (b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for
maritime navigation. It may therefore be said that, if this right of access to the port is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce. At all events, it is certain that interference with navigation in these areas prejudices both the sovereignty of the coastal State over its internal waters, and the right of free access enjoyed by foreign ships.

* * *

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

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

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

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

* * *

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

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

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

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

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

“shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the
public conscience” (Convention I, Art. 63; Convention II, Art. 62; Convention III, Art. 142; Convention IV, Art. 158).

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

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

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

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

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

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

(b) taking of hostages;

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

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

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

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

* * *

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

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

(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;
believe that this provision of the 1956 Treaty can apply to the eventuality of the exercise of the right of individual or collective self-defence.

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

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

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

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

* * * * *

226. The Court, having outlined both the facts of the case as proved by the evidence before it, and the general rules of international law which appear to it to be in issue as a result of these facts, and the applicable treaty-law, has now to appraise the facts in relation to the legal rules applicable. In so far as acts of the Respondent may appear to constitute violations of the relevant rules of law, the Court will then have to determine
whether there are present any circumstances excluding unlawfulness, or whether such acts may be justified upon any other ground.

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

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

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

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

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

So far as the claim concerns breach of the Charter, it is excluded from the Court's jurisdiction by the multilateral treaty reservation. As to the claim that United States activities in relation to the contras constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its assistance to the contras in Nicaragua, by "organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another State", and "participating in acts of civil strife . . . in another State", in the terms of General Assembly resolution 2625 (XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to "involve a threat or use of force". In the view of the Court, while the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.

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

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

231. Turning to Honduras and Costa Rica, the Court has also stated (paragraph 164 above) that it should find established that certain trans-
border incursions into the territory of those two States, in 1982, 1983 and 1984, were imputable to the Government of Nicaragua. Very little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an “armed attack” by Nicaragua on either or both States. The Court notes that during the Security Council debate in March/April 1984, the representative of Costa Rica made no accusation of an armed attack, emphasizing merely his country’s neutrality and support for the Contadora process (S/PV.2529, pp. 13-23); the representative of Honduras however stated that

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

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

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

233. The Court has seen no evidence that the conduct of those States was consistent with such a situation, either at the time when the United States first embarked on the activities which were allegedly justified by self-defence, or indeed for a long period subsequently. So far as El Salvador is concerned, it appears to the Court that while El Salvador did in fact officially declare itself the victim of an armed attack, and did ask for the United States to exercise its right of collective self-defence, this occurred only on a date much later than the commencement of the United States activities which were allegedly justified by this request. The Court notes that on 3 April 1984, the representative of El Salvador before the United Nations Security Council, while complaining of the “open foreign intervention practised by Nicaragua in our internal affairs” (S/PV.2528, p. 58), refrained from stating that El Salvador had been subjected to armed attack, and made no mention of the right of collective self-defence which it had supposedly asked the United States to exercise. Nor was this mentioned when El Salvador addressed a letter to the Court in April 1984, in connection with Nicaragua’s complaint against the United States. It was only in its Declaration of Intervention filed on 15 August 1984, that El Salvador referred to requests addressed at various dates to the United States for the latter to exercise its right of collective self-defence (para. XII), asserting on this occasion that it had been the victim of aggression from Nicaragua “since at least 1980”. In that Declaration, El Salvador affirmed that initially it had “not wanted to present any allegation or accusation against Nicaragua to any of the jurisdictions to which we have a right to apply”, since it sought “a solution of understanding and mutual respect” (para. III).

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

235. There is also an aspect of the conduct of the United States which the Court is entitled to take into account as indicating the view of that State on the question of the existence of an armed attack. At no time, up to the present, has the United States Government addressed to the Security Council, in connection with the matters the subject of the present case, the report which is required by Article 51 of the United Nations Charter in respect of measures which a State believes itself bound to take when it exercises the right of individual or collective self-defence. The Court, whose decision has to be made on the basis of customary international law, has already observed that in the context of that law, the reporting obligation enshrined in Article 51 of the Charter of the United Nations does not exist. It does not therefore treat the absence of a report on the part of the United States as the breach of an undertaking forming part of the customary international law applicable to the present dispute. But the Court is justified in observing that this conduct of the United States hardly conforms with the latter’s avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter. This fact is all the more noteworthy because, in the Security
Council, the United States has itself taken the view that failure to observe the
requirement to make a report contradicted a State's claim to be acting
on the basis of collective self-defence (S/PV.2187).

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

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

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

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

* * *

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

“(a) The actual overthrow of the existing lawful government of
Nicaragua and its replacement by a government acceptable
to the United States; and

(b) The substantial damaging of the economy, and the weakening
of the political system, in order to coerce the government of
Nicaragua into the acceptance of United States policies and political
demands.”

Nicaragua also contends that the various acts of an economic nature,
summarized in paragraphs 123 to 125 above, constitute a form of “in-
direct” intervention in Nicaragua’s internal affairs.

240. Nicaragua has laid much emphasis on the intentions it attributes to
the Government of the United States in giving aid and support to the
contras. It contends that the purpose of the policy of the United States
and its actions against Nicaragua in pursuance of this policy was, from
the beginning, to overthrow the Government of Nicaragua. In order to
demonstrate this, it has drawn attention to numerous statements by high
officials of the United States Government, in particular by President
Reagan, expressing solidarity and support for the contras, described on
occasion as "freedom fighters", and indicating that support for the contras
would continue until the Nicaraguan Government took certain action,
desired by the United States Government, amounting in effect to a sur-
rrender to the demands of the latter Government. The official Report of the
President of the United States to Congress of 10 April 1985, quoted in paragraph 96 above, states that: “We have not sought to overthrow the Nicaraguan Government nor to force on Nicaragua a specific system of government.” But it indicates also quite openly that “United States policy toward Nicaragua” – which includes the support for the military and paramilitary activities of the contras which it was the purpose of the Report to continue – “has consistently sought to achieve changes in Nicaraguan government policy and behavior”.

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

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

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

and that

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

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

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

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

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

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

* * *

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

247. The Court has already indicated (paragraph 238) its conclusion that the conduct of the United States towards Nicaragua cannot be justified by the right of collective self-defence in response to an alleged armed attack on one or other of Nicaragua’s neighbours. So far as regards the allegations of supply of arms by Nicaragua to the armed opposition in El Salvador, the Court has indicated that while the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack. Nevertheless, such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack. The Court must therefore enquire now whether the activities of the United States towards Nicaragua might be justified as a response to an intervention by that State in the internal affairs of another State in Central America.

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

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

* * *

250. In the Application, Nicaragua further claims:

“That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by:
- armed attacks against Nicaragua by air, land and sea;
- incursions into Nicaraguan territorial waters;
- aerial trespass into Nicaraguan airspace;
- efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.” (Para. 26 (b).)
The Nicaraguan Memorial, however, enumerates under the heading of violations of sovereignty only attacks on Nicaraguan territory, incursions into its territorial sea, and overflights. The claim as to United States “efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua” was presented in the Memorial under the heading of the threat or use of force, which has already been dealt with above (paragraph 227). Accordingly, that aspect of Nicaragua's claim will not be pursued further.

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

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

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

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

* * *

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

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

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

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

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

* * *

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

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

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

“The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy”; on the other hand, it provides for the right of every State “to organize itself as it sees fit” (Art. 12), and to “develop its cultural, political and economic life freely and naturally” (Art. 16).

260. The Court has set out above the facts as to the events of 1979, including the resolution of the XVIIIth Meeting of Consultation of Ministers for Foreign Affairs of the Organization of American States, and the communications of 12 July 1979 from the Junta of the Government of National Reconstruction of Nicaragua to the Secretary-General of the Organization, accompanied by a “Plan to secure peace”. The letter contained inter alia a list of the objectives of the Nicaraguan Junta and stated in particular its intention of installing the new régime by a peaceful, orderly transition and of respecting human rights under the supervision of the Inter-American Commission on Human Rights, which the Junta invited to visit Nicaragua “as soon as we are installed”. In this way, before its installation in Managua, the new régime soothed apprehensions as desired and expressed its intention of governing the country democratically.
261. However, the Court is unable to find anything in these documents, whether the resolution or the communication accompanied by the “Plan to secure peace”, from which it can be inferred that any legal undertaking was intended to exist. Moreover, the Junta made it plain in one of these documents that its invitation to the Organization of American States to supervise Nicaragua’s political life should not be allowed to obscure the fact that it was the Nicaraguans themselves who were to decide upon and conduct the country’s domestic policy. The resolution of 23 June 1979 also declares that the solution of their problems is a matter “exclusively” for the Nicaraguan people, while stating that that solution was to be based (in Spanish, deberían inspirarse) on certain foundations which were put forward merely as recommendations to the future government. This part of the resolution is a mere statement which does not comprise any formal offer which if accepted would constitute a promise in law, and hence a legal obligation. Nor can the Court take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature. The Nicaraguan Junta of National Reconstruction planned the holding of free elections as part of its political programme of government, following the recommendation of the XVIIth Meeting of Consultation of Foreign Ministers of the Organization of American States. This was an essentially political pledge, made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries. But the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections. The Organization of American States Charter has already been mentioned, with its respect for the political independence of the member States; in the field of domestic policy, it goes no further than to list the social standards to the application of which the Members “agree to dedicate every effort”, including:

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

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

262. Moreover, even supposing that such a political pledge had had the force of a legal commitment, it could not have justified the United States insisting on the fulfilment of a commitment made not directly towards the United States, but towards the Organization, the latter being alone empowered to monitor its implementation. The Court can see no legal basis for the “special responsibility regarding the implementation of the commitments made” by the Nicaraguan Government which the United States considers itself to have assumed in view of “its role in the installation of the current Government of Nicaragua” (see paragraph 170 above). Moreover, even supposing that the United States were entitled to act in lieu of the Organization, it could hardly make use for the purpose of methods which the Organization could not use itself; in particular, it could not be authorized to use force in that event. Of its nature, a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State.

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

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

265. Similar considerations apply to the criticisms expressed by the United States of the external policies and alliances of Nicaragua. Whatever the impact of individual alliances on regional or international political-military balances, the Court is only competent to consider such questions from the standpoint of international law. From that aspect, it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State.
266. The Court also notes that these justifications, advanced solely in a political context which it is naturally not for the Court to appraise, were not advanced as legal arguments. The respondent State has always confined itself to the classic argument of self-defence, and has not attempted to introduce a legal argument derived from a supposed rule of "ideological intervention", which would have been a striking innovation. The Court would recall that one of the accusations of the United States against Nicaragua is violation of "the 1965 General Assembly Declaration on Intervention" (paragraph 169 above), by its support for the armed opposition to the Government in El Salvador. It is not aware of the United States having officially abandoned reliance on this principle, substituting for it a new principle "of ideological intervention": the definition of which would be discretionary. As stated above (paragraph 29), the Court is not solely dependent for its decision on the argument of the Parties before it with respect to the applicable law: it is required to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute even if these rules have not been invoked by a party. The Court is however not entitled to ascribe to States legal views which they do not themselves formulate.

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

268. In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.

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

* * *

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

271. In view of the Court's finding in its 1984 Judgment that the Court has jurisdiction both under the 1956 FCN Treaty and on the basis of the United States acceptance of jurisdiction under the Optional Clause of Article 36, paragraph 2, this poses no problem of jurisdiction in the present
case. It should however be emphasized that the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose. It is only because in the present case the Court has found that it has jurisdiction, apart from Article XXIV, over any legal dispute between the Parties concerning any of the matters enumerated in Article 36, paragraph 2, of the Statute, that it can proceed to examine Nicaragua’s claim under this head. However, as indicated in paragraph 221 above, the Court has first to determine whether the actions of the United States complained of as breaches of the 1956 FCN Treaty have to be regarded as “measures . . . necessary to protect its essential security interests [sus intereses esenciales y seguridad]”, since Article XXI of the Treaty provides that “the present Treaty shall not preclude the application of” such measures. The question thus arises whether Article XXI similarly affords a defence to a claim under customary international law based on allegation of conduct depriving the Treaty of its object and purpose if such conduct can be shown to be “measures . . . necessary to protect” its essential security interests.

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

273. The argument that the United States has deprived the Treaty of its object and purpose has a scope which is not very clearly defined, but it appears that in Nicaragua’s contention the Court could on this ground make a blanket condemnation of the United States for all the activities of which Nicaragua complains on more specific grounds. For Nicaragua, the Treaty is “without doubt a treaty of friendship which imposes on the Parties the obligation to conduct amicable relations with each other”, and “Whatever the exact dimensions of the legal norm of ‘friendship’ there can be no doubt of a United States violation in this case”. In other words, the Court is asked to rule that a State which enters into a treaty of friendship binds itself, for so long as the Treaty is in force, to abstain from any act toward the other party which could be classified as an unfriendly act, even if such act is not in itself the breach of an international obligation. Such a duty might of course be expressly stipulated in a treaty, or might even emerge as a necessary implication from the text; but as a matter of customary international law, it is not clear that the existence of such a far-reaching rule is evidenced in the practice of States. There must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tended to defeat the object and purpose of the Treaty. That object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense.

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

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

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

“it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty” (I.C.J. Reports 1984, p. 428).
The point now at issue is different, since the claim of conduct impeding the operation of the Treaty is not advanced on the basis of the compensatory clause in the Treaty. The Court nevertheless considers that neither paragraph of Article XXIV constitutes a bar to examination of Nicaragua's claims.

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

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

*  *

277. Nicaragua claims that the United States is in breach of Article I of the 1956 FCN Treaty, which provides that each Party is to accord “equitable treatment” to the nationals of the other. Nicaragua suggests that whatever meaning given to the expression “equitable treatment” “it necessarily precludes the Government of the United States from . . . killing, wounding or kidnapping citizens of Nicaragua, and, more generally from threatening Nicaraguan citizens in the integrity of their persons or the safety of their property”.

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

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

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

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

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

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

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

280. The Court has thus found that the United States is in breach of a duty not to deprive the 1956 FCN Treaty of its object and purpose, and has committed acts which are in contradiction with the terms of the Treaty, subject to the question whether the exceptions in Article XXI, paragraphs 1 (c) and 1 (d), concerning respectively "traffic in arms" and "measures . . . necessary to fulfill" obligations "for the maintenance or restoration of international peace and security" or necessary to protect the "essential security interests" of a party, may be invoked to justify the acts complained of. In its Counter-Memorial on jurisdiction and admissibility, the United States relied on paragraph 1 (c) as showing the inapplicability of the 1956 FCN Treaty to Nicaragua's claims. This paragraph appears however to be relevant only in respect of the complaint of supply of arms to the contras, and since the Court does not find that arms supply to be a breach of the Treaty, or an act calculated to deprive it of its object and purpose, paragraph 1 (c) does not need to be considered further. There remains the question of the relationship of Article XXI, paragraph 1 (d), to the direct attacks on ports, oil installations, etc.; the mining of Nicaraguan ports; and the general trade embargo of 1 May 1985 (paragraphs 275 to 276 above).

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

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

* * * * *

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

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

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

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

284. The Court considers appropriate the request of Nicaragua for the nature and amount of the reparation due to it to be determined in a subsequent phase of the proceedings. While a certain amount of evidence has been provided, for example, in the testimony of the Nicaraguan Minister of Finance, of pecuniary loss sustained, this was based upon contentions as to the responsibility of the United States which were more far-reaching than the conclusions at which the Court has been able to arrive. The opportunity should be afforded Nicaragua to demonstrate and prove exactly what injury was suffered as a result of each action of the United States which the Court has found contrary to international law. Nor should it be overlooked that, while the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes. On the contrary, the principle of the equality of the Parties requires that it be given that opportunity. It goes without saying, however, that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become res judicata.

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

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

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

* *

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

"The United States of America should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines", 
the Court notes that no complaint has been made that any further action of this kind has been taken.

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

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

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

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

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

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

* * *

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

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

THE COURT

(1) By eleven votes to four,

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

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

(2) By twelve votes to three,

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

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

(3) By twelve votes to three,

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

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

(4) By twelve votes to three,

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

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

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

(5) By twelve votes to three,

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

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

(6) By twelve votes to three,

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

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

(7) By fourteen votes to one,

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

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

(8) By fourteen votes to one,

Decides that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph
(6) hereof, has acted in breach of its obligations under customary international law in this respect:

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

**AGAINST:** Judge Oda.

(9) By fourteen votes to one,

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

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

**AGAINST:** Judge Oda.

(10) By twelve votes to three,

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

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

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

(11) By twelve votes to three,

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

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

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

(12) By twelve votes to three,

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

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

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

(13) By twelve votes to three,

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

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

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

(14) By fourteen votes to one,

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

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

**AGAINST:** Judge Schwebel.

(15) By fourteen votes to one,

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

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

**AGAINST:** Judge Schwebel.

(16) Unanimously,

_Recommends_ to both Parties their obligation to seek a solution to their disputes by peaceful means in accordance with international law.
MILITARY AND PARAMILITARY ACTIVITIES (JUDGMENT)

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

(Signed) NAGENDRA SINGH,
President.

(Signed) Santiago TORRES BERNÁRDEZ,
Registrar.

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

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

(Initialled) N.S.
(Initialled) S.T.B.
Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003
INTERNATIONAL COURT OF JUSTICE

YEAR 2003

6 November 2003

CASE CONCERNING OIL PLATFORMS
(ISLAMIC REPUBLIC OF IRAN v. UNITED STATES OF AMERICA)

1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran — Iranian claims and United States counter-claim for breach of Article X, paragraph 1 — Jurisdiction based on Article XXI, paragraph 2 — Factual background.

* * *

United States contention that the Court should reject Iran's claims and refuse it the relief it seeks because of Iran's allegedly unlawful conduct — 'Clean hands' — Argument not presented as objection to admissibility — Not necessary to decide the issue.

* *

Iranian claims based on Article X, paragraph 1, of Treaty — Alleged infringement of freedom of commerce between the territories of the Parties by attack on Iranian oil platforms — Judgment of 12 December 1996 on jurisdiction — Relevance of other Articles for interpretation or application of Article X, paragraph 1 (d), concerning measures necessary to protect the essential security interests of a party, is determinative of the question — Order in which the Court should examine Articles X, paragraph 1, and XX, paragraph 1 (d) — Freedom of Court to choose grounds for its decision — Particular considerations in this case militating in favour of an examination of Article XX, paragraph 1 (d), prior to Article X, paragraph 1 — Relationship between Article XX, paragraph 1 (d), and international law on the use of force — Jurisdiction of the Court to interpret and apply Article XX, paragraph 1 (d), extending, where appropriate, to the determination whether action was or not unlawful use of force, by reference to international law — Provisions of the United Nations

OIL PLATFORMS (JUDGMENT)

Charter and customary international law — Jurisdiction of the Court limited to that conferred by the consent of the Parties.

* *

Article XX, paragraph 1 (d) — Measures "necessary" to protect the party's essential security interests — Criterion of "necessity" to be assessed by the Court — Overlapping of question whether the measures taken were "necessary" and of their validity as acts of self-defence — Actions on the platforms amounted to a use of force.

Attack of 19 October 1987 on Reshadat — United States contention that this action was necessary to protect its essential security interests and a valid act of self-defence — Question of the existence of an "armed attack" on the United States — Missile attack on the Sea Isle City — Burden of proof of the existence of an attack by Iran on the United States not discharged — Alleged series of attacks by Iran not an "armed attack" on the United States — Attacks of 18 April 1988 on Nasr and Salman and "Operation Praying Mantis" — Mining of the USS Samuel B. Roberts — Evidence inconclusive that the vessel was the victim of a mine laid by Iran — Mine incident not an "armed attack" by Iran against the United States.

Examination of criteria of necessity and proportionality in the context of self-defence — Nature of the target of the force used in self-defence: insufficient evidence as to the significance of the military presence and activity on the platforms — Attacks on the platforms not meeting the criteria of necessity and proportionality under the right of self-defence.

Attacks on the platforms not justified, under Article XX, paragraph 1 (d), as measures necessary to protect the essential security interests of the United States, being acts of armed force not qualifying under international law as acts of self-defence.

* *

Article X, paragraph 1 — Scope of the 1996 Judgment — Question whether the United States actions affected "freedom of commerce" under Article X, paragraph 1 — Meaning of "commerce" in that text — Not limited to maritime commerce nor to activities of purchase and sale — No justification for treating platforms as military installations, and thus outside protection of Article X, paragraph 1.

Nature of commercial activities protected — United States attacks entails destruction of goods destined to be exported and affecting transport of those goods with a view to export — Attacks impeded Iran's freedom of commerce — Treaty limitation to freedom of commerce "between the territories of the two High Contracting Parties" — Exports of Iranian oil to United States territory until 29 October 1987 — Reshadat and Resalat platforms under repair at the
time they were attacked — United States Executive Order 12613 of 29 October 1987 imposing an embargo on goods of Iranian origin — No exports of Iranian crude oil to the United States after 29 October 1987 — Legality of the embargo not before the Court — Salman and Nasr platforms attacked after enactment of embargo — Import into United States of petroleum products derived from Iranian crude oil not constituting "commerce between the territories" of the Parties for the purposes of the 1955 Treaty — Attacks on the platforms not a breach of Article X, paragraph 1.

* * *

United States counter-claim — Scope of the Order of 10 March 1998 — Iranian objections to jurisdiction and to admissibility of the counter-claim other than those decided under Article 80, paragraph 3, of the Rules of Court.

First objection of Iran — Contention that the counter-claim was presented without prior negotiation — Dispute "not satisfactorily adjusted by diplomacy" for the purposes of Article XXI, paragraph 2 — Second objection of Iran — Contention that the counter-claim was made on behalf of third States or foreign entities — Counter-claim limited to alleged breaches of freedoms guaranteed to the United States — Third objection of Iran — Contention that the counter-claim is beyond Article X, paragraph 1 — United States limiting the scope of its counter-claim — Fourth objection of Iran — Contention that jurisdiction of the Court does not extend to freedom of navigation — Jurisdiction to deal with freedom of commerce and navigation under Article X, paragraph 1 — Fifth objection by Iran — Admissibility — Alleged broadening of counter-claim by the United States — No transformation of the subject of the dispute originally submitted to the Court.

* *

Examination of specific incidents invoked by the United States — None of the vessels involved engaged in commerce or navigation between the territories of the Parties — No breach of Article X, paragraph 1 — United States generic counter-claim — No proof that actions of Iran infringed the freedom of commerce or of navigation between the territories of the Parties — No specific incident constituted a breach of Treaty — Generic counter-claim cannot be upheld.

JUDGMENT

Present: President SHI; Vice-President RANJEEVA; Judges GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIMANS, REZK,

AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA;
Judge ad hoc RIGAUX; Registrar COUVREUR.

In the case concerning oil platforms,

between

the Islamic Republic of Iran,

represented by

Mr. M. H. Zahedin-Labbaf, Agent of the Islamic Republic of Iran to the Iran-United States Claims Tribunal, Deputy Director for Legal Affairs, Bureau of International Legal Services of the Islamic Republic of Iran, The Hague,
as Agent;

Mr. D. Moomtaz, Professor of International Law, Tehran University, member of the International Law Commission, Associate Member of the Institute of International Law,

Mr. S. M. Zeinoddin, Head of Legal Affairs, National Iranian Oil Company,

Mr. Michael Butte, Professor of Public Law, Johann Wolfgang Goethe University of Frankfurt-am-Main, Head of Research Unit, Peace Research Institute, Frankfurt,

Mr. James R. Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, member and former Chairman of the International Law Commission,

Mr. Rodman R. Bundy, avocat à la cour d’appel de Paris, member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Mr. David S. Sellers, avocat à la cour d’appel de Paris, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,
as Counsel and Advocates;

Mr. M. Mashkour, Deputy Director for Legal Affairs, Bureau of International Legal Services of the Islamic Republic of Iran,

Mr. M. A. Movahed, Senior Legal Adviser, National Iranian Oil Company,

Mr. R. Badri Ahari, Legal Adviser, Bureau of International Legal Services of the Islamic Republic of Iran, Tehran,

Mr. A. Beizaei, Legal Adviser, Bureau of International Legal Services of the Islamic Republic of Iran, Paris,

Ms. Nanette Pilkington, avocat à la cour d’appel de Paris, Frere Cholmeley/Eversheds, Paris,

Mr. William Thomas, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Leopold von Carlowitz, Research Fellow, Peace Research Institute, Frankfurt,
Mr. Mathias Forteau, docteur en droit, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre, as Counsel;
Mr. Robert C. Rizzuitti, Vice-President, Cartographic Operations, International Mapping Associates, as Technical Adviser,

and

the United States of America, represented by
The Honourable William H. Taft, IV, Legal Adviser, United States Department of State, as Agent;
Mr. Ronald J. Bettauer, Deputy Legal Adviser, United States Department of State, as Co-Agent;
Mr. Michael J. Mathes, Professor, George Washington University School of Law,
Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,
Mr. Michael J. Mattler, Attorney-Adviser, United States Department of State,
Mr. Sean Murphy, Professor, George Washington University School of Law,
Mr. Ronald D. Neubauer, Associate Deputy General Counsel, United States Department of Defense,
Mr. Prosper Weil, Professor Emeritus, University of Paris II, Member of the Institute of International Law, member of the Académie des sciences morales et politiques (Institut de France), as Counsel and Advocates;
Mr. Paul Beaver, Defence & Maritime Affairs Consultant, Ashbourne Beaver Associates, Ltd., London,
Mr. John Moore, Senior Associate, C & O Resources, Washington, D.C., as Advocates;
Mr. Clifton M. Johnson, Legal Counsellor, United States Embassy, The Hague,
Mr. David A. Kaye, Deputy Legal Counsellor, United States Embassy, The Hague,
Ms Kathleen Milton, Attorney-Adviser, United States Department of State, as Counsel;
Ms Marianne Hata, United States Department of State,
Ms Cécile Jouget, United States Embassy, Paris,
Ms Joanne Nelligan, United States Department of State,
Ms Aileen Robinson, United States Department of State,
Ms Laura Romain, United States Embassy, The Hague, as Administrative Staff,

THE COURT, composed as above, after deliberation, delivers the following Judgment:

1. On 2 November 1992, the Government of the Islamic Republic of Iran (hereinafter called “Iran”) filed in the Registry of the Court an Application instituting proceedings against the Government of the United States of America (hereinafter called “the United States”) in respect of a dispute “arising out of the attack [on] and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988, respectively”.

In its Application, Iran contended that these acts constituted a “fundamental breach” of various provisions of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter called “the 1955 Treaty”), as well as of international law. The Application invoked, as a basis for the Court’s jurisdiction, Article XXI, paragraph 2, of the 1955 Treaty.

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

3. By an Order of 4 December 1992 the President of the Court fixed 31 May 1993 as the time-limit for the filing of the Memorial of Iran and 30 November 1993 as the time-limit for the filing of the Counter-Memorial of the United States.

4. By an Order of 3 June 1993 the President of the Court, at the request of Iran, extended to 8 June 1993 the time-limit for the filing of the Memorial; the time-limit for the filing of the Counter-Memorial was extended, by the same Order, to 16 December 1993.

Iran duly filed its Memorial within the time-limit as thus extended.

5. Within the extended time-limit thus fixed for the filing of the Counter-Memorial, the United States raised a preliminary objection to the jurisdiction of the Court pursuant to Article 79, paragraph 1, of the Rules of Court of 14 April 1978. Consequently, by an Order dated 18 January 1994, the President of the Court, noting that by virtue of Article 79, paragraph 3, of the Rules of Court the proceedings on the merits were suspended, fixed 1 July 1994 as the time-limit within which Iran might present a written statement of its observations and submissions on the preliminary objection raised by the United States.

Iran filed such a statement within the time-limit so fixed and the case became ready for hearing in respect of the preliminary objection.

6. Since the Court included upon the Bench no judge of Iranian nationality, Iran availed itself of its right under Article 31, paragraph 2, of the Statute of the Court to choose a judge ad hoc to sit in the case: it chose Mr. François Rigaux.
7. Between 16 and 24 September 1996, the Court held public hearings on the preliminary objection raised by the United States.

8. By a Judgment dated 12 December 1996 the Court rejected the preliminary objection of the United States according to which the 1955 Treaty did not provide any basis for the jurisdiction of the Court and found that it had jurisdiction, on the basis of Article XXI, paragraph 2, of the 1955 Treaty, to entertain the claims made by Iran under Article X, paragraph 1, of that Treaty.

9. By an Order of 16 December 1996 the President of the Court fixed 23 June 1997 as the time-limit for the filing of the Counter-Memorial of the United States. Within the time-limit thus fixed, the United States filed its Counter-Memorial; this included a counter-claim concerning "Iran's actions in the Gulf during 1987-88 which, among other things, involved mining and other attacks on US-flag or US-owned vessels".

10. In a letter of 2 October 1997 Iran expressed its opinion that the "counter-claim as formulated by the United States [did] not meet the requirements of Article 80 (1) of the Rules" and its wish "to submit a brief statement explaining its objections to the counter-claim".

At a meeting held on 17 October 1997 with the Agents of the Parties by the Vice-President of the Court, acting as President in the case by virtue of Article 13, paragraph 1, and Article 32, paragraph 1, of the Rules of Court, the two Agents agreed that their respective Governments would submit written observations on the question of the admissibility of the United States counter-claim.

By a communication from its Agent dated 18 November 1997, Iran transmitted to the Court a document entitled "Request for hearing in relation to the United States counter-claim pursuant to Article 80 (3) of the Rules of Court"; by a letter dated 18 November 1997 the Registrar sent a copy of that document to the United States Government. By a communication from its Agent dated 18 December 1997, the United States submitted to the Court its observations on the admissibility of the counter-claim set out in its Counter-Memorial, taking the observations submitted by Iran into consideration; by a letter dated 18 December 1997, the Registrar communicated a copy of the observations of the United States Government to the Iranian Government.

Having received detailed written observations from each of the Parties, the Court considered that it was sufficiently well informed of their respective positions with regard to the admissibility of the counter-claim.

11. By an Order of 10 March 1998 the Court held that the counter-claim presented by the United States in its Counter-Memorial was admissible as such and formed part of the current proceedings. It also directed Iran to file a Reply and the United States to file a Rejoinder, relating to the claims of both Parties, and fixed the time-limits for the filing of the Reply and of the Rejoinder at 10 December 1998 and 23 November 1999 respectively. The Court held that it was necessary moreover,

"in order to ensure strict equality between the Parties, to reserve the right of Iran to present its views in writing a second time on the United States counter-claim, in an additional pleading the filing of which might be the subject of a subsequent Order".

12. By Order of 26 May 1998, at the request of Iran, the Vice-President of the Court, acting as President in the case, extended the time-limits for the filing of the Reply of Iran and of the Rejoinder of the United States to, respectively, 10 December 1998 and 23 May 2000. By Order of 8 December 1998, at the request of Iran, the Court subsequently extended the time-limits for the filing of the Reply and of the Rejoinder to 10 March 1999 and 23 November 2000 respectively.

Iran duly filed its "Reply and Defence to Counter-Claim" within the time-limit as thus extended.

By Order of 4 September 2000, at the request of the United States, the President of the Court extended the time-limit for the filing of the Rejoinder of the United States to 23 March 2001.

The United States duly filed its Rejoinder within the time-limit as thus extended.

13. By a letter dated 30 July 2001, the Agent of Iran, referring to the above-mentioned Order of 10 March 1998, informed the Court that his Government wished to present its views in writing a second time on the counter-claim of the United States.

By an Order of 28 August 2001 the Vice-President of the Court, taking account of the agreement of the Parties, authorized the submission by Iran of an additional pleading relating solely to the counter-claim submitted by the United States and fixed 24 September 2001 as the time-limit for the filing of that pleading.

Iran duly filed the additional pleading within the time-limit as thus fixed and the case became ready for hearing.

14. At a meeting with the President of the Court on 6 November 2002, the Agent of Iran, subject to confirmation, and the Agent of the United States agreed that the oral proceedings on the merits should begin on 17 or 18 February 2003; the Agent of Iran subsequently confirmed the agreement of his Government. At the same meeting the Agents of the Parties also presented their views on the organization of the oral proceedings on the merits.

Pursuant to Articles 54 and 58 of the Rules, the Court fixed 17 February 2003 as the date for the opening of the hearings and adopted a timetable for them. The Registrar informed the Parties accordingly by letters of 19 November 2002.

15. At the meeting of 6 November 2002, the Agents of the Parties informed the President of the Court that they had decided not to present witnesses at the oral proceedings. The Agent of the United States nevertheless expressed his Government's intention, under Article 56 of the Rules, to file a new document containing an analysis and explanations by experts concerning certain evidence already produced in the case. The Agent of Iran stated that his Government reserved all its rights with regard to the production of that document. On 20 November 2002, the United States filed an expert's report dated 18 November 2002, together with a copy of a diplomatic Note dated 20 November 2002 from the Royal Norwegian Embassy in Washington D.C. to the United States Department of State. By a letter dated 20 January 2003, the Agent of Iran informed the Court that his Government did not object to the production of the above-mentioned documents by the United States and requested that, pur-
suant to Article 56, paragraph 3, of the Rules of Court, the comments of an expert of Iran on the expert report of the United States “be made part of the record in the case”. On 22 January 2003, the Court decided to authorize the production of the above-mentioned documents by the United States and the submission of the comments by Iran; by letters dated the same day, the Registrar communicated this decision to the Parties.

16. Pursuant to Article 53, paragraph 2, of its Rules, the Court, having consulted 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 on the merits.

17. Public sittings were held between 17 February and 7 March 2003, at which the Court heard the oral arguments and replies on the claim of Iran and on the counter-claim of the United States by:

For Iran:  
Mr. M. H. Zahedan-Labban,  
Mr. James R. Crawford,  
Mr. D. Montaz,  
Mr. Rodman R. Bundy,  
Mr. Alain Pellet,  
Mr. S. M. Zainoddin,  
Mr. David S. Sellers,  
Mr. Michael Bothe.

For the United States:  
The Honourable William H. Taft, IV,  
Mr. Paul Beaver,  
Mr. D. Stephen Mathias,  
Mr. Ronald D. Neubauer,  
Mr. John Moore,  
Mr. Ronald J. Beattauer,  
Mr. Michael J. Mattler,  
Mr. Michael J. Matheson,  
Mr. Prosper Weil,  
Mr. Sean Murphy.

In the course of the hearings, questions were put by Members of the Court and replies given in writing, pursuant to Article 61, paragraph 4, of the Rules of Court. Each Party presented written observations on the written replies received from the other, pursuant to Article 72 of the Rules.

* *

18. In the Application, the following requests were made by Iran:

“On the basis of the foregoing, and while reserving the right to supplement and amend these submissions as appropriate in the course of further proceedings in the case, the Islamic Republic respectfully requests the Court to adjudge and declare as follows:

(a) that the Court has jurisdiction under the Treaty of Amity to entertain the dispute and to rule upon the claims submitted by the Islamic Republic;

(b) that in attacking and destroying the oil platforms referred to in the Application on 19 October 1987 and 18 April 1988, the United States breached its obligations to the Islamic Republic, *inter alia*,

under Articles I and X (1) of the Treaty of Amity and international law;

(c) that in adopting a patently hostile and threatening attitude towards the Islamic Republic that culminated in the attack and destruction of the Iranian oil platforms, the United States breached the object and purpose of the Treaty of Amity, including Articles I and X (1), and international law;

(d) that the United States is under an obligation to make reparations to the Islamic Republic for the violation of its international legal obligations in an amount to be determined by the Court at a subsequent stage of the proceedings. The Islamic Republic reserves the right to introduce and present to the Court in due course a precise evaluation of the reparations owed by the United States; and

(e) any other remedy the Court may deem appropriate.”

19. In the written proceedings, the following submissions were made by the Parties:

On behalf of the Government of Iran,  
in the Memorial:

"In the light of the facts and arguments set out above, the Government of the Islamic Republic of Iran requests the Court to adjudge and declare:

1. That the Court has jurisdiction under the Treaty of Amity to entertain the dispute and to rule upon the claims submitted by Iran;

2. That in attacking and destroying the oil platforms referred to in Iran's Application on 19 October 1987 and 18 April 1988, the United States breached its obligations to Iran, *inter alia*, under Articles I, IV (1) and X (1) of the Treaty of Amity and international law, and that the United States bears responsibility for the attacks; and

3. That the United States is accordingly under an obligation to make full reparation to Iran for the violation of its international legal obligations and the injury thus caused in a form and amount to be determined by the Court at a subsequent stage of the proceedings. Iran reserves the right to introduce and present to the Court in due course a precise evaluation of the reparation owed by the United States; and

4. Any other remedy the Court may deem appropriate”;

in the “Reply and Defence to Counter-Claim”:

"With regard to Iran’s claims, and in the light of the facts and arguments set out above, and subject to the reservations set out in Chapter 12 above, the Government of the Islamic Republic of Iran requests the Court to adjudge and declare:

1. That in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran’s Application, the United States breached its obligations to Iran under Article X (1) of the Treaty of Amity, and that the United States bears responsibility for the attacks; and

2. That the United States is accordingly under an obligation to make full reparation to Iran for the violation of its international legal obligations and the injury thus caused in a form and amount to be determined by
the Court at a subsequent stage of the proceedings, the right being reserved to introduce and present to the Court in due course a precise evaluation of the reparation owed by the United States; and

3. Any other remedy the Court may deem appropriate.

With regard to the United States’ counter-claim, and in light of the facts and arguments set out above, and subject to the reservations set out in Chapter 12 above and, in view of the present uncertain nature of the United States’ counter-claim, further subject to the reservation of Iran’s right to amend these submissions, Iran requests the Court to adjudge and declare:

1. That the United States’ counter-claim does not fall within the scope of Article X (1) of the Treaty of Amity as interpreted by the Court in these proceedings, and accordingly that the counter-claim should be dismissed.

2. That the United States’ counter-claim is, in any event, inadmissible:

(a) generally, in that the United States has not satisfied the requirements of Article XXI of the Treaty of Amity with respect to the satisfactory diplomatic adjustment of the claim;

(b) in any event, to the extent that it relates to vessels which were not of United States nationality or whose United States flag was not opposable to Iran at the time.

3. That Iran did not, in any event, breach its obligations to the United States under Article X (1) of the Treaty of Amity as interpreted by the Court in these proceedings.

4. That accordingly the United States’ counter-claim be dismissed”;

in the additional pleading entitled “Further Response to the United States’ Counter-Claim”:

“Based on the facts and legal considerations set forth in Iran’s Reply and Defence to Counter-Claim in the present pleading, and subject to the reservations set out in Chapter 12 of its Reply and Defence to Counter-Claim and in Chapter VIII above and, in view of the present uncertain nature of the United States’ counter-claim, further subject to the reservation of Iran’s right to amend these submissions, Iran requests the Court, rejecting all submissions to the contrary, to adjudge and declare:

That the United States’ counter-claim be dismissed.”

On behalf of the Government of the United States,

in the “Counter-Memorial and Counter-Claim”:

“On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare:

1. That the United States did not breach its obligations to the Islamic Republic of Iran under Article X (1) of the Treaty of Amity between the United States and Iran, and,

2. That the claims of the Islamic Republic of Iran are accordingly dismissed.

With respect to its counter-claim, and in accordance with Article 80 of the Rules of the Court, the United States requests that the Court adjudge and declare:

1. That in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987-1988 that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty, and

2. That the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for violating the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings.

The United States reserves the right to introduce and present to the Court in due course a precise evaluation of the reparation owed by Iran”;

in the Rejoinder:

“On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare:

1. That the United States did not breach its obligations to the Islamic Republic of Iran under Article X, paragraph 1, of the 1955 Treaty of Amity between the United States and Iran, and

2. That the claims of the Islamic Republic of Iran are accordingly dismissed.

With respect to its counter-claim, the United States requests that the Court adjudge and declare:

1. Rejecting all submissions to the contrary, that, in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty, and

2. That the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for its breach of the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceeding.

The United States reserves the right to introduce and present to the Court in due course a precise evaluation of the reparation owed by Iran.”

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

On behalf of the Government of Iran,
at the hearing of 3 March 2003, on the claim of Iran:

“The Islamic Republic of Iran respectfully requests the Court, rejecting all contrary claims and submissions, to adjudge and declare:
1. That in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran’s Application, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity, and that the United States bears responsibility for the attacks; and
2. That the United States is accordingly under an obligation to make full reparation to Iran for the violation of its international legal obligations and the injury thus caused in a form and amount to be determined by the Court at a subsequent stage of the proceedings, the right being reserved to Iran to introduce and present to the Court in due course a precise evaluation of the reparation owed by the United States; and
3. Any other remedy the Court may deem appropriate;

at the hearing of 7 March 2003, on the counter-claim of the United States:

“The Islamic Republic of Iran respectfully requests the Court, rejecting all contrary claims and submissions, to adjudge and declare:
That the United States counter-claim be dismissed.”

On behalf of the Government of the United States,
at the hearing of 5 March 2003, on the claim of Iran and the counter-claim of the United States:

“The United States respectfully requests that the Court adjudge and declare:
(1) that the United States did not breach its obligations to the Islamic Republic of Iran under Article X, paragraph 1, of the 1955 Treaty between the United States and Iran; and
(2) that the claims of the Islamic Republic of Iran are accordingly dismissed.

With respect to its counter-claim, the United States requests that the Court adjudge and declare:
(1) rejecting all submissions to the contrary, that, in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran, the Islamic Republic of Iran breached its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty; and
(2) that the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for its breach of the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings.”

* * *

21. The task of the Court in the present proceedings is to determine whether or not there have been breaches of the 1955 Treaty, and if it finds that such is the case, to draw the appropriate consequences according to the submissions of the Parties. The Court is seized both of a claim by Iran alleging breaches by the United States, and of a counter-claim by the United States alleging breaches by Iran. Its jurisdiction to entertain both the claim and the counter-claim is asserted to be based upon Article XXI, paragraph 2, of the 1955 Treaty.

22. The Court recalls that, as regards the claim of Iran, the question of jurisdiction has been the subject of a judgment, given on 12 December 1996, whereby the Court found “that it has jurisdiction, on the basis of Article XXI, paragraph 2, of the 1955 Treaty, to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty” (I.C.J. Reports 1996 (II), p. 821, para. 55 (2)); certain questions have however been raised between the Parties as to the precise significance or scope of that Judgment, which will be examined below.

As to the counter-claim, the Court also recalls that it decided by an Order made on 10 March 1998 to admit the counter-claim, and indicated in that Order that the facts alleged and relied on by the United States “are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court”, and accordingly that “the Court has jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1” (I.C.J. Reports 1998, p. 204, para. 36). In this respect also questions have been raised between the Parties as to the significance and scope of that ruling on jurisdiction, and these will be examined below. It is however established, by the decisions cited, that both Iran’s claim and the counter-claim of the United States can be upheld only so far as a breach or breaches of Article X, paragraph 1, of the 1955 Treaty may be shown, even though other provisions of the Treaty may be relevant to the interpretation of that paragraph. Article X, paragraph 1, of the 1955 Treaty reads as follows: “Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.”

23. Before proceeding further, it will be convenient to set out the factual background to the case, as it emerges from the pleadings of both Parties; the broad lines of this background are not disputed, being a matter of historical record. The actions giving rise to both the claim and the counter-claim occurred in the context of the general events that took place in the Persian Gulf between 1980 and 1988, in particular the armed conflict that opposed Iran and Iraq. That conflict began on 22 September 1980, when Iraqi forces advanced into the western areas of Iranian territory, and continued until the belligerent parties accepted a ceasefire in the summer of 1988, pursuant to United Nations Security Council resolution 598 (1987) of 20 July 1987. During the war, combat occurred in the territories of both States, but the conflict also spread to the Persian Gulf — which is an international commercial route and line of communication of major importance — and affected commerce and navigation in the region. From the very beginning of the conflict, on 22 September 1980, Iran established a defence exclusion zone around its coasts; shortly after, in early October 1980, Iraq declared a “prohibited war zone” and later
established a “naval total exclusive zone” in the northern area of the Persian Gulf. In 1984, Iraq commenced attacks against ships in the Persian Gulf, notably tankers carrying Iranian oil. These were the first incidents of what later became known as the “Tanker War”: in the period between 1984 and 1988, a number of commercial vessels and warships of various nationalities, including neutral vessels, were attacked by aircraft, helicopters, missiles or warships, or struck mines in the waters of the Persian Gulf. Naval forces of both belligerent parties were operating in the region, but Iran has denied responsibility for any actions other than incidents involving vessels refusing a proper request for stop and search. The United States attributes responsibility for certain incidents to Iran, whereas Iran suggests that Iraq was responsible for them.

24. A number of States took measures at the time aimed at ensuring the security of their vessels navigating in the Persian Gulf. In late 1986 and early 1987, the Government of Kuwait expressed its preoccupation at Iran’s alleged targeting of its merchant vessels navigating in the Persian Gulf. It therefore requested the United States, the United Kingdom and the Soviet Union to “reflag” some of these vessels to ensure their protection. Following this request, the Kuwaiti Oil Tanker Company was able to charter a number of Soviet vessels, and to flag four ships under United Kingdom registry and 11 ships under United States registry. In addition, the Government of the United States agreed to provide all United States-flagged vessels with a naval escort when transiting the Persian Gulf, in order to deter further attacks; these escort missions were initiated in July 1987, under the designation “Operation Earnest Will”. Other foreign Powers, including Belgium, France, Italy, the Netherlands and the United Kingdom, took parallel action, sending warships to the region to protect international shipping. Despite these efforts, a number of ships, including reflagged Kuwaiti vessels, merchant tankers carrying Kuwaiti oil and warships participating in “Operation Earnest Will”, suffered attacks or struck mines in the Persian Gulf between 1987 and the end of the conflict.

25. Two specific attacks on shipping are of particular relevance in this case. On 16 October 1987, the Kuwaiti tanker Sea Isle City, reflagged to the United States, was hit by a missile near Kuwait harbour. The United States attributed this attack to Iran, and three days later, on 19 October 1987, it attacked Iranian offshore oil production installations, claiming to be acting in self-defence. United States naval forces launched an attack against the Reshadat (“Rostam”) and Resalat (“Rahsh”) complexes; the R-7 and R-4 platforms belonging to the Reshadat complex were destroyed in the attack. On 14 April 1988, the warship USS Samuel B. Roberts struck a mine in international waters near Bahrain while returning from an escort mission; four days later the United States, again asserting the right of self-defence, employed its naval forces to attack and destroy simultaneously the Nasr (“Siri”) and Salman (“Sassan”) complexes.

26. These attacks by United States forces on the Iranian oil platforms are claimed by Iran to constitute breaches of the 1955 Treaty; and the attacks on the Sea Isle City and the USS Samuel B. Roberts were invoked in support of the United States’ claim to act in self-defence. The counter-claim of the United States is however not limited to those attacks; according to the United States, Iran was in breach of its obligations under Article X, paragraph 1, of the 1955 Treaty, “in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran”. According to the United States, Iran conducted an aggressive policy and was responsible for more than 200 attacks against neutral shipping in international waters and the territorial seas of Persian Gulf States. Iran denies responsibility for those attacks, suggesting that they were committed by Iran and drawing attention to Iran’s interest in internationalizing the conflict. Furthermore, Iran claims that the attitude of the Iranian authorities and the measures taken by its naval forces in the Persian Gulf were solely defensive in nature. It has emphasized that Iraq was the aggressor State in the conflict, and has claimed that Iraq received diplomatic, political, economic and military support from a number of third countries that were not formally parties to the conflict, including Kuwait, Saudi Arabia and the United States.

27. The Court will first consider a contention to which the United States appears to have attributed a certain preliminary character. The United States asks the Court to dismiss Iran’s claim and refuse it the relief it seeks, because of Iran’s allegedly unlawful conduct, i.e., its violation of the 1955 Treaty and other rules of international law relating to the use of force. The United States invokes what it suggests are three related principles in support of this request. First, a party that acts improperly with respect to the subject-matter of a dispute is not entitled to relief; according to the United States, Iran had committed, at the time of the actions against the platforms, manifestly illegal armed attacks on United States and other neutral shipping in the Persian Gulf, and it has misrepresented, in the present proceedings, the facts of the case before the Court. Second, a party that has itself violated obligations identical to those that are the basis for its application is not entitled to relief and Iran had allegedly infringed itself the “mutual and reciprocal” obligations arising from the 1955 Treaty. Third, an applicant is not entitled to relief when the actions it complains of were the result of its own wrongful con-
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(d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.”

It is the contention of the United States that the actions complained of by Iran were measures necessary to protect the essential security interests of the United States, and that accordingly, if those actions would otherwise have been breaches of Article X, paragraph 1, of the Treaty, which the United States denies, the effect of Article XX, paragraph 1 (d), is that they are justified under the terms of the Treaty itself, and thus do not constitute breaches of it.

33. In its Judgment on the United States preliminary objection of 12 December 1996, the Court ruled that Article XX, paragraph 1 (d), does not afford an objection to admissibility, but “is confined to affording the Parties a possible defence on the merits” (I.C.J. Reports 1996 (II), p. 811, para. 20). In accordance with Article XXI, paragraph 2, of the Treaty, it is now for the Court to interpret and apply that subparagraph, inasmuch as such a defence is asserted by the United States.

34. As was noted in that Judgment, the Court has had occasion, in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), to examine a provision in another treaty concluded by the United States, of which the text is substantially identical to that of Article XX, paragraph 1 (d). This was Article XXI, paragraph 1 (d), of the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua. In its decision in that case, the Court observed that since that provision “contains a power for each of the parties to derogate from the other provisions of the Treaty, the possibility of invoking the clauses of that Article must be considered once it is apparent that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty” (I.C.J. Reports 1986, p. 117, para. 225).

If in the present case the Court is satisfied by the argument of the United States that the actions against the oil platforms were, in the circumstances of the case, “measures . . . necessary to protect [the] essential security interests” of the United States, within the meaning of Article XX, paragraph 1 (d), of the 1955 Treaty, it must hold that no breach of Article X, paragraph 1, of the Treaty has been established.

35. To uphold the claim of Iran, the Court must be satisfied both that the actions of the United States, complained of by Iran, infringed the freedom of commerce between the territories of the Parties guaranteed by Article X, paragraph 1, and that such actions were not justified to protect the essential security interests of the United States as contemplated by Article XX, paragraph 1 (d). The question however arises in what order the Court should examine these questions of interpretation and application of the Treaty. In the case concerning Military and Paramilitary Activities in and against Nicaragua, the Court first examined the question whether the United States conduct constituted a prima facie breach of other provisions of the Treaty; it concluded that the United States had “committed acts which are in contradiction with the terms of the Treaty”, but added that this was “subject to the question whether the exceptions in Article XXI” of the 1956 Treaty, concerning inter alia protection of the essential security interests of a party, “may be invoked to justify the acts complained of” (I.C.J. Reports 1986, p. 140, para. 280). The Court thus dealt first with the substantive provisions of the 1956 Treaty, breaches of which had been alleged, before turning to Article XXI of the Treaty; in effect, it analysed that Article as providing for “exceptions” to the substantive obligations provided for in other Articles of the Treaty (see ibid., p. 116, para. 222).

36. In the present case the United States has argued that Article XX, paragraph 1 (d), of the 1955 Treaty is not a limitation on Article X, paragraph 1, nor yet a derogation from it; and that it is a substantive provision that determines, defines and delimits the obligations of the parties, simultaneously with and on the same level as Article X, paragraph 1. The United States therefore contends that there is no compelling reason to examine the question of breach of Article X, paragraph 1, before turning to Article XX, paragraph 1 (d); the Court can, it suggests, dismiss the Iranian claim either on the ground that the actions of the United States did not involve a breach of Article X, paragraph 1, or on the ground that those actions were measures necessary to protect the essential security interests of the United States, and therefore justified under Article XX, paragraph 1 (d). On this basis, the United States suggests, the order in which the issues are treated is a matter for the discretion of the Court.

37. The Court does not consider that the order in which the Articles of the 1956 Treaty were dealt with in the case concerning Military and Paramilitary Activities in and against Nicaragua was dictated by the economy of the Treaty; it was rather an instance of the Court’s “freedom to select the ground upon which it will base its judgment” (Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1938, p. 62). In the present case, it appears to the Court that there are particular considerations militating in favour of an examination of the application of Article XX, paragraph 1 (d), before turning to Article X, paragraph 1. It is clear that the original dispute between the Parties related to the legality of the actions of the United States, in the
light of international law on the use of force. At the time of those actions, neither Party made any mention of the 1955 Treaty. The contention of the United States at the time was that its attacks on the oil platforms were justified as acts of self-defence, in response to what it regarded as armed attacks by Iran, and on that basis it gave notice of its action to the Security Council under Article 51 of the United Nations Charter. Before the Court, it has continued to maintain that it was justified in acting as it did in exercise of the right of self-defence; it contends that, even if the Court were to find that its actions do not fall within the scope of Article XXI, paragraph 1 (d), those actions were not wrongful since they were necessary and appropriate actions in self-defence.

38. Furthermore, as the United States itself recognizes in its Rejoinder, “The self-defense issues presented in this case raise matters of the highest importance to all members of the international community”, and both Parties are agreed as to the importance of the implications of the case in the field of the use of force, even though they draw opposite conclusions from this observation. The Court therefore considers that, to the extent that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty authorizes it to examine and rule on such issues, it should do so.

39. The question of the relationship between self-defence and Article XXI, paragraph 1 (d), of the Treaty has been disputed between the Parties, in particular as regards the jurisdiction of the Court. The United States emphasizes that the Court’s jurisdiction in this case is limited, pursuant to Article XXI, paragraph 2, of the 1955 Treaty, to the interpretation and application of that Treaty, and does not extend directly to the determination of the legality of any action of either Party under general international law. It has contended that

“the Court need not address the question of self-defence . . . [T]he scope of the exemption provided by Article XX, paragraph 1 (d), is not limited to those actions that would also meet the standards for self-defence under customary international law and the United Nations Charter.”

It however does not contend that the Treaty exempts it, as between the parties, from the obligations of international law on the use of force, but simply that where a party justifies certain action on the basis of Article XX, paragraph 1 (d), that action has to be tested solely against the criteria of that Article, and the jurisdiction conferred on the Court by Article XXI, paragraph 2, of the Treaty goes no further than that.

40. In the view of the Court, the matter is one of interpretation of the Treaty, and in particular of Article XXI, paragraph 1 (d). The question is whether the parties to the 1955 Treaty, when providing therein that it should “not preclude the application of measures . . . necessary to protect [the essential security interests]” of either party, intended that such should be the effect of the Treaty even where those measures involved a use of armed force; and if so, whether they contemplated, or assumed, a limitation that such use would have to comply with the conditions laid down by international law. In the case concerning Military and Paramilitary Activities in and against Nicaragua the Court took the view that “action taken in self-defence, individual or collective, might be considered as part of the wider category of measures qualified in Article XXI”—the text in that case corresponding to Article XX of the 1955 Treaty—“as necessary to protect” the “essential security interests” of a party” (I.C.J. Reports 1986, p. 117, para. 224); and it cited an extract from the proceedings of the United States Senate Foreign Relations Committee tending to show that such had been the intentions of the Parties (ibid.). This approach is consistent with the view that, when Article XX, paragraph 1 (d), is invoked to justify actions involving the use of armed force, allegedly in self-defence, the interpretation and application of that Article will necessarily entail an assessment of the conditions of legitimate self-defence under international law.

41. It should not be overlooked that Article I of the 1955 Treaty, quoted in paragraph 31 above, declares that “There shall be firm and enduring peace and sincere friendship between the United States of America and Iran.” The Court found in 1996 that this Article “is such as to throw light on the interpretation of the other Treaty provisions” (I.C.J. Reports 1996 (II), p. 815, para. 31). It is hardly consistent with Article I to interpret Article XX, paragraph 1 (d), to the effect that the “measures” there contemplated could include even an unlawful use of force by one party against the other. Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account “any relevant rules of international law applicable in the relations between the parties” (Art. 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty.

42. The Court is therefore satisfied that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty to decide any question of interpretation, or application of (inter alia) Article XX, paragraph 1 (d), of that Treaty extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an
unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law. The Court would however emphasize that its jurisdiction remains limited to that conferred on it by Article XXI, paragraph 2, of the 1955 Treaty. The Court is always conscious that it has jurisdiction only so far as conferred by the consent of the parties.

* *

43. The Court will thus examine first the application of Article XX, paragraph 1 (d), of the 1955 Treaty, which in the circumstances of this case, as explained above, involves the principle of the prohibition in international law of the use of force, and the qualification to it constituted by the right of self-defence. On the basis of that provision, a party to the Treaty may be justified in taking certain measures which it considers to be “necessary” for the protection of its essential security interests. As the Court emphasized, in relation to the comparable provision of the 1956 United States/Nicaragua Treaty in the case concerning Military and Paramilitary Activities in and against Nicaragua, “the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be ‘necessary’ for that purpose”; and whether a given measure is “necessary” is “not purely a question for the subjective judgment of the party” (I.C.J. Reports 1986, p. 141, para. 282), and may thus be assessed by the Court. In the present case, the question whether the measures taken were “necessary” overlaps with the question of their validity as acts of self-defence. As the Court observed in its decision of 1986 the criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence (see ibid., p. 103, para. 194, and paragraph 74 below).

44. In this connection, the Court notes that it is not disputed between the Parties that neutral shipping in the Persian Gulf was caused considerable inconvenience and loss, and grave damage, during the Iran-Iraq war. It notes also that this was to a great extent due to the presence of mines and minefields laid by both sides. The Court has no jurisdiction to enquire into the question of the extent to which Iran and Iraq complied with the international legal rules of maritime warfare. It can however take note of these circumstances, regarded by the United States as relevant to its decision to take action against Iran which it considered necessary to protect its essential security interests. Nevertheless, the legality of the action taken by the United States has to be judged by reference to Article XX, paragraph 1 (d), of the 1955 Treaty, in the light of international law on the use of force in self-defence.

45. The United States has never denied that its actions against the Iranian platforms amounted to a use of armed force. Some of the details of the attacks, so far as established by the material before the Court, may be pertinent to any assessment of the lawfulness of those actions. As already indicated, there were attacks on two successive occasions, on 19 October 1987 and on 18 April 1988. The Court will examine whether each of these met the conditions of Article XX, paragraph 1 (d), as interpreted by reference to the relevant rules of international law.

* *

46. The first installation attacked, on 19 October 1987, was the Reshadat complex, which consisted of three drilling and production platforms — R-3, R-4 and R-7 — linked to a total of 27 oil wells. The crude oil produced by the R-3 platform was transported by submarine pipeline to the R-4 platform and thence, together with the crude oil produced by R-4, to the R-7 platform that accommodated both production facilities and living quarters. This latter platform was also connected by submarine pipeline to another complex, named Resalat, which consisted of three linked drilling and production platforms, referred to as R-1. All the crude oil produced at the Reshadat and Resalat complexes, after gas and water separation, was transported by undersea pipeline from the R-7 platform to Lavan Island. At the time of the United States attacks, these complexes were not producing oil due to damage inflicted by prior Iraqi attacks in October 1986, July 1987 and August 1987. Iran has maintained that repair work on the platforms was close to completion in October 1987. The United States has however challenged this assertion (see below, paragraphs 65 and 93).

47. On 19 October 1987, four destroyers of the United States Navy, together with naval support craft and aircraft, approached the Reshadat R-7 platform. Iranian personnel was warned by the United States forces via radio of the imminent attack and abandoned the facility. The United States forces then opened fire on the platform; a unit later boarded and searched it, and placed and detonated explosive charges on the remaining structure. The United States ships then proceeded to the R-4 platform, which was being evacuated; according to a report of a Pentagon spokesman, cited in the press and not denied by the United States, the attack on the R-4 platform had not been included in the original plan, but it was seen as a “target of opportunity”. After having conducted reconnaissance fire and then having boarded and searched the platform, the United States forces placed and detonated explosive charges on this second installation. As a result of the attack, the R-7 platform was almost completely destroyed and the R-4 platform was severely damaged. While the attack was made solely on the Reshadat complex, it affected also the
operation of the Resalat complex. Iran states that production from the Reshadat and Resalat complexes was interrupted for several years.

48. The nature of this attack, and its alleged justification, was presented by the United States to the United Nations Security Council in the following terms (letter from the United States Permanent Representative of 19 October 1987, S/19219):

“In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that United States forces have exercised the inherent right of self-defense under international law by taking defensive action in response to attacks by the Islamic Republic of Iran against United States vessels in the Persian Gulf.

At approximately 11 p.m. Eastern Daylight Time on 16 October 1987, a Silkworm missile fired by Iranian forces from Iraqi-occupied Iraqi territory struck the Sea Isle City, a United States flag vessel, in the territorial waters of Kuwait. This is the latest in a series of such missile attacks against United States flag and other non-belligerent vessels in Kuwaiti waters in pursuit of peaceful commerce. These actions are, moreover, only the latest in a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation.

At approximately 7 a.m. Eastern Daylight Time on 19 October 1987, United States naval vessels destroyed the Iranian military ocean platform at Rashedat [sic] (also known as Rostam) in international waters of the Persian Gulf. The military forces stationed on this platform have engaged in a variety of actions directed against United States flag and other non-belligerent vessels and aircraft. They have monitored the movements of United States convoys by radar and other means; co-ordinated minelaying in the path of our convoys; assisted small-boat attacks against other non-belligerent shipping; and fired at United States military helicopters, as occurred on 8 October 1987. Prior warning was given to permit the evacuation of the platform.”

49. In its Counter-Memorial, the United States linked its previous invocation of the right of self-defense with the application of Article XX, paragraph 1 (d), of the 1955 Treaty. It argued that Iranian actions during the relevant period constituted a threat to essential security interests of the United States, inasmuch as the flow of maritime commerce in the Persian Gulf was threatened by Iran’s repeated attacks on neutral vessels; that the lives of United States nationals were put at risk; that United States naval vessels were seriously impeded in their security duties; and that the United States Government and United States nationals suffered severe financial losses. According to the United States, it was clear that diplomatic measures were not a viable means of deterring Iran from its attacks: “Accordingly, armed action in self-defense was the only option left to the United States to prevent additional Iranian attacks.”

50. The Court will thus first concentrate on the facts tending to show the validity or otherwise of the claim to exercise the right of self-defense. In its communication to the Security Council, cited above, the United States based this claim on the existence of

“a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation”;

it referred in particular to a missile attack on the Sea Isle City as being the specific incident that led to the attack on the Iranian platforms. Before the Court, it has based itself more specifically on the attack on the Sea Isle City, but has continued to assert the relevance of the other attacks (see paragraph 62 below). To justify its choice of the platforms as target, the United States asserted that they had “engaged in a variety of actions directed against United States flag and other non-belligerent vessels and aircraft”. Iran has denied any responsibility for (in particular) the attack on the Sea Isle City, and has claimed that the platforms had no military purpose, and were not engaged in any military activity.

51. Despite having thus referred to attacks on vessels and aircraft of other nationalities, the United States has not claimed to have been exercising collective self-defense on behalf of the neutral States engaged in shipping in the Persian Gulf; this would have required the existence of a request made to the United States “by the State which regards itself as the victim of an armed attack” (I.C.J. Reports 1986, p. 105, para. 199). Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defense, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature
as to be qualified as “armed attacks” within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. As the Court observed in the case concerning Military and Paramilitary Activities in and against Nicaragua, it is necessary to distinguish “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms” (I.C.J. Reports 1986, p. 101, para. 191), since “in the case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack” (ibid., p. 103, para. 195). The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defense.

52. Since it was the missile attack on the Sea Isle City that figured most prominently in the United States contentions, the Court will first examine in detail the evidence relating to that incident. The Sea Isle City was a Kuwaiti tanker reflagged to the United States; on 16 October 1987 it had just ended a voyage under “Operation Earnest Will” (see paragraph 24 above), when it was hit by a missile near Kuwait’s Al-Ahmad Sea Island (or Mina al-Ahmad) terminal. This incident, which caused damage to the ship and injury to six crew members, was claimed by the United States to be the seventh involving Iranian anti-ship cruise missiles in the area in the course of 1987. The United States asserted that the missile that struck the Sea Isle City was launched by Iran from a facility located in the Fao area. It recalls that in February 1986 Iran had taken control of a large part of the Fao peninsula and had captured three of its Arabian missiles in the area, which it used at the time of the attack. It also maintains that there was an additional active cruise missile staging facility on Iranian territory near the Fao peninsula.

53. The evidence produced by the United States includes images, taken by satellite or aerial reconnaissance aircraft, of the Fao area and of the four alleged missile sites under Iranian control at the time of the attack, as well as a complementary expert report describing and examining this imagery. Although the United States has indicated that it was unable to recover and examine fragments of the specific missile that hit the Sea Isle City, it has produced, in the present proceedings, a statement by an independent expert, dated 27 March 1997, based on a previous examination by United States military analysts of fragments retrieved from other similar incidents in early 1987. That evidence shows, in the United States submission, that the specific missile was a land-launched HY-2 cruise missile of Chinese manufacture (also known as the “Silkworm” missile). The United States has also produced the testimony, dated 21 May 1997, of two Kuwaiti officers, to the effect that military personnel stationed on Kuwaiti islands had witnessed, in January, September and October 1987, the launching of six missiles from Iranian-controlled territory in the Fao area; in addition, one of these officers asserts that he personally observed the path of the missile that struck the Sea Isle City on 16 October 1987.

54. Iran suggests that no credible evidence has been produced that there were operational Iranian missile sites in the Fao area; it acknowledges that it had captured three Iraqi missile sites in 1986, but these were “heavily damaged during the fighting with Iraq” and “were inoperative throughout the period that Iranian forces held Fao”. It therefore denies that the missile that struck the Sea Isle City was launched from those sites, or from an additional Iranian Silkworm missile site that the United States claims to have identified in the area, the existence of which Iran denies. Iran observes that the satellite images produced by the United States are not very clear, and appeals to its own experts’ opinion to prove that the installations shown therein “bear no resemblance to a normal Silkworm missile site”. Moreover, according to Iran, other United States evidence would show that, at the time of the attack, Iran had operational missile sites only in the Strait of Hormuz. Iran maintains that the statement of Kuwaiti officers produced by the United States is unconvincing since it is largely based on hearsay and is in part inconsistent.

55. Iran also suggests the alternative theory that the missile that hit the Sea Isle City was fired by Iraq, which, it contends, had both the appropriate missile capabilities, and an interest in internationalizing the conflict with Iran. According to Iran, the missile could have been launched by Iraq either from an aircraft, from a naval vessel or from an “operational missile site located at a position on Fao just to the west of areas occupied by Iran”. Iran alleges that, while the maximum range of the standard HY-2 (Silkworm) missile is 95 km, Iraq was in possession of modified versions of that missile that could cover ranges up to 150 or even 200 km. Moreover, according to an expert report produced by Iran, a missile of this kind does not necessarily travel in a straight line and could have been heading in the direction observed by the witnesses invoked by the United States even if it had not been launched from Iranian-held territory in the Fao area.

56. The United States claims that its satellite imagery shows that there was no Iraqi missile launching facility in the Fao area at the time. It also affirms, on the basis of an independent expert’s opinion, that HY-2 missiles are not equipped with a system capable of guiding them along a circuitous path, as contended by Iran. Finally, the United States rejects the Iranian theory that the missile was launched from air or sea, both because the fragments of missiles launched against Kuwaiti territory at the same period indicated a land-launched missile, and because United States AWACS radar planes did not detect any Iraqi military aircraft aloft in the northern Persian Gulf at the time of the attacks.
57. For present purposes, the Court has simply to determine whether the United States has demonstrated that it was the victim of an “armed attack” by Iran such as to justify it using armed force in self-defence; and the burden of proof of the facts showing the existence of such an attack rests on the United States. The Court does not have to attribute responsibility for firing the missile that struck the Sea Isle City, on the basis of a balance of evidence, either to Iran or to Iraq; if at the end of the day the evidence available is insufficient to establish that the missile was fired by Iran, then the necessary burden of proof has not been discharged by the United States.

58. As noted above, the United States claims that the missile that struck the Sea Isle City was a ground-launched HY-2 anti-ship missile of the type known as the “Silkworm”, but it has not been able to produce physical evidence of this, for example in the form of recovered fragments of the missile. The Court will however examine the other evidence on the hypothesis that the missile was of this type. The United States contends that the missile was fired from Iranian-held territory in the Fao area, and it has offered satellite pictures and expert evidence to show that there was, at the time, Iranian missile-firing equipment present there. Even with the assistance of the expert reports offered by both Parties, the Court does not however find the satellite images sufficiently clear to establish this point. The evidence that the particular missile came from the Fao direction is the testimony, mentioned above, of a Kuwaiti military officer, who claims to have observed the flight of the missile overhead, and thus to be able to identify the approximate bearing on which it was travelling. However, this testimony was given ten years after the reported events; and the officer does not state that he observed the launch of the missile (and the alleged firing point was too remote for this to have been possible), nor that he saw the missile strike the Sea Isle City, but merely that he saw a missile passing “overhead”, and that that vessel was struck by a missile “minutes later”. In sum, the witness evidence cannot be relied upon. Furthermore, the Court notes that there is a discrepancy between the English and Arabic texts of the statement produced before the Court, both of which were signed by the witness; the Arabic version lacks any indication of the bearing on which the observed missile was travelling.

59. There is a conflict of evidence between the Parties as to the characteristics of the Silkworm missile, in particular its maximum range, and whether or not when fired it always follows a straight-line course. According to the United States, the maximum range of the missile is of the order of 105 km, and this type of missile always follows a straight course until it approaches its objective, when its on-board guidance equipment causes it to lock on to a target which may be up to 12 degrees on either side of its course. Iran however contends that the missile may also be set to follow either a curved or dog-leg path, and that its maximum range is less, 95 km at the most. The Court does not consider that it is necessary for it to decide between the conflicting expert testimony. It appears that at the time different models of the missile existed, with differing programming characteristics and maximum ranges. There is however no direct evidence at all of the type of missile that struck the Sea Isle City; the evidence as to the nature of other missiles fired at Kuwaiti territory at this period is suggestive, but no more. In considering whether the United States has discharged the burden of proof that Iranian forces fired the missile that struck the Sea Isle City, the Court must take note of this deficiency in the evidence available.

60. In connection with its contention that the Sea Isle City was the victim of an attack by Iran, the United States has referred to an announcement by President Ali Khamenei of Iran some three months earlier, indicating that Iran would attack the United States if it did not “leave the region”. This however is evidently not sufficient to justify the conclusion that any subsequent attack on the United States in the Persian Gulf was indeed the work of Iran. The United States also observes that, at the time, Iran was blamed for the attack by “Lloyd’s Maritime Information Service, the General Council of British Shipping, Jane’s Intelligence Review and other authoritative public sources”. These “public sources” are by definition secondary evidence; and the Court has no indication of what was the original source, or sources, or evidence on which the public sources relied. In this respect the Court would recall the caveat it included in its Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua, that “Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source.” (I.C.J. Reports 1986, p. 41, para. 63.)

61. In short, the Court has examined with great care the evidence and arguments presented on each side, and finds that the evidence indicative of Iranian responsibility for the attack on the Sea Isle City is not sufficient to support the contentions of the United States. The conclusion to which the Court has come on this aspect of the case is that the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the Sea Isle City, has not been discharged.

62. In its notification to the Security Council, and before the Court, the United States has however not relied solely on the Sea Isle City incident as constituting the “armed attack” to which the United States claimed to be responding. It asserted that that incident was “the latest in a series of such missile attacks against United States flag and other non-belligerent vessels in Kuwaiti waters in pursuit of peaceful commerce” and that...
"These actions are, moreover, only the latest in a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation." (See paragraph 48 above.)

Before the Court, it has contended that the missile attack on the Sea Isle City was itself an armed attack giving rise to the right of self-defense: the alleged pattern of Iranian use of force, it is said, "added to the gravity of the specific attacks, reinforced the necessity of action in self-defense, and helped to shape the appropriate response".

63. The United States relies on the following incidents involving United States-flagged, or United States-owned, vessels and aircraft, in the period up to 19 October 1987, and attributes them to Iranian action: the mining of the United States-flagged Bridgeton on 24 July 1987; the mining of the United States-owned Texaco Caribbean on 10 August 1987; and firing on United States Navy helicopters by Iranian gunboats, and from the Reshadat oil platform, on 8 October 1987. The United States also claims to have detected and boarded an Iranian vessel, the Iran Afir, in the act of laying mines in international waters some 50 nautical miles north-east of Bahrain, in the vicinity of the entrance to Bahrain's deep-water shipping channel. Iran has denied any responsibility for the mining of the Bridgeton and the Texaco Caribbean; as regards the Iran Afir, Iran has admitted that the vessel was carrying mines, but denies that they were being laid at the time it was boarded, and claims that its only mission was to transport them by a secure route to a quite different area.

64. On the hypothesis that all the incidents complained of are to be attributed to Iran, and thus setting aside the question, examined above, of attribution to Iran of the specific attack on the Sea Isle City, the question is whether that attack, either in itself or in combination with the rest of the "series of . . . attacks" cited by the United States can be categorized as an "armed attack" on the United States justifying self-defence. The Court notes first that the Sea Isle City was in Kuwaiti waters at the time of the attack on it, and that a Silkworm missile fired from (it is alleged) more than 100 km away could not have been aimed at the specific vessel, but simply programmed to hit some target in Kuwaiti waters. Secondly, the Texaco Caribbean, whatever its ownership, was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State. As regards the alleged firing on United States helicopters from Iranian gunboats and from the Reshadat oil platform, no persuasive evidence has been supplied to support this allegation. There is no evidence that the minelaying alleged to have been carried out by the Iran Afir, at a time when Iran was at war with Iraq, was aimed specifically at the United States; and similarly it has not been established that the mine struck by the Bridgeton was laid with the specific intention of harming that ship, or other United States vessels. Even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning Military and Paramilitary Activities in and against Nicaragua, qualified as a "most grave" form of the use of force (see paragraph 51 above).

65. The second occasion on which Iranian oil installations were attacked was on 18 April 1988, with the action against the Salman and Nasr complexes. The Salman offshore oil complex consisted of seven interconnected platforms, including one drilling and two production platforms. Oil extracted from 21 wells was transported by submarine pipeline to this complex, and then on to Lavan Island after initial water and gas separation. This complex had been attacked by Iraq in October and November 1986, and was still undergoing repairs in April 1988; by that time, according to Iran, the works were "virtually completed", but the United States questions this. The Nasr complex comprised one central platform, one flaring point, and six oil-producing platforms grouped around the central platform, served by 44 wells in the Sirri field and four wells in the Nosrat field. Crude oil from all these wells was transported by submarine pipeline to the central platform, and from there to Sirri Island. This complex was functioning normally in April 1988.

66. United States naval forces attacked the Salman and Nasr complexes on 18 April 1988. Two destroyers and a supply ship were involved in the attack on the Salman complex: shortly before 8 a.m., local time, the United States forces warned the personnel on the platforms that the attack was due to begin; some of them began to evacuate the installation, while others opened fire. A few minutes later, shelling on the complex commenced from United States ships, warplanes and helicopters. United States forces then boarded some of the platforms (but not that containing the control centre), and placed and detonated explosives. Iran states that the attack caused severe damage to the production facilities of the platforms, and that the activities of the Salman complex were totally
interrupted for four years, its regular production being resumed only in September 1992, and reaching a normal level in 1993.

The central platform of the Nasr complex was attacked at around 8.15 a.m. by three United States warships and a number of helicopters. After having been warned of the imminent military action, Iranian personnel evacuated the platform. The United States forces bombarded the installation and almost completely destroyed it; the platform was not boarded, since it was considered unsafe due to secondary explosions and fire. According to Iranian accounts, activities in the whole Nasr complex (including oil production and water injection) were interrupted as a consequence of the attack and did not resume until nearly four years later.

67. The nature of the attacks on the Salman and Nasr complexes, and their alleged justification, was presented by the United States to the United Nations Security Council in the following terms (letter from the United States Permanent Representative of 18 April 1988, S/1979/1):

“In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that United States forces have exercised their inherent right of self-defence under international law by taking defensive action in response to an attack by the Islamic Republic of Iran against a United States naval vessel in international waters of the Persian Gulf. The actions taken are necessary and are proportionate to the threat posed by such hostile Iranian actions.

At approximately 1010 Eastern Daylight Time on 14 April the USS Samuel B. Roberts was struck by a mine approximately 60 miles east of Bahrain, in international waters. Ten US sailors were injured, one seriously, and the ship was damaged. The mine which struck the Roberts was one of at least four mines laid in this area. The United States has subsequently identified the mines by type, and we have conclusive evidence that these mines were manufactured recently in Iran. The mines were laid in shipping lanes known by Iran to be used by US vessels, and intended by them to damage or sink such vessels. This is but the latest in a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf.

Through diplomatic channels, the United States has informed the Government of the Islamic Republic of Iran on four separate occasions, most recently 19 October 1987, that the United States would not accept Iran’s minelaying in international waters or in the waters of neutral States. In October, my Government indicated that the United States did not seek a military confrontation with Iran, but that it would take appropriate defensive measures against such hostile actions.

Starting at approximately 0100 Eastern Daylight Time 18 April US forces attacked military targets in the Persian Gulf which have been used for attacks against non-belligerent shipping in international waterways of the Gulf.

The US actions have been against legitimate military targets. All feasible measures have been taken to minimize the risk of civilian damage or casualties . . . “

68. The Court notes that the attacks on the Salman and Nasr platforms were not an isolated operation, aimed simply at the oil installations, as had been the case with the attacks of 19 October 1987; they formed part of a much more extensive military action, designated “Operation Praying Mantis”, conducted by the United States against what it regarded as “legitimate military targets”; armed force was used, and damage done to a number of targets, including the destruction of two Iranian frigates and other Iranian naval vessels and aircraft.

69. The USS Samuel B. Roberts was a warship returning to Bahrain on 14 April 1988, after escorting a convoy of United States-flagged merchant ships in the context of “Operation Earnest Will”, when it hit a mine near Shah Allum Shoal in the central Persian Gulf. The United States reports that, in the days following the attack, Belgian and Dutch mine-clearing forces and its own navy discovered several mines bearing Iranian serial numbers in the vicinity and it concludes therefore that the mine struck by the USS Samuel B. Roberts was laid by Iran. It also adduces other discoveries of Iranian mining activities at the time (including the boarding by United States forces of the Iranian vessel Iran Ajir, said to have been caught in the act of laying mines, referred to in paragraph 63 above), contemporary statements by Iranian military leaders and conclusions of the international shipping community (see paragraph 60 above), all allegedly demonstrating that Iran made a general practice of using mines to attack neutral shipping.

70. Iran denies that it had systematic recourse to minelaying in the Persian Gulf and suggests that evidence produced by the United States is unpersuasive. Furthermore, it contends that the United States has submitted no independent evidence that the laying of the mine that hit the
USS Samuel B. Roberts is attributable to Iran. Iran also suggests that the mine may have been laid by Iraq, a hypothesis that the United States rejects.

71. As in the case of the attack on the Sea Isle City, the first question is whether the United States has discharged the burden of proof that the USS Samuel B. Roberts was the victim of a mine laid by Iran. The Court notes that mines were being laid at the time by both belligerents in the Iran-Iraq war, so that evidence of other minelaying operations by Iran is not conclusive as to responsibility of Iran for this particular mine. In its communication to the Security Council in connection with the attack of 18 April 1988, the United States alleged that “The mines were laid in shipping lanes known by Iran to be used by US vessels, and intended by them to damage or sink such vessels” (paragraph 67 above). Iran has claimed that it laid mines only for defensive purposes in the Khor Abdullah Channel, but the United States has submitted evidence suggesting that Iran’s mining operations were more extensive. The main evidence that the mine struck by the USS Samuel B. Roberts was laid by Iran was the discovery of moored mines in the same area, bearing serial numbers matching other Iranian mines, in particular those found aboard the vessel Iran Afr (see paragraph 63 above). This evidence is highly suggestive, but not conclusive.

72. The Court notes further that, as on the occasion of the earlier attack on oil platforms, the United States in its communication to the Security Council claimed to have been exercising the right of self-defence in response to the “attack” on the USS Samuel B. Roberts, linking it also with “a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf” (paragraph 67 above). Before the Court, it has contended, as in the case of the missile attack on the Sea Isle City, that the mining was itself an armed attack giving rise to the right of self-defence and that the alleged pattern of Iranian use of force “added to the gravity of the specific attacks, reinforced the necessity of action in self-defense, and helped to shape the appropriate response” (see paragraph 62 above). No attacks on United States-flagged vessels (as distinct from United States-owned vessels), additional to those cited as justification for the earlier attacks on the Reshadat platforms, have been brought to the Court’s attention, other than the mining of the USS Samuel B. Roberts itself. The question is therefore whether that incident sufficed in itself to justify action in self-defence, as amounting to an “armed attack”. The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the “inherent right of self-defence”; but in view of all the circumstances, including the inconclusiveness of the evidence of Iran’s responsibility for the mining of the USS Samuel B. Roberts, the Court is unable to hold that the attacks on the Salman and Nasr platforms have been shown to have been justifiably made in response to an “armed attack” on the United States by Iran, in the form of the mining of the USS Samuel B. Roberts.

73. As noted above (paragraph 43), in the present case a question of whether certain action is “necessary” arises both as an element of international law relating to self-defence and on the basis of the actual terms of Article XX, paragraph 1 (d), of the 1955 Treaty, already quoted, whereby the Treaty does “not preclude . . . measures . . . necessary to protect [the] essential security interests” of either party. In this latter respect, the United States claims that it considered in good faith that the attacks on the platforms were necessary to protect its essential security interests, and suggests that “A measure of discretion should be afforded to a party’s good faith application of measures to protect its essential security interests.” Iran was prepared to recognize some of the interests referred to by the United States — the safety of United States vessels and crew, and the uninterrupted flow of maritime commerce in the Persian Gulf — as being reasonable security interests of the United States, but denied that the United States actions against the platforms could be regarded as “necessary” to protect those interests. The Court does not however have to decide whether the United States interpretation of Article XX, paragraph 1 (d), on this point is correct, since the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any “measure of discretion”. The Court will therefore turn to the criteria of necessity and proportionality in the context of international law on self-defence.

74. In its decision in the case concerning Military and Paramilitary Activities in and against Nicaragua, the Court endorsed the shared view of the parties to that case that in customary law “whether the response to the [armed] attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence” (I.C.J. Reports 1986, p. 103, para. 194). One aspect of these criteria is the nature of the target of the force used avowedly in self-defence. In its communications to the Security Council, in particular in that of 19 October 1987 (paragraph 46 above), the United States indicated the grounds on
which it regarded the Iranian platforms as legitimate targets for an armed action in self-defence. In the present proceedings, the United States has continued to maintain that they were such, and has presented evidence directed to showing that the platforms collected and reported intelligence concerning passing vessels, acted as a military communication link co-ordinating Iranian naval forces and served as actual staging bases to launch helicopter and small boat attacks on neutral commercial shipping. The United States has referred to documents and materials found by its forces aboard the vessel *Iran Air* (see paragraph 63 above), allegedly establishing that the Reshadat platforms served as military communication facilities. It has also affirmed that the international shipping community at the time was aware of the military use of the platforms, as confirmed by the costly steps commercial vessels took to avoid them, and by various witness reports describing Iranian attacks. The United States has also submitted expert analysis of the conditions and circumstances surrounding these attacks, examining their pattern and location in the light of the equipment at Iran’s disposal. Finally, the United States has produced a number of documents, found on the Reshadat complex when it was attacked, allegedly corroborating the platforms’ military function. In particular, it contends that these documents prove that the Reshadat platforms had monitored the movements of the *Sea Isle City* on 8 August 1987. On the other hand, the forces that attacked the Salman and Nasr complexes were not able to board the platforms containing the control centres, and did not therefore seize any material (if indeed such existed) tending to show the use of those complexes for military purposes.

75. Iran recognizes the presence of limited military personnel and equipment on the Reshadat platforms, but insists that their purpose was exclusively defensive and justified by previous Iraqi attacks on its oil production facilities. Iran further challenges the evidence adduced by the United States in this regard. It alleges that documents found aboard the *Iran Air* and the Reshadat platforms are read out of their proper context, incorrectly translated and actually consistent with the platforms’ purely defensive role; and that military expert analysis relied on by the United States is hypothetical and contradictory. Iran asserts further that reports and testimony referred to by the United States are mostly non-specific about the use of the platforms as staging bases to launch attacks, and that the equipment at its disposal could be used from mainland and offshore islands, without any need to have recourse to the platforms.

76. The Court is not sufficiently convinced that the evidence available supports the contentions of the United States as to the significance of the military presence and activity on the Reshadat oil platforms; and it notes that no such evidence is offered in respect of the Salman and Nasr complexes. However, even accepting those contentions, for the purposes of discussion, the Court is unable to hold that the attacks made on the platforms could have been justified as acts of self-defence. The conditions for the exercise of the right of self-defence are well settled: as the Court observed in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, “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” (*I.C.J. Reports* 1996 (1), p. 245, para. 41); and in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court referred to a specific rule “whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it” as “a rule well established in customary international law” (*I.C.J. Reports* 1986, p. 94, para. 176). In the case both of the attack on the *Sea Isle City* and the mining of the USS *Samuel B. Roberts*, the Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents. In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of minelaying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act. The Court would also observe that in the case of the attack of 19 October 1987, the United States forces attacked the R-4 platform as a “target of opportunity”, not one previously identified as an appropriate military target (see paragraph 47 above).

77. As to the requirement of proportionality, the attack of 19 October 1987 might, had the Court found that it was necessary in response to the *Sea Isle City* incident as an armed attack committed by Iran, have been considered proportionate. In the case of the attacks of 18 April 1988, however, they were conceived and executed as part of a more extensive operation entitled ”*Operation Praying Mantis*” (see paragraph 68 above). The question of the lawfulness of other aspects of that operation is not before the Court, since it is solely the action against the Salman and Nasr complexes that is presented as a breach of the 1955 Treaty; but the Court cannot assess in isolation the proportionality of that action to the attack to which it was said to be a response; it cannot close its eyes to the scale of the whole operation, which involved, *inter alia*, the destruction of two Iranian frigates and a number of other naval vessels and aircraft. As a response to the mining, by an unidentified agency, of the single United States warship, which was severely damaged but not sunk, and without loss of life, neither “*Operation Praying Mantis*” as a whole, nor even that
part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.

* *

78. The Court thus concludes from the foregoing that the actions carried out by United States forces against Iranian oil installations on 19 October 1987 and 18 April 1988 cannot be justified, under Article XX, paragraph 1 (d), of the 1955 Treaty, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty.

* * *

79. Having satisfied itself that the United States may not rely, in the circumstances of the case, on the defence to the claim of Iran afforded by Article XX, paragraph 1 (d), of the 1955 Treaty, the Court has now to turn to that claim, made under Article X, paragraph 1, of that Treaty, which provides that “Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.” In that respect, Iran’s submission is that “in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran’s Application, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity...”. It contends that the United States attacks on the oil platforms were directed against commercial facilities that were protected by Article X, paragraph 1, that they “impeded the normal functioning of the oil platforms and that they even resulted in the complete interruption of the platforms’ activities... thus preventing gravely ab ovo the possibility for Iran to enjoy freedom of commerce as guaranteed by” that Article.

80. As noted above (paragraph 31), in its Judgment of 12 December 1996 on the preliminary objection of the United States, the Court had occasion, for the purposes of ascertaining and defining the scope of its jurisdiction, to interpret a number of provisions of the 1955 Treaty, including Article X, paragraph 1. It noted that the Applicant had not alleged that any military action had affected its freedom of navigation, so that the only question to be decided was “whether the actions of the United States complained of by Iran had the potential to affect ‘freedom of commerce’” as guaranteed by that provision (I.C.J. Reports 1996 (II), p. 817, para. 38). The Court also rejected the view, advanced by the United States, that the word “commerce” in Article X, paragraph 1, is confined to maritime commerce (ibid., para. 43). After examining the contentions of the Parties as to the meaning of the word, the Court concluded that

“it would be a natural interpretation of the word ‘commerce’ in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general — not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce” (ibid., p. 819, para. 49).

81. In 1996 the Court was concerned only to resolve the questions of its jurisdiction raised by the preliminary objection presented by the United States. For that purpose, it was not called upon to decide whether the actions of the United States did in fact interfere with freedom of commerce between the territories of the Parties, but only whether, as stated in the Judgment, the lawfulness of those actions could be evaluated in relation to Article X, paragraph 1 (ibid., p. 820, para. 51). It has been suggested by the United States in its written pleadings that that Article does not in fact create specific legal obligations relevant to Iran’s claims, but is merely an “aspirational” provision, but this view, which the United States did not press during the oral proceedings, does not seem to the Court to be consistent either with the structure of the 1955 Treaty or with the Court’s 1996 Judgment.

82. In that decision, the Court observed that it did not then have to enter into the question whether Article X, paragraph 1, “is restricted to commerce ‘between’ the Parties” (ibid., p. 817, para. 44). However it is now common ground between the Parties that that provision is in terms limited to the protection of freedom of commerce “between the territories of the two High Contracting Parties”. The Court observes that it is oil exports from Iran to the United States that are relevant to the case, not such exports in general. The United States has argued that for the purpose of interpreting Article X, paragraph 1, what must be considered is whether oil from the specific platforms attacked was, or would have been, exported to the United States. In this connection it questions whether the platforms could be said to be on the “territory” of Iran, inasmuch as they are outside Iran’s territorial sea, though upon its continental shelf, and within its exclusive economic zone. The Court does not however consider it tenable an interpretation of the 1955 Treaty that would have differentiated, for the purposes of “freedom of commerce”, between oil produced on the land territory or the territorial sea of Iran, and oil produced on its continental shelf, in the exercise of its sovereign rights of exploration and exploitation of the shelf, and parallel rights over the exclusive economic zone.
83. In the 1996 Judgment, the Court further emphasized that “Article X, paragraph 1, of the Treaty of 1955 does not strictly speaking protect ‘commerce’ but ‘freedom of commerce’”, and continued:

“Unless such freedom is to be rendered illusory, the possibility must be determined that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and storage with a view to export.” (I.C.J. Reports 1996 (II), p. 819, para. 50.)

The Court also noted that

“Iran’s oil production, a vital part of that country’s economy, constitutes an important component of its foreign trade.

On the material now before the Court, it is . . . not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil . . .” (Ibid., p. 820, para. 51.)

If, at the present stage of the proceedings, the Court were to find that Iran had established that such was the case, the claim of Iran under Article X, paragraph 1, could be upheld.

84. The arguments of the Parties in relation to Iran’s claim under that provision have therefore focused on the first and last stages of the production/export process. In order to establish that freedom of commerce in oil between the territories of the Parties was affected by the attack, so that the destruction of the platforms constituted a breach of Article X, paragraph 1, Iran has sought to show that oil produced or processed by, stored on, or transported from the platforms attacked could, to some degree, have been exported to the United States, but this was prevented by the destruction of the platforms. This has involved explanation of the construction and operation of the platforms, and assessment of the implications of the damage caused to them by the attacks. The question has also been raised as to whether there was an impact on overall oil exports to the United States, contemporaneous with, and attributable to, the attacks, or a potential impact of this kind, amounting to an interference with “freedom” of commerce between the Parties’ territories.

85. Before turning to the facts and to the details of Iran’s claim, the Court will mention one consideration advanced by the United States which, if upheld, would render unnecessary any further examination of the effects of the attacks on the platforms. The United States alleg es, as has already been noted in connection with its argument founded on self-defence, that military forces were stationed on the platforms and played a role in the attacks, attributable to Iran, on United States vessels and other neutral shipping (see for example the communication from the United States to the United Nations Security Council of 19 October 1987, quoted in paragraph 48 above). On this basis, the United States argues that the guarantee of “freedom of commerce” under Article X, paragraph 1, of the 1955 Treaty cannot have been intended to shield one party’s military activities against the other, and that therefore the coverage of that Article cannot be extended to the platforms in question. The United States has not succeeded, to the satisfaction of the Court, in establishing that the limited military presence on the platforms, and the evidence as to communications to and from them, could be regarded as justifying treating the platforms as military installations (see paragraph 76 above). For the same reason, the Court is unable to regard them as outside the protection afforded by Article X, paragraph 1, of the 1955 Treaty.

86. Iran’s initial claim that the attacks violated Article X, paragraph 1, was based on the contention that “they destroyed important petroleum installations used by Iran for the commercial exploitation of its natural resources”, and that “fundamental economic and commercial activities including oil production, storage and transportation were affected”. The Court in its 1996 Judgment contemplated the possibility that freedom of commerce could be impeded not only by “the destruction of goods destined to be exported”, but also by acts “capable of affecting their transport and their storage with a view to export” (I.C.J. Reports 1996 (II), p. 819, para. 50). In the view of the Court, the activities of the platforms are to be regarded, in general, as commercial in nature; it does not, however, necessarily follow that any interference with such activities involves an impact on the freedom of commerce between the territories of Iran and the United States.

87. As regards the first of these categories of activity, “acts entailing the destruction of goods destined to be exported”, the United States observes, first, that the attacks on the platforms did not destroy any oil as such; and secondly that in any event the platforms were not engaged in producing goods destined for export. It explains that the oil extracted by the platforms attacked was not in a form capable of being exported, either when it came on to or when it left the platforms, since to transform it into a product capable of being safely exported it was necessary to subject it to extensive processing, involving the extraction of gas, hydrogen sulphide and water. Iran however suggests that the question is not whether the oil was capable of being safely exported, but whether it was a good destined for export; in addition, it observes that equipment required for an initial processing of the oil extracted was situated on the platforms and destroyed with them by the United States attacks. It does not however contend that that initial processing rendered the oil capable of being safely exported.

88. The Court also included in the category of acts interfering with
freedom of commerce “acts . . . capable of affecting [the] transport and storage with a view to export” of goods destined to be exported. No storage of oil was effected on the platforms; as regards transport, the Court noted in 1996 that

“The oil pumped from the platforms attacked in October 1987 passed from there by subsea line to the oil terminal on Lavan Island and that the Salman complex, object of the attack of April 1988, was also connected to the oil terminal on Lavan Island by subsea line” (I.C.J. Reports 1996 (II), pp. 819-820, para. 50).

Similarly, the Nasr central platform served as a crude oil collecting point for transfer by pipeline to Sirri Island. An act interfering with these subsea lines would therefore prima facie have been an interference with the transport of goods mainly destined for export; but according to the United States the attacks on the platforms did not in fact damage the subsea lines, but only the portions of the platform above the waterline. An attempt was made by the United States Navy to destroy the power generation platform of the Salman complex, and if this had been successful it would, according to Iran, have destroyed the equipment necessary for the transport of oil to Lavan Island, but the explosives placed failed to detonate.

89. The Court notes that the conclusion which the United States is inviting the Court to reach is, in effect, that military attacks on installations used for commercial oil exploitation, which caused — and were intended to cause — very considerable damage to those installations, proved to be limited in their effects to the extent necessary to avoid a breach of a specific commercial treaty. Yet the Court notes also that there is no evidence that the relevant military orders were devised with this outcome in mind, or even that the existence and scope of the treaty was taken into account at all at the time of the attacks. However that may be, the Court considers that where a State destroys another State’s means of production and transport of goods destined for export, or means ancillary or pertaining to such production or transport, there is in principle an interference with the freedom of international commerce. In destroying the platforms, whose function, taken as a whole, was precisely to produce and transport oil, the military actions made commerce in oil, at that time and from that source, impossible, and to that extent prejudiced freedom of commerce. While the oil, when it left the platform complexes, was not yet in a state to be safely exported, the fact remains that it could be already at that stage destined for export, and the destruction of the platform prevented further treatment necessary for export. The Court therefore finds that the protection of freedom of commerce under Article X, paragraph 1, of the 1955 Treaty applied to the platforms attacked by the United States, and the attacks thus impeded Iran’s freedom of commerce. However, the question remains whether there was in this case an interference with freedom of commerce “between the territories of the High Contracting Parties”.

90. The United States in fact contends further that there was in any event no breach of Article X, paragraph 1, inasmuch as, even assuming that the attacks caused some interference with freedom of commerce, it did not interfere with freedom of commerce “between the territories of the two High Contracting Parties”. First, as regards the attack of 19 October 1987 on the Reshadat platforms, it observes that the platforms were under repair as a result of an earlier attack on them by Iraq; consequently, they were not engaged in, or contributing to, commerce between the territories of the Parties. Secondly, as regards the attack of 18 April 1988 on the Salman and Nasr platforms, it draws attention to United States Executive Order 12613, signed by President Reagan on 29 October 1987, which prohibited, with immediate effect, the import into the United States of most goods (including oil) and services of Iranian origin. As a consequence of the embargo imposed by this Order, there was, it is suggested, no commerce between the territories of the Parties that could be affected, and consequently no breach of the Treaty protecting it.

91. As the Court noted in its 1996 Judgment, it was then not contested between the Parties (and is not now contested) that “oil exports from Iran to the United States were — to some degree — ongoing at least until after the destruction of the first set of oil platforms”, i.e., 19 October 1987 (I.C.J. Reports 1996 (II), p. 818, para. 44). It appears also to be accepted by both Parties that the oil or petroleum products reaching the United States during this period were to some extent derived from crude oil produced by the platforms that were later subjected to attack. Iran has explained that in peace time it had sold crude oil in cargoes where the producing field was specifically identified, but where the Iran-Iraq war all Iranian light crudes and heavy crudes were mixed and sold generically, as either “Iranian light” or “Iranian heavy”. Iran has asserted, and the United States has not denied, that there was a market for Iranian crude oil directly imported into the United States up to the issuance of Executive Order 12613 of 29 October 1987. Thus Iranian oil exports did up to that time constitute the subject of “commerce between the territories of the High Contracting Parties” within the meaning of Article X, paragraph 1, of the 1955 Treaty.

92. At the time of the attack of 19 October 1987 no oil whatsoever was being produced or processed by the Reshadat and Resalat platforms,
since these had been put out of commission by earlier Iraqi attacks. While it is true that the attacks caused a major setback to the process of bringing the platforms back into production, there was at the moment of the attacks on these platforms no ongoing commerce in oil produced or processed by them. Iran however indicates that at the time of the attack the platforms were nearly repaired and were about to resume production; it argues that there was therefore an interference with “freedom of commerce”, when commerce is conceived as a pattern of trade over the years and not a temporary phenomenon. Injury to potential for future commerce is however, in the Court’s view, not necessarily to be identified with injury to freedom of commerce, within the meaning of Article X, paragraph 1, of the 1955 Treaty. In its Judgment of 12 December 1996, the Court emphasized that the Treaty protected “freedom of commerce” rather than merely “commerce”; but deduced from this no more than that

“the possibility must be entertained that [that freedom] could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export” (I.C.J. Reports 1996 (II), p. 819, para. 50; emphasis added).

93. There is however a further aspect of the question. According to Iran, the “Production Commissioning” schedule for the repair of the platforms contemplated that production would resume at a date around 24 October 1987, but the Court has no information whether, at the time of the attacks, the works were up to schedule. According to Iran, at the time of the attacks the turbines that supplied power to the platforms were being dismantled for repair, which does not suggest that the works were within a few days of completion. On 29 October 1987 United States Executive Order 12613 was issued, which put an end to imports of Iranian crude oil into the United States. Iran has not brought evidence to show that, if no attack had been made on the Reshadat platforms, production from them would have been an element of “commerce” between the two States before all direct commerce was halted by that Executive Order, and the Court cannot regard that point as established.

94. The embargo imposed by Executive Order 12613 was already in force when the attacks on the Salman and Nasr platforms were carried out; and, as just indicated, it has not been shown that the Reshadat and Resalat platforms would, had it not been for the attack of 19 October 1987, have resumed production before the embargo was imposed. The Court must therefore consider the significance of that Executive Order for the interpretation and application of Article X, paragraph 1, of the 1955 Treaty. Iran has not disputed that the effect of the Executive Order was to halt all direct exports of Iranian crude oil to the United States. The United States therefore argues that “any damage done to Iran’s oil platforms by US actions was irrelevant to Iran’s ability to export oil to customers located in the United States”, and that consequently, the attacks did not constitute a violation of the freedom of commerce “between the territories of the two High Contracting Parties”. Iran however, while not presenting any formal submission or claim that the embargo was unlawful as itself a breach of Article X, paragraph 1, of the 1955 Treaty, has asserted that such was the case, and therefore suggests that the argument advanced by the United States amounts to a party taking advantage of its own wrong. The Iranian contention rests on the hypothesis that the embargo was a breach of the 1955 Treaty, and not justified under Article XX, paragraph 1 (d), thereof; but these are questions which Iran has chosen not to put formally in issue, and on which the Court has thus not heard full argument. The Court is here concerned with the practical effects of the embargo, about which there is no dispute.

95. In response to the contention of the United States that the damage to the platforms was irrelevant to Iranian oil exports to the United States, Iran argues that this conclusion does not follow from the mere fact that direct import into the United States of Iranian crude oil, as such, ceased with the issue of the embargo. Iran suggests that “It is in the nature of the international oil trade that Iranian oil could not be excluded from the United States”: “If Iranian crude oil was received by a refinery, for example in Western Europe, ‘and if that refinery in turn exported products to the United States, then it follows that a quantity of Iranian oil was necessarily imported into the United States in the form of products.” Iran has observed that, as a result of the embargo, it found itself in 1987 with a surplus crude oil production of approximately 345,000 barrels per day, and had to find other outlets, namely in the Mediterranean and North-West Europe. At the same time, the United States had to make good the shortfall resulting from the prohibition of Iranian crude oil exports, and therefore increased its existing imports of petroleum products from refineries in the Mediterranean and Western Europe. Iran has submitted to the Court an expert report showing, inter alia, a very considerable increase in imports of Iranian crude oil to Western Europe from 1986 to 1987, and again in 1988, and an increase in United States imports of petroleum products from Western European refineries.

96. The Court sees no reason to question the view that, over the period during which the United States embargo was in effect, petroleum products were reaching the United States, in considerable quantities, that were derived in part from Iranian crude oil. Executive Order 12613 contained an exception (Section 2 (b)) whereby the embargo was not to apply to “petroleum products refined from Iranian crude oil in a third country”. It could reasonably be argued that, had the platforms not been attacked, some of the oil that they would have produced would have been
included in the consignments processed in Western Europe so as to produce the petroleum products reaching the United States. Whether, according to international trade law criteria, such as the "substantial transformation" principle, or the "value added approach", the final product could still retain for some purposes an Iranian character, is not the question before the Court. What the Court has to determine is not whether something that could be designated "Iranian" oil entered the United States in some form, during the currency of the embargo; it is whether there was "commerce" in oil between the territories of Iran and the United States during that time, within the meaning given to that term in the 1955 Treaty.

97. In this respect, what seems to the Court to be determinative is the nature of the successive commercial transactions relating to the oil, rather than the successive technical processes that it underwent. What Iran regards as "indirect" commerce in oil between itself and the United States involved a series of commercial transactions: a sale by Iran of crude oil to a customer in Western Europe, or some third country other than the United States; possibly a series of intermediate transactions; and ultimately the sale of petroleum products to a customer in the United States. This is not "commerce" between Iran and the United States, but commerce between Iran and an intermediate purchaser; and "commerce" between an intermediate seller and the United States. After the completion of the first contract Iran had no ongoing financial interest in, or legal responsibility for, the goods transferred. If, for example, the process of "indirect commerce" in Iranian oil through Western European refineries, as described above, were interfered with at some stage subsequent to Iran's having parted with a consignment, Iran's commitment and entitlement to freedom of commerce vis-à-vis the United States could not be regarded as having been violated.

98. The Court thus concludes, with regard to the attack of 19 October 1987 on the Reshadat platforms, that there was at the time of those attacks no commerce between the territories of Iran and the United States in respect of oil produced by those platforms and the Resalat platforms, inasmuch as the platforms were under repair and inoperative; and that the attacks cannot therefore be said to have infringed the freedom of commerce in oil between the territories of the High Contracting Parties protected by Article X, paragraph 1, of the 1955 Treaty, particularly taking into account the date of entry into force of the embargo effected by Executive Order 12613. The Court notes further that, at the time of the attacks of 18 April 1988 on the Salman and Nasr platforms, all commerce in crude oil between the territories of Iran and the United States had been suspended by that Executive Order, so that those attacks also cannot be said to have infringed the rights of Iran under Article X, paragraph 1, of the 1955 Treaty.

99. The Court is therefore unable to uphold the submissions of Iran, that in carrying out those attacks the United States breached its obligations to Iran under Article X, paragraph 1, of the 1955 Treaty. In view of this conclusion, the Iranian claim for reparation cannot be upheld.

* *

100. In view of the Court's finding, on the claim of Iran, that the attacks on the oil platforms did not infringe the rights of Iran under Article X, paragraph 1, of the 1955 Treaty, it becomes unnecessary for the Court to examine the argument of the United States (referred to in paragraphs 27-30 above) that Iran might be debarred from relief on its claim by reason of its own conduct.

* *

101. On 23 June 1997, within the time-limit fixed for the Counter-Memorial, the United States filed a counter-claim, in its Counter-Memorial, against Iran. It explains that its "counter-claim is based on actions by Iran in the Persian Gulf during 1987-88 that created extremely dangerous conditions for shipping, and thereby violated Article X of the 1955 Treaty". In the submissions in that pleading (see paragraph 19 above) the United States requests that the Court adjudge and declare:

"1. That in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987-88 that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty, and

2. That the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for violating the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings."

These submissions were later modified, as explained below.

102. By an Order of 10 March 1998 the Court found that the alleged attacks on shipping, laying of mines, and other military actions by Iran were facts capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty, that the Court had jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1 (I.C.J. Reports 1998, p. 204, para. 36), and that it emerged from the Parties' submissions that their claims rest on facts of the same nature and form part of the same factual complex, and that the Parties pursue the same legal aim
103. Iran maintains that the Court’s Order of 10 March 1998 did not decide all of the preliminary issues involved in the counter-claim presented by the United States. Iran points out that, in that Order, the Court only ruled on the admissibility of the United States counter-claim in relation to Article 80 of the Rules of Court, declaring it admissible “as such”, whilst reserving the subsequent procedure for further decision.

Iran contends that the Court should not deal with the merits of the counter-claim because:

(a) the counter-claim was presented without any prior negotiation, in disregard of the provisions of Article XXI, paragraph 2, of the 1955 Treaty;

(b) the United States has no title to submit a claim on behalf of third States or of foreign entities;

(c) the United States counter-claim extends beyond Article X, paragraph 1, of the 1955 Treaty, the only provision over which the Court has jurisdiction; and the Court cannot uphold any submissions falling outside the terms of paragraph 1 of Article X;

(d) the Court has jurisdiction only as far as freedom of commerce as protected under Article X, paragraph 1, is concerned but not on counter-claims alleging a violation of freedom of navigation as protected by the same paragraph;

(e) the United States cannot broaden the actual subject-matter of its claim beyond the submissions set out in its Counter-Memorial.

104. The United States contends that the Order of 10 March 1998 settled definitively in its favour all such issues of jurisdiction and admissibility as might arise.

The Court notes however that the United States is adopting an attitude different from its position in 1998. At that time, while Iran was asking the Court to rule generally on its jurisdiction and on the admissibility of the counter-claim, the United States was basing itself solely on Article 80. It argued in particular that:

"Many of Iran’s objections to jurisdiction and admissibility involve contested matters of fact which the Court cannot effectively address and decide at this stage, particularly not in the context of the abbre-

viated procedures of Article 80 (3)." (Cited in I.C.J. Reports 1998, p. 200, para. 22.)

105. The Court considers that it is open to Iran at this stage of the proceedings to raise objections to the jurisdiction of the Court to entertain the counter-claim or to its admissibility, other than those addressed by the Order of 10 March 1998. When in that Order the Court ruled on the "admissibility" of the counter-claim, the task of the Court at that stage was only to verify whether or not the requirements laid down by Article 80 of the Rules of Court were satisfied, namely, that there was a direct connection of the counter-claim with the subject-matter of the Iranian claims, and that, to the extent indicated in paragraph 102 above, the counter-claim fell within the jurisdiction of the Court. The Order of 10 March 1998 therefore does not address any other question relating to jurisdiction and admissibility, not directly linked to Article 80 of the Rules. This is clear from the terms of the Order, by which the Court found that the counter-claim was admissible "as such"; and in paragraph 41 of the Order the Court further stated that: "a decision given on the admissibility of a counter-claim taking account of the requirements set out in Article 80 of the Rules in no way prejudices any question which the Court will be called upon to hear during the remainder of the proceedings" (ibid., p. 205, para. 41). The Court will therefore proceed to address the objections now presented by Iran to its jurisdiction to entertain the counter-claim and to the admissibility thereof.

106. Iran maintains first that the Court cannot entertain the counter-claim of the United States because it was presented without any prior negotiation, and thus does not relate to a dispute "not satisfactorily adjusted by diplomacy" as contemplated by Article XXI, paragraph 2, of the 1955 Treaty, which reads as follows:

"Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

107. The Court cannot uphold this objection of Iran. It is established that a dispute has arisen between Iran and the United States over the issues raised in the counter-claim. The Court has to take note that the dispute has not been satisfactorily adjusted by diplomacy. Whether the fact that diplomatic negotiations have not been pursued is to be regarded as attributable to the conduct of the one Party or the other is irrelevant for present purposes, as is the question whether it is the Applicant or the Respondent that has asserted a fin de non-recevoir on this ground. As in previous cases involving virtually identical treaty provisions (see United
States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, pp. 26-28; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1984, pp. 427-429), it is sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to the Court.

108. According to the second objection of Iran, the United States is in effect submitting a claim on behalf of third States or of foreign entities, and has no title to do so. Reference has been made in the United States argument on the counter-claim to incidents involving vessels flying the flags of the Bahamas, Panama, the United Kingdom and Liberia; Iran contends that the United States is thus claiming to defend the interests of those States, which are not parties to the present proceedings.

109. The Court recalls that the first submission presented by the United States in regard to its counter-claim simply requests the Court to adjudge and declare that the alleged actions of Iran breached its obligations to the United States, without mention of any third States. Accordingly, the Court will strictly limit itself to consideration of whether the alleged actions by Iran infringed freedoms guaranteed to the United States under Article X, paragraph 1, of the 1955 Treaty. The objection of Iran is thus as such devoid of any object and the Court cannot therefore uphold it.

110. In its third objection, Iran contends that the United States counter-claim extends beyond Article X, paragraph 1, of the 1955 Treaty, the only text in respect of which the Court has jurisdiction, and that the Court cannot therefore uphold any submissions falling outside the terms of paragraph 1 of that Article.

111. The Court notes that, while in its Rejoinder the United States requested the Court to adjudge and declare

"that, in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty" (emphasis added),

in its final submissions (see paragraph 20 above) the United States substantially narrowed the basis of its counter-claim, when it requested the Court to adjudge and declare

"Rejecting all submissions to the contrary, that, in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran, the Islamic Republic of Iran breached its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty." (Emphasis added.)

The United States, in presenting its final submissions on the counter-claim, thus no longer relies on Article X of the 1955 Treaty as a whole, but on paragraph 1 of that Article only, and, furthermore, recognizes the territorial limitation of Article X, paragraph 1, referring specifically to the military actions that were allegedly "dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran" (emphasis added) rather than, generally, to "military actions that were dangerous and detrimental to maritime commerce".

By limiting the scope of its counter-claim in its final submissions, the United States has deprived Iran's third objection of any object, and the Court cannot therefore uphold it.

112. In its fourth objection Iran maintains that

"the Court has jurisdiction to rule only on counter-claims alleging a violation by Iran of freedom of commerce as protected under Article X (1), and not on counter-claims alleging a violation of freedom of navigation as protected by the same paragraph".

Iran concludes that

"since an alleged violation of 'freedom of commerce' as protected under Article X (1) constitutes the only possible basis for the Court's jurisdiction in the present case, no alleged violation of freedom of navigation or of any other provision of the Treaty of Amity can be entertained by the Court in the context of the counter-claim".

113. It seems, nevertheless, that Iran changed its position and recognized that the counter-claim could be founded on a violation of freedom of navigation. For example, it stated:

"Article X, paragraph 1, refers to 'freedom of commerce and navigation'. It appears that these are distinct freedoms, and in your Order of 1998 you referred to them in the plural . . . Thus there could be navigation between the territories of the High Contracting Parties without any commerce between those territories, even if there could not be navigation without any boat!"

114. The Court, in its Order of 10 March 1998, stated that

"Whereas the counter-claim presented by the United States alleges attacks on shipping, the laying of mines, and other military actions said to be 'dangerous and detrimental to maritime commerce'; whereas such facts are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the
Court; and whereas the Court has jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1.” (I.C.J. Reports 1998, p. 204, para. 36.)

115. Article X, paragraph 1, envisages both freedoms, freedom of commerce and freedom of navigation, as argued by the United States and accepted by Iran during the oral hearings. As regards the claim of Iran, it is true that the Court has found that only freedom of commerce is in issue (paragraph 80 above). However, the Court also concluded in 1998 that it had jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms (in the plural) guaranteed by Article X, paragraph 1, of the 1955 Treaty, i.e., freedom of commerce and freedom of navigation. This objection of Iran thus cannot be upheld by the Court.

116. Iran presents one final argument against the admissibility of the United States counter-claim, which however it conceals relates only to part of the counter-claim. Iran contends that the United States has broadened the subject-matter of its claim beyond the submissions set out in its counter-claim by having, belatedly, added complaints relating to freedom of navigation to its complaints relating to freedom of commerce, and by having added new examples of breaches of freedom of maritime commerce in its Rejoinder in addition to the incidents already referred to in the counter-claim presented with the Counter-Memorial.

117. The issue raised by Iran is whether the United States is presenting a new claim. The Court is thus faced with identifying what is “a new claim” and what is merely “additional evidence relating to the original claim”. It is well established in the Court’s jurisprudence that the parties to a case cannot in the course of proceedings “transform the dispute brought before the Court into a dispute that would be of a different nature” (Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 265, para. 63). In other words:

“The liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the [1936] Rules which provide that the Application must indicate the subject of the dispute” (Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 173).

A fortiori, the same applies to the case of counter-claims, having regard to the provisions of Article 80 of the Rules of Court, and in particular taking into account the fact that it is on the basis of the counter-claim as originally submitted that the Court determines whether it is “directly connected with the subject-matter of the claim”, and as such admissible under that text.

If it is the case, as contended by Iran, that the Court has before it something that “constitutes...a new claim, [so that] the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim” (Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992, p. 267, para. 70), then the Court will be bound to dismiss such new claim.

118. The Court has noted in its Order of 10 March 1998 in the present case that the counter-claim alleged “attacks on shipping, the laying of mines, and other military actions said to be dangerous and detrimental to maritime commerce” (I.C.J. Reports 1998, p. 204, para. 36). The Court concluded that the counter-claim was admissible in so far as “the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1” (ibid.).

Subsequently to its Counter-Memorial and counter-claim and to that Order of the Court, the United States provided detailed particulars of further incidents substantiating, in its contention, its original claims. In the view of the Court, the United States has not, by doing so, transformed the subject of the dispute originally submitted to the Court, nor has it modified the substance of its counter-claim, which remains the same, i.e., alleged attacks by Iran on shipping, laying of mines and other military actions said to be “dangerous and detrimental to maritime commerce”, thus breaching Iran’s obligations to the United States under Article X, paragraph 1, of the 1955 Treaty.

The Court therefore cannot uphold the objection of Iran.

119. Having disposed of all objections of Iran to its jurisdiction over the counter-claim, and to the admissibility thereof, the Court has now to consider the counter-claim on its merits. To succeed on its counter-claim, the United States must show that:

(a) its freedom of commerce or freedom of navigation between the territories of the High Contracting Parties to the 1955 Treaty was impaired; and that
(b) the acts which allegedly impaired one or both of those freedoms are attributable to Iran.

The Court would recall that Article X, paragraph 1, of the 1955 Treaty does not protect, as between the Parties, freedom of commerce or freedom of navigation in general. As already noted above (paragraph 90), the provision of that paragraph contains an important territorial limitation. In order to enjoy the protection provided by that text, the commerce or the navigation is to be between the territories of the United States and
Iran. The United States bears the burden of proof that the vessels which were attacked were engaged in commerce or navigation between the territories of the United States and Iran.

120. The Court will thus examine each of Iran's alleged attacks, in chronological order, from the standpoint of this requirement of the 1955 Treaty:

(a) 24 July 1987: A mine attack on the United States-reflagged steam tanker Bridgeion (see paragraph 63 above) in an international shipping channel approximately 18 nautical miles south-west of the Iranian island of Farsi, while en route from Rotterdam, Netherlands, via Fujairah Anchorage, United Arab Emirates, to Mina al-Alhmd, Kuwait. The Court notes that the ship was not engaged in commerce or navigation between the territories of the two High Contracting Parties.

(b) 10 August 1987: A mine attack on the United States bareboat-chartered, Panamanian-flagged, Texaco Caribbean (see paragraph 63 above), at the Khor Fakkan anchorage off Fujairah, which was laden with a cargo of Iranian light crude being carried from Larak Island Terminal, Iran, to Rotterdam, Netherlands. The Court notes that Iran conceded that the Texaco Caribbean was engaged in commerce between the territories of the two States; but this was in the context of its contention, in relation to its own claim, that the term "commerce" covers "indirect commerce" as well. It therefore requested the Court to dismiss the United States claim concerning this ship on different grounds, namely that the mine incident was not attributable to Iran, and that the United States suffered no loss since the ship was a Panamanian-owned vessel carrying a Norwegian-owned cargo. The United States argued, in relation to the claim of Iran, against such a broad interpretation of the term "commerce" in Article X, paragraph 1, of the 1955 Treaty and also adduced evidence that the cargo was owned by a United States corporation. Since the Court has concluded that the process of "indirect commerce" in Iranian oil through Western European refineries does not represent "commerce between the territories of the two High Contracting Parties" for the purposes of Article X, paragraph 1, of the 1955 Treaty (see paragraph 97 above), and taking account of the fact that the destination was not a United States port, the Court concludes that the vessel was not engaged in commerce or navigation between Iran and the United States.

(c) 15 August 1987: A mine attack on the United Arab Emirates flag supply vessel Anita in the vicinity of Khor Fakkan anchorage off Fujairah while proceeding to supply the vessels in the anchorage. The Court notes that the ship was not engaged in commerce or navigation between the territories of the two High Contracting Parties.

(d) 15 October 1987: A missile attack on the United States-owned, Liberian-flagged Sungari, while at anchor 10 miles off Mina al-Alhmd Sea Island Terminal, Kuwait. The Court notes that the ship was not engaged in commerce or navigation between the territories of the two High Contracting Parties.

(e) 16 October 1987: A missile attack on the United States-reflagged Sea Isle City (see paragraph 52 above), which was proceeding from its anchorage to the oil loading terminal at Kuwait's Mina al-Alhmd Terminal. The Court notes that the ship was not engaged in commerce or navigation between the territories of the two High Contracting Parties.

(f) 15 November 1987: A gunboat attack on the United States-owned, Liberian-flagged, motor tanker Lucy, near the Strait of Hormuz, off Al Khasat, northern Oman, en route to Ras Tanura, Saudi Arabia, from Oita, Japan. The Court notes that the ship was not engaged in commerce or navigation between the territories of the two High Contracting Parties.

(g) 16 November 1987: A gunboat attack on the United States-owned, Bahamian-flagged, steam tanker Esso Freeport en route from Ras Tanura, Saudi Arabia, to the Louisiana Offshore Oil Pipeline Terminal, United States. The Court notes that the ship was not engaged in commerce or navigation between the territories of the two High Contracting Parties.

(h) 7 February 1988: A frigate attack on the United States-owned, Liberian-flagged, motor tanker Diana, while loaded with crude oil from Ras Tanura, Saudi Arabia, en route from Bahrain and the United Arab Emirates to Japan. The Court notes that the ship was not engaged in commerce or navigation between the territories of the two High Contracting Parties.

(i) 14 April 1988: A mine attack on the USS Samuel B. Roberts (United States warship) near the Shab Alum Shoal, while returning to Bahrain after escorting a convoy of United States-flagged vessels. As a warship, the USS Samuel B. Roberts does not enjoy the protection of freedom of navigation guaranteed by Article X, paragraph 1, of the 1955 Treaty. Paragraph 6 of that Article states that "The term 'vessels', as used herein ... does not, except with reference to paragraphs 2 and 5 of the present Article, include ... vessels of war." The United States is nevertheless contending that since the USS Samuel B. Roberts was escorting commercial vessels, it enjoys the protection by the 1955 Treaty of freedom of commerce. However, at all events, these vessels were neither navigating nor engaged in commerce between Iran and the United States. Consequently, the United
States has not shown a breach of Article X, paragraph 1, of the 1955 Treaty in relation to the incident involving the USS Samuel B. Roberts.

(j) 11 June 1988: Speedboat attacks on the United States-owned, British-flagged, steam tanker Esso Demetia, loaded at Umm Said and Ras Tanura, Saudi Arabia, en route to Halul Island, Qatar, to complete loading for a planned discharge in Singapore. The Court notes that the ship was not engaged in commerce or navigation between the territories of the two High Contracting Parties.

121. None of the vessels described by the United States as being damaged by Iran’s alleged attacks was engaged in commerce or navigation “between the territories of the two High Contracting Parties”. Therefore, the Court concludes that there has been no breach of Article X, paragraph 1, of the 1955 Treaty in any of the specific incidents involving these ships referred to in the United States pleadings.

122. The United States has also presented its claim in a generic sense. It has asserted that as a result of the cumulation of attacks on United States and other vessels, laying mines and otherwise engaging in military actions in the Persian Gulf, Iran made the Gulf unsafe, and thus breached its obligation with respect to freedom of commerce and freedom of navigation which the United States should have enjoyed under Article X, paragraph 1, of the 1955 Treaty.

123. The Court cannot disregard the factual context of the case, as described in paragraphs 23 and 44 above. While it is a matter of public record that as a result of the Iran-Iraq war navigation in the Persian Gulf involved much higher risks, that alone is not sufficient for the Court to decide that Article X, paragraph 1, of the 1955 Treaty was breached by Iran. It is for the United States to show that there was an actual impediment to commerce or navigation between the territories of the two High Contracting Parties. However, according to the material before the Court the commerce and navigation between Iran and the United States continued during the war until the issuance of the United States embargo on 29 October 1987, and subsequently at least to the extent permitted by the exceptions to the embargo. The United States has not demonstrated that the alleged acts of Iran actually infringed the freedom of commerce or of navigation between the territories of the United States and Iran.

The Court considers that, in the circumstances of this case, a generic claim of breach of Article X, paragraph 1, of the 1955 Treaty cannot be made out independently of the specific incidents whereby, it is alleged, the actions of Iran made the Persian Gulf unsafe for commerce and navigation, and specifically for commerce and navigation between the territories of the parties. However, the examination in paragraph 120 above of those incidents shows that none of them individually involved any interference with the commerce and navigation protected by the 1955 Treaty; accordingly the generic claim of the United States cannot be upheld.

124. The Court has thus found that the counter-claim of the United States concerning breach by Iran of its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty, whether based on the specific incidents listed, or as a generic claim, must be rejected; there is therefore no need for it to consider, under this head, the contested issues of attribution of those incidents to Iran. In view of the foregoing, the United States claim for reparation cannot be upheld.

* * *

125. For these reasons,

THE COURT,

(1) By fourteen votes to two,

finds that the actions of the United States of America against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 (d), of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of international law on the use of force; finds further that the Court cannot however uphold the submission of the Islamic Republic of Iran that those actions constitute a breach of the obligations of the United States of America under Article X, paragraph 1, of that Treaty, regarding freedom of commerce between the territories of the parties, and that, accordingly, the claim of the Islamic Republic of Iran for reparation also cannot be upheld;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal, Owada, Simma, Tomka; Judge ad hoc Rigaux;

AGAINST: Judges Al-Khasawneh, Elaraby;

(2) By fifteen votes to one,

finds that the counter-claim of the United States of America concerning the breach of the obligations of the Islamic Republic of Iran under Article X, paragraph 1, of the above-mentioned 1955 Treaty, regarding freedom of commerce and navigation between the territories of the parties, cannot be upheld; and accordingly that the counter-claim of the United States of America for reparation also cannot be upheld.

61
OIL PLATFORMS (JUDGMENT)

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Rigaux;
AGAINST: Judge Simma.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this sixth day of November, two thousand and three, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Islamic Republic of Iran and the Government of the United States of America, respectively.

(Signed) Shi Jiuyong,
President.

(Signed) Philippe Couvreur,
Registrar.

Vice-President Ranjeva and Judge Koroma append declarations to the Judgment of the Court; Judges Higgins, Parra-Aranguren and Kooijmans append separate opinions to the Judgment of the Court; Judge Al-Khasawneh appends a dissenting opinion to the Judgment of the Court; Judge Buergenthal appends a separate opinion to the Judgment of the Court; Judge Elaraby appends a dissenting opinion to the Judgment of the Court; Judges Owada and Simma and Judge ad hoc Rigaux append separate opinions to the Judgment of the Court.

(Initialled) J.Y.S.
(Initialled) Ph.C.
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005
Situation in the Great Lakes region — Task of the Court.

* * *

Issue of consent.
The DRC consented to presence of Ugandan troops in eastern border area in period preceding August 1998 — Protocol on Security along the Common Border of 27 April 1998 between the DRC and Uganda — No particular formalities required for withdrawal of consent by the DRC to presence of Ugandan troops — Ambiguity of statement by President Kabila published on 28 July 1998 — Any prior consent withdrawn at latest by close of Victoria Falls Summit on 8 August 1998.

* *

Findings of fact concerning Uganda’s use of force in respect of Kitona.
Denial by Uganda that it was involved in military action at Kitona on 4 August 1998 — Assessment of evidentiary materials in relation to events at Kitona — Deficiencies in evidence adduced by the DRC — Not established to the Court’s satisfaction that Uganda participated in attack on Kitona.

* *

Findings of fact concerning military action in the east of the DRC and in other areas of that country.
Determination by the Court of facts as to Ugandan presence at, and taking of, certain locations in the DRC — Assessment of evidentiary materials — Sketch-map evidence — Testimony before Porter Commission — Statements against interest — Establishment of locations taken by Uganda and corresponding “dates of capture”.

* *

Did the Lusaka, Kampala and Harare Agreements constitute any consent of the DRC to the presence of Ugandan troops?
Contention of Uganda that the Lusaka, Kampala and Harare Agreements constituted consent to presence of Ugandan forces on Congolese territory — Nothing in provisions of Lusaka Agreement can be interpreted as affirmation that security interests of Uganda had already required the presence of Ugandan forces on territory of the DRC as from September 1998 — Lusaka Agreement represented an agreed modus operandi for the parties, providing framework for orderly withdrawal of all foreign forces from the DRC — The DRC did not thereby recognize situation on ground as legal — Kampala and Harare Disengagement Plans did not change legal status of presence of Ugandan troops — Luanda Agreement authorized limited presence of Ugandan troops in border area — None of the aforementioned Agreements (save for limited exception in the Luanda Agreement) constituted consent by the DRC to presence of Ugandan troops on Congolese territory for period after July 1999.

* *

Self-defence in light of proven facts.
Question of whether Ugandan military action in the DRC from early August 1998 to July 1999 could be justified as action in self-defence — Ugandan High Command document of 11 September 1998 — Testimony before Porter Commission of Ugandan Minister of Defence and of commander of Ugandan forces in the DRC — Uganda regarded military events of August 1998 as part of operation “Safe Haven” — Objectives of operation “Safe Haven”, as stated in Ugandan High Command document, not consonant with concept of self-defence — Examination of claim by Uganda of existence of tripartite anti-Ugandan conspiracy between the DRC, the ADF and the Sudan — Evidence adduced by Uganda lacking in relevance and probative value Article 51 of the United Nations Charter — No report made by Uganda to Security Council of events requiring it to act in self-defence — No claim by Uganda that it had been subjected to armed attack by armed forces of the DRC — No satisfactory proof of involvement of Government of the DRC in alleged ADF attacks on Uganda — Legal and factual circumstances for exercise of right of self-defence by Uganda not present.
Findings of law on the prohibition against the use of force.

Article 2, paragraph 4, of United Nations Charter — Security Council resolutions 1234 (1999) and 1304 (2000) — No credible evidence to support allegation by DRC that MLC was created and controlled by Uganda — Obligations arising under principles of non-use of force and non-intervention violated by Uganda — Unlawful military intervention by Uganda in the DRC constitutes grave violation of prohibition on use of force expressed in Article 2, paragraph 4, of Charter.

* * *

The issue of belligerent occupation.

Definition of occupation — Examination of evidence relating to the status of Uganda as occupying Power — Creation of new province of "Kibali-Ituri" by commander of Ugandan forces in the DRC — No specific evidence provided by the DRC to show that authority exercised by Ugandan armed forces in any areas other than in Ituri — Contention of the DRC that Uganda indirectly controlled areas outside Ituri administered by Congolese rebel groups not upheld by the Court — Uganda was the occupying Power in Ituri — Obligations of Uganda.

* * *

Violations of international human rights law and international humanitarian law: contentions of the Parties.

Contention of the DRC that Ugandan armed forces committed wide-scale human rights violations on Congolese territory, particularly in Ituri — Contention of Uganda that the DRC has failed to provide any credible evidentiary basis to support its allegations.

* *

Admissibility of claims in relation to events in Kisangani.

Contention of Uganda that the Court lacks competence to deal with events in Kisangani in June 2000 in the absence of Rwanda — Jurisprudence contained in Certain Phosphate Lands in Nauru case applicable in current proceedings — Interests of Rwanda do not constitute "the very subject-matter" of decision to be rendered by the Court — The Court is not precluded from adjudicating on whether Uganda's conduct in Kisangani is a violation of international law.

* *

Violations of international human rights law and international humanitarian law: findings of the Court.

Examination of evidence relating to violations of international human rights law and international humanitarian law — Findings of fact — Conduct of UPDF and of officers and soldiers of UPDF attributable to Uganda — Irrelevant whether UPDF personnel acted contrary to instructions given or exceeded their authority — Applicable law — Violations of specific obligations under Hague Regulations of 1907 binding as customary international law — Violations of specific provisions of international humanitarian law and international human rights law instruments — Uganda is internationally responsible for violations of international human rights law and international humanitarian law.

* * *

Illegal exploitation of natural resources.

Contention of the DRC that Ugandan troops systematically looted and exploited the assets and natural resources of the DRC — Contention of Uganda that the DRC has failed to provide reliable evidence to corroborate its allegations.

* *

Findings of the Court concerning acts of illegal exploitation of natural resources.

Examination of evidence relating to illegal exploitation of Congolese natural resources by Uganda — Findings of fact — Conduct of UPDF and of officers and soldiers of UPDF attributable to Uganda — Irrelevant whether UPDF personnel acted contrary to instructions given or exceeded their authority — Applicable law — Principle of permanent sovereignty over natural resources not applicable to this situation — Illegal acts by UPDF in violation of the jus in bello — Violation of duty of vigilance by Uganda with regard to illegal acts of UPDF — No violation of duty of vigilance by Uganda with regard to illegal acts of rebel groups outside Ituri — International responsibility of Uganda for acts of its armed forces — International responsibility of Uganda as an occupying Power.

* *

Legal consequences of violations of international obligations by Uganda.

The DRC's request that Uganda cease continuing internationally wrongful acts — No evidence to support allegations with regard to period after 2 June 2003 — Not established that Uganda continues to commit internationally wrongful acts specified by the DRC — The DRC's request cannot be upheld.

The DRC's request for specific guarantees and assurances of non-repetition of the wrongful acts — Tripartite Agreement on Regional Security in the Great Lakes of 26 October 2004 — Commitments assumed by Uganda under the Tripartite Agreement meet the DRC's request for specific guarantees and assurances of non-repetition — Demand by the Court that the Parties respect their obligations under that Agreement and under general international law.
The DRC’s request for reparation — Obligation to make full reparation for the injury caused by an international wrongful act — Internationally wrongful acts committed by Uganda resulted in injury to the DRC and persons on its territory — Uganda’s obligation to make reparation accordingly — Question of reparation to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings.

* * *

Compliance with the Court’s Order on provisional measures.

Binding effect of the Court’s orders on provisional measures — No specific evidence demonstrating violations of the Order of 1 July 2000 — The Court’s previous findings of violations by Uganda of its obligations under international human rights law and international humanitarian law until final withdrawal of Ugandan troops on 2 June 2003 — Uganda did not comply with the Court’s Order on provisional measures of 1 July 2000 — This finding is without prejudice to the question as to whether the DRC complied with the Order.

* * *

Counter-claims: admissibility of objections.

Question of whether the DRC is entitled to raise objections to admissibility of counter-claims at current stage of proceedings — The Court’s Order of 29 November 2001 only settled question of a “direct connection” within the meaning of Article 80 — Question of whether objections raised by the DRC are inadmissible because they fail to conform to Article 70 of the Rules of Court — Article 79 inapplicable to the case of an objection to counter-claims joined to the original proceedings — The Court is entitled to challenge admissibility of Uganda’s counter-claims.

* * *

First counter-claim.

Contention of Uganda that the DRC supported anti-Ugandan irregular forces — Division of Uganda’s first counter-claim into three periods by the DRC: prior to May 1997, from May 1997 to 2 August 1998 and subsequent to 2 August 1998 — No obstacle to examining the first counter-claim following the three periods of time and for practical purposes useful to do so — Admissibility of part of first counter-claim relating to period prior to May 1997 — Waiver of right must be express or unequivocal — Nothing in conduct of Uganda can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu régime — The long period of time between events during the Mobutu régime and filing of Uganda’s counter-claim has not rendered inadmissible Uganda’s first counter-claim for the period prior to May 1997 — No proof that Zaire provided political and military support to anti-Ugandan rebel groups — No breach of duty of vigilance by Zaire — No evidence of support for anti-Ugandan rebel groups by the DRC in the second period — Any military action taken by the DRC against Uganda in the third period could not be deemed wrongful since it would be justified as action in self-defence — No evidence of support for anti-Ugandan rebel groups by the DRC in the third period.

Second counter-claim.

Contention of Uganda that Congolese armed forces attacked the premises of the Ugandan Embassy, maltreated diplomats and other Ugandan nationals present on the premises and at Ndjili International Airport — Objections by the DRC to the admissibility of the second counter-claim — Contention of the DRC that the second counter-claim is not founded — Admissibility of the second counter-claim — Uganda is not precluded from invoking the Vienna Convention on Diplomatic Relations — With regard to diplomats Uganda claims its own rights under the Vienna Convention on Diplomatic Relations — Substance of the part of the counter-claim relating to acts of maltreatment against other persons on the premises of the Embassy falls within the ambit of Article 22 of the Vienna Convention on Diplomatic Relations — The part of the counter-claim relating to maltreatment of persons not enjoying diplomatic status at Ndjili International Airport is based on diplomatic protection — No evidence of Ugandan nationality of persons in question — Sufficient evidence to prove attacks against the Embassy and maltreatment of Ugandan diplomats — Property and archives removed from Ugandan Embassy — Breaches of the Vienna Convention on Diplomatic Relations.

The DRC bears responsibility for violation of international law on diplomatic relations — Question of reparation to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings.

JUDGMENT

Present: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetic, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judges ad hoc Verhoeven, Kateka; Registrar Couvreur.

In the case concerning armed activities on the territory of the Congo, between
the Democratic Republic of the Congo, represented by

H.E. Mr. Honorius Kisimba Ngoy Ndalewe, Minister of Justice, Keeper of the Seals of the Democratic Republic of the Congo, as Head of Delegation;

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands, as Agent;

Maitre Tshibangu Kalala, member of the Kinshasa and Brussels Bars, as Co-Agent and Advocate;

Mr. Olivier Corten, Professor of International Law, Université libre de Bruxelles,

Mr. Pierre Klein, Professor of International Law, Director of the Centre for International Law, Université libre de Bruxelles,

Mr. Jean Salmon, Professor Emeritus, Université libre de Bruxelles, Member of the Institute of International Law and of the Permanent Court of Arbitration,

Mr. Philippe Sands, Q.C., Professor of International Law, Director of the Centre for International Courts and Tribunals, University College London,

Mr. Olivier Corten, Professor of International Law, Université libre de Bruxelles,

Mr. Pierre Klein, Professor of International Law, Director of the Centre for International Law, Université libre de Bruxelles,

Mr. Jean Salmon, Professor Emeritus, Université libre de Bruxelles, Member of the Institute of International Law and of the Permanent Court of Arbitration,

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Mr. Pierre Klein, Professor of International Law, Director of the Centre for International Law, Université libre de Bruxelles,

Mr. Jean Salmon, Professor Emeritus, Université libre de Bruxelles, Member of the Institute of International Law and of the Permanent Court of Arbitration,

Mr. Philippe Sands, Q.C., Professor of International Law, Director of the Centre for International Courts and Tribunals, University College London,
limit for the filing of the Counter-Memorial of Uganda. The DRC filed its Memorial within the time-limit thus prescribed.

4. On 19 June 2000, the DRC submitted to the Court a request for the indication of provisional measures pursuant to Article 41 of the Statute of the Court. By an Order dated 1 July 2000, the Court, after hearing the Parties, indicated certain provisional measures.

5. Uganda filed its Counter-Memorial within the time-limit fixed for that purpose by the Court. On 24 April 2001, the Court, after hearing the Parties, indicated certain provisional measures.

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each Party availed itself of its right under Article 31 of the Statute of the Court to choose a judge ad hoc to sit in the case. By a letter dated 16 August 2000, the DRC notified the Court of its intention to choose Mr. Joe Verhoeven and by a letter dated 4 October 2000, Uganda notified the Court of its intention to choose Mr. James K. Kataki. No objections having been raised, Mr. Verhoeven and Mr. Kataki were appointed as judges ad hoc.

7. At a meeting held by the President of the Court with the Agents of the Parties on 11 June 2001, the DRC, invoking Article 80 of the Rules of Court, raised certain objections to the admissibility of the counter-claims of Uganda. At that meeting, the parties agreed on the time-limits for that purpose. On 28 June 2001, the DRC filed its written observations on the question of the admissibility of the counter-claims. The Court considered that it was sufficiently well informed of their respective positions on the question of the admissibility of the counter-claims and, by an Order of 7 November 2001, authorized the transmission of the counter-claims to the judges ad hoc appointed by the Court.

8. By an Order of 29 November 2001, the Court held that two of the three counter-claims submitted by Uganda in its Counter-Memorial were admissible as such and formed part of the case, and that those claims were to be the subject of a subsequent Order. The DRC duly filed its Reply within the time-limit prescribed for that purpose.

9. By a letter dated 2 October 2003, the DRC requested that the Court delay the hearing of the case by a second time for the purpose of submitting additional pleadings. By an Order of 29 November 2003, the Court authorized the submission by the DRC of an additional pleading and fixed the time-limit for the filing of that pleading at 15 March 2004. The DRC duly filed its additional pleading within the time-limit fixed and the case became ready for hearing.

10. By a letter dated 2 October 2003, the DRC asked the Court to modify Article 45 of the Rules of Court so as to extend the time-limit for the filing of the Rejoinder of Uganda. By a letter dated 3 November 2003, the Court extended the time-limit for the filing of the Rejoinder within the time-limit as thus extended.

11. At a meeting held by the President of the Court with the Agents of the Parties on 24 April 2003, the Agents presented their views on the organization of the oral proceedings on the merits. The Parties agreed on the date for the opening of the oral proceedings. The Registrar informed the Parties accordingly by letters dated 8 May 2003.

12. Pursuant to the instructions of the Court under Article 69 of the Rules of Court, the Registrar sent the notifications provided for in Article 34, paragraph 3, of the Statute and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Permanent Secretaries-General of the United Nations and of the International Civil Aviation Organization, the International Criminal Police Organization, the International Labour Organization, the International Finance Corporation, the International Maritime Organization, the International Union of Marine Insurers, the United Nations Office for the Protection of the Civilian Persons in Armed Conflict, the International Civil Aviation Organization, the International Criminal Court and the African Commission on Human and People’s Rights. The Secretariat was also asked whether they wished to make observations to inform the Court of any concerns related to the subject matter of the case. None of those organizations expressed a wish to make such observations.

13. By a letter dated 2 October 2003, the DRC asked the Court to extend the time-limit for the filing of the Rejoinder within the time-limit as thus extended.

14. By an Order of 7 November 2002, at the request of Uganda, the Court extended the time-limit for the filing of the Rejoinder within the time-limit as thus extended.
ARMED ACTIVITIES (JUDGMENT)

On 6 November 2003, the Registrar informed the Parties by letter that the Court, "taking account of the representations made to it by the Parties, [had] decided to postpone the opening of the oral proceedings in the case", and that the new date for the oral proceedings would be Monday 11 April 2005. On 16 November 2003, the Agent of the DRC informed the Court that the DRC had decided, in accordance with Article 54 of the Rules of Court, to raise any objection to the production of the remaining documents. On 18 November 2003, the Court, "taking account of the representations made to it by the Parties, [had] decided to postpone the opening of the oral proceedings in the case" and that the new date for the oral proceedings would be Monday 11 April 2005. On 19 November 2003, the Registrar informed the Parties that the Court had taken note, firstly, that the DRC did not object to the production of the documents submitted by the DRC on 5 November 2003, and that counsel would be free to quote from both sets of documents during the oral proceedings. On 20 November 2003, the Agent of the DRC informed the Court that his Government wished, in accordance with Article 56 of the Rules of Court, to submit a "small number" of new documents in accordance with Article 56 of the Rules of Court. No objection having been made by the Congolese Government to the Ugandan request, the Registrar, on 8 April 2005, informed the Parties that the Court had decided to authorize the production of the document to which the Ugandan Government had raised no objection, as well as the production of the other documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to the DRC. On 6 November 2003, the Agent of the DRC informed the Court that his Government had no objection to the production of the documents submitted by the DRC on 5 November 2003, and that counsel would be free to quote from both sets of documents during the oral proceedings. On 12 November 2003, the Registrar informed the Parties that the Court had no objection to the production of the documents submitted by the DRC on 5 November 2003, and that counsel would be free to quote from both sets of documents during the oral proceedings.

The requested documents were transmitted to the Agent of Uganda. On 5 November 2003, the Agent of the DRC informed the Court that his Government had no objection to the production of one of the new documents by the DRC, and presented certain observations on the remaining documents. On 21 February 2005, the Registrar informed the Parties by letter that the Court had decided to authorize the production of the document to which the Ugandan Government had raised no objection, as well as the production of the other documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to the DRC. On 6 November 2003, the Agent of the DRC informed the Court that his Government had no objection to the production of the documents submitted by the DRC on 5 November 2003, and that counsel would be free to quote from both sets of documents during the oral proceedings.

On 6 November 2003, the Registrar informed the Parties by letter that the Court had decided to postpone the opening of the oral proceedings in the case, and that the new date for the oral proceedings would be Monday 11 April 2005. On 16 November 2003, the Agent of the DRC informed the Court that his Government wished, in accordance with Article 56 of the Rules of Court, to submit a "small number" of new documents in accordance with Article 56 of the Rules of Court. No objection having been made by the Congolese Government to the Ugandan request, the Registrar, on 8 April 2005, informed the Parties that the Court had decided to authorize the production of the document to which the Ugandan Government had raised no objection, as well as the production of the other documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to the DRC. On 6 November 2003, the Agent of the DRC informed the Court that his Government had no objection to the production of the documents submitted by the DRC on 5 November 2003, and that counsel would be free to quote from both sets of documents during the oral proceedings.

On 5 November 2003, the Agent of the DRC made a formal application to the Court, "taking account of the representations made to it by the Parties, [had] decided to postpone the opening of the oral proceedings in the case", and that the new date for the oral proceedings would be Monday 11 April 2005. On 16 November 2003, the Agent of the DRC informed the Court that his Government wished, in accordance with Article 56 of the Rules of Court, to submit a "small number" of new documents in accordance with Article 56 of the Rules of Court. No objection having been made by the Congolese Government to the Ugandan request, the Registrar, on 8 April 2005, informed the Parties that the Court had decided to authorize the production of the document to which the Ugandan Government had raised no objection, as well as the production of the other documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to the DRC. On 6 November 2003, the Agent of the DRC informed the Court that his Government had no objection to the production of the documents submitted by the DRC on 5 November 2003, and that counsel would be free to quote from both sets of documents during the oral proceedings.
22. In the course of the hearings, questions were put to the Parties by Judges Vereshchetin, Kooijmans and Elaraby. Judge Vereshchetin addressed a separate question to each Party. The DRC was asked: “What are the respective periods of time to which the concrete submissions, found in the written pleadings of the Democratic Republic of the Congo, refer?”; and Uganda was asked: “What are the respective periods of time to which the concrete submissions relating to the first counter-claim, found in the written pleadings of Uganda, refer?”

Judge Kooijmans addressed the following question to both Parties: “Can the Parties indicate which areas of the provinces of Equateur, Orientale, North Kivu and South Kivu were in the relevant periods in time under the control of the UPDF and which under the control of the various rebellious militias? It would be appreciated if sketch-maps would be added.”

Judge Elaraby addressed the following question to both Parties: “The Lusaka Agreement signed on 10 July 1999 which takes effect 24 hours after the signature, provides that: ‘The final orderly withdrawal of all foreign forces from the national territory of the Democratic Republic of Congo shall be in accordance with Annex “B” of this Agreement.’ (Annex A, Chapter 4, para. 4.1.) Subparagraph 17 of Annex B provides that the ‘Orderly Withdrawal of all Foreign Forces’ shall take place on ‘D-Day + 180 days’. Uganda asserts that the final withdrawal of its forces occurred on 2 June 2003. What are the views of the two Parties regarding the legal basis for the presence of Ugandan forces in the Democratic Republic of the Congo in the period between the date of the ‘final orderly withdrawal’, agreed to in the Lusaka Agreement, and 2 June 2003?”

The Parties provided replies to these questions orally and in writing, pursuant to Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each Party presented written observations on the written replies received from the other.

23. In its Application, the DRC made the following requests:

“Consequently, and whilst reserving the right to supplement and amplify the present request in the course of the proceedings, the Democratic Republic of the Congo requests the Court to:

Adjudge and declare that:
(a) Uganda is guilty of an act of aggression within the meaning of Article 1 of resolution 3314 of the General Assembly of the United Nations of 14 December 1974 and of the jurisprudence of the International Court of Justice, contrary to Article 2, paragraph 4, of the United Nations Charter;
(b) further, Uganda is committing repeated violations of the Geneva Conventions of 1949 and their Additional Protocols of 1977, in flagrant disregard of the elementary rules of international humanitarian law in conflict zones, and is also guilty of massive human rights violations in defiance of the most basic customary law;
(c) more specifically, by taking forcible possession of the Inga hydroelectric dam, and deliberately and regularly causing massive electrical power cuts, in violation of the provisions of Article 56 of the Additional Protocol of 1977, Uganda has rendered itself responsible for very heavy losses of life among the 5 million inhabitants of the city of Kinshasa and the surrounding area;
(d) by shooting down, on 9 October 1998 at Kindu, a Boeing 727 the property of Congo Airlines, thereby causing the death of 40 civilians, Uganda has also violated the Convention on International Civil Aviation signed at Chicago on 7 December 1944, the Hague Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft and the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

Consequently, and pursuant to the aforementioned international legal obligations, to adjudged and declare that:
(1) all Ugandan armed forces participating in acts of aggression shall forthwith vacate the territory of the Democratic Republic of the Congo;
(2) Uganda shall secure the immediate and unconditional withdrawal from Congolese territory of its nationals, both natural and legal persons;
(3) the Democratic Republic of the Congo is entitled to compensation from Uganda in respect of all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to Uganda, in respect of which the Democratic Republic of the Congo reserves the right to determine at a later date the precise amount of the damage suffered, in addition to its claim for the restitution of all property removed.”

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

On behalf of the Government of the DRC,
in the Memorial:

“The Democratic Republic of the Congo, while reserving the right to supplement or modify the present submissions and to provide the Court with fresh evidence and pertinent new legal arguments in the context of the present dispute, requests the Court to adjudge and declare:
(1) that the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces operating there, has violated the following principles of conventional and customary law:
— the principle of non-use of force in international relations, including the prohibition of aggression;
— the obligation to settle international disputes exclusively by peace-
ful means so as to ensure that international peace and security, as well as justice, are not placed in jeopardy;
— respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;
— the principle of non-interference in matters within the domestic jurisdiction of States, which includes refraining from extending any assistance to the parties to a civil war operating on the territory of another State;

(2) that the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources and by pillaging its assets and wealth, has violated the following principles of conventional and customary law:
— respect for the sovereignty of States, including over their natural resources;
— the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;
— the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters;

(3) that the Republic of Uganda, by committing acts of oppression against the nationals of the Democratic Republic of the Congo, by killing, injuring, abducting or despoiling those nationals, has violated the following principles of conventional and customary law:
— the principle of conventional and customary law involving the obligation to respect and ensure respect for fundamental human rights, including in times of armed conflict;
— the entitlement of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural;

(4) that, in light of all the violations set out above, the Republic of Uganda shall, to the extent of and in accordance with, the particulars set out in Chapter VI of this Memorial, and in conformity with customary international law:
— cease forthwith any continuing internationally wrongful act, in particular its occupation of Congolese territory, its support for irregular forces operating in the Democratic Republic of the Congo, its unlawful detention of Congolese nationals and its exploitation of Congolese wealth and natural resources;
— make reparation for all types of damage caused by all types of wrongful act attributable to it, no matter how remote the causal link between the acts and the damage concerned;
— accordingly make reparation in kind where this is still physically possible, in particular restitution of any Congolese resources, assets or wealth still in its possession;
— failing this, furnish a sum covering the whole of the damage suffered, including, in particular, the examples mentioned in paragraph 6.65 of this Memorial;
— further, in any event, render satisfaction for the insults inflicted by it upon the Democratic Republic of the Congo, in the form of official apologies, the payment of damages reflecting the gravity of the infringements and the prosecution of all those responsible;
— provide specific guarantees and assurances that it will never again in the future commit any of the above-mentioned violations against the Democratic Republic of the Congo";

in the Reply:
“The Democratic Republic of the Congo, while reserving the right to supplement or modify the present submissions and to provide the Court with fresh evidence and pertinent new legal arguments in the context of the present dispute, requests the Court to adjudge and declare:

(1) that the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces operating there, has violated the following principles of conventional and customary law:
— the principle of non-use of force in international relations, including the prohibition of aggression;
— the obligation to settle international disputes exclusively by peaceful means so as to ensure that peace, international security and justice are not placed in jeopardy;
— respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;
— the principle of non-interference in matters within the domestic jurisdiction of States, which includes refraining from extending any assistance to the parties to a civil war operating on the territory of another State;

(2) that the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources and by pillaging its assets and wealth, has violated the following principles of conventional and customary law:
— respect for the sovereignty of States, including over their natural resources;
— the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;
— the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters;

(3) that the Republic of Uganda, by committing abuses against nationals of the Democratic Republic of the Congo, by killing, injuring, and abducting those nationals or robbing them of their property, has violated the following principles of conventional and customary law:
(4) that, in light of all the violations set out above, the Republic of Uganda shall, in accordance with customary international law:

— cease forthwith all continuing internationally wrongful acts, and in particular its occupation of Congolese territory, its support for irregular forces operating in the Democratic Republic of the Congo and its exploitation of Congolese wealth and natural resources;
— make reparation for all types of damage caused by all types of wrongful act attributable to it, no matter how remote the causal link between the acts and the damage concerned;
— accordingly, make reparation in kind where this is still physically possible, in particular in regard to any Congolese resources, assets or wealth still in its possession;
— failing this, furnish a sum covering the whole of the damage suffered, including, in particular, the examples set out in paragraph 6.65 of the Memorial of the Democratic Republic of the Congo and restated in paragraph 1.58 of the present Reply;
— provide specific guarantees and assurances that it will never again in the future perpetrate any of the above-mentioned violations against the Democratic Republic of the Congo;

(5) that the Ugandan counter-claim alleging involvement by the DRC in armed attacks against Uganda be dismissed, on the following grounds:

— to the extent that it relates to the period before Laurent-Désiré Kabila came to power, the claim is inadmissible because Uganda had previously waived its right to lodge such a claim and, in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;
— to the extent that it relates to the period after Laurent-Désiré Kabila came to power, the claim is unfounded because Uganda has failed to establish the facts on which it is based.

(6) that the Ugandan counter-claim alleging involvement by the DRC in an attack on the Ugandan Embassy and on Ugandan nationals in Kinshasa be dismissed, on the following grounds:

— to the extent that Uganda is seeking to engage the responsibility of the DRC for acts contrary to international law allegedly committed to the detriment of Ugandan nationals, the claim is inadmissible because Uganda has failed to show that the persons for whose protection it claims to provide are its nationals or that such persons have exhausted the local remedies available in the DRC; in the alternative, this claim is unfounded because Uganda has failed to establish the facts on which it is based;
— that part of the Ugandan claims concerning the treatment allegedly inflicted on its diplomatic premises and personnel in Kinshasa is unfounded because Uganda has failed to establish the facts on which it is based”;

in the additional pleading entitled “Additional Written Observations on the Counter-Claims presented by Uganda”:

“The Democratic Republic of the Congo, while reserving the right to supplement or modify the present submissions and to provide the Court with fresh evidence and pertinent new legal arguments in the context of the present dispute, requests the Court, pursuant to the Rules of Court, to adjudge and declare:

As regards the first counter-claim presented by Uganda:

(1) to the extent that it relates to the period before Laurent-Désiré Kabila came to power, the claim is inadmissible because Uganda had previously waived its right to lodge such a claim and, in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;
(2) to the extent that it relates to the period from when Laurent-Désiré Kabila came to power until the onset of Ugandan aggression, the claim is unfounded in fact because Uganda has failed to establish the facts on which it is based;
(3) to the extent that it relates to the period after the onset of Ugandan aggression, the claim is founded neither in fact nor in law because Uganda has failed to establish the facts on which it is based, and because, from 2 August 1998, the DRC was in any event in a situation of self-defence.

As regards the second counter-claim presented by Uganda:

(1) to the extent that it is now centred on the interpretation and application of the Vienna Convention of 1961 on Diplomatic Relations, the claim presented by Uganda radically modifies the subject-matter of the dispute, contrary to the Statute and Rules of Court; this aspect of the claim must therefore be dismissed from the present proceedings;
(2) the aspect of the claim relating to the inhumane treatment allegedly suffered by certain Ugandan nationals remains inadmissible, as Uganda has still not shown that the conditions laid down by international law for the exercise of its diplomatic protection have been met;
in the alternative, this aspect of the claim is unfounded, as Uganda is still unable to establish the factual and legal bases for its claims;

(3) the aspect of the claim relating to the alleged expropriation of Ugandan public property is unfounded, as Uganda is still unable to establish the factual and legal bases for its claims.”

On behalf of the Government of Uganda,
in the Counter-Memorial:

“Reserving its right to supplement or amend its requests, the Republic of Uganda requests the Court:

(1) To adjudge and declare in accordance with international law:

(A) that the requests of the Democratic Republic of the Congo relating to activities or situations involving the Republic of Rwanda or its agents are inadmissible for the reasons set forth in Chapter XV of the present Counter-Memorial;

(B) that the requests of the Democratic Republic of the Congo that the Court adjudge that the Republic of Uganda is responsible for various breaches of international law, as alleged in the Application and/or the Memorial of the Democratic Republic of Congo, are rejected; and

(C) that the Counter-claims presented in Chapter XVIII of the present Counter-Memorial be upheld.

(2) To reserve the issue of reparation in relation to the Counter-claims for a subsequent stage of the proceedings”;

in the Rejoinder:

“Reserving her right to supplement or amend her requests, the Republic of Uganda requests the Court:

1. To adjudge and declare in accordance with international law:

(A) that the requests of the Democratic Republic of the Congo relating to activities or situations involving the Republic of Rwanda or her agents are inadmissible for the reasons set forth in Chapter XV of the present Counter-Memorial;

(B) that the requests of the Democratic Republic of the Congo that the Court adjudge that the Republic of Uganda is responsible for various breaches of international law, as alleged in the Memorial and/or the Reply of the Democratic Republic of Congo, are rejected; and

(C) that the Counter-claims presented in Chapter XVIII of the Counter-Memorial and reaffirmed in Chapter VI of the present Rejoinder be upheld.

2. To reserve the issue of reparation in relation to the Counter-claims for a subsequent stage of the proceedings.”

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

On behalf of the Government of the DRC,
at the hearing of 25 April 2005, on the claims of the DRC:
to refrain from exposing peoples to foreign subjugation, domination or exploitation;
— the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters.

4. (a) That the violations of international law set out in submissions 1, 2 and 3 constitute wrongful acts attributable to Uganda which engage its international responsibility;
(b) that the Republic of Uganda shall cease forthwith all continuing internationally wrongful acts, and in particular its support for irregular forces operating in the DRC and its exploitation of Congolese wealth and natural resources;
(c) that the Republic of Uganda shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of;
(d) that the Republic of Uganda is under an obligation to the Democratic Republic of the Congo to make reparation for all injury caused to the latter by the violation of the obligations imposed by international law and set out in submissions 1, 2 and 3 above;
(e) that the nature, form and amount of the reparation shall be determined by the Court, failing agreement thereon between the Parties, and that the Court shall reserve the subsequent procedure for that purpose.

5. That the Republic of Uganda has violated the Order of the Court on provisional measures of 1 July 2000, in that it has failed to comply with the following provisional measures:
(1) both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;
(2) both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000;
(3) both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law”;

at the hearing of 29 April 2005, on the counter-claims of Uganda:

“The Congo requests the International Court of Justice to adjudge and declare:
As regards the first counter-claim submitted by Uganda:

(1) to the extent that it relates to the period before Laurent-Désiré Kabila came to power, Uganda’s claim is inadmissible because Uganda had previously renounced its right to lodge such a claim; in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;
(2) to the extent that it relates to the period from the time when Laurent-Désiré Kabila came to power to the time when Uganda launched its armed attack, Uganda’s claim is unfounded in fact because Uganda has failed to establish the facts on which it is based;
(3) to the extent that it relates to the period subsequent to the launching of Uganda’s armed attack, Uganda’s claim is unfounded both in fact and in law because Uganda has failed to establish the facts on which it is based and, in any event, from 2 August 1998 the DRC was in a situation of self-defence.

As regards the second counter-claim submitted by Uganda:

(1) to the extent that it now relates to the interpretation and application of the Vienna Convention of 1961 on Diplomatic Relations, the claim submitted by Uganda radically changes the subject-matter of the dispute, contrary to the Statute and to the Rules of Court; that part of the claim must therefore be dismissed from the present proceedings;
(2) that part of the claim relating to the alleged mistreatment of certain Ugandan nationals remains inadmissible because Uganda has still failed to show that the requirements laid down by international law for the exercise of its diplomatic protection were satisfied; in the alternative, that part of the claim is unfounded because Uganda is still unable to establish the factual and legal bases of its claims.
(3) that part of the claim relating to the alleged expropriation of Uganda’s public property is unfounded because Uganda is still unable to establish the factual and legal bases of its claims.”

On behalf of the Government of Uganda,
at the hearing of 27 April 2005, on the claims of the DRC and the counter-claims of Uganda:

“The Republic of Uganda requests the Court:
(1) To adjudge and declare in accordance with international law:
(A) that the requests of the Democratic Republic of the Congo relating to the activities or situations involving the Republic of Rwanda or her agents are inadmissible for the reasons set forth in Chapter XV of the Counter-Memorial and reaffirmed in the oral pleadings;
(B) that the requests of the Democratic Republic of the Congo that the Court adjudge and declare that the Republic of Uganda is responsible for various breaches of international law, as alleged in the Memorial, the Reply and/or the oral pleadings are rejected; and
(C) that Uganda’s counter-claims presented in Chapter XVIII of the
Counter-Memorial, and reaffirmed in Chapter VI of the Rejoinder as well as the oral pleadings be upheld.

(2) To reserve the issue of reparation in relation to Uganda’s counter-claims for a subsequent stage of the proceedings.”

* * *

26. The Court is aware of the complex and tragic situation which has long prevailed in the Great Lakes region. There has been much suffering by the local population and destabilization of much of the region. In particular, the instability in the DRC has had negative security implications for Uganda and some other neighbouring States. Indeed, the Summit meeting of the Heads of State in Victoria Falls (held on 7 and 8 August 1998) and the Agreement for a Ceasefire in the Democratic Republic of the Congo signed in Lusaka on 10 July 1999 (hereinafter “the Lusaka Agreement”) acknowledged as legitimate the security needs of the DRC’s neighbours. The Court is aware, too, that the factional conflicts within the DRC require a comprehensive settlement to the problems of the region.

However, the task of the Court must be to respond, on the basis of international law, to the particular legal dispute brought before it. As it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that.

* * *

27. The Court finds it convenient, in view of the many actors referred to by the Parties in their written pleadings and at the hearing, to indicate the abbreviations which it will use for those actors in its judgment. Thus the Allied Democratic Forces will hereinafter be referred to as the ADF, the Alliance of Democratic Forces for the Liberation of the Congo (Alliance des forces démocratiques pour la libération du Congo) as the AFDL, the Congo Liberation Army (Armée de libération du Congo) as the ALC, the Congolese Armed Forces (Forces armées congolaises) as the FAC, the Rwandan Armed Forces (Forces armées rwandaises) as the FAR, the Former Uganda National Army as the FUNA, the Lord’s Resistance Army as the LRA, the Congo Liberation Movement (Mouvement de libération du Congo) as the MLC, the National Army for the Liberation of Uganda as the NALU, the Congolese Rally for Democracy (Rassemblement congolais pour la démocratie) as the RCD, the Congolese Rally for Democracy-Kisangani (Rassemblement congolais pour la démocratie-Kisangani) as the RCD-Kisangani (also known as RCD-Wamba), the Congolese Rally for Democracy-Liberation Movement (Rassemblement congolais pour la démocratie-Mouvement de libération) as the RCD-ML, the Rwandan Patriotic Army as the RPA, the Sudan People’s Liberation Movement/Army as the SPLM/A, the Uganda National Rescue Front II as the UNRF II, the Uganda Peoples’ Defence Forces as the UPDF, and the West Nile Bank Front as the WNBF.

* * *

28. In its first submission the DRC requests the Court to adjudge and declare:

“1. That the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces having operated there, has violated the following principles of conventional and customary law:
   — the principle of non-use of force in international relations, including the prohibition of aggression;
   — the obligation to settle international disputes exclusively by peaceful means so as to ensure that international peace and security, as well as justice, are not placed in jeopardy;
   — respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;
   — the principle of non-intervention in matters within the domestic jurisdiction of States, including refraining from extending any assistance to the parties to a civil war operating on the territory of another State.”

29. The DRC explains that in 1997 Laurent-Désiré Kabila, who was at the time a Congolese rebel leader at the head of the AFDL (which was supported by Uganda and Rwanda), succeeded in overthrowing the then President of Zaire, Marshal Mobutu Ssese Seko, and on 29 May 1997 was formally sworn in as President of the renamed Democratic Republic of the Congo. The DRC claims, however, that President Kabila subsequently sought a gradual reduction in the influence of these two States over the DRC’s political, military and economic spheres. It was, according to the DRC, this “new policy of independence and emancipation” from the two States that constituted the real reason for the invasion of Congolese territory by Ugandan armed forces in August 1998.

30. The DRC maintains that at the end of July 1998 President Kabila learned of a planned coup d’état organized by the Chief of Staff of the FAC, Colonel Kabarebe (a Rwandan national), and that, in an official statement published on 28 July 1998 (see paragraph 49 below), President Kabila resolved to act immediately in order to prevent this threat to the national security of the DRC. The DRC submits that it was necessary for it to act to maintain law and order in the country and, as a result, President Kabila’s actions were justified and in the interest of the DRC as a whole.
Kabila called for the withdrawal of foreign troops from Congolese territory. Although his address referred mainly to Rwandan troops, the DRC argues that there can be no doubt that President Kabila intended to address his message to “all foreign forces”. The DRC states that on 2 August 1998 the 10th Brigade assigned to the province of North Kivu rebelled against the central Government of the DRC, and that during the night of 2 to 3 August 1998 Congolese Tutsi soldiers and a few Rwandan soldiers not yet repatriated attempted to overthrow President Kabila. According to the DRC, Uganda began its military intervention in the DRC immediately after the failure of the coup attempt.

31. The DRC argues that on 4 August 1998 Uganda and Rwanda organized an airborne operation, flying their troops from Goma on the eastern frontier of the DRC to Kitona, some 1,800 km away on the other side of the DRC, on the Atlantic coast. The DRC alleges that the aim was to overthrow President Kabila within ten days. According to the DRC, in the advance towards Kinshasa, Ugandan and Rwandan troops captured certain towns and occupied the Inga Dam, which supplies electricity to Kinshasa. The DRC explains that Angola and Zimbabwe came to the assistance of the Congolese Government to help prevent the capture of Kinshasa. The DRC also states that in the north-eastern part of the country, within a matter of months, UPDF troops had advanced and had progressively occupied a substantial part of Congolese territory in several provinces.

32. The DRC submits that Uganda’s military operation against the DRC also consisted in the provision of support to Congolese armed groups opposed to President Kabila’s Government. The DRC thus maintains that the RCD was created by Uganda and Rwanda on 12 August 1998, and that at the end of September 1998 Uganda supported the creation of the new MLC rebel group, which was not linked to the Rwandan military. According to the DRC, Uganda was closely involved in the recruitment, education, training, equipment and supplying of the MLC and its military wing, the ALC. The DRC alleges that the close links between Uganda and the MLC were reflected in the formation of a united military front in combat operations against the FAC. The DRC maintains that in a number of cases the UPDF provided tactical support, including artillery cover, for ALC troops. Thus, the DRC contends that the UPDF and the ALC constantly acted in close co-operation during many battles against the Congolese regular army. The DRC concludes that Uganda, “in addition to providing decisive military support for several Congolese rebel movements, has been extremely active in supplying these movements with a political and diplomatic framework”.

33. The DRC notes that the events in its territory were viewed with grave concern by the international community. The DRC claims that at the Victoria Falls Summit, which took place on 7 and 8 August 1998, and was attended by representatives of the DRC, Uganda, Namibia, Rwanda, Tanzania, Zambia and Zimbabwe,

“...member countries of the SADC [Southern African Development Community], following the submission of an application by the Democratic Republic of the Congo, unequivocally condemned the aggression suffered by the Congo and the occupation of certain parts of its national territory”.

The DRC further points out that, in an attempt to help resolve the conflict, the SADC, the States of East Africa and the Organization of African Unity (OAU) initiated various diplomatic efforts, which included a series of meetings between the belligerents and the representatives of various African States, also known as the “Lusaka Process”. On 18 April 1999 the Sirte Peace Agreement was concluded, in the framework of the Lusaka peace process, between President Kabila of the DRC and President Museveni of Uganda. The DRC explains that, under this Agreement, Uganda undertook to “cease hostilities immediately” and to withdraw its troops from the territory of the DRC. The Lusaka Agreement was signed by the Heads of State of the DRC, Uganda and other African States (namely, Angola, Namibia, Rwanda and Zimbabwe) on 10 July 1999 and by the MLC and RCD (rebek groups) on 1 August 1999 and 31 August 1999, respectively. The DRC explains that this Agreement provided for the cessation of hostilities between the parties’ forces, the disengagement of these forces, the deployment of OAU verifiers and of the United Nations Mission in the Democratic Republic of the Congo (hereinafter “MONUC”), to be followed by the withdrawal of foreign forces. On 8 April 2000 and 6 December 2000 Uganda signed troop disengagement agreements known as the Kampala plan and the Harare plan.

34. According to the DRC, following the withdrawal of Ugandan troops from its territory in June 2003, Uganda has continued to provide arms to ethnic groups confronting one another in the Ituri region, on the boundary with Uganda. The DRC further argues that Uganda “has left behind it a fine network of warlords, whom it is still supplying with arms and who themselves continue to plunder the wealth of the DRC on behalf of Ugandan and foreign businessmen”.

* * *

35. Uganda, for its part, claims that from early 1994 through to approximately May 1997 the Congolese authorities provided military and logistical support to anti-Ugandan insurgents. Uganda asserts that from the beginning of this period it was the victim of cross-border attacks from these armed rebels in eastern Congo. It claims that, in response to these attacks, until late 1997 it confined its actions to its own side of the
Congo-Uganda border, by reinforcing its military positions along the frontier.

36. According to Uganda, in 1997 the AFDL, made up of a loose alliance of the combined forces of the various Congolese rebel groups, together with the Rwandan army, overthrew President Mobutu’s régime in Zaire. Uganda asserts that upon assuming power on 29 May 1997, President Kabila invited Uganda to deploy its own troops in eastern Congo in view of the fact that the Congolese army did not have the resources to control the remote eastern provinces, and in order to “eliminate” the anti-Ugandan insurgents operating in that zone and to secure the border region. According to Uganda, it was on this understanding that Uganda sent two UPDF battalions into eastern Congo, followed by a third one in April 1998, also at the invitation of the Congolese President. Uganda states that on 27 April 1998 the Protocol on Security along the Common Border was signed by the two Governments in order to reaffirm the invitation of the DRC to Uganda to deploy its troops in eastern Congo as well as to commit the armed forces of both countries to jointly combat the anti-Ugandan insurgents in Congolese territory and secure the border region. Uganda maintains that three Ugandan battalions were accordingly stationed in the border region of the Ruwenzori Mountains within the DRC.

37. However, Uganda claims that between May and July 1998 President Kabila broke off his alliances with Rwanda and Uganda and established new alliances with Chad, the Sudan and various anti-Ugandan insurgent groups.

With regard to the official statement by President Kabila published on 28 July 1998 calling for the withdrawal of Rwandan troops from Congolese territory, Uganda interprets this statement as not affecting Uganda, arguing that it made no mention of the Ugandan armed forces that were then in the DRC pursuant to President Kabila’s earlier invitation and to the Protocol of 27 April 1998.

38. Uganda affirms that it had no involvement in or knowledge of the FAC rebellion that occurred in eastern Congo on 2 August 1998 nor of the attempted coup d’état against President Kabila on 2-3 August 1998. Uganda likewise denies that it participated in the attack on the Kitona military base. According to Uganda, on 4 August 1998 there were no Ugandan troops present in either Goma or Kitona, or on board the planes referred to by the DRC.

39. Uganda further claims that it did not send additional troops into the DRC during August 1998. Uganda states, however, that by August-September 1998, as the DRC and the Sudan prepared to attack Ugandan forces in eastern Congo, its security situation had become untenable. Uganda submits that “[i]n response to this grave threat, and in the lawful exercise of its sovereign right of self-defence”, it made a decision on 11 September 1998 to augment its forces in eastern Congo and to gain control of the strategic airfields and river ports in northern and eastern Congo in order to stop the combined forces of the Congolese and Sudanese armies as well as the anti-Ugandan insurgent groups from reaching Uganda’s borders. According to Uganda, the military operations to take control of these key positions began on 20 September 1998. Uganda states that by February 1999 Ugandan forces succeeded in occupying all the key airfields and river ports that served as gateways to eastern Congo and the Ugandan border. Uganda maintains that on 3 July 1999 its forces gained control of the airport at Gbadolite and drove all Sudanese forces out of the DRC.

40. Uganda notes that on 10 July 1999 the on-going regional peace process led to the signing of a peace agreement in Lusaka by the Heads of State of Uganda, the DRC, Rwanda, Zimbabwe, Angola and Namibia, followed by the Kampala (8 April 2000) and Harare (6 December 2000) Disengagement Plans. Uganda points out that, although no immediate or unilateral withdrawal was called for, it began withdrawing five battalions from the DRC on 22 June 2000. On 20 February 2001 Uganda announced that it would withdraw two more battalions from the DRC. On 6 September 2002 Uganda and the DRC concluded a peace agreement in Luanda (Agreement between the Governments of the Democratic Republic of the Congo and the Republic of Uganda onWithdrawal of Ugandan Troops from the Democratic Republic of the Congo, Co-operation and Normalisation of Relations between the two Countries, hereinafter “the Luanda Agreement”). Under its terms Uganda agreed to withdraw from the DRC all Ugandan troops, except for those expressly authorized by the DRC to remain on the slopes of Mt. Ruwenzori. Uganda claims that, in fulfilment of its obligations under the Luanda Agreement, it completed the withdrawal of all of its troops from the DRC in June 2003. Uganda asserts that “since that time, not a single Ugandan soldier has been deployed inside the Congo”.

41. As for the support for irregular forces operating in the DRC, Uganda states that it has never denied providing political and military assistance to the MLC and the RCD. However, Uganda asserts that it did not participate in the formation of the MLC and the RCD.

“[T]he support for irregular forces operating in the DRC, while not denying providing political and military assistance to the MLC and the RCD. However, Uganda asserts that it did not participate in the formation of the MLC and the RCD.

According to Uganda, its military support for the MLC and for the RCD began in January 1999 and March 1999 respectively. Moreover, Uganda argues that the nature and extent of its military support for the Congolese rebels was consistent with and limited to the requirements of self-defence. Uganda further states that it refrained from providing the rebels
with the kind or amount of support they would have required to achieve such far-reaching purposes as the conquest of territory or the overthrow of the Congolese Government.

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**ISSUE OF CONSENT

42. The Court now turns to the various issues connected with the first submission of the DRC.

43. In response to the DRC’s allegations of military and paramilitary activities amounting to aggression, Uganda states that from May 1997 (when President Laurent-Désiré Kabila assumed power in Kinshasa) until 11 September 1998 (the date on which Uganda states that it decided to respond on the basis of self-defence) it was present in the DRC with the latter’s consent. It asserts that the DRC’s consent to the presence of Ugandan forces was renewed in July 1999 by virtue of the terms of the Lusaka Agreement and extended thereafter. Uganda defends its military actions in the intervening period of 11 September 1998 to 10 July 1999 as lawful self-defence. The Court will examine each of Uganda’s arguments in turn.

44. In a written answer to the question put to it by Judge Vereshchetin (see paragraph 22 above), the DRC clarified that its claims relate to actions by Uganda beginning in August 1998. However, as the Parties do not agree on the characterization of events in that month, the Court deems it appropriate first to analyse events which occurred a few months earlier, and the rules of international law applicable to them.

45. Relations between Laurent-Désiré Kabila and the Ugandan Government had been close, and with the coming to power of the former there was a common interest in controlling anti-government rebels who were active along the Congo-Uganda border, carrying out in particular cross-border attacks against Uganda. It seems certain that from mid-1997 and during the first part of 1998 Uganda was being allowed to engage in military action against anti-Ugandan rebels in the eastern part of Congolese territory. Uganda claims that its troops had been invited into eastern Congo by President Kabila when he came to power in May 1997. The DRC has acknowledged that “Ugandan troops were present on the territory of the Democratic Republic of the Congo with the consent of the country’s lawful government”. It is clear from the materials put before the Court that in the period preceding August 1998 the DRC did not object to Uganda’s military presence and activities in its eastern border area. The written pleadings of the DRC make reference to authorized Ugandan operations from September 1997 onwards. There is reference to such authorized action by Uganda on 19 December 1997, in early February 1998 and again in early July 1998, when the DRC author-

ized the transfer of Ugandan units to Ntabi, in Congolese territory, in order to fight more effectively against the ADF.

46. A series of bilateral meetings between the two Governments took place in Kinshasa from 11 to 13 August 1997, in Kampala from 6 to 7 April 1998 and again in Kinshasa from 24 to 27 April 1998. This last meeting culminated in a Protocol on Security along the Common Border being signed on 27 April 1998 between the two countries, making reference, *inter alia*, to the desire “to put an end to the existence of the rebel groups operating on either side of the common border, namely in the Ruwenzori”. The two parties agreed that their respective armies would “co-operate in order to insure security and peace along the common border”. The DRC contends that these words do not constitute an “invitation or acceptance by either of the contracting parties to send its army into the other’s territory”. The Court believes that both the absence of any objection to the presence of Ugandan troops in the DRC in the preceding months, and the practice subsequent to the signing of the Protocol, support the view that the continued presence as before of Ugandan troops would be permitted by the DRC by virtue of the Protocol. Uganda told the Court that

“[p]ursuant to the Protocol, Uganda sent a third battalion into eastern Congo, which brought her troop level up to approximately 2,000, and she continued military operations against the armed groups in the region both unilaterally and jointly with Congolese Government forces”.

The DRC has not denied this fact nor that its authorities accepted this situation.

47. While the co-operation envisaged in the Protocol may be reasonably understood as having its effect in a continued authorization of Ugandan troops in the border area, it was not the legal basis for such authorization or consent. The source of an authorization or consent to the crossing of the border by these troops antedated the Protocol and this prior authorization or consent could thus be withdrawn at any time by the Government of the DRC, without further formalities being necessary.

48. The Court observes that when President Kabila came to power, the influence of Uganda and in particular Rwanda in the DRC became substantial. In this context it is worthy of note that many Rwandan officers held positions of high rank in the Congolese army and that Colonel James Kabarebe, of Rwandan nationality, was the Chief of Staff of the FAC (the armed forces of the DRC). From late spring 1998, President Kabila sought, for various reasons, to reduce this foreign influence; by mid-1998, relations between President Kabila and his former allies had
deteriorated. In light of these circumstances the presence of Rwandan troops on Congolese territory had in particular become a major concern for the Government of the DRC.

49. On 28 July 1998, an official statement by President Kabila was published, which read as follows:

“The Supreme Commander of the Congolese National Armed Forces, the Head of State of the Republic of the Congo and the Minister of National Defence, advises the Congolese people that he has just terminated, with effect from this Monday 27 July 1998, the Rwandan military presence which has assisted us during the period of the country’s liberation. Through these military forces, he would like to thank all of the Rwandan people for the solidarity they have demonstrated to date. He would also like to congratulate the democratic Congolese people on their generosity of spirit for having tolerated, provided shelter for and trained these friendly forces during their stay in our country. This marks the end of the presence of all foreign military forces in the Congo.” [Translation by the Registry.]

50. The DRC has contended that, although there was no specific reference to Ugandan troops in the statement, the final phrase indicated that consent was withdrawn for Ugandan as well as Rwandan troops. It states that, having learned of a planned coup, President Kabila “officially announced … the end of military co-operation with Rwanda and asked the Rwandan military to return to their own country, adding that this marked the end of the presence of foreign troops in the Congo”. The DRC further explains that Ugandan forces were not mentioned because they were “very few in number in the Congo” and were not to be treated in the same way as the Rwandan forces, “who in the prevailing circumstances, were perceived as enemies suspected of seeking to overthrow the regime”. Uganda, for its part, maintains that the President’s statement was directed at Rwandan forces alone; that the final phrase of the statement was not tantamount to the inclusion of a reference to Ugandan troops; and that any withdrawal of consent for the presence of Ugandan troops would have required a formal denunciation, by the DRC, of the April 1998 Protocol.

51. The Court notes, first, that for reasons given above, no particular formalities would have been required for the DRC to withdraw its consent to the presence of Ugandan troops on its soil. As to the content of President Kabila’s statement, the Court observes that, as a purely textual matter, the statement was ambiguous.

52. More pertinently, the Court draws attention to the fact that the consent that had been given to Uganda to place its forces in the DRC, and to engage in military operations, was not an open-ended consent. The DRC accepted that Uganda could act, or assist in acting, against rebels on the eastern border and in particular to stop them operating across the common border. Even had consent to the Ugandan military presence extended much beyond the end of July 1998, the parameters of that consent, in terms of geographic location and objectives, would have remained thus restricted.

53. In the event, the issue of withdrawal of consent by the DRC, and that of expansion by Uganda of the scope and nature of its activities, went hand in hand. The Court observes that at the Victoria Falls Summit (see paragraph 33 above) the DRC accused Rwanda and Uganda of invading its territory. Thus, it appears evident to the Court that, whatever interpretation may be given to President Kabila’s statement of 28 July 1998, any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998, i.e. the closing date of the Victoria Falls Summit.

54. The Court recalls that, independent of the conflicting views as to when Congolese consent to the presence of Ugandan troops might have been withdrawn, the DRC has informed the Court that its claims against Uganda begin with what it terms an aggression commencing on 2 August 1998.

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FINDINGS OF FACT CONCERNING UGANDA’S USE OF FORCE IN RESPECT OF KITONA

55. The Court observes that the dispute about the commencement date of the military action by Uganda that was not covered by consent is, in the most part, directed at the legal characterization of events rather than at whether these events occurred. In some instances, however, Uganda denies that its troops were ever present at particular locations, the military action at Kitona being an important example. The DRC has informed the Court that from 2 August 1998 Uganda was involved in military activities in the DRC that violated international law, and that these were directed at the overthrow of President Kabila. According to the DRC, Ugandan forces (together with those of Rwanda) were involved on 4 August in heavy military action at Kitona, which lies in the west of the DRC some 1,800 km from the Ugandan frontier. Virtually simultaneously Uganda engaged in military action in the east, first in Kivu and then in Orientale province. The DRC contends that this was followed by an invasion of Equateur province in north-west Congo. The DRC maintains that “[a]fter a few months of advances, the Ugandan army had thus conquered several hundred thousand square kilometres of territory”. The DRC provided a sketch-map to illustrate the alleged scope and reach of Ugandan military activity.

56. Uganda characterizes the situation at the beginning of August
1998 as that of a state of civil war in the DRC — a situation in which President Kabila had turned to neighbouring Powers for assistance, including, notably, the Sudan (see paragraphs 120-129 below). These events caused great security concerns to Uganda. Uganda regarded the Sudan as a long-time enemy, which now, as a result of the invitation from President Kabila, had a free rein to act against Uganda and was better placed strategically to do so. Uganda strongly denies that it engaged in military activity beyond the eastern border area until 11 September. That military activity by its troops occurred in the east during August is not denied by Uganda. But it insists that it was not part of a plan agreed with Rwanda to overthrow President Kabila: it was rather actions taken by virtue of the consent given by the DRC to the operations by Uganda in the east, along their common border.

57. In accordance with its practice, the Court will first make its own determination of the facts and then apply the relevant rules of international law to the facts which it has found to have existed. The Court will not attempt a determination of the overall factual situation as it applied to the vast territory of the DRC from August 1998 till July 2003. It will make such findings of fact as are necessary for it to be able to respond to the first submission of the DRC, the defences offered by Uganda, and the first submissions of Uganda as regards its counter-claims. It is not the task of the Court to make findings of fact (even if it were in a position to do so) beyond these parameters.

58. These findings of fact necessarily entail an assessment of the evidence. The Court has in this case been presented with a vast amount of materials proffered by the Parties in support of their versions of the facts. The Court has not only the task of deciding which of those materials must be considered relevant, but also the duty to determine which of them have probative value with regard to the alleged facts. The greater part of these evidentiary materials appear in the annexes of the Parties to their written pleadings. The Parties were also authorized by the Court to produce new documents at a later stage. In the event, these contained important items. There has also been reference, in both the written and the oral pleadings, to material not annexed to the written pleadings but which the Court has treated as “part of a publication readily available” under Article 56, paragraph 4, of its Rules of Court. Those, too, have been examined by the Court for purposes of its determination of the relevant facts.

59. As it has done in the past, the Court will examine the facts relevant to each of the component elements of the claims advanced by the Parties. In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value. In accordance with its prior practice, the Court will explain what items it should eliminate from further consideration (see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 50, para. 85; see equally the practice followed in the case concerning United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3).

60. Both Parties have presented the Court with a vast amount of documentation. The documents advanced in supporting findings of fact in the present case include, inter alia, resolutions of the United Nations Security Council, reports of the Special Rapporteur of the Commission on Human Rights, reports and briefings of the OAU, communiqués by Heads of State, letters of the Parties to the Security Council, reports of the Secretary-General on MONUC, reports of the United Nations Panels of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (hereinafter “United Nations Panel reports”), the White Paper prepared by the Congolese Ministry of Human Rights, the Porter Commission Report, the Ugandan White Paper on the Porter Commission Report, books, reports by non-governmental organizations and press reports.

61. The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties.

62. The Court will embark upon its task by determining whether it has indeed been proved to its satisfaction that Uganda invaded the DRC in early August 1998 and took part in the Kitona airbone operation on 4 August 1998. In the Memorial the DRC claimed that on 4 August 1998 three Boeing aircraft from Congo Airlines and Blue Airlines, and a Con-
golese plane from Lignes Aériennes Congolaises (LAC), were boarded by armed forces from “aggressor countries”, including Uganda, as they were about to leave Goma Airport. It was claimed that, after refuelling and taking on board ammunition in Kigali, they flew to the airbase in Kitona, some 1,800 km from Uganda’s border, where several contingents of foreign soldiers, including Ugandans, landed. It was claimed by the DRC that these forces, among which were Ugandan troops, took Kitona, Boma, Matadi and Inga, which they looted, as well as the Inga Dam. The DRC claimed that the aim of Uganda and Rwanda was to march to Kinshasa and rapidly overthrow President Kabila.

63. Uganda for its part has denied that its forces participated in the airborne assault launched at Kitona, insisting that at the beginning of August the only UPDF troops in the DRC were the three battalions in Beni and Butembo, present with the consent of the Congolese authorities. In the oral pleadings Uganda stated that it had been invited by Rwanda to join forces with it in displacing President Kabila, but had declined to do so. No evidence was advanced by either Party in relation to this contention. The Court accordingly does not need to address the question of “intention” and will concentrate on the factual evidence, as such.

64. In its Memorial the DRC relied on “testimonies of Ugandan and other soldiers, who were captured and taken prisoners in their abortive attempt to seize Kinshasa”. No further details were provided, however. No such testimonies were ever produced to the Court, either in the later written pleadings or in the oral pleadings. Certain testimonies by persons of Congolese nationality were produced, however. These include an interview with the Congo airline pilot, in which he refers — in connection with the Kitona airborne operation — to the presence of both Rwandans and Ugandans at Hotel Nyira. The Court notes that this statement was prepared more than three years after the alleged events and some 20 months after the DRC lodged with the Court its Application commencing proceedings. It contains no signature as such, though the pilot says he “signed on the manuscript”. The interview was conducted by the Assistant Legal Adviser at the Service for the Military Detection of Unpatriotic Activities in the DRC. Notwithstanding the DRC’s position that there is nothing in this or other such witness statements to suggest that they were obtained under duress, the setting and context cannot therefore be regarded as conducive to impartiality. The same conclusion has to be reached as regards the interview with Issa Kisaka Kakule, a former rebel. Even in the absence of these deficiencies, the statement of the airline pilot cannot prove the arrival of Ugandan forces and their participation in the military operation in Kitona. The statement of Lieutenant Colonel Viala Mbeang Ilwa was more contemporaneous (15 October 1998) and is of some particular interest, as he was the pilot of the plane said to have been hijacked. In it he asserts that Ugandan officers at the hotel informed him of their plan to topple President Kabila within ten days. There is, however, no indication of how this statement was provided, or in what circumstances. The same is true of the statement of Commander Mpele-Mpele regarding air traffic allegedly indicating Ugandan participation in the Kitona operation.

65. The Court has been presented with some evidence concerning a Ugandan national, referred to by the DRC as Salim Byaruhanga, said to be a prisoner of war. The record of an interview following the visit of Ugandan Senator Aggrey Awori consists of a translation, unsigned by the translator. Later, the DRC produced for the Court a video, said to verify the meeting between Mr. Awori and Ugandan prisoners. The video shows four men being asked questions by another addressing them in a language of the region. One of these says his name is “Salim Byaruhanga”. There is, however, no translation provided, nor any information as to the source of this tape. There do exist letters of August 2001 passing between the International Committee of the Red Cross (ICRC) and the Congolese Government on the exchange of Ugandan prisoners, one of whom is named as Salim Byaruhanga. However, the ICRC never refers to this person as a member of the UPDF. Uganda has also furnished the Court with a notarized affidavit of the Chief of Staff of the UPDF saying that there were no Ugandan prisoners of war in the DRC, nor any officer by the name of Salim Byaruhanga. This affidavit is stated to have been prepared in November 2002, in view of the forthcoming case before the International Court of Justice. The Court recalls that it has elsewhere observed that a member of the government of a State engaged in litigation before this Court — and especially litigation relating to armed conflict — “will probably tend to identify himself with the interests of his country” (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 43, para. 70). The same may be said of a senior military officer of such a State, and “while in no wayimpugning the honour or veracity” of such a person, the Court should “treat such evidence with great reserve” (ibid.).

66. The Court observes that, even if such a person existed and even if he was a prisoner of war, there is nothing in the ICRC letters that refers to his participation (or to the participation of other Ugandan nationals) at Kitona. Equally, the PANA Agency press communiqué of 17 September 2001 mentions Salim Byaruhanga when referring to the release of four Ugandan soldiers taken prisoner in 1998 and 1999 — but there is no reference to participation in action in Kitona.

67. The press statements issued by the Democratic Party of Uganda on 14 and 18 September 1998, which refer to Ugandan troops being
flown to western Congo from Gala Airport, make no reference to the
location of Kitona or to events there on 4 August.

68. Nor can the truth about the Kitona airborne operation be estab-
lished by extracts from a few newspapers, or magazine articles, which rely
on a single source (Agence France Presse, 2 September 1998); on an
interested source (Integrated Regional Information Networks (herein-
after IRIN)), or give no sources at all (Pierre Barbancey, Regards 41).
The Court has explained in an earlier case that press information may be
useful as evidence when it is “wholly consistent and concordant as to the
main facts and circumstances of the case” (United States Diplomatic and
Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 10, para. 13),
but that particular caution should be shown in this area. The Court
observes that this requirement of consistency and concordance is not
present in the journalistic accounts. For example, while Professor Weiss
referred to 150 Ugandan troops under the command of the Rwandan
Colonel Kaberebe at Kitona in an article relating to the events in the
DRC, the Belgian journalist Mrs. Braekman wrote about rebels fleeing a
Ugandan battalion of several hundred men.

69. The Court cannot give weight to claims made by the DRC that a
Ugandan tank was used in the Kitona operation. It would seem that a
tank of the type claimed to be “Ugandan” was captured at Kasangulu.
This type of tank a — T-55 — was in fact used also by the DRC itself
and by Rwanda. The DRC does not clarify in its argument whether a
single tank was transported from Uganda, nor does it specify, with sup-
porting evidence, on which of the planes mentioned (a Boeing 727,
Ilyushin 76, Boeing 707 or Antonov 32) it was transported from Uganda.
The reference by the DRC to the picture of Mr. Bemba, the leader of the
MLC, on a tank of this type in his book Le choix de la liberté, published
in 2001, cannot prove its use by Ugandan forces in Kitona. Indeed, the
Court finds it more pertinent that in his book Mr. Bemba makes no
mention of the involvement of Ugandan troops at Kitona, but rather
confirms that Rwanda took control of the military base in Kitona.

70. The Court has also noted that contemporaneous documentation
clearly indicated that at the time the DRC regarded the Kitona operation
as having been carried out by Rwanda. Thus the White Paper annexed to
the Application of the DRC states that between 600 and 800 Rwandan
soldiers were involved in the Kitona operation on 4 August. The letter
sent by the Permanent Representative of the DRC on 2 September 1998
to the President of the Security Council referred to 800 soldiers from
Rwanda being involved in the Kitona operation on 4 August 1998. This
perception seems to be confirmed by the report of the Special Rapporteur
of the Commission on Human Rights in February 1999, where reference
is made to Rwandan troops arriving in Kitona on 4 August in order to
attack Kinshasa. The press conference given at United Nations Head-
quarters in New York by the Permanent Representative of the DRC to
the United Nations on 13 August 1998 only referred to Rwandan soldiers
conducting the Kitona airborne operation on 4 August, and to Ugandan
troops advancing upon Bunia on 9 August.

71. The Court thus concludes that, on the basis of the evidence before
it, it has not been established to its satisfaction that Uganda participated
in the attack on Kitona on 4 August 1998.

* FINDINGS OF FACT: MILITARY ACTION IN THE EAST OF THE DRC
AND IN OTHER AREAS OF THAT COUNTRY

72. The Court will next analyse the claim made by the DRC of mili-
tary action by Uganda in the east of the DRC during August 1998. The
facts regarding this action are relatively little contested between the
Parties. Their dispute is as to how these facts should be characterized.
The Court must first establish which relevant facts it regards as having
been convincingly established by the evidence, and which thus fall for
scrutiny by reference to the applicable rules of international law.

73. The Court finds it convenient at this juncture to explain that its
determination of the facts as to the Ugandan presence at, and taking of,
certain locations is independent of the sketch-map evidence offered by
the Parties in support of their claims in this regard. In the response given
by the DRC to the question of Judge Kooijmans, reference was made to
the sketch-map provided by the DRC (see paragraph 55 above) to con-
firm the scope of the Ugandan “invasion and occupation”. This sketch-
map is based on a map of approximate deployment of forces in the DRC
contained in a Report (Africa Report No. 26) prepared by International
Crisis Group (hereinafter ICG), an independent, non-governmental body,
whose reports are based on information and assessment from the field.
On the ICG map, forces of the MLC and Uganda are shown to be “deployed” in certain positions to the north-west (Gbodolite, Zongo,
Gemena, Bondo, Buta, Bumba, Lisala, Bomongo, Basankusu, and
Mbendaka); and Ugandan and “RCD-Wamba” (officially known as
RCD-Kisangani) forces are shown as “deployed” on the eastern frontier
at Bunia, Beni and Isiro. The presence of Uganda and RCD-Wamba
forces is shown at two further unspecified locations.

74. As to the sketch-maps which Uganda provided at the request of
Judge Kooijmans, the DRC argues that they are too late to be relied on
and were unilaterally prepared without any reference to independent
source materials.
75. In the view of the Court, these maps lack the authority and credibility, tested against other evidence, that is required for the Court to place reliance on them. They are at best an aid to the understanding of what is contended by the Parties. These sketch-maps necessarily lack precision. With reference to the ICG map (see paragraph 73 above), there is also the issue of whether MLC forces deployed in the north-west may, without yet further findings of fact and law, be treated as “Ugandan” forces for purposes of the DRC’s claim of invasion and occupation. The same is true for the RCD-Wamba forces deployed in the north-east.

76. Uganda has stated, in its response to the question put to it during the oral proceedings by Judge Kooijmans (see paragraph 22 above), that as of 1 August 1998

“there were three battalions of UPDF troops — not exceeding 2,000 soldiers — in the eastern border areas of the DRC, particularly in the northern part of North Kivu Province (around Beni and Butembo) and the southern part of Orientale Province (around Bunia)”.

Uganda states that it “modestly augmented the UPDF presence in the Eastern border” in response to various events. It has informed the Court that a UPDF battalion went into Bunia on 13 August, and that a single battalion had been sent to Watsa “to maintain the situation between Bunia and the DRC’s border with Sudan”. Uganda further states in its response to Judge Kooijmans’ question that by the end of August 1998 there were no Ugandan forces present in South Kivu, Maniema or Kasai Oriental province; “nor were Ugandan forces present in North Kivu Province south of the vicinity of Butembo”.

77. The DRC has indicated that Beni and Butembo were taken by Ugandan troops on 6 August 1998, Bunia on 13 August and Watsa on 25 August.

78. The Court finds that most evidence of events in this period is indirect and less reliable than that which emerges from statements made under oath before the Porter Commission. The Court has already noted that statements “emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them” (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 41, para. 64). The Court believes the same to be the case when such statements against interest are made by senior military officers given the objective circumstances in which those statements were taken. Accordingly, the Court finds it relevant that before the Porter Commission, Brigadier General Kazini, who was commander of the Ugandan forces in the DRC, referred to “the capture of Beni, that was on 7 August 1998”.

79. He also referred to 8 August 1998 as the date of capture of Beni, 7 August being the date “that was the fighting (when it took place) and our troops occupied Beni”. The Court is satisfied that Beni was taken on 7 August, and Bunia on 13 August. There is some small uncertainty about the precise date of the taking of Watsa, though none as to the fact of its being taken in this period. A report by Lieutenant Colonel Waswa (Annexure G, Porter Commission Report) asserts that the “7th infantry Battalion operational force” entered the DRC at Aru on 10 August, leaving there on 14 August, and “went to Watsa via Duruba 250 km away from the Uganda-Congo border. The force spent one day at Duruba, i.e., 23 August 1998 and proceeded to Watsa which is 40 km where we arrived on 24 August 1998.” Twenty days were said by him to have been spent at Watsa, where the airport was secured. Notwithstanding that this report was dated 18 May 2001, the Court notes that it is detailed, specific and falls within the rubric of admission against interest to which the Court will give weight. However, Justice Porter refers to 29 August as the relevant date for Watsa; whereas, in its response to the question of Judge Kooijmans, the DRC gives the date of 25 August for the “prise de Watsa” (taking of Watsa).

80. The Court will now consider the events of September 1998 on the basis of the evidence before it. Uganda acknowledges that it sent part of a battalion to Kisangani Airport, to guard that facility, on 1 September 1998. It has been amply demonstrated that on several later occasions, notably in August 1999 and in May and June 2000, Uganda engaged in large-scale fighting in Kisangani against Rwandan forces, which were also present there.

81. The Court notes that a schedule was given by the Ugandan military to the Porter Commission containing a composite listing of locations and corresponding “dates of capture”. The Court observes that the period it covers short of the period covered by the DRC’s claims. This evidence was put before the Court by Uganda. It includes references to locations not mentioned by the DRC, whose list, contained in the response to Judge Kooijmans’s question, is limited to places said to have been “taken”. The Court simply observes that Ugandan evidence before the Porter Commission in relation to the month of September 1998 refers to Kisangani (1 September); Munubele (17 September); Bengamusa (18 September); Banalia (19 September); Isiro (20 September); Falalde (23 September); and Tele Bridge (29 September). Kisangani (1 September) and Isiro (20 September) are acknowledged by Uganda as having been “taken” by its forces (and not just as locations passed through).

82. As for the events of October 1998, Uganda has confirmed that it was at Buta on 3 October and Aketi on 6 October. The DRC lists the taking of Aketi as 8 November (response to the question put by Judge Kooijmans), but the Court sees no reason for this date to be preferred.
Both Parties agree that Buta was taken on 3 October and Dulia on 27 October. The Porter Commission was informed that Ugandan troops were present at Bafwasende on 12 October.

83. The DRC has alleged that Kindu was taken by Ugandan troops on 20 October 1998; this was denied in some detail by Uganda in its Rejoinder. No response was made in the oral pleadings and the Court does not feel it has convincing evidence as to Kindu having been taken by Ugandan forces in October 1998.

84. There is agreement between the Parties that Bumba was taken on 17 November 1998.

85. Uganda claims that Lisala was taken on 12 December 1998. The list contained in the Porter Commission exhibits makes reference to the location of Benda, first on 12 December and again on 28 December, and to Gemena, on 18 December, 28 December and 29 December 1998. The Court accepts that Lisala was taken on 12 December 1998.

86. The DRC claims that Ango was taken on 5 January 1999, and this is agreed by Uganda. There also appears in the Ugandan "location/dates of capture" list, Lino-Mbambi (2 January 1999) and Lino (same date), Akila Port (4 January), Kamwa (1 March), Ngeyi (4 March), Bonanza (7 March), Baso Adia (11 March), Kamba (17 May), Kasala (28 May), Bungudanda (28 May), Bungundu (28 May), Bungundu (28 May), and Bungundu (28 May).

87. The DRC also claims that Ango was taken on 3 July 1999 and this is agreed by Uganda. The Ugandan list does not include Ango on 3 July 1999.

88. The DRC also claims that Buta was taken on 10 July 1999 and this is agreed by Uganda.

89. There is considerable controversy between the Parties over the DRC's claim regarding towns taken after 10 July 1999. The Court recalls that on this date the Parties had agreed to a cease-fire. It is the position of Uganda that its military actions until 11 September 1999 were carried out with the consent of the DRC, that from 11 September 1999 until 10 July 1999 it was acting in self-defence, and that thereafter the presence of its soldiers was again consented to under the Lusaka Agreement.

90. The Court notes that the DRC's and Uganda's lists of towns taken after 10 July 1999 are significantly different. The DRC claims Fangak (2 August), Malabulu (4 August), Kiboko (6 August), Kaveza (27 August), Kukuruki (27 August), Moboca (2 September), and Businga (7 September) as towns taken on or after 10 July 1999. The Court accepts that Moboca was taken on 30 June 1999. The DRC also claims that Bongandanga and Basankusu (two locations in the south of Equateur province) were taken on 30 November 1999 and Bomorge, Moboza and Dongo at unspecified dates in February 2000. The DRC also claims that Bongandanga, Basankusu, Bomorge, Moboza and Dongo were taken at unspecified dates in February 2000.

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92. It is the position of Uganda that its military actions until 11 September 1999 were carried out with the consent of the DRC, that from 11 September 1999 until 10 July 1999 it was acting in self-defence, and that thereafter the presence of its soldiers was again consented to under the Lusaka Agreement.

The Court will first consider whether the Lusaka Agreement, the Kampala and Harare Disengagement Plans and the Luanda Agreement constituted any consent of the DRC to the presence of Ugandan troops on the territory of the DRC.

93. The Court is of the opinion that the Lusaka Agreement, the Kampala and Harare Disengagement Plans and the Luanda Agreement constituted any consent of the DRC to the presence of Ugandan troops on the territory of the DRC. The Court issues an Order regarding counter-claims contained in the Counter-Memorial of Uganda. The Court found certain of Uganda's counter-claims to be admissible under Article 80, paragraph 1, of the Rules of Court.
94. It does not follow, however, that the Lusaka Agreement is thereby excluded from all consideration by the Court. Its terms may certainly be examined in the context of responding to Uganda’s contention that, according to its provisions, consent was given by the DRC to the presence of Ugandan troops from the date of its conclusion (10 July 1999) until all the requirements contained therein should have been fulfilled.

95. The Lusaka Agreement does not refer to “consent”. It confines itself to providing that “[t]he final withdrawal of all foreign forces from the national territory of the DRC shall be carried out in accordance with the Calendar in Annex “B” of this Agreement and a withdrawal schedule to be prepared by the UN, the OAU and the JMC [Joint Military Commission]” (Art. III, para. 12). Under the terms of Annex “B”, the Calendar for the Implementation of the Ceasefire Agreement was dependent upon a series of designated “Major Events” which were to follow upon the official signature of the Agreement (“D-Day”). This “Orderly Withdrawal of all Foreign Forces” was to occur on “D-Day plus 180 days”. It was provided that, pending that withdrawal, “[a]ll forces shall remain in the declared and recorded locations” in which they were present at the date of signature of the Agreement (Ann. A, Art. 11.4).

96. The Court first observes that nothing in the provisions of the Lusaka Agreement can be interpreted as an affirmation that the security interests of Uganda had already required the presence of Ugandan forces on the territory of the DRC as from September 1998, as claimed by Uganda in the oral proceedings.

97. The Lusaka Agreement is, as Uganda argues, more than a mere ceasefire agreement, in that it lays down various “principles” (Art. III) which cover both the internal situation within the DRC and its relations with its neighbours. The three annexes appended to the Agreement deal with these matters in some considerable detail. The Agreement goes beyond the mere ordering of the parties to cease hostilities; it provides a framework to facilitate the orderly withdrawal of all foreign forces to a stable and secure environment. The Court observes that the letter from the Secretary-General of the United Nations to the President of Uganda of 4 May 2001, calling for Uganda to adhere to the agreed timetable for orderly withdrawal, is to be read in that light. It carries no implication as to the Ugandan military presence having been accepted as lawful. The overall provisions of the Lusaka Agreement acknowledge the importance of internal stability in the DRC for all of its neighbours. However, the Court cannot accept the argument made by Uganda in the oral proceedings that the Lusaka Agreement constituted “an acceptance by all parties of Uganda’s justification for sending additional troops into the DRC between mid-September 1998 and mid-July 1999”.

98. A more complex question, on which the Parties took clearly opposed positions, was whether the calendar for withdrawal and its relationship to the series of “[Major Events]”, when taken together with the reference to the “D-Day plus 180 days”, constituted consent by the DRC to the presence of Ugandan forces for at least 180 days from 10 July 1999 — and indeed beyond that time if the envisaged necessary “Major Events” did not occur.

99. The Court is of the view that, notwithstanding the special features of the Lusaka Agreement just described, this conclusion cannot be drawn. The Agreement took as its starting point the realities on the ground. Among those realities were the major Ugandan military deployment across vast areas of the DRC and the massive loss of life over the preceding months. The arrangements made at Lusaka, to progress towards withdrawal of foreign forces and an eventual peace, with security for all concerned, were directed at these factors on the ground and at the realities of the unstable political and security situation. The provisions of the Lusaka Agreement thus represented an agreed modus operandi for the parties. They stipulated how the parties should move forward. They did not purport to qualify the Ugandan military presence in legal terms. In accepting this modus operandi the DRC did not “consent” to the presence of Ugandan troops. It simply concurred that there should be a process to end that reality in an orderly fashion. The DRC was willing to proceed from the situation on the ground as it existed and in the manner agreed as most likely to secure the result of a withdrawal of foreign troops in a stable environment. But it did not thereby recognize the situation on the ground as legal, either before the Lusaka Agreement or in the period that would pass until the fulfilment of its terms.

100. In resolution 1234 of 9 April 1999 the Security Council had called for the “immediate signing of a ceasefire agreement” allowing for, inter alia, “the orderly withdrawal of all foreign forces”. The Security Council fully appreciated that this withdrawal would entail political and security elements, as shown in paragraphs 4 and 5 of resolution 1234 (1999). This call was reflected three months later in the Lusaka Agreement. But these arrangements did not preclude the Security Council from continuing to identify Uganda and Rwanda as having violated the sovereignty and territorial integrity of the DRC and as being under an obligation to withdraw their forces “without further delay, in conformity with the timetable of the ceasefire Agreement” (Security Council resolution 1304, 16 June 2000), i.e., without any delay to the modus operandi provisions agreed upon by the parties.

101. This conclusion as to the effect of the Lusaka Agreement upon the legality of the presence of Ugandan troops on Congolese territory did not change with the revisions to the timetable that became necessary. The
Kampala Disengagement Plan of 8 April 2000 and the Harare Disengagement Plan of 6 December 2000 provided for new schedules for withdrawal, it having become apparent that the original schedule in the Annex to the Lusaka Agreement was unrealistic. While the status of Ugandan troops remained unchanged, the delay in relation to the D-Day plus 180 days envisaged in the Lusaka Agreement likewise did not change the legal status of the presence of Uganda, all parties having agreed to these delays to the withdrawal calendar.

102. The Luanda Agreement, a bilateral agreement between the DRC and Uganda on “withdrawal of Ugandan troops from the Democratic Republic of the Congo, co-operation and normalisation of relations between the two countries”, alters the terms of the multilateral Lusaka Agreement. The other parties offered no objection.

103. The withdrawal of Ugandan forces was now to be carried out “in accordance with the Implementation Plan marked Annex “A’ and attached thereto” (Art. 1, para. 1). This envisaged the completion of withdrawal within 100 days after signature, save for the areas of Gbado-lite, Beni and their vicinities, where there was to be an immediate withdrawal of troops (Art. 1, para. 2). The Parties also agreed that

“the Ugandan troops shall remain on the slopes of Mt. Ruwenzori until the Parties put in place security mechanisms guaranteeing Uganda’s security, including training and co-ordinated patrol of the common border”.

104. The Court observes that, as with the Lusaka Agreement, none of these elements purport generally to determine that Ugandan forces had been legally present on the territory of the DRC. The Luanda Agreement revised the modus operandi for achieving the withdrawal of Ugandan forces in a stable security situation. It was now agreed — without reference to whether or not Ugandan forces had been present in the area when the agreement was signed, and to whether any such presence was lawful — that their presence on Mount Ruwenzori should be authorized, if need be, after the withdrawal elsewhere had been completed until appropriate security mechanisms had been put in place. The Court observes that this reflects the acknowledgment by both Parties of Uganda’s security needs in the area, without pronouncing upon the legality of prior Ugandan military actions there or elsewhere.

105. The Court thus concludes that the various treaties directed to achieving and maintaining a ceasefire, the withdrawal of foreign forces and the stabilization of relations between the DRC and Uganda did not (save for the limited exception regarding the border region of the Ruwenzori Mountains contained in the Luanda Agreement) constitute consent by the DRC to the presence of Ugandan troops on its territory for the period after July 1999, in the sense of validating that presence in law.

106. The Court has already said that, on the basis of the evidence before it, it has not been established to its satisfaction that Uganda participated in the attack on Kitona on 4 August 1998 (see paragraph 71 above). The Court has also indicated that with regard to the presence of Ugandan troops on Congolese territory near to the common border after the end of July 1998, President Kabila’s statement on 28 July 1998 was ambiguous (see paragraph 51 above). The Court has further found that any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998 (see paragraph 53 above). The Court now turns to examine whether Uganda’s military activities starting from this date could be justified as actions in self-defence.

107. The DRC has contended that Uganda invaded on 2 August 1998, beginning with a major airborne operation at Kitona in the west of the DRC, then rapidly capturing or taking towns in the east, and then, continuing to the north-west of the country. According to the DRC, some of this military action was taken by the UPDF alone or was taken in conjunction with anti-government rebels and/or with Rwanda. It submits that Uganda was soon in occupation of a third of the DRC and that its forces only left in April 2003.

108. Uganda insists that 2 August 1998 marked the date only of the beginning of civil war in the DRC and that, although Rwanda had invited it to join in an effort to overthrow President Kabila, it had declined. Uganda contends that it did not act jointly with Rwanda in Kitona and that it had the consent of the DRC for its military operations in the east until the date of 11 September 1998. 11 September was the date of issue of the “Position of the High Command on the Presence of the UPDF in the DRC” (hereinafter “the Ugandan High Command document”) (see paragraph 109 below). Uganda now greatly increased the number of its troops from that date on. Uganda acknowledges that its military operations thereafter can only be justified by reference to an entitlement to act in self-defence.

109. The Court finds it useful at this point to reproduce in its entirety the Ugandan High Command document. This document has been relied on by both Parties in this case. The High Command document, although mentioning the date of 11 September 1998, in the Court’s view, provides the basis for the operation known as operation “Safe Haven”. The document reads as follows:

“WHEREAS for a long time the DRC has been used by the enemies of Uganda as a base and launching pad for attacks against Uganda;
AND

WHEREAS the successive governments of the DRC have not been in effective control of all the territory of the Congo;

AND

WHEREAS in May 1997, on the basis of a mutual understanding the Government of Uganda deployed UPDF to jointly operate with the Congolese Army against Uganda enemy forces in the DRC;

AND

WHEREAS when an anti-Kabila rebellion erupted in the DRC the forces of the UPDF were still operating along side the Congolese Army in the DRC, against Uganda enemy forces who had fled back to the DRC;

NOW THEREFORE the High Command sitting in Kampala this 11th day of September, 1998, resolves to maintain forces of the UPDF in order to secure Uganda’s legitimate security interests which are the following:

1. To deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda.
2. To enable UPDF neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.
3. To ensure that the political and administrative vacuum, and instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda.
4. To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR, which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.
5. To be in position to safeguard the territory integrity of Uganda against irresponsible threats of invasion from certain forces.

110. In turning to its assessment of the legal character of Uganda’s activities at Aru, Beni, Bunia and Watsa in August 1998, the Court begins by observing that, while it is true that those localities are all in close proximity to the border, “as per the consent that had been given previously by President Kabila”, the nature of Ugandan action at these locations was of a different nature from previous operations along the common border. Uganda was not in August 1998 engaging in military operations against rebels who carried out cross-border raids. Rather, it was engaged in military assaults that resulted in the taking of the town of Beni and its airfield between 7 and 8 August, followed by the taking of the town of Bunia and its airport on 13 August, and the town of Watsa and its airport at a date between 24 and 29 August.

111. The Court finds these actions to be quite outside any mutual understanding between the Parties as to Uganda’s presence on Congolese territory near to the border. The issue of when any consent may have terminated is irrelevant when the actions concerned are so clearly beyond co-operation “in order to ensure peace and security along the common border”, as had been confirmed in the Protocol of 27 April 1998.

112. The Court observes that the Ugandan operations against these eastern border towns could therefore only be justified, if at all, as actions in self-defence. However, at no time has Uganda sought to justify them on this basis before the Court.

113. Operation “Safe Haven”, by contrast, was firmly rooted in a claimed entitlement “to secure Uganda’s legitimate security interests” rather than in any claim of consent on the part of the DRC. The Court notes, however, that those most intimately involved in its execution regarded the military actions throughout August 1998 as already part and parcel of operation “Safe Haven”.

114. Thus Mr. Kavuma, the Minister of State for Defence, informed the Porter Commission that the UPDF troops first crossed the border at the beginning of August 1998, at the time of the rebellion against President Kabila, “when there was confusion inside the DRC” (Porter Commission document CW/01/02 23/07/01, p. 23). He confirmed that this “entry” was “to defend our security interests”. The commander of the Ugandan forces in the DRC, General Kazini, who had immediate control in the field, informing Kampala and receiving thereafter any further orders, was asked “[w]hen was ‘Operation Safe Haven’? When did it commence?” He replied “[i]t was in the month of August. That very month of August 1998. ‘Safe Haven’ started after the capture of Beni, that was on 7 August 1998.” (CW/01/03 24/07/01, p. 774.) General Kazini emphasized that the Beni operation was the watershed: “So before that . . . ‘Operation Safe Haven’ had not started. It was the normal UPDF operations—counter-insurgency operations in the Rwenzoris before that date of 7 August, 1998.” (CW/01/03 24/07/01, p. 129.) He spoke of “the earlier plan” being that both Governments, in the form of the UPDF and the FAC, would jointly deal with the rebels along the border. “But now this new phenomenon had developed: there was a mutiny, the rebels were taking control of those areas. So we decided to launch an offensive together with the rebels, a special operation we code-named ‘Safe Haven’.” General Kazini was asked by Justice Porter what was the objective of this joint offensive with the rebels. General Kazini replied “[t]o crush the bandits together with their FAC allies” and confirmed that by “FAC” he meant the “Congolese Government Army” (CW/01/03 24/07/01, p. 129).
115. It is thus clear to the Court that Uganda itself actually regarded the military events of August 1998 as part and parcel of operation “Safe Haven”, and not as falling within whatever “mutual understandings” there had previously been.

116. The Court has noted that within a very short space of time Ugandan forces had moved rapidly beyond these border towns. It is agreed by all that by 1 September 1998 the UPDF was at Kisangani, very far from the border. Furthermore, Lieutenant Colonel Mageni informed the Porter Commission, under examination, that he had entered the DRC on 13 August and stayed there till mid-February 1999. He was based at Isiro, some 580 km from the border. His brigade had fought its way there: “we were fighting the ADFs who were supported by the FAC”.

117. Accordingly, the Court will make no distinction between the events of August 1998 and those in the ensuing months.

118. Before this Court Uganda has qualified its action starting from mid-September 1998 as action in self-defence. The Court will thus examine whether, throughout the period when its forces were rapidly advancing across the DRC, Uganda was entitled to engage in military action in self-defence against the DRC. For these purposes, the Court will not examine whether each individual military action by the UPDF could have been characterized as action in self-defence, unless it can be shown, as a general proposition, that Uganda was entitled to act in self-defence in the DRC in the period from August 1998 till June 2003.

119. The Court first observes that the objectives of operation “Safe Haven”, as stated in the Ugandan High Command document (see paragraph 109 above), were not consonant with the concept of self-defence as understood in international law.

120. Uganda in its response to the question put to it by Judge Kooijmans (see paragraph 22 above) confirms that the changed policies of President Kabila had meant that co-operation in controlling insurgency in the border areas had been replaced by “stepped-up cross-border attacks against Uganda by the ADF, which was being re-supplied and re-equipped by the Sudan and the DRC Government”. The Court considers that, in order to ascertain whether Uganda was entitled to engage in military action on Congolese territory in self-defence, it is first necessary to examine the reliability of these claims. It will thus begin by an examination of the evidence concerning the role that the Sudan was playing in the DRC at the relevant time.

121. Uganda claimed that there was a tripartite conspiracy in 1998 between the DRC, the ADF and the Sudan; that the Sudan provided military assistance to the DRC’s army and to anti-Ugandan rebel groups; that the Sudan used Congo airfields to deliver materiel; that the Sudan airlifted rebels and its own army units around the country; that Sudanese aircraft bombed the UPDF positions at Bunia on 26 August 1998; that a Sudanese brigade of 2,500 troops was in Gbadolite and was preparing to engage the UPDF forces in eastern Congo; and that the DRC encouraged and facilitated stepped-up cross border attacks from May 1998 onwards.

122. The Court observes, more specifically, that in its Counter-Memorial Uganda claimed that from 1994 to 1997 anti-Ugandan insurgents “received direct support from the Government of Sudan” and that the latter trained and armed insurgent groups, in part to destabilize Uganda’s status as a “good example” in Africa. For this, Uganda relied on a Human Rights Watch (hereinafter HRW) report. The Court notes that this report is on the subject of slavery in the Sudan and does not assist with the issue before the Court. It also relied on a Ugandan political report which simply claimed, without offering supporting evidence, that the Sudan was backing groups launching attacks from the DRC. It further relies on an HRW report of 2000 stating that the Sudan was providing military and logistical assistance to the LRA, in the north of Uganda, and to the SPLM/A (by which Uganda does not claim to have been attacked). The claims relating to the LRA, which are also contained in the Counter-Memorial of Uganda, have no relevance to the present case. No more relevant is the HRW report of 1998 criticizing the use of child soldiers in northern Uganda.

123. The Court has next examined the evidence advanced to support the assertion that the Sudan was supporting anti-Ugandan groups which were based in the DRC, namely FUNA, UNRF II and NALU. This consists of a Ugandan political report of 1998 which itself offers no evidence, and an address by President Museveni of 2000. These documents do not constitute probative evidence of the points claimed.

124. Uganda states that President Kabila entered into an alliance with the Sudan, “which he invited to occupy and utilise airfields in north-eastern Congo for two purposes: delivering arms and other supplies to the insurgents; and conducting aerial bombardment of Uganda towns and villages”. Only President Museveni’s address to Parliament is relied on. Certain assertions relating to the son of Idi Amin, and the role he was being given in the Congolese military, even were they true, prove nothing as regards the specific allegations concerning the Sudan.

125. Uganda has informed the Court that a visit was made by President Kabila in May 1998 to the Sudan, in order to put at the Sudan’s disposal all the airfields in northern and eastern Congo, and to deliver arms and troops to anti-Ugandan insurgents along Uganda’s border. Uganda offered as evidence President Museveni’s address to Parliament, together with an undated, unsigned internal Ugandan military intelligence document. Claims as to what was agreed as a result of any such meeting that might have taken place remain unproven.
126. Uganda informed the Court that Uganda military intelligence reported that in August 1998 the Sudan airlifted insurgents from the WNBF and LRA to fight alongside Congolese forces against RPA and RCD rebels. The Court observes that, even were that proven (which in the Court’s view is not the case), the DRC was entitled so to have acted. This invitation could not of itself have entitled Uganda to use force in self-defence. The Court has not been able to verify from concordant evidence the claim that the Sudan transported an entire Chadian brigade to Gbadolite (whether to join in attacks on Uganda or otherwise).

127. The Court further observes that claims that the Sudan was training and transporting FAC troops, at the request of the Congolese Government, cannot entitle Uganda to use force in self-defence, even were the alleged facts proven. In the event, such proof is not provided by the unsigned Ugandan military intelligence document, nor by a political report that Uganda relies on.

128. Article 51 of the Charter refers to the right of “individual or collective” self-defence. The Court notes that a State may invite another State to assist it in using force in self-defence. On 2 August 1998 civil war had broken out in the DRC and General Kazini later testified to the Porter Commission that operation “Safe Haven” began on 7-8 August 1998. The Ugandan written pleadings state that on 14 August 1998 Brigadier Khalil of the Sudan delivered three plane loads of weapons to the FAC in Kinshasa, and that the Sudan stepped up its training of FAC troops and airlifted them to different locations in the DRC. Once again, the evidence offered to the Court as to the delivery of the weapons is the undated, unsigned, internal Ugandan military intelligence report. This was accompanied by a mere political assertion of Sudanese backing for troops launching attacks on Uganda from the DRC. The evidentiary situation is exactly the same as regards the alleged agreement by President Kabila with the Sudanese Vice-President for joint military measures against Uganda. The same intelligence report, defective as evidence that the Court can rely on, is the sole source for the claims regarding the Sudanese bombing with an Antonov aircraft of UPDF positions in Bunia on 26 August 1998; the arrival of the Sudanese brigade in Gbadolite shortly thereafter; the deployment of Sudanese troops, along with those of the DRC, on Uganda’s border on 14 September; and the pledges made on 18 September for the deployment of more Sudanese troops.

129. It was said by Uganda that the DRC had effectively admitted the threat to Uganda’s security posed by the Sudan, following the claimed series of meetings between President Kabila and Sudanese officials in May, August and September 1998. In support of these claims Uganda referred the Court to a 1999 ICG report, “How Kabila Lost His Way”; although not provided in the annexes, this report was in the public domain and the Court has ascertained its terms. Reliance is also placed on a political statement by the Ugandan High Command. The Court observes that this does not constitute reliable evidence and in any event it speaks only of the reason for the mid-September deployment of troops. The Court has also found that it cannot rely as persuasive evidence on a further series of documents said to support these various claims relating to the Sudan, all being internal political documents. The Court has examined the notarized affidavit of 2002 of the Ugandan Ambassador to the DRC, which refers to documents that allegedly were at the Ugandan Embassy in Kinshasa, showing that “the Sudanese government was supplying ADF rebels”. While a notarized affidavit is entitled to a certain respect, the Court must observe that it is provided by a party in the case and provides at best indirect “information” that is unverified.

130. The Court observes that it has not been presented with evidence that can safely be relied on in a court of law to prove that there was an agreement between the DRC and the Sudan to participate in or support military action against Uganda; or that any action by the Sudan (of itself factually uncertain) was of such a character as to justify Uganda’s claim that it was acting in self-defence.

131. The Court has also examined, in the context of ascertaining whether Uganda could have been said to have acted in self-defence, the evidence for Uganda’s claims that from May 1998 onwards the frequency, intensity and destructiveness of cross-border attacks by the ADF “increased significantly”, and that this was due to support from the DRC and from the Sudan.

132. The Court is convinced that the evidence does show a series of attacks occurring within the relevant time-frame, namely: an attack on Kichwamba Technical School of 8 June 1998, in which 33 students were killed and 106 abducted; an attack near Kichwamba, in which five were killed; an attack on Benyangule village on 26 June, in which 11 persons were killed or wounded; the abduction of 19 seminarians at Kiburara on 5 July; an attack on Kasese town on 1 August, in which three persons were killed. A sixth attack was claimed at the oral hearings to have occurred at Kijurumba, with 33 fatalities. The Court has not been able to ascertain the facts as to this latter incident.
The DRC does not deny that a number of attacks took place, but its position is that the ADF alone was responsible for them. The documents relied on by Uganda for its entitlement to use force in self-defence against the DRC include a report of the interrogation of a captured ADF rebel, who admits participating in the Kichwamba attack and refers to an "intention" to obtain logistical support and sanctuary from the Congolese Government; this report is not signed by the person making the statement, nor does it implicate the DRC. Uganda also relies on a document entitled "Chronological Illustration of Acts of Destabilisation by Sudan and Congo Based Dissidents", which is a Ugandan military document. Further, some articles in newspapers relied on by Uganda in fact blame only the ADF for the attacks. A very few do mention the Sudan. Only some internal documents, namely unsigned witness statements, make any reference to Congolese involvement in these acts.

The Court observes that this is also the case as regards the documents said to show that President Kabila provided covert support to the ADF. These may all be described as internal documents, often with no authenticating features, and containing unsigned, unauthenticaded and sometimes illegible witness statements. These do not have the quality or character to satisfy the Court as to the matters claimed.

In oral pleadings Uganda again referred to these "stepped up attacks". Reference was made to an ICG report of August 1998, "North Kivu, into the Quagmire". Although not provided in the annexes, this report was in the public domain and the Court has ascertained its terms. It speaks of the ADF as being financed by Iran and the Sudan. It further states that the ADF is "exploiting the incapacity of the Congolese Armed Forces" in controlling areas of North Kivu with neighbour Uganda. This independent report does seem to suggest some Sudanese support for the ADF's activities. It also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border.

Uganda relies on certain documents annexed by the DRC to its Reply. However, the Court does not find this evidence weighty or convincing. It consists of a bundle of news reports of variable reliability, which go no further than to say that unconfirmed reports had been received that the Sudan was flying military supplies to Juba and Dungu. The Court has therefore not found probative such media reports as the IRIN update for 12 to 14 September 1998, stating that Hutu rebels were being trained in southern Sudan, and the IRIN update for 16 September 1998, stating that "rebels claim Sudan is supporting Kabila at Kindu".

Neither has the Court relied on the (unreferenced and unsourced) claim that President Kabila made a secret visit to Khartoum on 25 August 1998 nor on the extract from Mr. Bemba's book Le choix de la liberté stating that 108 Sudanese soldiers were in the DRC, under the command of the Congolese army, to defend the area around Gbadolite.

The Court has been able to satisfy itself as to certain internal military intelligence documents, belatedly offered, which lack explanations as to how the information was obtained (e.g. Revelations of Command General Junju Juma (former commanding officer in the ADF) of 17 May 2000, undated Revelations by Issa Twatera (former commanding officer in the ADF)).

A further "fact" relied on by Uganda in this case as entitling it to act in self-defence is that the DRC incorporated anti-Ugandan rebel groups and Interahamwe militia into the FAC. The Court will examine the evidence and apply the law to its findings.

In its Counter-Memorial, Uganda claimed that President Kabila had incorporated into his army thousands of ex-FAR and Interahamwe génocidaires in May 1998. A United States State Department statement in October 1998 condemned the DRC's recruitment and training of former perpetrators of the Rwandan genocide, thus giving some credence to the reports internal to Uganda that were put before the Court, even though these lacked signatures or particulars of sources relied on. But this claim, even if true, seems to have relevance for Rwanda rather than Uganda.

Uganda in its oral pleadings repeated the claims of incorporation of former Rwandan soldiers and Interahamwe into special units of the Congolese army. No sources were cited, nor was it explained to the Court how this might give rise to a right of self-defence on the part of Uganda.

In the light of this assessment of all the relevant evidence, the Court is now in a position to determine whether the use of force by Uganda within the territory of the DRC could be characterized as self-defence.

Article 51 of the United Nations Charter provides:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and
shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

143. The Court recalls that Uganda has insisted in this case that operation “Safe Haven” was not a use of force against an anticipated attack. As was the case also in the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) case, “reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised” (I.C.J. Reports 1986, p. 103, para. 194). The Court there found that “[a]ccordingly [it] expresses no view on that issue”. So it is in the present case. The Court feels constrained, however, to observe that the wording of the Ugandan High Command document on the position regarding the presence of the UPDF in the DRC makes no reference whatever to armed attacks that have already occurred against Uganda at the hands of the DRC (or indeed by persons for whose action the DRC is claimed to be responsible). Rather, the position of the High Command is that it is necessary “to secure Uganda’s legitimate security interests”. The specified security needs are essentially preventative — to ensure that the political vacuum does not adversely affect Uganda, to prevent attacks from “genocidal elements”, to be in a position to safeguard Uganda from irresponsible threats of invasion, to “deny the Sudan the opportunity to use the territory of the DRC to destabilize Uganda”. Only one of the five listed objectives refers to a response to acts that had already taken place — the neutralization of “Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan”.

144. While relying heavily on this document, Uganda nonetheless insisted to the Court that after 11 September 1998 the UPDF was acting in self-defence in response to attacks that had occurred. The Court has already found that the military operations of August in Beni, Bunia and Watsa, and of 1 September at Kisangani, cannot be classified as coming within the consent of the DRC, and their legality, too, must stand or fall by reference to self-defence as stated in Article 51 of the Charter.

145. The Court would first observe that in August and early September 1998 Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence.

146. It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The “armed attacks” to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.

147. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentsions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.

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Findings of Law on the Prohibition against the Use of Force

148. The prohibition against the use of force is a cornerstone of the United Nations Charter. Article 2, paragraph 4, of the Charter requires that:

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

Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these
parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.

149. The Court has found that, from 7 August 1998 onwards, Uganda engaged in the use of force for purposes and in locations for which it had no consent whatever. The Court has also found that the events attested to by Uganda did not justify recourse to the use of force in self-defence.


151. The Court recalls that on 9 April 1999 the Security Council determined the conflict to constitute a threat to peace, security and stability in the region. In demanding an end to hostilities and a political solution to the conflict (which call was to lead to the Lusaka Agreement of 10 July 1999), the Security Council deplored the continued fighting and presence of foreign forces in the DRC and called for the States concerned “to bring to an end the presence of these uninvited forces” (United Nations doc. S/RES/1234, 9 April 1999).

152. The United Nations has throughout this long series of carefully balanced resolutions and detailed reports recognized that all States in the region must bear their responsibility for finding a solution that would bring peace and stability. The Court notes, however, that this widespread responsibility of the States of the region cannot excuse the unlawful military action of Uganda.

153. The evidence has shown that the UPDF traversed vast areas of the DRC, violating the sovereignty of that country. It engaged in military operations in a multitude of locations, including Bunia, Kisangani, Gbadolite and Ituri, and many others. These were grave violations of Article 2, paragraph 4, of the Charter.


155. The Court further observes that Uganda — as is clear from the evidence given by General Kazini and General Kavuma to the Porter Commission (see above, paragraph 114) — decided in early August 1998 to launch an offensive together with various factions which sought to overthrow the Government of the DRC. The DRC has in particular claimed that, from September 1998 onwards, Uganda both created and controlled the MLC rebel group led by Mr. Bemba.

156. The DRC also points to the book written by Mr. Bemba (see paragraph 69 above) to support this contention, as well as to the fact that in the Harare Disengagement Plan the MLC and UPDF are treated as a single unit.

157. For its part, Uganda acknowledges that it assisted the MLC during fighting between late September 1998 and July 1999, while insisting that its assistance to Mr. Bemba “was always limited and heavily conditioned”. Uganda has explained that it gave “just enough” military support to the MLC to help Uganda achieve its objectives of driving out the Sudanese and Chadian troops from the DRC, and of taking over the airfields between Gbadolite and the Ugandan border; Uganda asserts that it did not go beyond this.

158. The Court observes that the pages cited by the DRC in Mr. Bemba’s book do not in fact support the claim of “the creation” of the MLC by Uganda, and cover the later period of March-July 1999. The Court has noted the description in Mr. Bemba’s book of the training of his men by Ugandan military instructors and finds that this accords with statements he made at that time, as recorded in the ICG report of 20 August 1999. The Court has equally noted Mr. Bemba’s insistence, in November 1999, that, while he was receiving support, it was he who was in control of the military venture and not Uganda. The Court is equally of the view that the Harare Disengagement Plan merely sought to identify locations of the various parties, without passing on their relationships to each other.

159. The Court has not relied on various other items offered as evidence on this point by the DRC, finding them, uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say by the DRC, or even in some cases partisan. The Court has for such reasons set aside the ICG report of 17 November, the HRW Report of March 2001, passages from the Secretary-General’s report on MONUC of 4 September 2000 (where reliance on second-hand reports is acknowledged); articles in the IRIN bulletin and Jeune Afrique; and the statement of a
The deserter who was co-operating with the Congolese military commission in preparing a statement for purposes of the present proceedings.

160. The Court concludes that there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use. In the view of the Court, the conduct of the MLC was not that of "an organ" of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Art. 5). The Court has considered whether the MLC's conduct was "on the instructions of, or under the direction or control of" Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 62-65, paras. 109-115).

161. The Court would comment, however, that, even if the evidence does not suggest that the MLC's conduct is attributable to Uganda, the training and military support given by Uganda to the ALC, the military wing of the MLC, violates certain obligations of international law.

162. Thus the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter "the Declaration on Friendly Relations") provides that:

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

(General Assembly resolution 2625 (XXV), 24 October 1970.)

The Declaration further provides that

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

163. The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war.

164. In the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), the Court made it clear that the principle of non-intervention prohibits a State "to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State" (I.C.J. Reports 1986, p. 108, para. 206). The Court notes that in the present case it has been presented with probative evidence as to military intervention. The Court further affirms that acts which breach the principle of non-intervention "will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations" (ibid., pp. 109-110, para. 209).

165. In relation to the first of the DRC's final submissions, the Court accordingly concludes that Uganda has violated the sovereignty and also the territorial integrity of the DRC. Uganda's actions equally constituted an interference in the internal affairs of the DRC and in the civil war there raging. The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.

* * *

166. Before turning to the second and third submissions of the DRC, dealing with alleged violations by Uganda of its obligations under international human rights law and international humanitarian law and the illegal exploitation of the natural resources of the DRC, it is essential for the Court to consider the question as to whether or not Uganda was an occupying Power in the parts of Congolese territory where its troops were present at the relevant time.

* * *

The Issue of Belligerent Occupation

167. The DRC asserts that the border regions of eastern Congo were attacked by Ugandan forces between 7 and 8 August 1998, and that more areas fell under the control of Ugandan troops over the following months with the advance of the UPDF into Congolese territory. It further points
out that “the territories occupied by Uganda have varied in size as the conflict has developed”: the area of occupation initially covered Orientale province and part of North Kivu province; in the course of 1999 it increased to cover a major part of Equateur province. The DRC specifies that the territories occupied extended from Bunia and Beni, close to the eastern border, to Bururu and Mobenzene, in the far north-western part of the DRC; and that “the southern boundary of the occupied area ran north of the towns of Mbandaka westwards, then extended east to Kisangani, rejoining the Ugandan border between Goma and Butembo”. According to the DRC, the occupation of its territory ended with the withdrawal of the Ugandan army on 2 June 2003.

168. The DRC contends that “the UPDF set up an occupation zone, which it administered both directly and indirectly”, in the latter case by way of the creation of and active support for various Congolese rebel factions. As an example of such administration, the DRC refers to the creation of a new province within its territory. In June 1999, the Ugandan authorities, in addition to the existing ten provinces, created an 11th province in the north-east of the DRC, in the vicinity of the Ugandan frontier. The “Kibali-Ituri” province thus created was the result of merging the districts of Ituri and Haut-Uélé, detached from Orientale province. On 18 June 1999 General Kazini, commander of the Ugandan forces in the DRC, “appointed Ms Adele Lotsove, previously Deputy Governor of Orientale Province, to govern this new province”. The DRC further asserts that acts of administration by Uganda of this province continued until the withdrawal of Ugandan troops. In support of this contention, the DRC states that Colonel Musoora, of the UPDF, exercised de facto the duties of governor of the province between January and May 2001, and that “at least two of the five governors who succeeded Ms Lotsove up until 2003 were relieved of their duties by the Ugandan military authorities, sometimes under threat of force”. The DRC claims that the Ugandan authorities were directly involved “in the political life of the occupied regions” and, citing the Ugandan daily newspaper New Vision, that “Uganda has even gone so far as to supervise local elections”. The DRC also refers to the Sixth report of the Secretary-General on MONUC, which describes the situation in Bunia (capital of Ituri district) in the following terms: “since 22 January, MONUC military observers in Bunia have reported the situation in the town to be tense but with UPDF in effective control”.

169. Finally, according to the DRC, the fact that Ugandan troops were not present in every location in the vast territory of the north and east of the DRC “in no way prevents Uganda from being considered an occupying power in the localities or areas which were controlled by its armed forces”. The DRC claims that the notion of occupation in inter-

170. For its part, Uganda denies that it was an occupying Power in the areas where UPDF troops were present. It argues that, in view of the small number of its troops in the territory of the DRC, i.e. fewer than 10,000 soldiers “at the height of the deployment”, they could not have occupied vast territories as claimed by the DRC. In particular, Uganda maintains that its troops “were confined to the regions of eastern Congo adjacent to the Uganda border and to designated strategic locations, especially airfields, from which Uganda was vulnerable to attack by the DRC and her allies”. Thus, there was “no zone of Ugandan military occupation and there was no Ugandan military administration in place”. Uganda points out, moreover, that it “ensured that its troops refrained from all interferences in the local administration, which was run by the Congolese themselves”. Uganda further notes that “it was the rebels of the Congo Liberation Movement (MLC) and of the Congolese Rally for Democracy (RDC) which controlled and administered these territories, exercising de facto authority”.

171. As for the appointment of a governor of Ituri district, which Uganda characterizes as “the only attempt at interference in this local administration by a Ugandan officer”, Uganda states that this action was “motivated by the desire to restore order in the region of Ituri in the interests of the population”. Furthermore, Uganda emphasizes that this step was “immediately opposed and disavowed by the Ugandan authorities” and that the officer in question, General Kazini, was firmly reprimanded by his superiors, who instituted disciplinary measures against him.

172. The Court observes that, under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised (see Legal Con-

173. In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an “occupying Power” in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance: nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied.

174. The Court will now ascertain whether parts of the territory of the DRC were placed under the authority of the Ugandan army in the sense of Article 42 of the Hague Regulations of 1907. In this regard, the Court first observes that the territorial limits of any zone of occupation by Uganda in the DRC cannot be determined by simply drawing a line connecting the geographical locations where Ugandan troops were present, as has been done on the sketch-map presented by the DRC (see paragraphs 53 and 73 above).

175. It is not disputed between the Parties that General Kazini, commander of the Ugandan forces in the DRC, created the new “province of Kibali-Ituri” in June 1999 and appointed Ms Adèle Lotsove as its Governor. Various sources of evidence attest to this fact, in particular a letter from General Kazini dated 18 June 1999, in which he appoints Ms Adèle Lotsove as “provisional Governor” and gives suggestions with regard to questions of administration of the new province. This is also supported by material from the Porter Commission. The Court further notes that the Sixth report of the Secretary-General on MONUC (S/2001/128 of 12 February 2001) states that, according to MONUC military observers, the UPDF was in effective control in Bunia (capital of Ituri district).

176. The Court considers that regardless of whether or not General Kazini, commander of the Ugandan forces in the DRC, acted in violation of orders and was punished as a result, his conduct is clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power.

177. The Court observes that the DRC makes reference to “indirect administration” through various Congolese rebel factions and to the supervision by Ugandan officers over local elections in the territories under UPDF control. However, the DRC does not provide any specific evidence to show that authority was exercised by Ugandan armed forces in any areas other than in Ituri district. The Court further notes that, although Uganda recognized that as of 1 September 1998 it exercised “administrative control” at Kisangani Airport, there is no evidence in the case file which could allow the Court to characterize the presence of Ugandan troops stationed at Kisangani Airport as occupation in the sense of Article 42 of the Hague Regulations of 1907. Neither can the Court uphold the DRC’s contention that Uganda was an occupying Power in areas outside Ituri controlled and administered by Congolese rebel movements. As the Court has already indicated, the evidence does not support the view that these groups were “under the control” of Uganda (see paragraph 160 above).

178. The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.

180. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation.

* * *

VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW: CONTENTIONS OF THE PARTIES

181. It is recalled (see paragraph 25 above) that in its second submission the DRC requests the Court to adjudge and declare:
2. That the Republic of Uganda, by committing acts of violence against nationals of the Democratic Republic of the Congo, by killing and injuring them or despoiling them of their property, by failing to take adequate measures to prevent violations of human rights in the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:

— the principle of conventional and customary law imposing an obligation to respect, and ensure respect for, fundamental human rights, including in times of armed conflict, in accordance with international humanitarian law;
— the principle of conventional and customary law imposing an obligation, at all times, to make a distinction in an armed conflict between civilian and military objectives;
— the right of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural.

182. The DRC cites various sources of evidence in support of its claims, including the 2004 MONUC report on human rights violations in Ituri, reports submitted by the Special Rapporteur of the United Nations Commission on Human Rights, and testimony gathered on the ground by a number of Congolese and international non-governmental organizations. The DRC argues that it has “presented abundant evidence of violations of human rights attributable to Uganda, based on reliable, varied and concordant sources”. In particular, it notes that many of the grave accusations are the result of careful fieldwork carried out by MONUC experts, and attested to by other independent sources.

183. The DRC claims that the Ugandan armed forces perpetrated wide-scale massacres of civilians during their operations in the DRC, in particular in the Ituri region, and resorted to acts of torture and other forms of inhumane and degrading treatment. The DRC claims that soldiers of the UPDF carried out acts of reprisal directed against the civilian inhabitants of villages presumed to have harboured anti-Ugandan fighters. In the specific context of the conflict in Ituri, the DRC argues that the findings of the 2004 MONUC report on human rights violations in Ituri clearly establish the fact that the Ugandan armed forces participated in the mass killings of civilians.

184. The DRC maintains that, in the areas occupied by the UPDF, Ugandan soldiers plundered civilian property for their “personal profit”, and engaged in the deliberate destruction of villages, civilian dwellings and private property. With regard to the clashes between Uganda and Rwanda in the city of Kisangani in 1999 and 2000, the DRC refers, in particular, to Security Council resolution 1304 (2000), in which the Council deplored, inter alia, “the damage to property inflicted by the forces of Uganda and Rwanda on the Congolese population”. The DRC also alleges that the property and resources of the civilian populations in the eastern Congolese regions occupied by the Ugandan army were destroyed on certain occasions by UPDF soldiers as part of a “scorched earth” policy aimed at combating ADF rebels.

185. The DRC claims that several hundred Congolese children were forcibly recruited by the UPDF and taken to Uganda for ideological and military training in the year 2000. In particular, according to the DRC, many children were abducted in August 2000 in the areas of Bunia, Beni and Butembo and given military training at the Kyankwanzi camp in Uganda with a view to incorporating them into the Ugandan armed forces. The DRC maintains that the abducted children were only able to leave the Kyankwanzi training camp for final repatriation to the DRC at the beginning of July 2001 after persistent efforts by UNICEF and the United Nations to ensure their release.

186. The DRC contends that the Ugandan armed forces failed to protect the civilian population in combat operations with other belligerents. Thus it alleges that attacks were carried out by the UPDF without any distinction being made between combatants and non-combatants. In this regard, the DRC makes specific reference to fighting between Ugandan and Rwandan forces in Kisangani in 1999 and 2000, causing widespread loss of life within the civilian population and great damage to the city’s infrastructure and housing. In support of its claims, the DRC cites various reports of Congolese and international non-governmental organizations and refers extensively to the June 2000 MONUC Report and to the December 2000 report by the United Nations inter-agency assessment mission, which went to Kisangani pursuant to Security Council resolution 1304 (2000). The DRC notes that the latter report referred to “systematic violations of international humanitarian law and indiscriminate attacks on civilians” committed by Uganda and Rwanda as they fought each other.

187. The DRC claims that Ugandan troops were involved in ethnic conflicts between groups in the Congolese population, particularly between Hema and Lendu in the Ituri region, resulting in thousands of civilian casualties. According to the DRC, UPDF forces opened fire with the Hema ethnic group because of “alleged ethnic links between its members and the Ugandan population”. In one series of cases, the DRC alleges that Ugandan armed forces provided direct military support to Congolese factions and joined with them in perpetrating massacres of...
civilians. The DRC further claims that Uganda not only supported one of the groups but also provided training and equipment for other groups over time, thereby aggravating the local conflicts.

188. The DRC also asserts that, on several occasions, Ugandan forces passively witnessed atrocities committed by the members of local militias in Ituri. In this connection, the DRC refers to various incidents attested to by reports emanating from the United Nations and MONUC, and from Congolese and international non-governmental organizations. In particular, the DRC refers to a massacre of ethnic Lenda carried out by ethnic Hema militias in Bunia on 19 January 2001. The DRC states that similar events occurred in other localities.

189. The DRC charges that Uganda breached its obligation of vigilance incumbent upon it as an occupying Power by failing to enforce respect for human rights and international humanitarian law in the occupied regions, and particularly in Ituri. The DRC argues that the need to ensure full respect for fundamental rights in the territories occupied by the Ugandan army was similarly emphasized by the United Nations Commission on Human Rights.

190. The DRC argues that, by its actions, Uganda has violated provisions of the Hague Regulations of 1907; the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; the International Covenant on Civil and Political Rights; the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977; the African Charter on Human and Peoples’ Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the African Charter on the Rights and Welfare of the Child.

191. Uganda contends that the DRC has consistently failed to provide any credible evidentiary basis to support its allegations of the involvement of Ugandan troops in massacres, torture and ill-treatment of Congolese civilians, supposed acts of plunder and scorched earth policy, destruction of Congolese villages and civilian dwellings, and looting of private property. In this regard, Uganda refers to each of the incidents alleged by the DRC and argues that the documentation relied upon by the DRC to prove its claims either fails to show that the incident occurred, or fails to show any involvement of Ugandan troops. In more general terms, Uganda points to the unreliability of the evidence adduced by the DRC, claiming that it does not distinguish between the various armies operating in eastern Congo during the relevant period. Uganda also maintains that the DRC relies on partisan sources of information, such as the Association africaine des droits de l’homme (ASADHO), which Uganda describes as a pro-Congolese non-governmental organization. Uganda further asserts that the 2004 MONUC report on human rights violations in Ituri, heavily relied on by the DRC to support its various claims in connection with the conflict in Ituri, “is inappropriate as a form of assistance in any assessment accompanied by judicial rigour”. Uganda states, inter alia, that in its view, “MONUC did not have a mission appropriate to investigations of a specifically legal character” and that “both before and after deployment of the multinational forces in June 2003, there were substantial problems of access to Ituri”.

192. Uganda contends that the DRC’s allegations regarding the forced recruitment of child soldiers by Uganda are “framed only in general terms” and lack “evidentiary support”. According to Uganda, the children “were rescued” in the context of ethnic fighting in Bunia and a mutiny within the ranks of the RCD-ML rebel group, and taken to the Kyankwanzi Leadership Institute for care and counselling in 2001. Uganda states that the children were subsequently repatriated under the auspices of UNICEF and the Red Cross. In support of its claims, Uganda refers to the Fifth and Sixth reports on MONUC of the Secretary-General of the United Nations. Uganda also maintains that it received expressions of gratitude from UNICEF and from the United Nations for its role in assisting the children in question.

193. Uganda reserves its position on the events in Kisangani in 2000 and, in particular, on the admissibility of issues of responsibility relating to these events (see paragraphs 197-198 below).

194. Uganda claims that the DRC’s assertion that Ugandan forces incited ethnic conflicts among groups in the Congolese population is false and furthermore is not supported by credible evidence.

195. Uganda argues that no evidence has been presented to establish that Uganda had any interest in becoming involved in the civil strife in Ituri. Uganda asserts that, from early 2001 until the final departure of its troops in 2003, Uganda did what it could to promote and maintain a peaceful climate in Ituri. Uganda believes that its troops were insufficient to control the ethnic violence in that region, “and that only an international force under United Nations auspices had any chance of doing so”.

* *
Before considering the merits of the DRC’s allegations of violations by Uganda of international human rights law and international humanitarian law, the Court must first deal with a question raised by Uganda concerning the admissibility of the DRC’s claims relating to Uganda’s responsibility for the fighting between Ugandan and Rwandan troops in Kisangani in June 2000.

Uganda submits that “the Court lacks competence to deal with the events in Kisangani in June 2000 in the absence of consent on the part of Rwanda, and, in the alternative, even if competence exists, in order to safeguard the judicial function the Court should not exercise that competence”.

Moreover, according to Uganda, the terms of the Court’s Order of 1 July 2000 indicating provisional measures were without prejudice to issues of fact and imputability; neither did the Order prejudge the question of the jurisdiction of the Court to deal with the merits of the case.

Concerning the events in Kisangani, Uganda maintains that Rwanda’s legal interests form “the very subject-matter” of the decision which the DRC is seeking, and that consequently a decision of the Court covering these events would infringe the “indispensable third party” principle referred to in the cases concerning Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America) (Judgment, I.C.J. Reports 1954, p. 19, and East Timor (Portugal v. Australia) (Judgment, I.C.J. Reports 1995, p. 90). According to Uganda, the circumstances in the present case produce the same type of dilemma faced by the Court in those cases. In particular, Uganda states that “[t]he culpability or otherwise of Uganda, as a consequence of the conduct of its armed forces, can only be assessed on the basis of appropriate legal standards if the conduct of the armed forces of Rwanda is assessed at the same time”. Uganda further argues that, “[i]n the absence of evidence as to the role of Rwanda, it is impossible for the Court to know whether the justification of self-defence is available to Uganda or, in respect of the quantum of damages, how the role of Rwanda is to be taken into account”. Uganda contends that, “[i]f the conflict was provoked by Rwanda, this would materially and directly affect the responsibility of Uganda vis-à-vis the DRC”. Uganda also claims that the necessity to safeguard the judicial function of the Court, as referred to in the case concerning Northern Cameroons (Preliminary Objections, Judgment, I.C.J. Reports 1963, pp. 33-34, 37, 38), would preclude the Court from exercising any jurisdiction it might have in relation to the events that occurred in Kisangani.

The DRC argues that the Court is competent to adjudicate on the events in Kisangani “without having to consider the question of whether it should be Rwanda or Uganda that is held responsible for initiating the hostilities that led to the various clashes”. The DRC refers to the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia) in support of its contention that there is nothing to prevent the Court from “exercising its jurisdiction with regard to a respondent State, even in the absence of other States implicated in the Application”. The DRC argues that the Monetary Gold and East Timor cases, relied on by Uganda to support its arguments, are fundamentally different from the present case. According to the DRC, the application which it filed against Uganda “is entirely autonomous and independent” and does not bear on any separate proceedings instituted by the DRC against other States. The DRC maintains that “[i]t is Uganda’s responsibility which is the subject-matter of the Congolese claim, and there is no other ‘indispensable party’ whose legal interests would form ‘the very subject-matter of the decision’, as in the Monetary Gold or East Timor precedents”.

The DRC points out that the Court, in its Order of 1 July 2000 indicating provisional measures, “refused to accept Uganda’s reasoning and agreed to indicate certain measures specifically relating to the events in Kisangani despite the absence of Rwanda from the proceedings”.

In light of the above considerations, the DRC argues that Uganda’s objection must be rejected.

The Court has had to examine questions of this kind on previous
occasions. In the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), the Court observed that it is not precluded from adjudicating upon the claims submitted to it in a case in which a third State “has an interest of a legal nature which may be affected by the decision in the case”, provided that “the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for”. The Court further noted that:

“In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru’s Application and the situation is in that respect different from that with which the Court had to deal in the Monetary Gold case. In the latter case, the determination of Albania’s responsibility was a prerequisite for a decision to be taken on Italy’s claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru’s claim. In the Monetary Gold case the link between, on the one hand, the necessary findings regarding, Albania’s alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical . . .

In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court’s decision on Nauru’s claims against Australia. Accordingly the Court cannot decline to exercise its jurisdiction.” (Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 261-262, para. 55.)

204. The Court considers that this jurisprudence is applicable in the current proceedings. In the present case, the interests of Rwanda clearly do not constitute “the very subject-matter” of the decision to be rendered by the Court on the DRC’s claims against Uganda, nor is the determination of Rwanda’s responsibility a prerequisite for such a decision. The fact that some alleged violations of international human rights law and international humanitarian law by Uganda occurred in the course of hostilities between Uganda and Rwanda does not impinge on this finding. Thus it is not necessary for Rwanda to be a party to this case for the Court to be able to determine whether Uganda’s conduct was a violation of these rules of international law.

* * *
208. The Court further finds that there is sufficient evidence of a reliable quality to support the DRC’s allegation that the UPDF failed to protect the civilian population and to distinguish between combatants and non-combatants in the course of fighting against other troops, especially the FAR. According to the report of the inter-agency assessment mission to Kisangani (established pursuant to paragraph 14 of Security Council resolution 1304 (2000) (doc. S/2000/1153 of 4 December 2000, paras. 15-16)), the armed conflict between Ugandan and Rwandan forces in Kisangani led to

“fighting spreading into residential areas and indiscriminate shelling occurring for 6 days . . .
Over 760 civilians were killed, and an estimated 1,700 wounded. More than 4,000 houses were partially damaged, destroyed or made uninhabitable. Sixty-nine schools were shelled, and other public buildings were badly damaged. Medical facilities and the cathedral were also damaged during the shelling, and 65,000 residents were forced to flee the fighting and seek refuge in nearby forests.”

MONUC’s special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, para. 73) states that on 6 and 7 March 2003,

“during and after fighting between UPC [Union des patriotes congolais] and UPDF in Bunia, several civilians were killed, houses and shops were looted and civilians were wounded by gunshots . . . Stray bullets reportedly killed several civilians; others had their houses shelled.” (Para. 73.)

In this context, the Court notes that indiscriminate shelling is in itself a grave violation of humanitarian law.

209. The Court considers that there is also persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district. The reports of the Special Rapporteur of the Commission on Human Rights (doc. A/55/403 of 20 September 2000, para. 26 and E/CN.4/2001/40 of 1 February 2001, para. 31) state that the Ugandan presence in Ituri caused a conflict between the Hema (of Ugandan origin) and the Lendu. According to these reports, land was seized from the Lendu by the Hema with the encouragement and military support of Ugandan soldiers. The reports also state that the confrontations in August 2000 resulted in some 10,000 deaths and the displacement of some 50,000 people, and that since the beginning of the conflict the UPDF had failed to take action to put an end to the violence. The Sixth Report of the Secretary-General on MONUC (doc. S/2001/128 of 12 February 2001, para. 56) stated that “UPDF troops stood by during the killings and failed to protect the civilians”. It is also indicated in MONUC’s special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, para. 6), that

“Ugandan army commanders already present in Ituri, instead of trying to calm the situation, preferred to benefit from the situation and support alternately one side or the other according to their political and financial interests”.

The above reports are consistent in the presentation of facts, support each other and are corroborated by other credible sources, such as the HRW Report “Ituri: Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo”, July 2003 (available at http://hrw.org/reports/2003/ituri0703/).

210. The Court finds that there is convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF’s failure to prevent the recruitment of child soldiers in areas under its control. The Fifth Report of the Secretary-General on MONUC (doc. S/2000/1156 of 6 December 2000, para. 75) refers to the confirmed “cross-border deportation of recruited Congolese children from the Bunia, Beni and Butembo region to Uganda”. The Eleventh Report of the Secretary-General on MONUC (doc. S/2002/621 of 5 June 2002, para. 47) points out that the local UPDF authorities in and around Bunia in Ituri district “have failed to prevent the fresh recruitment or re-recruitment of children” as child soldiers. MONUC’s special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, para. 148) refers to several incidents where Congolese children were transferred to UPDF training camps for military training.

211. Having examined the case file, the Court considers that it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.

212. With regard to the claim by the DRC that Uganda carried out a
deliberate policy of terror, confirmed in its view by the almost total impu-
tinity of the soldiers and officers responsible for the alleged atrocities com-
mitted on the territory of the DRC, the Court, in the absence of specific
evidence supporting this claim, does not consider that this allegation has
been proven. The Court, however, wishes to stress that the civil war and
foreign military intervention in the DRC created a general atmosphere of
terror pervading the lives of the Congolese people.

* * *

213. The Court turns now to the question as to whether acts and omis-
sions of the UPDF and its officers and soldiers are attributable to
Uganda. The conduct of the UPDF as a whole is clearly attributable to
Uganda, being the conduct of a State organ. According to a well-estab-
lished rule of international law, which is of customary character, “the
conduct of any organ of a State must be regarded as an act of that State”
(Difference Relating to Immunity from Legal Process of a Special Rap-
porteur of the Commission on Human Rights, Advisory Opinion, I.C.J.
Reports 1999 (I), p. 87, para. 62). The conduct of individual soldiers and
officers of the UPDF is to be considered as the conduct of a State organ.
In the Court’s view, by virtue of the military status and function of
Ugandan soldiers in the DRC, their conduct is attributable to Uganda.
The contention that the persons concerned did not act in the capacity of
persons exercising governmental authority in the particular circumstances,
is therefore without merit.

214. It is furthermore irrelevant for the attribution of their conduct to
Uganda whether the UPDF personnel acted contrary to the instructions
given or exceeded their authority. According to a well-established rule of
a customary nature, as reflected in Article 3 of the Fourth Hague Con-
vention respecting the Laws and Customs of War on Land of 1907 as
well as in Article 91 of Protocol I additional to the Geneva Conventions
of 1949, a party to an armed conflict shall be responsible for all acts by
persons forming part of its armed forces.

* * *

215. The Court, having established that the conduct of the UPDF and
of the officers and soldiers of the UPDF is attributable to Uganda, must
now examine whether this conduct constitutes a breach of Uganda’s
international obligations. In this regard, the Court needs to determine
the rules and principles of international human rights law and international
humanitarian law which are relevant for this purpose.

216. The Court first recalls that it had occasion to address the issues of
the relationship between international humanitarian law and interna-
tional human rights law and of the applicability of international human
rights law instruments outside national territory in its Advisory Opinion
of 9 July 2004 on the Legal Consequences of the Construction of a Wall
in the Occupied Palestinian Territory. In this Advisory Opinion the
Court found that

“the protection offered by human rights conventions does not cease
in case of armed conflict, save through the effect of provisions for
derogation of the kind to be found in Article 4 of the International
Covenant on Civil and Political Rights. As regards the relationship
between international humanitarian law and human rights law, there
are thus three possible situations: some rights may be exclusively
matters of international humanitarian law; others may be exclu-
sively matters of human rights law; yet others may be matters of
both these branches of international law.” (I.C.J. Reports 2004,
p. 178, para. 106.)

It thus concluded that both branches of international law, namely inter-
national human rights law and international humanitarian law, would
have to be taken into consideration. The Court further concluded that
international human rights instruments are applicable “in respect of acts
done by a State in the exercise of its jurisdiction outside its own terri-
tery”, particularly in occupied territories (ibid., pp. 178-181, paras. 107-
113).

217. The Court considers that the following instruments in the fields of
international humanitarian law and international human rights law are
applicable, as relevant, in the present case:

— Regulations Respecting the Laws and Customs of War on Land
annexed to the Fourth Hague Convention of 18 October 1907.
Neither the DRC nor Uganda are parties to the Convention. How-
ever, the Court reiterates that “the provisions of the Hague Regula-
tions have become part of customary law” (Legal Consequences
of the Construction of a Wall in the Occupied Palestinian Territory,
Advisory Opinion, I.C.J. Reports 2004, p. 172, para. 89) and as
such are binding on both Parties;

— Fourth Geneva Convention relative to the Protection of Civilian
Persons in Time of War of 12 August 1949. The DRC’s (at the
time Republic of the Congo (Léopoldville)) notification of success-
dated 20 February 1961 was deposited on 24 February 1961, with
retroactive effect as from 30 June 1960, the date on which the DRC
became independent; Uganda acceded on 18 May 1964;

— International Covenant on Civil and Political Rights of 19 December
1966. The DRC (at the time Republic of Zaire) acceded to the
Covenant on 1 November 1976; Uganda acceded on 21 June 1995;

— Protocol Additional to the Geneva Conventions of 12 August 1949,
and relating to the Protection of Victims of International Armed
Conflicts (Protocol I), 8 June 1977. The DRC (at the time Republic of

Zaire) acceded to the Protocol on 3 June 1982; Uganda acceded on 13 March 1991;

218. The Court moreover emphasizes that, under common Article 2 of the four Geneva Conventions of 12 August 1949,

"[i]n addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

219. In view of the foregoing, the Court finds that the acts committed by the UPDF and officers and soldiers of the UPDF (see paragraphs 206-211 above) are in clear violation of the obligations under the Hague Regulations of 1907, Articles 25, 27 and 28, as well as Articles 43, 46 and 47 with regard to obligations of an occupying Power. These obligations are binding on the Parties as customary international law. Uganda also violated the following provisions of the international humanitarian law and international human rights law instruments, to which both Uganda and the DRC are parties:

— Fourth Geneva Convention, Articles 27 and 32 as well as Article 53 with regard to obligations of an occupying Power;
— International Covenant on Civil and Political Rights, Articles 6, paragraph 1, and 7;
— First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2;
— African Charter on Human and Peoples' Rights, Articles 4 and 5;
— Convention on the Rights of the Child, Article 38, paragraphs 2 and 3;
— Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, 4, 5 and 6.

The Court finds that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.

221. The Court finally would point out that, while it has pronounced on the violations of international human rights law and international humanitarian law committed by Ugandan military forces on the territory of the DRC, it nonetheless observes that the actions of the various parties in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population. The Court is painfully aware that many atrocities have been committed in the course of the conflict. It is incumbent on all those involved in the conflict to support the peace process in the DRC and other peace processes in the Great Lakes area, in order to ensure respect for human rights in the region.

* * *

**ILLEGAL EXPLOITATION OF NATURAL RESOURCES**

222. In its third submission the DRC requests the Court to adjudge and declare:

"3. That the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources, by pillaging its assets and wealth, by failing to take adequate measures to prevent the illegal exploitation of the resources of the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:

— the applicable rules of international humanitarian law;
— respect for the sovereignty of States, including over their natural resources;
— the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;
— the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters."

223. The DRC alleges that, following the invasion of the DRC by
Uganda in August 1998, the Ugandan troops “illegally occupying” Congolese territory, acting in collaboration with Congolese rebel groups supported by Uganda, systematically looted and exploited the assets and natural resources of the DRC. According to the DRC, the Ugandan military and the rebel groups which it supported “moved on to another phase in the expropriation of the wealth of Congo, by direct exploitation of its resources” for their own benefit. The DRC contends that the Ugandan army took outright control of the entire economic and commercial system in the occupied areas, with almost the entire market in consumer goods being controlled by Ugandan companies and businessmen. The DRC further claims that UDPF forces have engaged in hunting and plundering of protected species. The DRC charges that the Ugandan authorities did nothing to put an end to these activities and indeed encouraged the UPDF, Ugandan companies and rebel groups supported by Uganda to exploit natural resources on Congolese territory.

224. The DRC maintains that the highest Ugandan authorities, including President Museveni, were aware of the UPDF forces’ involvement in the plundering and illegal exploitation of the natural resources of the DRC. Moreover, the DRC asserts that these activities were tacitly supported or even encouraged by the Ugandan authorities, “who saw in them a way of financing the continuation of the war in the DRC, ‘rewarding’ the military involved in this operation and opening up new markets to Ugandan companies”.

225. The DRC claims that the illegal exploitation, plundering and looting of the DRC’s natural resources by Uganda have been confirmed in a consistent manner by a variety of independent sources, among them the Porter Commission Report, the United Nations Panel reports and reports of national organs and non-governmental organizations. According to the DRC, the facts which it alleges are also corroborated by the economic data analysed in various reports by independent experts.

226. The DRC contends that illegal exploitation, plundering and looting of the DRC’s natural resources constitute violations by Uganda of “the sovereignty and territorial integrity of the DRC, more specifically of the DRC’s sovereignty over its natural resources”. In this regard the DRC refers to the right of States to their natural resources and cites General Assembly resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, adopted on 14 December 1962; the Declaration on the Establishment of a New International Economic Order contained in United Nations General Assembly resolution 3201 (S.VI) of 1 May 1974 and the Charter of Economic Rights and Duties of States, adopted by the United Nations General Assembly in its resolution 3281 (XXIX) of 12 December 1974.

227. The DRC claims that Uganda in all circumstances is responsible for acts of plunder and illegal exploitation of the resources of the DRC committed by officers and soldiers of the UPDF as an organ of the Republic of Uganda. For the DRC it is not relevant whether members of the Ugandan army acted under, or contrary to, official orders from their Government or in an official or private capacity.

228. Turning to the duty of vigilance, the DRC argues that, in relation to the obligation to respect the sovereignty of States over their natural resources, this duty implies that a State should take adequate measures to ensure that its military forces, nationals or groups that it controls do not engage in illegal exploitation of natural resources on the territory of another State. The DRC claims that all activities involving exploitation of natural resources conducted by Ugandan companies and nationals and rebel movements supported by Uganda were acts of illegal exploitation. The DRC further contends that Uganda took no proper steps to bring to an end the illegal exploitation of the natural resources of the DRC by members of Ugandan military, private companies or nationals and by the Congolese rebel movements that it controlled and supported, thus violating its duty of vigilance.

229. The DRC asserts that, by engaging in the illegal exploitation, plundering and looting of the DRC’s natural resources, Uganda also violated its obligations as an occupying Power under the jus in bello. According to the DRC, “the detailed rules of the law of armed conflict in relation to the exploitation of natural resources have to be considered against the background of this fundamental principle of permanent sovereignty over natural resources”. This principle, in the view of the DRC, continues to apply at all times, including during armed conflict and occupation.

230. For its part, Uganda maintains that the DRC has not provided reliable evidence to corroborate its allegations regarding the looting and illegal exploitation of natural resources of the DRC by Uganda. It claims that neither the United Nations Panel reports nor the Porter Commission Report can be considered as supporting the DRC’s allegations. Moreover, according to Uganda, the limited nature of its intervention is inconsistent with the DRC’s contention that Uganda occupied the eastern Congo in order to exploit natural resources. Nor, in view of this fact, could Uganda exercise the pervasive economic control required to exploit the areas as alleged by the DRC.

231. Uganda further denies that it has violated the principle of the Congolese people’s sovereignty over its natural resources. It maintains that this principle, “which was shaped in a precise historical context (that of decolonization) and has a very precise purpose”, cannot be applicable in the context of the present case. Uganda claims that individual acts of
members of the Ugandan military forces committed in their private capacity and in violation of orders and instructions cannot serve as basis for attributing to Uganda a wrongful act violating the principle of the permanent sovereignty of Congolese people over their natural resources.

232. Uganda likewise denies that it violated its duty of vigilance with regard to acts of illegal exploitation in the territories where its troops were present. Uganda does not agree with the contention that it had a duty of vigilance with regard to the Congolese rebel groups, asserting that it did not control those groups and had no power over their administrative acts. Uganda also maintains that, “within the limits of its capabilities, it exercised a high degree of vigilance to ensure that its nationals did not, through their actions, infringe the Congolese people’s right to control their natural resources”.

233. Uganda also contests the view that the alleged breach of its “duty of vigilance” is founded on Uganda’s failure to prohibit trade “between its nationals and the territories controlled by the rebels in eastern Congo”. In Uganda’s view, the de facto authority of Congolese rebel movements established in eastern Congo could not affect the commercial relations between the eastern Congo, Uganda and several other States, which were maintained in the interests of the local populations and essential to the populations’ survival, and therefore “did not impose an obligation to apply commercial sanctions”.

234. Uganda states that the DRC’s contentions that Uganda failed to take action against illegal activity are without merit. In this regard it refers to a radio broadcast by President Museveni in December 1998, which made “it clear that no involvement of the members of the Ugandan armed forces in commercial activities in eastern Congo would be tolerated”. Furthermore, Uganda points out that “the Porter Commission found that there was no Ugandan governmental policy to exploit the DRC’s natural resources”. It maintains that the Porter Commission confirmed that the Ugandan Government’s policy was to forbid its officers and soldiers from engaging in any business or commercial activities in the DRC. However, in cases where the Porter Commission found that there was evidence to support allegations that individual soldiers engaged in commercial activities and looting “acting in a purely private capacity for their personal enrichment”, the Government of Uganda accepted the Commission’s recommendations to initiate criminal investigations against the alleged offenders.

235. Uganda recognizes that, as found by the Porter Commission, there were instances of illegal commercial activities or looting committed by certain members of the Ugandan military forces acting in their private capacity and in violation of orders and instructions given to them “by the highest State authorities”. However, Uganda maintains that these individual acts cannot be characterized as “internationally wrongful acts” of

Uganda. For Uganda, violations by Ugandan nationals of the internal law of Uganda or of certain Congolese rules and practices in the territories where rebels exercised de facto administrative authority, referred to by the Porter Commission, do not necessarily constitute an internationally wrongful act, “for it is well known that the originating act giving rise to international responsibility is not an act characterized as ‘illegal’ by the domestic law of the State but an ‘internationally wrongful act’ imputable to a State”.

236. Finally, Uganda asserts that the DRC neither specified precisely the wrongful acts for which it seeks to hold Uganda internationally responsible nor did it demonstrate that “it suffered direct injury as a result of acts which it seeks to impute to Uganda”. In this regard Uganda refers to the Porter Commission, which, according to Uganda, concluded that “the overwhelming majority, if not all, of the allegations concerning the exploitation of the DRC’s forest and agricultural resources by Uganda or by Ugandan soldiers”, were not proven; that several allegations of looting were also unfounded; and that Uganda “had at no time intended to exploit the natural resources of the DRC or to use those resources to ‘finance the war’ and that it did not do so”.

* * *

FINDINGS OF THE COURT CONCERNING ACTS OF ILLEGAL EXPLOITATION OF NATURAL RESOURCES

237. The Court observes that in order to substantiate its allegations the DRC refers to the United Nations Panel reports and to the Porter Commission Report. The Court has already expressed its view with regard to the evidentiary value of the Porter Commission materials in general (see paragraph 61 above) and considers that both the Porter Commission Report, as well as the United Nations Panel reports, to the extent that they have later proved to be probative, furnish sufficient and convincing evidence for it to determine whether or not Uganda engaged in acts of looting, plundering and illegal exploitation of the DRC’s natural resources. Taking this into account, in order to rule on the third submission of the DRC, the Court will draw its conclusions on the basis of the evidence it finds reliable.

In reaching its decision on the DRC’s claim, it is not necessary for the Court to make findings of fact with regard to each individual incident alleged.

238. According to the Porter Commission Report, the written message sent by General Kazini in response to the radio message broadcast by the Ugandan President in December 1998 demonstrated that the General was aware of problems of conduct of some UPDF officers, that he did not take any “real action until the matter became public” and that he did
not inform the President. The Commission further states that it follows from General Kazini’s message that he, in point of fact, admitted that the allegation that “some top officers in the UPDF were planning from the beginning to do business in Congo was generally true”; “that Commanders in business partnership with Ugandans were trading in the DRC, about which General Kazini took no action”; and that Ugandan “military aircraft were carrying Congolese businessmen into Entebbe, and carrying items which they bought in Kampala back to the Congo”. The Commission noted that, while certain orders directed against the use of military aircraft by businessmen were made by General Kazini, that practice nonetheless continued. The Commission also referred to a radio message of General Kazini in which he said that “officers in the Colonel Peter Kerim sector, Bunia and based at Kisangani Airport were engaging in business contrary to the presidential radio message”. The Commission further stated that General Kazini was aware that officers and men of the UPDF were involved in gold mining and trade, smuggling and looting of civilians.

239. The Commission noted that General Kazini’s radio messages in response to the reports about misconduct of the UPDF did not intend, in point of fact, to control this misconduct. It stated as follows:

“There is no doubt that his purpose in producing these messages was to try to show that he was taking action in respect of these problems . . . . There appears to have been little or no action taken as a result of these messages . . . all this correspondence was intended by General Kazini to cover himself, rather than to prompt action. There also appears to be little or no follow up to the orders given.”

240. The Commission found that General Kazini was “an active supporter in the Democratic Republic of the Congo of Victoria, an organization engaged in smuggling diamonds through Uganda: and it is difficult to believe that he was not profiting for himself from the operation”. The Commission explained that the company referred to as “Victoria” in its Report dealt “in diamonds, gold and coffee which it purchased from Isiro, Bunia, Bumba, Bondo, Buta and Kisangani” and that it paid taxes to the MLC.

241. The Commission further recognized that there had been exploitation of the natural resources of the DRC since 1998, and indeed from before that. This exploitation had been carried out, inter alia, by senior army officers working on their own and through contacts inside the DRC; by individual soldiers taking advantage of their postings; by cross-border trade and by private individuals living within Uganda. There were instances of looting, “about which General Kazini clearly knew as he sent a radio message about it. This Commission is unable to exclude the possibility that individual soldiers of the UPDF were involved, or that they were supported by senior officers.” The Commission’s investigations “reveal that there is no doubt that both RCD and UPDF soldiers were imposing a gold tax, and that it is very likely that UPDF soldiers were involved in at least one mining accident”.

242. Having examined the case file, the Court finds that it does not have at its disposal credible evidence to prove that there was a government policy of Uganda directed at the exploitation of natural resources of the DRC or that Uganda’s military intervention was carried out in order to obtain access to Congolese resources. At the same time, the Court considers that it has ample credible and persuasive evidence to conclude that officers and soldiers of the UPDF, including the most high-ranking officers, were involved in the looting, plundering and exploitation of the DRC’s natural resources and that the military authorities did not take any measures to put an end to these acts. (Such acts are referred to in a number of paragraphs in the Porter Commission Report, in particular, paragraphs 13.1. “UPDF Officers conducting business”, 13.2. “Gold Mining”, 13.4. “Looting”, 13.5. “Smuggling”, 14.4. “Allegations against top UPDF Officers”, 14.5. “Allegations against General Kazini”, 15.7. “Organised Looting”, 20.3. “General James Kazini” and 21.3.4. “The Diamond Link: General Kazini”.)

243. As the Court has already noted (see paragraph 213 above), Uganda is responsible both for the conduct of the UPDF as a whole and for the conduct of individual soldiers and officers of the UPDF in the DRC. The Court further recalls (see paragraph 214 above) that it is also irrelevant for the purposes of attributing their conduct to Uganda whether UPDF officers and soldiers acted contrary to instructions given or exceeded their authority. Thus the Court must now examine whether acts of looting, plundering and exploitation of the DRC’s natural resources by officers and soldiers of the UPDF and the failure of the Ugandan authorities to take adequate measures to ensure that such acts were not committed constitute a breach of Uganda’s international obligations.

244. The Court finds that it cannot uphold the contention of the DRC that Uganda violated the principle of the DRC’s sovereignty over its natural resources (see paragraph 226 above). The Court recalls that the principle of permanent sovereignty over natural resources is expressed in General Assembly resolution 1803 (XVII) of 14 December 1962 and further elaborated in the Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S.VI) of 1 May 1974) and the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974). While recognizing the importance of this principle, which is a principle of customary international law, the Court notes that there is nothing in these General Assembly resolutions which suggests that they are applicable to
247. As for the claim that Uganda also failed to prevent the looting, plundering and illegal exploitation of the DRC's natural resources by rebel groups, the Court has already found that the latter were not under the control of Uganda (see paragraph 160 above). Thus, with regard to the illegal activities of such groups outside of Ituri, it cannot conclude that Uganda was in breach of its duty of vigilance.

248. The Court further observes that the fact that Uganda was the occupying Power in the district (see paragraph 178 above) does not change the obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources of the occupied territory to cover private military forces. It is apparent from various findings of the Porter Commission that Uganda's military forces committed such activities (see paragraph 240 above). In particular the Report indicates that "General Kazini gave specific instructions to UPDF commanders in the occupied territories, including Victoria Group, 20/3. "General James Kazini" and "The Diamond Link".)

249. Thus the Court finds that it has been proven that Uganda has not complied with its obligations as an occupying Power in Ituri. The Court would add that Uganda's argument, that any benefit of the local population, as permitted under humanitarian law, is not supported by any reliable evidence.

250. The Court concludes that it is in possession of sufficient credible evidence to find that Uganda is internationally responsible for acts of looting, plundering and exploitation of natural resources in the occupied territory.

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LEGAL CONSEQUENCES OF VIOLATIONS OF INTERNATIONAL OBLIGATIONS BY UGANDA

251. The Court, having established that Uganda committed internationally wrongful acts entailing its international responsibility (see paragraphs 165, 220 and 250 above), turns now to the determination of the legal consequences which such responsibility involves.

252. In its fourth submission the DRC requests the Court to adjudge and declare:

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4. (a) .......................................................... ;
(b) that the Republic of Uganda shall cease forthwith all continuing internationally wrongful acts, and in particular its support for irregular forces operating in the DRC and its exploitation of Congolese wealth and natural resources;
(c) that the Republic of Uganda shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of;
(d) that the Republic of Uganda is under an obligation to the Democratic Republic of the Congo to make reparation for all injury caused to the latter by the violation of the obligations imposed by international law and set out in submissions 1, 2 and 3 above;
(e) that the nature, form and amount of the reparation shall be determined by the Court, failing agreement thereon between the Parties, and that the Court shall reserve the subsequent procedure for that purpose.
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253. The DRC claims that, as the first legal consequence of the establishment of Uganda’s international responsibility, the latter is under an obligation to cease forthwith all continuing internationally wrongful acts. According to the DRC’s Memorial, this obligation of cessation covers, in particular, the occupation of Congolese territory, the support for irregular forces operating in the DRC, the unlawful detention of Congolese nationals and the exploitation of Congolese wealth and natural resources. In its Reply the DRC refers to the occupation of Congolese territory, the support for irregular forces operating in the DRC and the exploitation of Congolese wealth and natural resources. In its final submission presented at the end of the oral proceedings, the DRC, in view of the withdrawal of Ugandan troops from the territory of the DRC, asks that Uganda cease from providing support for irregular forces operating in the DRC and cease from exploiting Congolese wealth and natural resources.

254. In answer to the question by Judge Vereshchetin (see paragraph 22 above), the DRC explained that, while its claims relating to the occupation of the territory of the DRC covered the period from 6 August 1998 to 2 June 2003, other claims including those of new military actions, new acts of support to irregular forces, as well as continuing illegal exploitation of natural resources, covered the period from 2 August 1998 until the end of the oral proceedings. The Court notes, however, that it has not been presented with evidence to support allegations with regard to the period after 2 June 2003.

In particular, the Court observes that there is no evidence in the case file which can corroborate the DRC’s allegation that at present Uganda supports irregular forces operating in the DRC and continues to be involved in the exploitation of Congolese natural resources. Thus, the Court does not find it established that Uganda, following the withdrawal of its troops from the territory of the DRC in June 2003, continues to commit the internationally wrongful acts specified by the DRC. The Court thus concludes that the DRC’s request that Uganda be called upon to cease the acts referred to in its submission 4(b) cannot be upheld.

* *

255. The DRC further requests the Court to rule that Uganda provide specific guarantees and assurances of non-repetition of the wrongful acts complained of. The DRC claims that this request is justified by “the threats which accompanied the troop withdrawal in May 2003”. In this regard it alleges that in April 2003 Mr. James Wapakhabulo, the then Minister for Foreign Affairs of Uganda, made a statement “according to which ‘the withdrawal of our troops from the Democratic Republic of the Congo does not mean that we will not return there to defend our security!’ ”. As to the form of the guarantees and assurances of non-repetition, the DRC, referring to existing international practice, requests from Uganda “a solemn declaration that it will in future refrain from pursuing a policy that violates the sovereignty of the Democratic Republic of the Congo and the rights of its population”; in addition, it “demands that specific instructions to that effect be given by the Ugandan authorities to their agents”.

* *

256. In this respect the Court has taken judicial notice of the Tripartite Agreement on Regional Security in the Great Lakes, signed on 26 October 2004 by the DRC, Rwanda and Uganda. In the Preamble of this Agreement the Parties emphasize “the need to ensure that the principles of good neighbourliness, respect for the sovereignty, territorial integrity, and non-interference in the internal affairs of sovereign states are
respected, particularly in the region”. Article I indicates that one of the objectives of the Agreement is to “enshrine respect for the sovereignty and territorial integrity of the countries in the region and cessation of any support for armed groups or militias, in accordance with relevant resolutions of the United Nations and other rules of international law”. Finally, in paragraph 1 of Article II, “[t]he Parties reiterate their commitment to fulfill their obligations and undertakings under existing agreements and the relevant resolutions of the United Nations Security Council”. The Parties further agreed to establish a Tripartite Joint Commission, which, inter alia, “shall implement the terms of this Agreement and ensure that the objectives of this Agreement are being met”.

257. The Court considers that, if a State assumes an obligation in an international agreement to respect the sovereignty and territorial integrity of the other States parties to that agreement (an obligation which exists also under general international law) and a commitment to cooperate with them in order to fulfill such obligation, this expresses a clear legally binding undertaking that it will not repeat any wrongful acts. In the Court’s view, the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC’s request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law.

258. The DRC also asks the Court to adjudge and declare that Uganda is under an obligation to make reparation to the DRC for all injury caused by the violation of its obligations under international law. The DRC contends that the internationally wrongful acts attributable to Uganda which engaged the latter’s international responsibilities, namely “years of invasion, occupation, fundamental human rights violations and plundering of natural resources”, caused “massive war damage” and therefore entail an obligation to make reparation. The DRC acknowledges that “for the purposes of determining the extent of reparation it must specify the nature of the injury and establish the causal link with the initial wrongful act”. However, at this stage of the proceedings the DRC requests a general declaration by the Court establishing the principle that reparation is due, with the determination of the exact amount of the damages and the nature, form and amount of the reparation, failing agreement between the Parties, being deferred until a later stage in the proceedings. The DRC points out that such a procedure is “in accordance with existing international jurisprudence” and refers, in particular, to the Court’s Judgment on the merits in the case concerning

259. The Court observes that it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act (see Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21; Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 81, para. 152; Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 59, para. 119). Upon examination of the case file, given the character of the internationally wrongful acts for which Uganda has been found responsible (illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and of international humanitarian law, looting, plunder and exploitation of the DRC’s natural resources), the Court considers that those acts resulted in injury to the DRC and to persons on its territory. Having satisfied itself that this injury was caused to the DRC by Uganda, the Court finds that Uganda has an obligation to make reparation accordingly.

260. The Court further considers appropriate the request of the DRC for the nature, form and amount of the reparation due to it to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings. The DRC would thus be given the opportunity to demonstrate and prove the exact injury that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts for which it is responsible. It goes without saying, however, as the Court has had the opportunity to state in the past, “that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become res judicata” (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 143, para. 284).

261. The Court also notes that the DRC has stated its intention to seek initially to resolve the issue of reparation by way of direct negotiations with Uganda and to submit the question to the Court only “failing agreement thereon between the parties”. It is not for the Court to determine the final result of these negotiations to be conducted by the Parties. In such negotiations, the Parties should seek in good faith an agreed solution based on the findings of the present Judgment.
COMPLIANCE WITH THE COURT’S ORDER ON PROVISIONAL MEASURES

262. In its fifth submission the DRC requests the Court to adjudge and declare

“5. That the Republic of Uganda has violated the Order of the Court on provisional measures of 1 July 2000, in that it has failed to comply with the following provisional measures:

“(1) both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

(2) both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000;

(3) both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.”

263. The Court observes that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109). The Court recalls that the purpose of provisional measures is to protect the rights of either party, pending the determination of the merits of the case. The Court’s Order of 1 July 2000 on provisional measures created legal obligations which both Parties were required to comply with.

264. With regard to the question whether Uganda has complied with the obligations incumbent upon it as a result of the Order of 1 July 2000, the Court observes that the Order indicated three provisional measures, as referred to in the DRC’s fifth submission. The Court notes that the DRC put forward no specific evidence demonstrating that after July 2000 Uganda committed acts in violation of each of the three provisional measures indicated by the Court. The Court however observes that in the present Judgment it has found that Uganda is responsible for acts in violation of international human rights law and international humanitarian law carried out by its military forces in the territory of the DRC (see paragraph 220 above). The evidence shows that such violations were committed throughout the period when Ugandan troops were present in the DRC, including the period from 1 July 2000 until practically their final withdrawal on 2 June 2003 (see paragraphs 206-211 above). The Court thus concludes that Uganda did not comply with the Court’s Order on provisional measures of 1 July 2000.

265. The Court further notes that the provisional measures indicated in the Order of 1 July 2000 were addressed to both Parties. The Court’s finding in paragraph 264 is without prejudice to the question as to whether the DRC did not also fail to comply with the provisional measures indicated by the Court.

* * *

COUNTER-CLAIMS: ADMISSIBILITY OF OBJECTIONS

266. It is recalled that, in its Counter-Memorial, Uganda submitted three counter-claims (see paragraph 5 above). Uganda’s counter-claims were presented in Chapter XVIII of the Counter-Memorial. Uganda’s first counter-claim related to acts of aggression allegedly committed by the DRC against Uganda. Uganda contended that the DRC had acted in violation of the principle of the non-use of force incorporated in Article 2, paragraph 4, of the United Nations Charter and found in customary international law, and of the principle of non-intervention in matters within the domestic jurisdiction of States. Uganda’s second counter-claim related to attacks on Ugandan diplomatic premises and personnel in Kinshasa, and on Ugandan nationals, for which the DRC is alleged to be responsible. Uganda contended that the acts of the DRC amounted to an illegal use of force, and were in breach of certain rules of conventional or customary international law relating to the protection of persons and property. Uganda’s third counter-claim related to alleged violations by the DRC of specific provisions of the Lusaka Agreement. Uganda also requested that the Court reserve the issue of reparation in relation to the counter-claims for a subsequent stage of the proceedings (see Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001, p. 664, para. 4).

267. By an Order of 29 November 2001 the Court found, with regard to the first and second counter-claims, that the Parties’ respective claims in both cases related to facts of the same nature and formed part of the same factual complex, and that the Parties were moreover pursuing the same legal aims. The Court accordingly concluded that these two
counter-claims were admissible as such (I.C.J. Reports 2001, pp. 678-682, paras. 38-41, 45 and 51). By contrast, the Court found that Uganda's third counter-claim was inadmissible as such, since it was not directly connected with the subject-matter of the counter-claims. 271. The Court notes that in the *Oil Platforms* case it was called upon to resolve the same issue now raised by Uganda. In that case, the Court had previously been found admissible under Article 80 of the Rules (Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 210, para. 105). Discussing prior Order 272. There is nothing in the facts of the present case that compels a different conclusion. On the contrary, the language of the Court's Order of 29 November 2001 clearly calls for the same outcome as the Court reached in the *Oil Platforms* case. After finding the first and second counter-claim admissible under the Article 29 November 2001 connection given on the admissibility of a counter-claim taking account of the requirements with which the Court would have to deal during the remainder of the proceedings (Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001, p. 681, para. 49). 273. The enquiry under Article 80 as to admissibility is only in regard to the manner in which the counter-claim is directly connected with the subject-matter of the principal claim. It is not an overarching test of admissibility. Thus the Court, in its Order of 29 November 2001, intended only to settle the question of a 'direct connection' within the meaning to Article 80. At that point in time it had before it only an objection to the admissibility of the counter-claim. Article 80 of the Rules of Court on which is requested before any further proceedings. 274. With regard to Uganda's contention that the preliminary objections of the DRC are inadmissible because they failed to conform to Article 79 of the Rules of Court, the Court would observe to the jurisdiction of the Court in the case of an object of Article 79 concerns the admissibility of the counter-claim. The Court only ruled in its Order of 29 November 2001 that a decision given on the admissibility of the counter-claim is not an only question which might arise with respect of it (emphasis in the original). The DRC is the only one in the first written pleading following both the admissibility of the counter-claim, with the subject-matter of the counter-claims. ...
the merits”. It is inapplicable to the case of an objection to counter-claims which have been joined to the original proceedings. The Court notes that nonetheless, the DRC raised objections to the counter-claims in its Reply, i.e., the first pleading following the submission of Uganda’s Counter-Memorial containing its counter-claims.

275. In light of the findings above, the Court concludes that the DRC is still entitled, at this stage of the proceedings, to challenge the admissibility of Uganda’s counter-claims.

FIRST COUNTER-CLAIM

276. In its first counter-claim, Uganda contends that, since 1994, it has been the victim of military operations and other destabilizing activities carried out by hostile armed groups based in the DRC (which between 1971 and 1997 was called Zaire) and either supported or tolerated by successive Congolese governments. Uganda asserts that elements of these anti-Ugandan armed groups were supported by the Sudan and fought in co-operation with the Sudanese and Congolese armed forces. Uganda further claims that the DRC cultivated its military alliance with the Government of the Sudan, pursuant to which the Sudanese army occupied airfields in north-eastern Congo for the purpose of delivering arms, supplies and troops to the anti-Ugandan rebels.

277. Uganda maintains that actions taken in support of the anti-Ugandan insurgents on the part of the Congolese authorities constitute a violation of the general rule forbidding the use of armed force in international relations, as well as a violation of the principle of non-intervention in the internal affairs of a State. Uganda recalls in particular that in the Corfu Channel case, the International Court of Justice pointed out that “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” is a “general and well-recognized principle” (I.C.J. Reports 1949, pp. 22-23). In Uganda’s view, from this principle there flows not only a duty to refrain from providing any support to groups carrying out subversive or terrorist activities against another State, but also a duty of vigilance to ensure that such activities are not tolerated. In the present case, Uganda contends that “the DRC not only tolerated the anti-Ugandan rebels, but also supported them very effectively in various ways, before simply incorporating some of them into its armed forces”.

278. In the context of the DRC’s alleged involvement in supporting anti-Ugandan irregular forces from May 1997 to August 1998, Uganda contends that it is not necessary to prove the involvement of the DRC in each attack; it suffices to prove that “President Kabila and his government were co-ordinating closely with the anti-Ugandan rebels prior to August 1998”.

279. According to Uganda, the DRC’s support for anti-Ugandan armed irregular forces cannot be justified as a form of self-defence in response to the alleged armed aggression by Uganda, since the DRC’s military alliances with the rebel groups and the Sudan and their activities preceded Uganda’s decision of 11 September 1998 to send its troops into the DRC (see paragraphs 37, 39 and 121 above).

280. In rebutting Uganda’s first counter-claim, the DRC divides it into three periods of time, corresponding to distinct factual and legal situations: (a) the period prior to President Laurent-Désiré Kabila coming to power; (b) the period starting from the accession to power of President Kabila until 2 August 1998, the date on which Uganda’s military attack was launched; and (c) the period subsequent to 2 August 1998. It submits that, in so far as the alleged claim that the DRC was involved in armed attacks against Uganda covers the first period, it is inadmissible and, in the alternative, groundless. It further asserts that the claim has no basis in fact for the second period and that it is not founded in fact or in law regarding the third period.

281. With regard to the first period, before President Kabila came to power in May 1997, the DRC contends that the Ugandan counter-claim is inadmissible on the basis that Uganda renounced its right to invoke the international responsibility of the DRC (Zaire at the time) in respect of acts dating back to that period. In particular, the DRC contends that “Uganda never expressly imputed international responsibility to Zaire” and did not “express any intention of formally invoking such responsibility”. The DRC further states that the close collaboration between the two States after President Kabila came to power, including in the area of security, justifiably led the Congolese authorities to believe that “Uganda had no intention of resurrecting certain allegations from the period concerned and of seeking to engage the Congo’s international responsibility on that basis”.

282. In the alternative, the DRC claims that the first Ugandan counter-claim in respect of this period is devoid of foundation, since the documents presented in support of Uganda’s contention, “emanating
unilaterally from Uganda, fail to meet the judicial standard of proof” and that Uganda has made no efforts to provide further proof.

283. In any event, the DRC denies having breached any duty of vigilance, during the period when Marshal Mobutu was in power, by having failed to prevent Ugandan rebel groups from using its territory to launch attacks in Uganda. The DRC also denies having provided political and military support to those groups during the period concerned.

284. Regarding the second period, from May 1997 to early August 1998, the DRC reiterates that it has always denied having provided military support for Ugandan rebel groups or having participated in their military operations. According to the DRC, Uganda has failed to demonstrate not only that the rebel groups were its de facto agents, but also that the DRC had planned, prepared or participated in any attack or that the DRC had provided support to Ugandan irregular forces.

285. The DRC further contends that no evidence has been adduced to support the claim that, in early August 1998, the DRC entered into a military alliance with the Sudan. In the view of the DRC, Uganda has failed to provide proof either of the alleged meeting which was said to have taken place between the President of the DRC and the President of the Sudan in May 1998, or of the alleged agreement concluded between the DRC and the Sudan that same month and designed to destabilize Uganda.

286. With regard to the third period, the DRC maintains that the documents presented by Uganda, which were prepared by the Ugandan authorities themselves, are not sufficient to establish that the DRC was involved in any attacks against Uganda after the beginning of August 1998. Likewise, the DRC states that the allegations of general support by the DRC for the anti-Ugandan rebels cannot be substantiated by the documents submitted by Uganda.

287. The DRC argues in the alternative that, in any event, from a legal perspective it was in a position of self-defence from that date onwards; and that, in view of the involvement of the UPDF in the airborne operation at Kitona on 4 August 1998, the DRC would have been entitled to use force to repel the aggression against it, as well as to seek support from other States.

288. In response to the foregoing arguments of the DRC as set out in paragraphs 280 to 281 above, Uganda states the following.

289. It disagrees that the first counter-claim should be divided into three historical periods, namely, from 1994 to 1997 (under Mobutu’s presidency), from May 1997 to 2 August 1998, and the period beginning on 2 August 1998. Uganda argues that in its Order of 29 November 2001 the Court found that “Uganda’s counter-claim satisfied the direct connection requirement laid down by Article 80 of the Rules of Court and did so for the entire period since 1994”. In Uganda’s view, this shows that the Court “refuses to accept the DRC’s argument that three periods should be distinguished in the history of recent relations between the Congo and Uganda”. Uganda further argues that by attempting to “slice” a continuing wrongful act into separate periods the DRC is seeking to “limit Uganda’s counter-claim”. Uganda maintains that Zaire and the DRC “are not distinct entities” and that “by virtue of the State continuity principle, it is precisely the same legal person” which is responsible for the acts complained of in the first counter-claim.

290. With reference to the objection raised by the DRC that Uganda is precluded from filing a claim in relation to alleged violations of its territorial sovereignty on the grounds that it renounced its right to do so, Uganda argues that the conditions required in international law for the waiver of an international claim to be recognized are not satisfied in the present case. In terms of fact, Uganda asserts that, during the Mobutu years, it repeatedly protested against Zaire’s passive and active support of anti-Ugandan forces directly to Zaire and to the United Nations. Uganda also repeatedly informed the United Nations of Zaire’s joint efforts with the Sudan to destabilize Uganda. Uganda further argues that its co-operation with Laurent-Désiré Kabila’s AFDL movement, aimed at improving security along the common border area, did not amount to a waiver of any earlier claims against Zaire. In terms of law, Uganda asserts that in any event the absence of protest does not validate illegal acts and that any failure to address complaints to the Security Council should not be regarded as a cause of inadmissibility. Uganda concludes that the DRC’s objections to its first counter-claim should therefore be dismissed.

291. The Court has taken note that Uganda disagrees with the division of the first counter-claim of Uganda into three periods as argued by the DRC. The Court recalls that, in paragraph 39 of its Order on Counter-Claims of 29 November 2001, it considered that “the first counter-claim submitted by Uganda is . . . directly connected, in regard to the entire period covered, with the subject-matter of the Congo’s claims”. The DRC does not contest this finding, but rather argues that the first counter-claim is partially inadmissible and not founded as to the merits. The Court observes that its Order of 29 November 2001 does not deal with questions of admissibility outside the scope of Article 80 of the
Rules, nor does it deal with the merits of the first counter-claim. Neither does the Order prejudge any question as to the possibility of dividing this counter-claim according to specific periods of time. The Court is not therefore precluded, if it is justified by the circumstances of the case, from considering the first counter-claim following specific time periods. In the present case, in view of the fact that the historical periods identified by the DRC indeed differ in their factual context and are clearly distinguishable, the Court does not see any obstacle to examining Uganda’s first counter-claim following these three periods of time and for practical purposes deems it useful to do so.

292. The Court now turns to the question of admissibility of the part of the first counter-claim of Uganda relating to the period prior to May 1997. The Court observes that the DRC has not presented any evidence showing an express renunciation by Uganda of its right to bring a counter-claim in relation to facts dating back to the Mobutu régime. Rather, it argues that Uganda’s subsequent conduct amounted to an implied waiver of whatever claims it might have had against the DRC as a result of the actions or inaction of the Mobutu régime.

293. The Court observes that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims; noting the absence of any express waiver, the Court furthermore considered that a waiver of those claims could not be implied on the basis of the conduct of Nauru (Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 247-250, paras. 12-21). Similarly, the International Law Commission, in its commentary on Article 45 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, points out that “[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal” (ILC report, doc. A/56/10, 2001, p. 308). In the Court’s view, nothing in the conduct of Uganda in the period after May 1997 can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu régime.

294. The period of friendly relations enjoyed between the DRC and Uganda between May 1997 and July 1998 does nothing to affect this outcome. A period of good or friendly relations between two States should not, without more, be deemed to prevent one of the States from raising a pre-existing claim against the other, either when relations between the two States have again deteriorated or even while the good relations continue. The political climate between States does not alter their legal rights.

295. The Court further observes that, in a situation where there is a delay on the part of a State in bringing a claim, it is “for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible” (Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 254, para. 32). In the circumstances of the present case, the long period of time between the events at stake during the Mobutu régime and the filing of Uganda’s counter-claims has not rendered inadmissible Uganda’s first counter-claim for the period prior to May 1997.

296. The Court accordingly finds that the DRC’s objection cannot be upheld.

297. Regarding the merits of Uganda’s first counter-claim for the period prior to May 1997, Uganda alleges that the DRC breached its duty of vigilance by allowing anti-Ugandan rebel groups to use its territory to launch attacks on Uganda, and by providing political and military support to those groups during this period.

298. The Court considers that Uganda has not produced sufficient evidence to show that the Zairean authorities were involved in providing political and military support for specific attacks against Ugandan territory. The bulk of the evidence submitted consists of uncorroborated Ugandan military intelligence material and generally fails to indicate the sources from which it is drawn. Many such statements are unsigned. In addition, many documents were submitted as evidence by Uganda, such as the address by President Museveni to the Ugandan Parliament on 28 May 2000, entitled “Uganda’s Role in the Democratic Republic of the Congo”, and a document entitled “Chronological Illustration of Acts of Destabilization by Sudan and Congo based Dissidents”. In the circumstances of this case, these documents are of limited probative value to the extent that they were neither relied on by the other Party nor corroborated by impartial, neutral sources. Even the documents that purportedly relate eyewitness accounts are vague and thus unconvincing. For example, the information allegedly provided by an ADF deserter, reproduced in Annex 60 to the Counter-Memorial, is limited to the following: “In 1996 during Mobutu era before Mpondwe attack, ADF received several weapons from Sudan government with the help of Zaire government.” The few reports of non-governmental organizations put forward by Uganda (e.g. a report by HRW) are too general to support a claim of Congolese involvement rising to a level engaging State responsibility.

299. In sum, none of the documents submitted by Uganda, taken
separately or together, can serve as a sound basis for the Court to conclude that the alleged violations of international law occurred. Thus, Uganda has failed to discharge its burden of proof ...

300. As to the question of whether the DRC breached its duty of vigilance by tolerating anti-Ugandan rebels on its territory, the Court notes that this is a different issue from the question of active support for the rebels, because the DRC recognized that anti-Ugandan rebel groups were operating on its territory from at least 1986. Under the Declaration on Friendly Relations, "every State has the duty to refrain from...acquiescing in organized activities undertaken by...other States...". As stated earlier, these provisions are declaratory of customary international law (see paragraph 227 above).

301. The Court has noted that, according to Uganda, the rebel groups were able to operate "unimpeded" in the border region between the DRC and Uganda because of its mountainous terrain, its remoteness from central government presence or authority in the region during President Mobutu's 32-year term in office. During the period under consideration both anti-Ugandan and anti-Zairean rebel groups operated in this area. Neither Zaire nor Uganda were in a position to put an end to their activities. The Court cannot conclude that the rebel groups were the effective agents of the State because of the evidence before it. The evidence of the involvement of the State in support for the rebels is insufficient to establish that the rebel groups were acting at the behest of the State. Therefore, Uganda's first counter-claim must fail.

302. With regard to the second period, from May 1997 until 2 August 1998, the DRC does not contest the admissibility of Uganda's counter-claim. Rather, it argues simply that the counter-claim has no basis in actual fact. The Court cannot conclude that the rebel groups have been the effective agents of the State because of the evidence before it.

303. In relation to the third period, following 2 August 1998, the Court has already found that the legal situation after the military intervention of the Ugandan forces into the border area was different from the pre-intervention period (see paragraph 149 above). In view of the finding that the DRC was after 7 August engaged in an illegal military operation against the rebels, the Court considers that the DRC was entitled to use force in order to repel Uganda's forces. The Court also notes that it has never been claimed that the use of force by the DRC was without justification under the UN Charter. Accordingly, the DRC cannot be regarded as having breached its duty of vigilance by tolerating the rebels during this period. The first counter-claim of Uganda in respect of attacks by anti-Ugandan rebels against the DRC and the training, arming, equipping, financing and supplying of anti-Ugandan insurgents, cannot be considered as having been proven (see paragraph 131 above). Consequently, following 2 August 1998, the first counter-claim of Uganda must fail.

304. The Court thus concludes that the first counter-claim submitted by Uganda fails in its entirety.

305. In its second counter-claim, Uganda claims that Congolese armed forces carried out three separate attacks on the Ugandan Embassy in Kinshasa in August, September and November 1998; confiscated the properties of the Ugandan diplomatic mission in Kinshasa; and caused damage to property belonging to the Ugandan government and properties of private Ugandan nationals. The Court has already found that the legal situation after the military intervention of the Ugandan forces into the border area was different from the pre-intervention period (see paragraph 121 above). Consequently, Uganda's first counter-claim cannot be upheld as regards the period following 2 August 1998.
property belonging to the Government of Uganda, Ugandan diplomats and Ugandan nationals; and maltreated diplomats and other Ugandan nationals present on the premises of the mission.

307. In particular, Uganda contends that on or around 11 August 1998 Congolese soldiers stormed the Ugandan Embassy in Kinshasa, threatened the ambassador and other diplomats, demanding the release of certain Rwandan nationals. According to Uganda, the Congolese soldiers also stole money found in the Chancery. Uganda alleges that, despite protests by Ugandan Embassy officials, the Congolese Government took no action.

308. Uganda further asserts that, prior to their evacuation from the DRC on 20 August 1998, 17 Ugandan nationals and Ugandan diplomats were likewise subjected to inhumane treatment by FAC troops stationed at Ndjili International Airport. Uganda alleges that, before releasing the Ugandans, the FAC troops confiscated their money, valuables and briefcases. Uganda states that a Note of protest with regard to this incident was sent by the Embassy of Uganda to the Ministry of Foreign Affairs of the DRC on 21 August 1998.

309. Uganda claims that in September 1998, following the evacuation of the remaining Ugandan diplomats from the DRC, FAC troops forcibly seized the Ugandan Chancery and the official residence of the Ugandan Ambassador in Kinshasa. Uganda maintains that the Congolese troops stole property from the premises, including four embassy vehicles. According to Uganda, on 23 November 1998 FAC troops again forcibly entered the Ugandan Chancery and the official residence of the Ugandan Ambassador in Kinshasa and stole property, including embassy furniture, household and personal effects belonging to the Ambassador and to other diplomatic staff, embassy office equipment, Ugandan flags and four vehicles belonging to Ugandan nationals. Uganda alleges that the Congolese army also occupied the Chancery and the official residence of the Ugandan Ambassador.

310. Uganda states that on 18 December 1998 the Ministry of Foreign Affairs of Uganda sent a Note of protest to the Ministry of Foreign Affairs of the DRC, in which it referred to the incidents of September 1998 and 23 November 1998 and demanded, inter alia, that the Government of the DRC return all the property taken from the Embassy premises, that all Congolese military personnel vacate the two buildings and that the mission be protected from any further intrusion.

311. Uganda alleges, moreover, that “[t]he Congolese government permitted WNBF commander Taban Amin, the son of former Ugandan dictator Idi Amin, to occupy the premises of the Uganda Embassy in Kinshasa and establish his official headquarters and residence at those facilities”. In this regard, Uganda refers to a Note of protest dated 21 March 2001, whereby the Ministry of Foreign Affairs of Uganda requested that the Government of the DRC ask Mr. Taban Amin to vacate the Ugandan Embassy’s premises in Kinshasa.

312. Uganda further refers to a visit on 28 September 2002 by a joint delegation of Ugandan and Congolese officials to the Chancery and the official residence of the Ambassador of Uganda in Kinshasa. Uganda notes that the Status Report, signed by the representatives of both Parties following the visit, indicates that “at the time of the inspection, both premises were occupied” and that the joint delegation “did not find any movable property belonging to the Uganda embassy or its former officials”. Uganda states that the joint delegation also “found the buildings in a state of total disrepair”. As a result of that situation, Uganda claims that it was recently obliged to rent premises for its diplomatic and consular mission in Kinshasa.

313. Uganda argues that the DRC’s actions are in breach of international diplomatic and consular law, in particular Articles 22 (inviolability of the premises of the mission), 29 (inviolability of the person of diplomatic agents), 30 (inviolability of the private residence of a diplomatic agent) and 24 (inviolability of archives and documents of the mission) of the 1961 Vienna Convention on Diplomatic Relations. In addition, Uganda contends that,

“[t]he inhumane treatment and threats to the security and freedom of nationals of Uganda . . . constitute a series of breaches of the international minimum standard relating to the treatment of foreign nationals lawfully on State territory, which standard forms a part of customary or general international law”;

and that, in respect of the seizure of the Embassy of Uganda, the official residence of the Ambassador and official cars of the mission, these actions constitute an unlawful expropriation of the public property of Uganda.

* 

314. The DRC contends that Uganda’s second counter-claim is partially inadmissible on the ground that Uganda has ascribed new legal bases in its Rejoinder to the DRC’s responsibility by including claims based on the violation of the Vienna Convention on Diplomatic Relations. According to the DRC, Uganda thus breaks the connection with the principal claim, which refers to “the violation of the United Nations Charter provisions on the use of force and on non-intervention, as well as the Hague and Geneva Conventions on the protection of persons and property in time of occupation and armed conflict”. The DRC also asserts that the alleged modification of the subject-matter of this part of the dispute is manifestly incompatible with the Court’s Order of 29 November 2001.
The DRC further argues that the claim based on the inhumane treatment of Ugandan nationals cannot be admitted, because the requirements for admissibility of a diplomatic protection claim are not satisfied. As for the first condition relating to the nationality of the alleged victims, the DRC claims that Uganda has not shown that the persons on whose behalf it is claiming to act are of Ugandan nationality and not Rwandan or of any dual nationality. Regarding the second condition relating to the exhaustion of local remedies, the DRC contends that, “since it seems that these individuals left the Democratic Republic of the Congo in a group in August 1998 and that is when they allegedly suffered the unspecified, unproven injuries, it would not appear that the requirement of exhaustion of local remedies has been satisfied”.

Uganda, for its part, claims that Chapter XVIII of its Counter-Memorial “clearly shows, with no possibility of doubt, that since the beginning of the dispute Uganda has invoked violation of the 1961 Vienna Convention in support of its position on the responsibility of the Congo”. Uganda further notes that in its Order of 29 November 2001, in the context of Uganda’s second counter-claim, the Court concluded that the Parties were pursuing the same legal aims by seeking “to establish the responsibility of the other by invoking, in connection with the alleged illegal use of force, certain rules of conventional or customary international law relating to the protection of persons and property” (I.C.J. Reports 2001, p. 679, para. 40). Uganda contends that the reference to “conventional . . . law” must necessarily relate to the Vienna Convention on Diplomatic Relations, “the only conventional instrument expressly named in that part of the Counter-Memorial devoted to the second claim”. Thus Uganda argues that it has not changed the subject-matter of the dispute.

As to the inadmissibility of the part of the claim relating to the alleged maltreatment of certain Ugandan nationals, according to Uganda it is not linked to any claims of Ugandan nationals; its claim is based on violations by the DRC, directed against Uganda itself, of general rules of international law relating to diplomatic relations, of which Ugandan nationals present in the premises of the mission were indirect victims. Uganda considers that local remedies need not be exhausted when the individual is only the indirect victim of a violation of a State-to-State obligation. Uganda states that “[t]he breaches of the Convention also constitute direct injury to Uganda and the local remedies rule is therefore inapplicable”. Uganda contends that, even assuming that this aspect of the second claim could be interpreted as the exercise by Uganda of diplomatic protection, the local remedies rule would not in any event be applicable because the principle is that the rule can only apply when effective remedies are available in the national system. In this regard, Uganda argues that any remedy before Congolese courts would be ineffective, due to the lack of impartiality within the Congolese justice system. Additionally, Uganda contends that “[t]he inhumane treatment and threats to the security and freedom of nationals of Uganda . . . constitute a series of breaches of the international minimum standard relating to the treatment of foreign nationals lawfully on State territory, which standard forms a part of customary or general international law”.

As to the merits of the second counter-claim, the DRC, without prejudice to its arguments on the inadmissibility of the second counter-claim, argues that in any event Uganda has been unable to establish the factual and legal bases of its claims. According to the DRC, “none of these accusations made against [the DRC] by the Respondent has any serious and credible factual basis”. The DRC also challenges the evidentiary value “in law” of the documents adduced by Uganda to support its claims.

The DRC denies having subjected Ugandan nationals to inhumane treatment during an alleged attack on the Ugandan Embassy in Kinshasa on 11 August 1998 and denies that further attacks occurred in September and November 1998. According to the DRC, the Ugandan diplomatic buildings in Kinshasa were never seized or expropriated, nor has the DRC ever sought to prevent Uganda from reoccupying its property. The DRC further states that it did not expropriate Ugandan public property in Kinshasa in August 1998, nor did it misappropriate the vehicles of the Ugandan diplomatic mission in Kinshasa, or remove the archives or seize movable property from those premises.

The DRC likewise contests the assertion that it allowed the commander of the WNBF to occupy the premises of the Ugandan Embassy in Kinshasa and to establish his official headquarters and residence there. The DRC also refutes the allegation that on 20 August 1998 various Ugandan nationals were maltreated by the FAC at Ndjili International Airport in Kinshasa.

The DRC contends that the part of the claim relating to the alleged expropriation of Uganda’s public property is unfounded because Uganda has been unable to establish the factual and legal bases of its claims. According to the DRC, Uganda has not adduced any credible evidence to show that either the two buildings (the Embassy and the
Ambassador’s residence) or the four official vehicles were seized by the DRC.

322. The Court will first turn to the DRC’s challenge to the admissibility of the second counter-claim on the grounds that, by formally invoking the Vienna Convention on Diplomatic Relations for the first time in its Rejoinder of 6 December 2002, Uganda has “[sought] improperly to enlarge the subject-matter of the dispute, contrary to the Statute and Rules of Court” and contrary to the Court’s Order of 29 November 2001.

323. The Court first recalls that the Vienna Convention on Diplomatic Relations continues to apply notwithstanding the state of armed conflict that existed between the Parties at the time of the alleged maltreatment. The Court recalls that, according to Article 44 of the Vienna Convention on Diplomatic Relations:

“The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.”

324. Further, Article 45 of the Vienna Convention provides as follows:

“If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

(b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

(c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.”

In the case concerning United States Diplomatic and Consular Staff in Tehran, the Court emphasized that

“[e]ven in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, . . . must be respected by the receiving State” (Judgment, I.C.J. Reports 1980, p. 40, para. 86).

325. In relation to the DRC’s claim that the Court’s Order of 29 November 2001 precludes the subsequent invocation of the Vienna Convention on Diplomatic Relations, the Court recalls the language of this Order:

“each Party holds the other responsible for various acts of oppression allegedly accompanying an illegal use of force . . . each Party seeks to establish the responsibility of the other by invoking, in connexion with the alleged illegal use of force, certain rules of conventional or customary international law relating to the protection of persons and property” (I.C.J. Reports 2001, p. 679, para. 40; emphasis added).

326. The Court finds this formulation sufficiently broad to encompass claims based on the Vienna Convention on Diplomatic Relations, taking note that the new claims are based on the same factual allegation, i.e. the alleged illegal use of force. The Court was entirely aware, when making its Order, that the alleged attacks were on Embassy premises. Later reference to specific additional legal elements, in the context of an alleged illegal use of force, does not alter the nature or subject-matter of the dispute. It was the use of force on Embassy premises that brought this counter-claim within the scope of Article 80 of the Rules, but that does not preclude examination of the special status of the Embassy. As the jurisprudence of the Court reflects, counter-claims do not have to rely on identical instruments to meet the “connection” test of Article 80 (see Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 318-319).

327. The Court therefore finds that Uganda’s second counter-claim is not rendered inadmissible in so far as Uganda has subsequently invoked Articles 22, 24, 29, and 30 of the Vienna Convention on Diplomatic Relations.

328. The Court will now consider the DRC’s challenge to the admissibility of the second counter-claim on the ground that it is in reality a claim founded on diplomatic protection and as such fails, as Uganda has not shown that the requirements laid down by international law for the exercise of diplomatic protection have been satisfied.

329. The Court notes that Uganda relies on two separate legal bases in its allegations concerning the maltreatment of persons. With regard to diplomats, Uganda relies on Article 29 of the Vienna Convention on Diplomatic Relations. With regard to other Ugandan nationals not enjoying diplomatic status, Uganda grounds its claim in general rules of international law relating to diplomatic relations and in the international minimum standard relating to the treatment of foreign nationals who are present on a State’s territory. The Court will now address both of these bases in turn.

330. First, as to alleged acts of maltreatment committed against Ugan-
dan diplomats finding themselves both within embassy premises and elsewhere, the Court observes that Uganda’s second counter-claim aims at obtaining reparation for the injuries suffered by Uganda itself as a result of the alleged violations by the DRC of Article 29 of the Vienna Convention on Diplomatic Relations. Therefore Uganda is not exercising diplomatic protection on behalf of the victims but vindicating its own rights under the Vienna Convention. Accordingly, the Court finds that the failure to exhaust local remedies does not pose a barrier to Uganda’s counter-claim under Article 29 of the Vienna Convention on Diplomatic Relations, and the claim is thus admissible.

331. As to acts of maltreatment committed against other persons on the premises of the Ugandan Embassy at the time of the incidents, the Court observes that the substance of this counter-claim currently before the Court as a direct claim, brought by Uganda in its sovereign capacity, concerning its Embassy in Kinshasa, falls within the ambit of Article 22 of the Vienna Convention on Diplomatic Relations. Consequently, the objection advanced by the DRC to the admissibility of this part of Uganda’s second counter-claim cannot be upheld, and this part of the counter-claim is also admissible.

332. The Court turns now to the part of Uganda’s second counter-claim which concerns acts of maltreatment by FAC troops of Ugandan nationals not enjoying diplomatic status who were present at Ndjili International Airport as they attempted to leave the country.

333. The Court notes that Uganda bases this part of the counter-claim on the international minimum standard relating to the treatment of foreign nationals who are present on a State’s territory. The Court thus considers that this part of Uganda’s counter-claim concerns injury to the particular individuals in question and does not relate to a violation of an international obligation by the DRC causing a direct injury to Uganda. The Court is of the opinion that in presenting this part of the counter-claim Uganda is attempting to exercise its right to diplomatic protection with regard to its nationals. It follows that Uganda would need to meet the conditions necessary for the exercise of diplomatic protection as recognized in general international law, namely the requirement of Ugandan nationality of the claimants and the prior exhaustion of local remedies. The Court observes that no specific documentation can be found in the case file identifying the individuals concerned as Ugandan nationals. The Court thus finds that, this condition not being met, Uganda’s counter-claim concerning the alleged maltreatment of its nationals not enjoying diplomatic status at Ndjili International Airport is inadmissible.

334. Regarding the merits of Uganda’s second counter-claim, the Court finds that there is sufficient evidence to prove that there were attacks against the Embassy and acts of maltreatment against Ugandan diplomats at Ndjili International Airport.

335. The Court observes that various Ugandan diplomatic Notes addressed to the Congolese Foreign Ministry or to the Congolese Embassy in Kampala make reference to attacks by Congolese troops against the premises of the Ugandan Embassy and to the occupation by the latter of the buildings of the Chancery. In particular, the Court considers important the Note of 18 December 1998 from the Ministry of Foreign Affairs of Uganda to the Ministry of Foreign Affairs of the DRC, protesting against Congolese actions in detriment of the Ugandan Chancery and property therein in September and November 1998, in violation of international law and the 1961 Vienna Convention on Diplomatic Relations. This Note deserves special attention because it was sent in duplicate to the Secretary-General of the United Nations and to the Secretary-General of the OAU, requesting them to urge the DRC to meet its obligations under the Vienna Convention. The Court takes particular note of the fact that the DRC did not reject this accusation at the time at which it was made.

336. Although some of the other evidence is inconclusive or appears to have been prepared unilaterally for purposes of litigation, the Court was particularly persuaded by the Status Report on the Residence and Chancery, jointly prepared by the DRC and Uganda under the Luanda Agreement. The Court has given special attention to this report, which was prepared on site and was drawn up with the participation of both Parties. Although the report does not offer a clear picture regarding the alleged attacks, it does demonstrate the resulting long-term occupation of the Ugandan Embassy by Congolese forces.

337. Therefore, the Court finds that, as regards the attacks on Uganda’s diplomatic premises in Kinshasa, the DRC has breached its obligations under Article 22 of the Vienna Convention on Diplomatic Relations.

338. Acts of maltreatment by DRC forces of persons within the Ugandan Embassy were necessarily consequential upon a breach of the inviolability of the Embassy premises prohibited by Article 22 of the Vienna Convention on Diplomatic Relations. This is true regardless of whether the persons were or were not nationals of Uganda or Ugandan diplomats. In so far as the persons attacked were in fact diplomats, the DRC further breached its obligations under Article 29 of the Vienna Convention.

339. Finally, there is evidence that some Ugandan diplomats were maltreated at Ndjili International Airport when leaving the country. The
Court considers that a Note of Protest sent by the Embassy of Uganda to the Ministry of Foreign Affairs of the DRC on 21 August 1998, i.e., on the day following the incident, which at the time did not lead to a reply by the DRC denying the incident, shows that the DRC committed acts of maltreatment of Ugandan diplomats at Ndjili International Airport. The fact that the assistance of the dean of the diplomatic corps (Ambassador of Switzerland) was needed in order to organize an orderly departure of Ugandan diplomats from the airport is also an indication that the DRC failed to provide effective protection and treatment required under international law on diplomatic relations. The Court therefore finds that, through acts of maltreatment inflicted on Ugandan diplomats at the airport when they attempted to leave the country, the DRC acted in violation of its obligations under international law on diplomatic relations.

340. In summary, the Court concludes that, through the attacks by members of the Congolese armed forces on the premises of the Ugandan Embassy in Kinshasa, and their maltreatment of persons who found themselves at the Embassy at the time of the attacks, the DRC breached its obligations under Article 22 of the Vienna Convention on Diplomatic Relations. The Court further concludes that by the maltreatment by members of the Congolese armed forces of Ugandan diplomats on Embassy premises and at Ndjili International Airport, the DRC also breached its obligations under Article 29 of the Vienna Convention.

341. As to the claim concerning Ugandan public property, the Court notes that the original wording used by Uganda in its Counter-Memorial was that property belonging to the Government of Uganda and Ugandan diplomats had been “confiscated”, and that later pleadings referred to “expropriation” of Ugandan public property. However, there is nothing to suggest that in this case any confiscation or expropriation took place in the technical sense. The Court therefore finds neither term suitable in the present context. Uganda appears rather to be referring to an illegal appropriation in the general sense of the term. The seizures clearly constitute an unlawful use of that property, but no valid transfer of the title to the property has occurred and the DRC has not become, at any point in time, the lawful owner of such property.

342. Regarding evidentiary issues, the Status Report on the Residence and Chancery, jointly prepared by the DRC and Uganda under the Luanda Agreement, provides sufficient evidence for the Court to conclude that Ugandan property was removed from the premises of the official residence and Chancery. It is not necessary for the Court to make a determination as to who might have removed the property reported missing. The Vienna Convention on Diplomatic Relations not only prohibits any infringements of the inviolability of the mission by the receiving State itself but also puts the receiving State under an obligation to prevent others — such as armed militia groups — from doing so (see United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, pp. 30-32, paras. 61-67). Therefore, although the evidence available is insufficient to identify with precision the individuals who removed Ugandan property, the mere fact that items were removed is enough to establish that the DRC breached its obligations under the Vienna Convention on Diplomatic Relations. At this stage, the Court considers that it has found sufficient evidence to hold that the removal of Ugandan property violated the rules of international law on diplomatic relations, whether it was committed by actions of the DRC itself or by the DRC’s failure to prevent such acts on the part of armed militia groups. Similarly, the Court need not establish a precise list of items removed — a point of disagreement between the Parties — in order to conclude at this stage of the proceedings that the DRC breached its obligations under the relevant rules of international law. Although these issues will become important should there be a reparation stage, they are not relevant for the Court’s finding on the legality or illegality of the acts of the DRC.

343. In addition to the issue of the taking of Ugandan public property described in paragraph 309, above, Uganda has specifically pleaded that the removal of “almost all of the documents in their archives and working files” violates Article 24 of the Vienna Convention on Diplomatic Relations. The same evidence discussed in paragraph 342 also supports this contention, and the Court accordingly finds the DRC in violation of its obligations under Article 24 of the Vienna Convention.

344. The Court notes that, at this stage of the proceedings, it suffices for it to state that the DRC bears responsibility for the breach of the inviolability of the diplomatic premises, the maltreatment of Ugandan diplomats at the Ugandan Embassy in Kinshasa, the maltreatment of Ugandan diplomats at Ndjili International Airport, and for attacks on and seizure of property and archives from Ugandan diplomatic premises, in violation of international law on diplomatic relations. It would only be at a subsequent phase, failing an agreement between the Parties, that the specific circumstances of these violations as well as the precise damage suffered by Uganda and the extent of the reparation to which it is entitled would have to be demonstrated.

* * *

345. For these reasons,
THE COURT,

(1) By sixteen votes to one,

Finds that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter’s territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Verhoeven;
AGAINST: Judge ad hoc Kateka;

(2) Unanimously,

Finds admissible the claim submitted by the Democratic Republic of the Congo relating to alleged violations by the Republic of Uganda of its obligations under international human rights law and international humanitarian law in the course of hostilities between Ugandan and Rwandan military forces in Kisangani;

(3) By sixteen votes to one,

Finds that the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Verhoeven;
AGAINST: Judge ad hoc Kateka;

(4) By sixteen votes to one,

Finds that the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Verhoeven;
AGAINST: Judge ad hoc Kateka;

(5) Unanimously,

Finds that the Republic of Uganda is under obligation to make reparation to the Democratic Republic of the Congo for the injury caused;

(6) Unanimously,

Decides that, failing agreement between the Parties, the question of reparation due to the Democratic Republic of the Congo shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case;

(7) By fifteen votes to two,

Finds that the Republic of Uganda did not comply with the Order of the Court on provisional measures of 1 July 2000;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Verhoeven;
AGAINST: Judges Kooijmans, Tomka, Judge ad hoc Kateka;

(8) Unanimously,

Rejects the objections of the Democratic Republic of the Congo to the admissibility of the first counter-claim submitted by the Republic of Uganda;

(9) By fourteen votes to three,

Finds that the first counter-claim submitted by the Republic of Uganda cannot be upheld;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Abraham; Judge ad hoc Verhoeven;
AGAINST: Judges Kooijmans, Tomka, Judge ad hoc Kateka;

(10) Unanimously,

Rejects the objection of the Democratic Republic of the Congo to the
admissibility of the part of the second counter-claim submitted by the
Republic of Uganda relating to the breach of the Vienna Convention on
Diplomatic Relations of 1961;

(11) By sixteen votes to one,

Upholds the objection of the Democratic Republic of the Congo to the
admissibility of the part of the second counter-claim submitted by the
Republic of Uganda relating to the maltreatment of individuals other
than Ugandan diplomats at Ndjili International Airport on 20 August
1998;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma,
Vereshchinet, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh,
Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc
Verhoeven;
AGAINST: Judge ad hoc Kateka;

(12) Unanimously,

Finds that the Democratic Republic of the Congo, by the conduct of
its armed forces, which attacked the Ugandan Embassy in Kinshasa,
maltreated Ugandan diplomats and other individuals on the Embassy
premises, maltreated Ugandan diplomats at Ndjili International Airport,
as well as by its failure to provide the Ugandan Embassy and Ugandan
diplomats with effective protection and by its failure to prevent archives
and Ugandan property from being seized from the premises of the Ugandan
Embassy, violated obligations owed to the Republic of Uganda under the Vienna Convention on Diplomatic Relations of 1961;

(13) Unanimously,

Finds that the Democratic Republic of the Congo is under obligation
to make reparation to the Republic of Uganda for the injury caused;

(14) Unanimously,

Decides that, failing agreement between the Parties, the question of
reparation due to the Republic of Uganda shall be settled by the Court,
and reserves for this purpose the subsequent procedure in the case.

Done in English and in French, the English text being authoritative, at
the Peace Palace, The Hague, this nineteenth day of December, two thou-
sand and five, in three copies, one of which will be placed in the archives
of the Court and the others transmitted to the Government of the Demo-

Judge Koroma appends a declaration to the Judgment of the Court;
Judges Parra-Aranguren, Kooijmans, Elaraby and Simma append separate opinions to the Judgment of the Court; Judge Tomka and
Judge ad hoc Verhoeven append declarations to the Judgment of the Court; Judge ad hoc Kateka appends a dissenting opinion to the Judgment of the Court.

(Signed) Shi Jiuyong,
President.

(Signed) Philippe Couvreur,
Registrar.

(Initialled) J.Y.S.
(Initialled) Ph.C.
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Declaration of Judge Koroma, I.C.J. Reports 2005
DECLARATION OF JUDGE KOROMA

The Court has found Uganda in violation of a wide range of legal instruments to which it is a party — Rejection of claim of self-defence — Article 3 (g) of the Definition of Aggression of 1974 (XXIX) — Non-attributability of attacks by rebel groups reaffirms the Court’s earlier jurisprudence and is consistent with Article 51 of the Charter — Customary law character of General Assembly resolution 1803 (XVII) of 14 December 1962 — Article 21 of the African Charter on Human and Peoples’ Rights of 1981 — Findings of the Court are in general accordance with determinations made by the Security Council in its resolutions on this dispute — Principle of pacta sunt servanda.

1. The circumstances and consequences of this case involving the loss of between three and four million human lives and other suffering have made it one of the most tragic and compelling to come before this Court.


3. The Court has found that the Republic of Uganda:

— by engaging in military activities against the DRC and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the Congo, violated the principle of non-use of force in international relations and the principle of non-intervention;

— by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict, as well as by its failure to take measures to respect and ensure respect for human rights and international humanitarian law in the Congo, violated its obligations under international human rights law and international humanitarian law; and

— by acts of looting, plundering and exploitation of Congolese natural resources committed by members of Ugandan armed forces in the territory of the DRC, and by its failure to comply with its obligations as an occupying Power in Ituri District to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the DRC under international law.

4. These violations found by the Court are very serious breaches of international law and are compounded by the gravity of this case and the human tragedy underlying it. In effect, the Court’s findings confirm that Uganda has been in violation of its obligations under the following international legal instruments: Article 2, paragraph 4, of the United Nations Charter, prohibiting the use of force by States in their international relations; the Charter of the Organization of African Unity (OAU), which obliges all States to respect the sovereignty and territorial integrity of one another, to resolve disputes between them by peaceful means, and to refrain from interfering in each other’s internal affairs; the Regulations respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907; the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; Protocol I Additional to the Geneva Conventions of 12 August 1949; the International Covenant on Civil and Political Rights of 19 December 1966; the African Charter on Human and Peoples’ Rights of 27 June 1981; the Convention on the Rights of the Child of 20 November 1989; and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, all of which are binding on Uganda.

5. More specifically, the Court found that acts committed by the Uganda Peoples’ Defence Forces (UPDF) itself and by officers and soldiers in it were in clear violation of the provisions of international humanitarian law and human rights instruments to which both Uganda and the Congo are parties, as well as of international customary law, in particular:

— the Hague Regulations, Articles 25, 27, 28, 43, 46 and 47, with regard to the obligations of an occupying Power;

— the Fourth Geneva Convention, Articles 27, 32 and 53, also with regard to the obligations of an occupying Power;
— the International Covenant on Civil and Political Rights, Articles 6, paragraph 1, and 7;
— the First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2;
— the African Charter on Human and Peoples' Rights, Articles 4 and 5;
— the Convention on the Rights of the Child, Article 38, paragraphs 2 and 3;
— the Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, 4, 5 and 6.

In a nutshell, Uganda has been found responsible for illegal use of force, violation of sovereignty and territorial integrity, military intervention, violation of human rights and international humanitarian law, looting, plunder and exploitation of the Congo's natural resources, causing injury to the Congo as well as to Congolese citizens. Thus Uganda has been found in breach of a wide range of legal instruments to which it is a party and, according to the evidence before the Court, the violations gave rise to the most egregious of consequences. The non-fulfilment of obligations by a State entails international responsibility.

6. Not only are the international Conventions violated by Uganda binding on it, but they are intended to uphold the rule of law between neighbouring States and constitute the foundation on which the existing international legal order is constructed. They oblige States to conduct their relations in accordance with civilized behaviour and modern values — to refrain from the use of military force, to respect territorial integrity, to solve international disputes by peaceful means, and to respect human rights, human dignity, and international humanitarian law. Under the international humanitarian law and international human rights instruments mentioned above, Uganda was obliged to refrain from carrying out attacks against civilians, to ensure humane treatment of them and even of combatants caught up in military conflict, and to respect the most basic of their rights, the right to life. In this regard, Article 1 of the Fourth Geneva Convention stipulates that: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." (Emphasis added.) Article 2 of the Convention provides that:

"In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." (Emphasis added.)

Article 27 states:

"Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights . . . They shall at all times be humanely treated, and shall be protected . . . against all acts of violence . . .

Women shall be especially protected against any attack on their honour, in particular against rape . . . or any form of indecent assault."

According to Article 51 of Additional Protocol I to the 1949 Geneva Conventions:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations . . .

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

4. Indiscriminate attacks [against civilians] are prohibited . . ."

In other words, in the course of a military conflict, civilians should be spared unnecessary violence, including massacres and other atrocities such as those allegedly perpetrated by the UPDF. Furthermore, according to Article 3 of the 1989 Convention on the Rights of the Child, to which Uganda is also a party, in all actions concerning children, the primary consideration must be the best interests of the child. Article 19 provides that States parties agree to take all appropriate measures to protect the child from all forms of physical and mental violence, while Article 38 of the Convention provides that States parties undertake to respect and to ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. States parties to the Convention must take all feasible measures to ensure that persons who have not attained the age of 15 years do not take part in direct hostilities. Yet, according to the evidence before the Court, these obligations were wantonly flouted during the UPDF's military campaign in the Congo, as children were recruited as child soldiers to take part in the fighting.

7. The Court thus reached the justifiable conclusion that Uganda repeatedly and egregiously transgressed both the jus ad bellum and jus in bello, illegally used force and violated the rules of international humanitarian law.

8. Crucially and for very cogent reasons, the Court has rejected, under both Article 51 of the United Nations Charter and customary international law, Uganda's contention that it acted in self-defence in using mil-
tary force in the Congo. Uganda argued, inter alia, that the Congo was responsible for the armed attacks by various rebel groups and was therefore guilty of aggression under the conditions set forth in the Definition of Aggression of 1974 (XXIX) in Article 3, paragraph (g), which provides:

“Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

The Court rejected the contention, observing that: Uganda never claimed that it had been the victim of an armed attack by the armed forces of the DRC; the “armed attacks” to which reference was made came rather from the ADF; there was no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC; and the attacks did not emanate from armed bands or irregulars sent by the DRC, or on behalf of the DRC, within the meaning of Article 3 (g) of General Assembly resolution 3314 (XXIX) of 1974 on the Definition of Aggression. The Court concluded that, on the basis of the evidence before it, even if the series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.

9. This finding is also consistent with the jurisprudence of the Court. In the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), the Court stressed the need to recognize a distinction between cases of armed attack and "other less grave forms" of the use of force (Merits, Judgment, I.C.J. Reports 1986, p. 101, para. 191). This distinction was reaffirmed by the Court in 2003 in the case concerning Oil Platforms (Islamic Republic of Iran v. United States of America). According to the Court, it is necessary to distinguish between a State’s massive support for armed groups, including deliberately allowing them access to its territory, and a State’s enabling groups of this type to act against another State. Only the first hypothesis could be characterized as an “armed attack” within the meaning of Article 51 of the Charter, thus justifying a unilateral response. Although the second would engage the international responsibility of the State concerned, it constitutes no more than a “breach of the peace”, enabling the Security Council to take action pursuant to Chapter VII of the Charter, without, however, creating an entitlement to unilateral response based on self-defence. In other words, if a State is powerless to put an end to the armed activities of rebel groups despite the fact that it opposes them, that is not tantamount to use of armed force by that State, but a threat to the peace which calls for action by the Security Council. In my opinion, this interpretation is consistent with Article 51 of the Charter and represents the existing law.

10. However, according to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)):

“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”.

Uganda, in the course of the proceedings, acknowledged that it had supported one of the Congolese rebel movements, explaining, inter alia, that it gave “just enough” military support to the movement to help Uganda achieve its objectives of driving out Sudanese and Chadian forces from the Congo and of taking over the airfields between Gbadolite and the Ugandan border and that its support was not directed at the overthrow of the President of the Congo. The Court notes that even if Uganda’s activities were in support of its perceived security needs, it necessarily still violated the principles of international law.

11. Another issue that was pleaded before the Court relates to permanent sovereignty over natural resources. The Court’s acknowledgment of the customary law character of General Assembly resolution 1803 (XVII) of 14 December 1962, on permanent sovereignty over natural resources, is not without significance, for, although the Court has decided that it is the Hague Regulations of 1907 as well as the Fourth Geneva Convention of 1949 which lay down the rules according to which Uganda’s conduct must be judged, resolution 1803 (XVII), it should be recalled, confirmed the “right of peoples and nations to permanent sovereignty over their natural wealth and resources”. It makes clear that such resources should be exploited “in the interest of . . . the well-being of the people of the State concerned”. These rights and interests remain in effect at all times, including during armed conflict and during occupation. The Security Council in resolution 1291 (2000) reaffirmed the sovereignty of the DRC over its natural resources, and noted with concern reports of the illegal exploitation of the country’s assets and the potential consequences of these actions on the security conditions and continuation of hostilities. Accordingly, in my view, the exploitation of the natural resources of a State by the forces of occupation contravenes the principle of permanent sovereignty over natural resources, as well as the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949. Moreover, both the
DRC and Uganda are parties to the African Charter on Human and Peoples' Rights of 1981, which stipulates that:

“All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.” (Art. 21, para. 1; emphasis added.)

12. It is noteworthy that the findings of the Court, a judicial organ, are in the main in tandem with determinations made earlier by the Security Council in its resolutions on this dispute. In its resolution 1234 (1999) the Council implicitly considered the Congo, not Uganda, to be in a situation of self-defence. In that resolution, the Council not only recalled the inherent right of individual or collective self-defence under Article 51 of the United Nations Charter, but also deplored the continuing fighting and the presence of forces of foreign States in the DRC in a manner inconsistent with the principles of the United Nations Charter, and called upon those States to bring to an end the presence of invited forces. In its resolution 1291 (2000) the Council called for the orderly withdrawal of all foreign forces from the Congo in accordance with the Lusaka Ceasefire Agreement (1999). The Council also called on all parties to the conflict in the DRC to protect human rights and respect international humanitarian law and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Acting under Chapter VII of the Charter the Council, in resolution 1304 (2000), confirmed that Uganda and Rwanda had violated the sovereignty and territorial integrity of the DRC and demanded that they withdraw all their forces from the DRC without further delay, and called on all parties to the conflict to protect human rights and respect international humanitarian law.

13. On the other hand, the Court has found the DRC to have been in breach of its obligations to Uganda under the Vienna Convention on Diplomatic Relations of 1961 because of its maltreatment of Ugandan diplomats and other individuals. In other words, the Congo, even when acting in self-defence,

“is not relieved from fulfilling its obligations:

(b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.” (Responsibility of States for Internationally Wrongful Acts, United Nations, Official Records of the General Assembly, Fifty-sixth Session, Supple-

14. If Uganda, above all, had respected the fundamental and customary law principle of *pacta sunt servanda* — requiring a State to comply with its obligations under a treaty — the tragedy so vividly put before the Court would not, at least, have been compounded. Observance of treaty obligations is not only moral, but serves an important role in maintaining peace and security between neighbouring States and in preventing military conflicts between them. Respect for this Judgment should contribute to putting an end to this tragedy.

15. It is, *inter alia*, against this background that I have voted in favour of the Judgment.

(Signed) Abdul G. Koroma.
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Separate Opinion of Judge Parra-Aranguren, I.C.J. Reports 2005
SEPARATE OPINION OF JUDGE PARRA-ARANGUREN

Time-limits on Uganda’s violation of international law by its military actions in DRC territory — Sudan’s role — Uganda’s assistance to former irregular forces — Uganda not an occupying Power in Kibali-Ituri district — Articles 42 and 43 of the Hague Regulations of 1907 not applicable to Uganda’s military presence in Kibali-Ituri district.

1. My vote in favour of the Judgment does not mean that I agree with all the findings of its operative part nor that I concur with each and every part of the reasoning followed by the majority of the Court in reaching its conclusions.

2. In paragraph 345 (1) of the operative part of the Judgment, the Court “Finds that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo...violated the principle of non-use of force in international relations and the principle of non-intervention.”

3. I agree that the Republic of Uganda (hereinafter referred to as “Uganda”) violated the principle of non-use of force in international relations and the principle of non-intervention by engaging in military activities against the Democratic Republic of the Congo (hereinafter referred to as the “DRC”) between 7 and 8 August 1998 and 10 July 1999, for the reasons explained in the Judgment; but I disagree with the finding that the violation continued from 10 July 1999 until 2 June 2003, when Ugandan troops withdrew from the DRC territory, because in my opinion the DRC consented during this period to their presence in its territory, not retroactively but under the terms and conditions prescribed in the Lusaka Ceasefire Agreement of 10 July 1999, the Kampala Disengagement Plan of 8 April 2000, the Harare Disengagement Plan of 6 December 2000 and the Luanda Agreement of 6 September 2002, as amended in the Dar es Salaam Agreement of 10 February 2003.

4. The Judgment states that the Lusaka Ceasefire Agreement does not refer to “consent” (para. 95) and that it goes beyond the mere ordering of the Parties to cease hostilities, providing a framework to facilitate the orderly withdrawal of all foreign forces to a stable and secure envi-roment, but carrying no implication as to the Ugandan military presence having been accepted as lawful (para. 97). It also explains:

“The Agreement took as its starting point the realities on the ground. Among those realities were the major Ugandan military deployment across vast areas of the DRC and the massive loss of life over the preceding months. The arrangements made at Lusaka, to progress towards withdrawal of foreign forces and an eventual peace, with security for all concerned, were directed at these factors on the ground and at the realities of the unstable political and security situation. The provisions of the Lusaka Agreement thus represented an agreed modus operandi for the parties. They stipulated how the parties should move forward. They did not purport to qualify the Ugandan military presence in legal terms. In accepting this modus operandi the DRC did not ‘consent’ to the presence of Ugandan troops. It simply concurred that there should be a process to end that reality in an orderly fashion. The DRC was willing to proceed from the situation on the ground as it existed and in the manner agreed as most likely to secure the result of a withdrawal of foreign troops in a stable environment. But it did not thereby recognize the situation on the ground as legal, either before the Lusaka Agreement or in the period that would pass until the fulfilment of its terms.” (Judgment, para. 99.)

5. The Judgment adds in paragraph 101:

“This conclusion as to the effect of the Lusaka Agreement upon the legality of the presence of Ugandan troops on Congolese territory did not change with the revisions to the timetable that became necessary. The Kampala Disengagement Plan of 8 April 2000 and the Harare Disengagement Plan of 6 December 2000 provided for new schedules for withdrawal, it having become apparent that the original schedule in the Annex to the Lusaka Agreement was unrealistic. While the status of Ugandan troops remained unchanged, the delay in relation to the D-Day plus 180 days envisaged in the Lusaka Agreement likewise did not change the legal status of the presence of Uganda, all parties having agreed to these delays to the withdrawal calendar.”

6. In respect to the Luanda Agreement the Judgment states that none of its elements “purport generally to determine that Ugandan forces had been legally present on the territory of the DRC. The Luanda Agreement revised the modus operandi for achieving the withdrawal of Ugandan forces in a stable security situation. It was now agreed — without
reference to whether or not Ugandan forces had been present in the area when the agreement was signed, and to whether any such presence was lawful — that their presence on Mount Ruwenzori should be authorized, if need be, after the withdrawal elsewhere had been completed until appropriate security mechanisms had been put in place. The Court observes that this reflects the acknowledgment by both Parties of Uganda’s security needs in the area, without pronouncing upon the legality of prior Ugandan military actions there or elsewhere.” (Para. 104.)

7. Therefore, the majority of the Court understands that the Lusaka Ceasefire Agreement did not change the legal status of the presence of Uganda, i.e., in violation of international law, but at the same time it considers that Uganda was under an obligation to respect the timetable agreed upon, as revised in the Kampala Disengagement Plan of 8 April 2000, the Harare Disengagement Plan of 6 December 2000 and the Luanda Agreement of 6 September 2002.

8. This interpretation of the Lusaka Ceasefire Agreement, the Kampala Disengagement Plan, the Harare Disengagement Plan and the Luanda Agreement creates an impossible legal situation for Uganda. On the one hand, if Uganda complied with its treaty obligations and remained in the territory of the DRC until the expiration of the timetables agreed upon, Uganda would be in violation of international law because the legal status of its presence had not been changed, the status of its military forces in the DRC being a violation of international law. On the other hand, if Uganda chose not to violate international law as a consequence of its military presence in the DRC, and therefore withdrew its troops from the territory of the DRC otherwise than in accordance with the timetables agreed upon, Uganda would have violated its treaty obligations, thereby also being in violation of international law.

9. This reasoning is, in my opinion, persuasive enough not to accept the very peculiar interpretation advanced in the Judgment of the Lusaka Ceasefire Agreement, the Kampala Disengagement Plan, the Harare Disengagement Plan and the Luanda Agreement. Moreover, an examination of the terms of these instruments leads to a different conclusion.

10. The Lusaka Ceasefire Agreement was signed on 10 July 1999 among the Republic of Angola, the Democratic Republic of the Congo, the Republic of Namibia, the Republic of Rwanda, the Republic of Uganda, the Republic of Zimbabwe, the Congolese Rally for Democracy (RCD) and the Movement for the Liberation of the Congo (MLC).

11. In my opinion, the DRC consented in the Lusaka Ceasefire Agreement to the presence in its territory not only of Ugandan troops but of all foreign forces, as evidenced in the following provisions:

(a) Article III, paragraph 12, prescribes that “[t]he final withdrawal of all foreign forces from the national territory of the DRC shall be carried out in accordance with the Calendar in Annex ‘B’ of this Agreement and a withdrawal schedule to be prepared by the UN, the OAU and the JMC”, i.e., the Joint Military Commission to be created as stipulated in Chapter 7 of Annex “A”;

(b) Chapter 4 of Annex “A”, number 4.1, reiterates that “[t]he final orderly withdrawal of all foreign forces from the national territory of the Democratic Republic of Congo shall be in accordance with Annex ‘B’ of this Agreement”, and number 4.2 indicates that “[t]he Joint Military Commission/OAU and UN shall draw up a definitive schedule for the orderly withdrawal of all foreign forces from the Democratic Republic of Congo”;

(c) Chapter 8, Article 8.1, contemplates that a force should be constituted, facilitated and deployed in the DRC by the United Nations in collaboration with the Organization of African Unity with the mandate, among others, to schedule and supervise the withdrawal of all foreign forces (Art. 8.2.1); and

(d) Chapter 11, Article 11.4, stipulates:

“...“All forces shall be restricted to the declared and recorded locations and all movements shall be authorised by the JMC, OAU and UN mechanisms. All forces shall remain in the declared and recorded locations until:

(a) in the case of foreign forces, withdrawal has started in accordance with JMC/OAU, UN withdrawal schedule;

(b) ...................................................

(e) Annex “B”, number 17 indicates “180 days from the formal signing of the Ceasefire” as the deadline for the withdrawal of all foreign forces.

12. The Kampala Disengagement Plan (“Plan for the Disengagement and Redeployment of Forces in Democratic Republic of Congo (DRC) in Accordance with the Lusaka Agreement”) was agreed on 8 April 2000 by all the parties to the Lusaka Ceasefire Agreement. It included stipulations providing that

“During the process of Disengagement and Redeployment of the forces, in order to establish a cessation of hostilities, no Party shall threaten or use force against another Party, and under no circumstances shall any armed forces of any Party enter into or stay within the territory controlled by any other Party without the authorization of the JMC and MONUC.” (Art. 1, para. 2 (a).)
ance with Articles 1 and 3 of the Lusaka Cease Fire Agreement. Each Party shall ensure that all personnel and organizations with military capability under its control or within territory under its control, including armed civilian groups (illegally armed), Armed Groups controlled by or in the pay of one or other Party comply with this Plan.” (Art. 1, para. 2 (d).)

“Whilst reserving the right to self-defence, within defended positions, the Parties shall strictly avoid committing any reprisals, counter-attacks, or any unilateral actions, in response to violations of this Plan by another Party. The Parties are to report all alleged violations of the provisions of this Plan to HQ MONUC and the JMC.” (Art. 2, para. 5.)

13. This last provision is remarkable in reserving the right of self-defence not only to the signatory States (the DRC, Namibia, Rwanda, Uganda, Zimbabwe) but also to the rebel movements Congolese Rally for Democracy (RCD) and the Movement for the Liberation of the Congo (NLC). Therefore it is not possible to accept the explanation given by the DRC in its letter of 6 May 2005 to the Court that the sole effect of the Lusaka Ceasefire Agreement was to suspend “the Congo’s power to exercise its right of self-defence by repelling the armies of the occupying States by force”; the right of self-defence being also expressly admitted in Article 2, paragraph 5, of the Harare Disengagement Plan.

14. Moreover, the Kampala Disengagement Plan stipulated that the Disengagement obligation assumed by the parties was based on the assumption that a ceasefire existed, in order to facilitate the immediate deployment of MONUC, Phase 2 (Art. 3, para. 7); that “[a] total Cessation of Hostilities by all Parties” was included among the prerequisites to be met before an effective disengagement could take place (Art. 3, para. 8 (a)); and that the Ceasefire Zone was divided in four areas, as detailed in the map attached as Appendix 2 (Art. 14).

15. Some time later, on 6 December 2000, the Harare Disengagement Plan laid down the Sub Plans for Disengagement and Repatriation specifying the obligations in respect to Area A where the MCL, UPDF and FAC and their allies had declared to be present.

16. Therefore, in my opinion the presence of Ugandan troops in Congolese territory was consented to by the DRC in the terms stipulated in the Kampala and Harare Disengagement Plans.

17. The Luanda Agreement came into force upon its signing, on 6 September 2002, and was entitled “Agreement between the Governments of the Democratic Republic of The Congo and the Republic of Uganda on withdrawal of Ugandan Troops from the Democratic Republic of The Congo, Cooperation and Normalisation of Relations between the Two Countries”.

18. Article 1, paragraph 4, of the Luanda Agreement stipulates: “The Parties agree that the Ugandan troops shall remain on the slopes of Mt. Ruwenzori until the Parties put in place security . . . including training and coordinated patrol of the common border.”

19. The DRC therefore expressly consented in Article 1, paragraph 4, of the Luanda Agreement to the presence of Ugandan troops on the slopes of Mt. Ruwenzori. In my opinion, the DRC also consented to their presence in the places from which they were to be withdrawn in accordance with the detailed plan stipulated in Annex A, Article 8, of the Luanda Agreement, with special reference to Beni and Gbadolite (D-5 days), Bunia (the withdrawal of troops to begin on D-70 days, and to be completed by D-100 days). Moreover this consent is expressed again in the Amendment signed at Dar es Salaam on 10 February 2003 extending the withdrawal from Bunia, D-38, to 20 March 2003, this date ultimately being extended to the end of May 2003. Consequently, the presence of Ugandan troops in Congolese territory as provided in the Luanda Agreement and in its Amendment of Dar es Salaam cannot be considered a violation of conventional and customary international law.

20. For the reasons set out above, it is my opinion that the DRC consented to the presence of Ugandan troops in its territory from 10 July 1999 until 2 June 2003, under the terms and conditions prescribed in the Lusaka Ceasefire Agreement of 10 July 1999, the Kampala Disengagement Plan of 8 April 2000, the Harare Disengagement Plan of 6 December 2000, and the Luanda Agreement of 6 September 2002, as amended in the Dar es Salaam Amendment of 10 February 2003. Therefore, Uganda’s military presence in the DRC during this period did not violate the principle of non-use of force in international relations and the principle of non-intervention.

II

21. Paragraph 130 of the Judgment states

“that it has not been presented with evidence that can safely be relied on in a court of law to prove that there was an agreement between the DRC and the Sudan to participate in or support military action against Uganda; or that any action by the Sudan (of itself factually uncertain) was of such a character as to justify Uganda’s claim that it was acting in self-defence”.

22. In this respect I wish to make reference to the statement by the Chief Prosecutor on the Uganda arrest warrants, dated 14 October 2005,
because it is in the public domain and the Court may ascertain its terms. The statement announces that the pre-trial Chamber II of the International Criminal Court has unsealed five warrants of arrest in the Uganda situation, because it considered there to be sufficient evidence that the concerned persons have committed crimes against humanity and war crimes; it is recalled therein that the Lord’s Resistance Army (LRA) has killed, abducted, enslaved and raped the people of northern Uganda for 19 years, that more than 50 missions were made to Uganda, in small groups of two or three, to investigate the situation, and that among other facts, it was established that Joseph Kony is the absolute leader of the LRA and that he directs all of the LRA operations from his bases in the Sudan.

III

23. In paragraph 345 (1) of the operative part of the Judgment the Court “Finds that the Republic of Uganda . . . by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention.”

24. It is to be observed that the Lusaka Ceasefire Agreement stipulated the importance of the solution of the internal conflict in the DRC by inter-Congolese dialogue. The Government of the DRC, the Rally for the Congolese Democracy (RCD), the Movement for the Liberation of the Congo (MLC), the political opposition, the civil society, the Congolese Rally for Democracy/Movement of Liberation (RCD-NL), the Congolese Rally for Democratic/National (RDC/N) and the Mai Mai decided, on 16 December 2002 in Pretoria, to put in place a government of national unity, aiming at national reconciliation. A calendar was set forth but it was not complied with, political reconciliation only being implemented through the installation of a new national government, including leaders of the three armed rebel organizations and Congolese society: the military forces of these three rebel groups were fully integrated into the national army and democratic elections were to be held within two years.

25. While I accept the principles of international law enunciated in General Assembly resolution 2625 (XXV) (24 October 1970) mentioned in paragraph 162 of the Judgment, they do not, in my view, apply to the present case. As a consequence of the dialogue among the parties, a new national government was installed on 1 July 2003 in the DRC with participation of the leaders of the rebel forces, which were integrated into the Congolese army; this reconciliation, in my opinion, exonerates Uganda from any possible international responsibility arising out of the assistance it gave in the past to the Rally for the Congolese Democracy (RCD) and to the Movement for the Liberation of the Congo (MLC).

26. A similar situation took place in the Congo not very long ago, when in May 1997 the Alliance of Democratic Forces for the Liberation of the Congo (AFGL), with the support of Uganda and Rwanda, overthrew the legal Head of State of the former Zaire, Marshal Mobutu Sese Seko, taking control of the country under the direction of Laurent-Désiré Kabila. I wonder whether Uganda would have been condemned for this assistance had the Court been requested by the DRC to make such a declaration after Laurent-Désiré Kabila legally assumed the Presidency of the country.

IV

27. In paragraph 345 (1) of the operative part of the Judgment the Court “Finds that the Republic of Uganda . . . by occupying Ituri . . . violated the principle of non-use of force in international relations and the principle of non-intervention.”

28. The majority of the Court maintains that customary international law is reflected in the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter “the Hague Regulations of 1907”) (Judgment, paras. 172 and 217). This statement is noteworthy because occupying Powers have not always complied with the Hague Regulations of 1907.

29. The Judgment considers applicable Article 42 of the Hague Regulations of 1907 providing that

“A territory is considered as being occupied when it is actually under the authority of the hostile army.

The occupation extends only to the regions where this authority is established and capable of being asserted.”

30. The Court therefore examines whether the requirements of Article 42 are met in the present case, stressing that it must satisfy itself that Ugandan armed forces in the DRC were not only stationed in particular locations but that they had substituted their own authority for that of the Congolese Government (Judgment, para. 173).

31. In this respect paragraph 175 of the Judgment states:

“It is not disputed between the Parties that General Kazini, commander of the Ugandan forces in the DRC, created the new
‘province of Kibali-Ituri’ in June 1999 and appointed Ms Adèle Lotsove as its Governor. Various sources of evidence attest to this fact, in particular a letter from General Kazini dated 18 June 1999, in which he appoints Ms Adèle Lotsove as ‘provisional Governor’ and gives suggestions with regard to questions of administration of the new province. This is also supported by material from the Porter Commission. The Court further notes that the Sixth Report of the Secretary-General on MONUC (S/2001/128 of 12 February 2001) states that, according to MONUC military observers, the UPDF was in effective control in Bunia (capital of Ituri district).”

32. These facts are not disputed by Uganda and the majority of the Court concludes from them that the conduct of General Kazini “is clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power” (Judgment, para. 176).

33. In my opinion, this conclusion is not acceptable. It is true that General Kazini, Commander of the Ugandan forces in the DRC, appointed Ms Adèle Lotsove as “provisional Governor” in charge of the newly created province of Kibali-Ituri in June 1999, giving her suggestions with regard to questions of the administration of the province. However, this fact does not prove that either General Kazini or the appointed Governor were in a position to exercise, and in fact did exercise, actual authority in the whole province of Kibali-Ituri. It is also true that the UPDF was in control in Bunia (capital of Kibali-Ituri district), but control over Bunia does not imply effective control over the whole province of Kibali-Ituri, just as control over the capital (Kinshasa) by the Government of the DRC does not inevitably mean that it actually controls the whole territory of the country.

34. Therefore, in my opinion, the elements advanced in the Judgment do not prove that Uganda established and exercised actual authority in the whole province of Kibali-Ituri, as required in Article 42 of the Hague Regulations of 1907.

35. In addition, it may be observed that the elements advanced by the DRC to prove Uganda’s actual control of the whole of Kibali-Ituri province are not conclusive, for the following reasons:

(a) The DRC’s Application instituting proceedings against Rwanda, filed in the Registry on 28 May 2002, which is a document in the public domain, states in paragraph 5 of the section entitled Statement of Facts, under the heading “Armed Aggression”:

“5. Since 2 August 1995, Rwandan troops have occupied a significant part of the eastern Democratic Republic of the Congo, notably in the provinces of Nord-Kivu, Sud-Kivu, Katanga, Kasai Oriental, Kasai Occidental, and Maniema and in Orientale Province, committing atrocities of all kinds there with total impunity.” (Armed Activities on the Territory of the Congo (New Application: 2002), Application I. Statement of Facts; A. Armed Aggression, p. 7.)

36. Consequently, in this statement “against interest” the DRC maintains that Rwanda occupied Orientale province from August 1995 until the end of May 2002, the date of its new Application to the Court, and Orientale province included the territories of what was to become Kibali-Ituri province in 1999. Therefore, the DRC considered Rwanda as the occupying Power of those territories, including the territories of Kibali-Ituri, and gave no indication in its Application that the occupation by Rwanda came to an end after the creation of Kibali-Ituri province.

(b) The special report on the events in Ituri, January 2002 to December 2003, prepared by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and distributed on 16 July 2004 (hereinafter the “2004 MONUC report”) dedicates the following special paragraph to the role of Rwanda:

“On 6 January 2003, RCD-Goma, a Congolese rebel movement supported by Rwanda, announced an alliance with UPC. Rwanda had become involved in the Ituri crisis much earlier, however. The Chief of Staff of the Rwandan army, James Kabarebe Kagunda, was reportedly the biggest advocate of Rwandan support to Hema militia and was in contact with Chief Kawa, who negotiated the arms supplies in June 2002. Rwanda reportedly supplied arms by airdrop to the UPC camps located in Mandro, Tchomia, Bule, Bulukwa and Dhego and sent military experts to train Hema militias, including child soldiers. Moreover, some UPC elements (estimated at 150) went for training in Rwanda from September to December 2002. On 31 December 2002, Thomas Lubanga visited Kagiri for the first time. Kagiri also facilitated the transport to Ituri of PRA elements, earlier trained in Rwanda, and used some Kinyarwanda-speaking Congolese to organize this support. One ex-UPDF sector Commander of Ituri, Colonel Muzora, who had left the Rwandan army to join the Rwandan forces, was seen by several witnesses in the UPC camps, mainly to orient the newcomers from Rwanda. Practically all witnesses interviewed by MONUC believe that Rwandan nationals occupied posts in UPC military commands. MONUC obtained testimonies about adults and children being trained in Rwanda and being sent through Goma, in 2002 and 2003, to fight in Ituri with UPC. It also appears that, when Thomas Lubanga and other high-ranking UPC officers fled from Ituri in March 2003, they were evacuated by air to Rwanda. Arms and ammunition were then supplied from Rwanda to UPC by air before UPC retook Bunia in May 2003. On 11 and 12 May 2003, two aircraft landed at Dhego — not far from Mongbwalu — from Rwanda, with grenades, rocket-propelled grenades, mortars and ammunition.
The first of the aircraft was also carrying back Lubanga and Bosco from Kigali.” (Special report on the events in Ituri, January 2002-December 2003 prepared by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), 16 July 2004, para. 29.)

37. The 2004 MONUC report describes the role of the pre-transitional Government of Kinshasa in the following terms:

“Until 2002, the pre-transition Government in Kinshasa was hardly involved in Ituri. Its first delegation arrived in Bunia in August 2002, after a visit to Kampala. During a second visit, on 29 August 2002, the Minister for Human Rights, Ntumba Lwaba, was abducted by Hema militia and freed only after three days in exchange for the release of Lubanga and several UPC members who had been arrested in Kampala and transferred to Kinshasa. Early in 2002, the involvement of the Kinshasa Government centred on military assistance that it provided to RCD-ML in Beni. Kinshasa sent trainers, weapons and also some military elements, allegedly amounting to four battalions, in support of APC, which reportedly was sending weapon supplies from Beni to Lendu militia. FAC and APC were also named by eyewitnesses and victims as parties in some attacks on Hema villages. It is alleged that, in the last three months of 2002, some military supplies may also have been sent directly to the Lendu militia, notably to Rethy, in Djugu territory.” (Special report on the events in Ituri, January 2002-December 2003 prepared by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), 16 July 2004, para. 30.)

38. In respect to the Transitional Government of Kinshasa, the 2004 MONUC report informs:

“The political initiative of the Transitional Government to calm the tension in Ituri has focused on the deployment of some judicial and police personnel and sending official delegations. There have also been a number of press statements. Apart from the delivery of a humanitarian aid shipment early in 2004, humanitarian aid from the Government to the Ituri victims has been negligible. More concrete actions and active engagement would be needed to find a solution to the ongoing crisis. It was planned that the first brigade of the new national army would be deployed in Ituri before June 2004. However, there are no guarantees that these troops will receive regular payments and supplies.” (Special report on the events in Ituri, January 2002-December 2003 prepared by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), 16 July 2004, para. 31.)

39. Additionally, the 2004 MONUC report states that other rebel groups were acting in Kibali-Ituri province from 1998 to 2003. Annex I lists the following as armed and political groups involved in the Ituri conflict: (a) Ituri armed groups: Union des patriotes congolais (UPC); Parti pour l’unité et la sauvegarde de l’intégrité du Congo (PUSIC); Forces populaires pour la démocratie au Congo (FPDC); Forces armées du peuple congolais (FAPC); Front nationaliste intégrationniste (FN1); Front de résistance patriotique de l’Ituri (FRPI); Front pour l’intégration et la paix en Ituri (FIPI); (b) Regional Political Groups: Mouvement de libération du Congo (MLC); Rassemblement congolais pour la démocratie (RCD); RCD-Kisangani/Mouvement de libération (RCD-K/ML); RCD-Nationale (RCD-N).

40. The 2004 MONUC report also describes the activities of Ugandan troops in the province of Kibali-Ituri but does not state that Ugandan forces actually controlled or were capable to exercise actual authority in the totality of its territory.

41. Consequently, as the reliability of the 2004 MONUC report is “unchallenged” by the DRC, it does not support the conclusion that Uganda’s authority was actually exercised in the whole territory of Kibali-Ituri province, as would be required by the 1907 Hague Regulations in order for Uganda to be considered its occupying Power. On the contrary, the 2004 MONUC report acknowledges that Rwanda as well as many rebel groups played an important role in the tragedy experienced in Kibali-Ituri province.

(c) As evidence of the occupation by Uganda of Kibali-Ituri province, the DRC has also cited Article 2, paragraph 3, of the 2002 Luanda Agreement, stating that the parties agree “[t]o work closely together in order to expedite the pacification of the DRC territories currently under...Uganda[n] control and the normalization of the situation along the common border”. However, the sentence quoted by the DRC does not indicate that Uganda controlled the whole of Kibali-Ituri province but rather some Congolese territories, and for this reason it does not demonstrate that Uganda was the occupying Power in Kibali-Ituri province.

42. The above considerations, in my opinion, demonstrate that Uganda was not an occupying Power of the whole of Kibali-Ituri province but of some parts of it and at different times, as Uganda itself acknowledges. Therefore, it is for the DRC in the second phase of the present proceedings to demonstrate in respect of each one of the illegal acts violating
human rights and humanitarian law, and each one of the illegal acts of looting, plundering and exploitation of Congolese natural resources it complains of, that it was committed by Uganda or in an area under Uganda’s occupation at the time.

43. Additionally it is to be observed that rebel groups existed in the province of Kibali-Ituri before May 1997, when Marshal Mobutu Ssese Seko governed the former Zaire; they continued to exist after President Larent-Désiré Kabila came to power and for this reason the DRC expressly consented to the presence of Ugandan troops in its territory. The Court itself acknowledges the inability of the DRC to control events along its border (Judgment, paras. 135, 301). Rebel groups were also present during Uganda’s military actions in the region and continue to be present even after the withdrawal of Ugandan troops from the territory of the DRC on 2 June 2003, notwithstanding the intensive efforts of the Government of the DRC, with strong help from the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), employing more that 15,000 soldiers, as is a matter of public knowledge.

44. As indicated above, the majority of the Court concluded that Uganda was an occupying Power of Kibali-Ituri province and that for this reason it

“was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.” (Judgment, para. 178.)

45. Article 43 of the Hague Regulations of 1907 states:

“When the legally constituted authority has actually passed into the hands of the occupant, the latter shall take all measures within his power to restore and, as far as possible, to insure public order and life, respecting the laws in force in the country unless absolutely prevented.”

46. Consequently, application of Article 43 is conditional on the fact that “legally constituted authority actually passed into the hands of the occupant”. It is not clear to me how the majority of the Court came to the conclusion that this requirement was met, because no explanation in this respect is given in the Judgment.

47. Moreover, the obligation imposed upon the occupying Power by Article 43 is not an obligation of result. An occupying Power is not in violation of Article 43 for failing to effectively restore public order and life in the occupied territory, since it is only under the obligation to “take all measures within his power to restore and as far as possible, to insure public order and life”. It is an open question whether the nature of this obligation has been duly taken into account in the Judgment.

48. Furthermore, when dealing with the occupation of the province of Kibali-Ituri by Uganda, the majority of the Court rarely takes into account the province’s geographical characteristics in order to determine whether Uganda complied with its obligation of due diligence under Article 43 of the Hague Regulations of 1907; but they were considered to exonerate the DRC for its failure to prevent cross-border actions of anti-Ugandan rebel forces, as may be observed in the examination of Uganda’s first counter-claim.

(Signed) Gonzalo PARRA-ARANGUREN.
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Separate Opinion of Judge Kooijmans, I.C.J. Reports 2005
SEPARATE OPINION OF JUDGE KOOIJMANS

General context of the dispute — Chronic instability in the region — Interconnection between bilateral dispute and overall crisis — Function of judicial dispute settlement — Importance of balanced appraisal of concerns and interests of litigants — Judgment insufficiently reflects complexity of situation.

Ugandan military actions after 7 August 1998 only justifiable under right of self-defence — No involvement of DRC Government in armed actions by Ugandan rebel groups — Actions thus not attributable to DRC — Right of self-defence not conditional upon armed attack by State — Uganda entitled to self-defence against armed irregulars — Standard of necessity and proportionality no longer met after 1 September 1998.

Belligerent occupation in invaded areas other than Ituri district — DRC rendered incapable of exercising authority by invasion — Uganda occupying Power in all invaded areas until Lusaka Agreement — Status of Congolese rebel movements after Lusaka — Effect on status of Uganda as occupying Power.

Occupation no violation of principle of non-use of force — Conceptual distinction between jure ad bellum and jure belli.

Provisional measures addressed to both Parties — No evidence of violation by Uganda provided by DRC — Court's finding in operative part not appropriate.

First counter-claim — Duty of vigilance and burden of proof — No evidence of efforts by Zaire Government to control rebel groups in relevant period.

1. Although I have voted in favour of most of the findings of the Court as reflected in the dispositif, I nevertheless feel constrained to make the following remarks. My main difficulty with the present Judgment is a certain lack of balance in the description of the dispute and of the relevant facts even if the conclusions drawn are in my view in general legally correct. I will therefore start with a number of general remarks and subsequently deal with certain legal issues with regard to which I would have preferred a different approach.

A. GENERAL REMARKS

2. In an article entitled “Explaining Ugandan Intervention in Congo: Evidence and Interpretations”, the author writes:

“[T]o explain the intervention of one State into the affairs of another is rarely simple or uncontroversial . . . To maintain objectivity in the face of confusing and contradictory evidence is particularly difficult . . . Moreover, the results are likely to be tentative, partial and complex, and therefore less than totally satisfying. One is more likely to end with a ‘thick description’ of a complex episode than a ‘scientific’ explanation of a discrete social event.”

3. These cautious words of a social scientist are of limited use for a court of justice which has to evaluate the legality of certain specific activities which have been put before it. The task of a judicial body does not allow it to conclude with a “thick description” of a complex episode but compels it to come to a clear and unequivocal determination of the legal consequences of acts committed during that “complex episode”.

4. However, in order to make its legal assessments and conclusions comprehensible and thereby acceptable to litigant States whose leaders are no trained lawyers (even though they may be assisted by legal professionals), but are the main actors in the process of implementing the judgment, a court should make clear in its reasoning that it is fully aware of the wider context and the complexity of the issues involved. A judgment which is not seen as logical and fair in its historical, political and social dimensions runs the risk of being one compliance with which will be difficult for the parties.

5. The Parties to the present dispute share a hapless post-decolonization history. They have been in the grip of merciless dictatorships which elicited violent resistance and armed rebellions. The overthrow of these dictatorships (in Uganda in 1986 and the Congo in 1997) did not bring internal stability: armed groups, either loyal to the previous régime or pursuing goals of their own and operating from remote parts of their own territory or from abroad continued to threaten the new leadership. In this respect the Parties shared the plight which seems to have become endemic in much of the African continent: régimes under constant threat from armed movements often operating from the territory of neighbouring States, whose Governments sometimes support such movements but often merely tolerate them since they do not have the means to control or repel them. The latter case is one where a Government lacks power and consequently fails to exercise effectively its territorial authority; in short, there is a partial failure of State authority and such failure is badly concealed by the formal performance of State functions on the international level.

Commitments entered into by Governments unable to implement them

are unworthy of reliance from the very start and hardly contribute to the creation of more stability.

6. Under such circumstances, the ruling powers may feel left to their own resources. In order to fight the armed movements operating from abroad, usually by carrying out hit and run tactics, they often engage in a kind of hot pursuit onto neighbouring territory since diplomatic démarches have no effect. They may, moreover, lack all confidence in the good intentions of the neighbour Government in spite of its commitments and this may, in turn, induce them to support opposition movements seeking to overthrow that "untrustworthy" Government.

7. And so the circle is closed and we find ourselves confronted with a pattern which is so typical for post-Cold War Africa: Governments, harassed by armed rebel movements often operating from foreign territory, trying to improve their security by meddling in the affairs of neighbouring States; Governments, moreover, which have sometimes come to power through external intervention themselves but which, once in power, turn against their former supporters in order to become master in their own house and to strengthen their grip on the internal situation.

8. Needless to say, such chronic instability and the ensuing incessant practice of unrestrained violence lead to immense human suffering. The human disaster in Rwanda in 1994 is an extreme example, genocidal in dimension, of a much more general pattern of gross violations of human rights by warring factions and authorities trying to remain in power.

9. The organized international community has thus far been unable to provide structural assistance, necessary to strengthen State institutions, and has thus failed to lay the basis for an improved security system in the region. It has mainly limited itself to monitoring the situation, providing a sometimes robust, but more often impotent, peace-keeping assistance in war-stricken areas, and to furnishing humanitarian assistance.

10. It is within this framework that the dispute before the Court must be placed. It is not necessary to describe in detail the crisis as it developed since the 1994 genocide in Rwanda nor to demonstrate how an increasing number of States, in the Great Lakes region and even beyond, became involved. These events have been well documented in various articles and in a great number of reports from United Nations agencies and non-governmental organizations. Suffice it to say that the Congo's eastern border area, a "line of political instability on which the future of central Africa may well hinge" (as it was aptly called by David Shearer), occupied a central place in the crisis. The overall picture is moreover obfuscated by the fact that, apart from the Governments involved, an even greater number of insurgent movements, sometimes controlled by Governments but more often with shifting alliances, determined and determine the situation on the ground.

11. Is it possible to extract from this tangled web one element, to isolate it, to subject it to legal analysis and to arrive at a legal assessment as to its consequences for the relations between only two of the parties involved? A court mandated by its Statute to decide disputes between States whenever it has jurisdiction to do so cannot refrain from carrying out that mandate on the ground that its judgment would only cover one dispute which is indissolubly linked to the overall conflict. The system of international judicial dispute settlement is premised on the existence of a series of bilateral inter-State disputes, artificial as this sometimes may be, as became clear, for example, in the *Legality of the Use of Force* cases (the Federal Republic of Yugoslavia *versus* ten individual Member States of NATO).

12. In a slightly different context (different in that the dispute before the Court was said to represent "a marginal and secondary aspect of an overall problem" between the Parties) the Court stated that "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important". In the present case the latter part of the sentence could be paraphrased as "merely because that dispute is intricately linked to a much wider problem which involves other parties as well". The Court went on to say that

"never has the view been put forward that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal question at issue between them . . . ; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching

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and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes” (United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 20, para. 37; emphasis added).

13. The last part of this quotation illustrates the important place assigned by the Charter to the Court in the context of the peaceful settlement of disputes, as is clear from Article 36, paragraph 3, in Chapter VI on the Pacific Settlement of Disputes. The concept of peaceful dispute settlement is premised on the condition that the parties to a dispute find their particular position and their specific concerns reflected in the settlement suggested to or imposed upon them. That settlement must acknowledge those concerns, even if it fails to satisfy the parties’ demands or even censures their conduct.

14. I regret that the Judgment of the Court in my view falls short of meeting the standard just mentioned. It inadequately reflects the structural instability and insecurity in the region, the overall pattern of lawlessness and disorder and the reprehensible behaviour of all parties involved. A reading of the Judgment cannot fail to leave the impression that the dispute is first and foremost a dispute between two neighbouring States about the use of force and the ensuing excesses, perpetrated by one of them. A two-dimensional picture may correctly depict the object shown but it lacks depth and therefore does not reflect reality in full.

15. It is true that in paragraph 26 the Court states that it is aware of the complexity of the situation which has prevailed in the Great Lakes region and that the instability in the DRC has had negative security implications for Uganda and other neighbouring States.

It is also true that in paragraph 221 the Court observes that the actions of the various Parties in the complex conflict have contributed to the immense suffering faced by the Congolese population.

But in my view this awareness is insufficiently reflected in the Court’s consideration of the various claims of the Parties. I will try to demonstrate this in the sections of this opinion dealing with the right of self-defence as claimed by Uganda (see B below), Uganda’s first counter-claim (see E below) and Uganda’s breach of its obligations under the Order on provisional measures (see D below).

B. USE OF FORCE AND SELF-DEFENCE

16. I am in full agreement with the Court that, as from the beginning of August 1998, Uganda could, for the presence of its forces on Congo-
para. 195), was still in conformity with contemporary international law.

In the oral pleadings counsel for Uganda contended that

“armed attacks by armed bands whose existence is tolerated by the territorial sovereign generate legal responsibility and therefore constitute armed attacks for the purpose of Article 51. And thus, there is a separate, a super-added standard of responsibility, according to which a failure to control the activities of armed bands, creates a susceptibility to action in self-defence by neighbouring States.” (CR 2005/7, p. 30, para. 80.)

The DRC for its part denied that the mere acknowledgment that armed groups were present on its territory was tantamount to support.

“To assimilate mere tolerance by the territorial sovereign of armed groups on its territory with an armed attack clearly runs counter to the most established principles in such matters. That position, which consists in considerably lowering the threshold required for the establishment of aggression, obviously finds no support in the Nicaragua Judgment.” (CR 2005/12, p. 26, para. 6.)

22. The Court does not deem it necessary at this point to deal with these contentions since it has found that the attacks by the rebels “did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression adopted on 14 December 1974” (Judgment, para. 146; emphasis added). By drawing this conclusion, the Court, however, implicitly rejects Uganda’s argument that mere tolerance of irregulars “creates a susceptibility to action in self-defence by neighbouring States”.

23. It deserves mentioning, however, that the Court deals in more explicit detail with this issue when considering Uganda’s first counter-claim with regard to the period 1994-1997. The Court there says that it “cannot conclude that the absence of action by Zaire’s Government against the rebel groups in the border area is tantamount to ‘tolerating’ or ‘acquiescing’ in their activities” and that “[t]hus the part of Uganda’s first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be upheld.” (Judgment, para. 301).

24. I agree that in general it cannot be said that a mere failure to control the activities of armed bands present on a State’s territory is by itself tantamount to an act which can be attributed to that State, even though I do not share the Court’s finding with regard to the first counter-claim.

But I fail to understand why the Court said explicitly there what it only said implicitly with regard to the DRC’s first claim, notwithstanding that Uganda raised that very same argument when it contested that claim.

25. What is more important, however, is that the Court refrains from taking a position with regard to the question whether the threshold set out in the Nicaragua Judgment is still in conformity with contemporary international law in spite of the fact that that threshold has been subject to increasingly severe criticism ever since it was established in 1986. The Court thus has missed a chance to fine-tune the position it took 20 years ago in spite of the explicit invitation by one of the Parties to do so.

26. But the sentence quoted in paragraph 20 calls for another comment. Even if one assumes (as I am inclined to do) that mere failure to control the activities of armed bands cannot in itself be attributed to the territorial State as an unlawful act, that in my view does not necessarily mean that the victim State is under such circumstances not entitled to exercise the right of self-defence under Article 51. The Court only deals with the question whether Uganda was entitled to act in self-defence against the DRC and replies in the negative since the activities of the rebel movements could not be attributed to the DRC. By doing so, the Court does not answer the question as to the kind of action by the rebel movements would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces” (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 103, para. 195) but no involvement of the “host Government” can be proved.

27. The Court seems to take the view that Uganda would have only been entitled to self-defence against the DRC since the right of self-defence is conditional on an attack being attributable, either directly or indirectly, to a State. This would be in line with what the Court said in its Advisory Opinion of 9 July 2004: “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State” (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004, p. 194, para. 139; emphasis added).

28. By implicitly sticking to that position, the Court seems to ignore or even to deny the legal relevance of the question referred to at the end of paragraph 26.
“conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years” (I.C.J. Reports 2004, p. 230, para. 35).

I also observed that this interpretation no longer seems to be shared by the Security Council, since in resolutions 1368 (2001) and 1373 (2001) it recognizes the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. In these resolutions the Council called acts of international terrorism, without any further qualification and without ascribing them to a particular State, a threat to international peace and security.

29. If the activities of armed bands present on a State’s territory cannot be attributed to that State, the victim State is not the object of an armed attack by it. But if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its inherent right of self-defence.

30. When dealing with the first counter-claim in paragraph 301 of the Judgment, the Court describes a phenomenon which in present-day international relations has unfortunately become as familiar as terrorism, viz. the almost complete absence of government authority in the whole or part of the territory of a State. If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require. "Just as Utopia is entitled to exercise self-defence against an armed attack by Arcadia, it is equally empowered to defend itself against armed bands or terrorists operating from within the Arcadian territory". as Professor Yoram Dinstein puts it.

31. Whether such reaction by the attacked State should be called self-defence or an act under the state of necessity or be given a separate name, for example “extra-territorial law enforcement”, as suggested by Dinstein himself, is a matter which is not relevant for the present purpose. The lawfulness of the conduct of the attacked State must be put to the same test as that applied in the case of a claim of self-defence against a State: does the armed action by the irregulars amount to an armed attack and, if so, is the armed action by the attacked State in conformity with the requirements of necessity and proportionality?

32. As for the first question, I am of the view that the series of attacks which were carried out from June till the beginning of August 1998, and which are enumerated in paragraph 132 of the Judgment, can be said to have amounted to an armed attack in the sense of Article 51, thus entitling Uganda to the exercise of self-defence. Although Uganda, during the proceedings, persistently claimed that the DRC was directly or indirectly involved in these attacks, the finding that this allegation cannot be substantiated and that these attacks are therefore not attributable to the DRC has no direct legal relevance for the question whether Uganda is entitled to exercise its right of self-defence.

33. The next question therefore is: was this right of self-defence exercised in conformity with the rules of international law?

During the month of August 1998 Ugandan military forces seized a number of towns and airports in an area contiguous to the border-zone where Uganda had previously operated with the consent of and, according to the Protocol of April 1998, in co-operation with the DRC.

Taking into account the increased instability and the possibility of a return to the undesirable conditions of the late Mobutu period, I do not find these actions unnecessary or disproportionate to the purpose of repelling the persistent attacks of the Ugandan rebel movements.

34. It was only when Uganda acted upon the invitation of Rwanda and sent a battalion to occupy the airport of Kisangani — located at a considerable distance from the border area — on 1 September 1998 that it grossly overstepped the limits set by customary international law for the lawful exercise of the right of self-defence.

Not by any stretch of the imagination can this action or any of the subsequent attacks against a great number of Congolese towns and military bases be considered as having been necessitated by the protection of Uganda’s security interests. These actions moreover were grossly disproportionate to the professed aim of securing Uganda’s border from armed attacks by anti-Ugandan rebel movements.

35. I therefore fully share the Court’s final conclusion that Uganda’s military intervention was of such a magnitude and duration that it must be considered a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter (Judgment, para. 165).

I feel strongly, however, that the Court, on the basis of the facts and the arguments presented by the Parties and irrespective of the motives ascribed to them, should have gone further than merely finding that Uganda had failed to substantiate its claim that the DRC was directly or
indirectly involved in the attacks by the rebel movements and thus concluding that Uganda was not entitled to self-defence. In the circumstances of the case and in view of its complexity, a further legal analysis of Uganda’s position, and the rights ensuing therefrom, would in my view have been appropriate.

Thus the Court has forgone a precious opportunity to provide clarification on a number of issues which are of great importance for present-day international society but still are largely obscure from a legal point of view.

C. BELLIGERENT OCCUPATION

36. The Court is of the view that Uganda must be considered as the occupying Power, in the sense of the *jus in bello*, in Ituri district. It further concludes that it has not been provided with evidence to show that authority as occupying Power was exercised by Ugandan armed forces in any areas other than in Ituri district (Judgment, paras. 176 and 177).

37. Although I have no difficulty with the Court’s finding with regard to Ituri district, I have some doubts in respect of the Court’s reasoning leading to the conclusion that Uganda was not in the position of an occupying Power in other areas invaded by the UDPF.

38. Article 42 of the 1907 Hague Regulations provides that:

“territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.”

To all appearances this definition is based on factual criteria. However, as Professor Adam Roberts aptly remarks: “The core meaning of the term is obvious enough; but as usually happens with abstract concepts, its frontiers are less clear.”

39. The reasons for this lack of clarity may in the first place be of a factual nature. The situation on the ground is often confused and the parties involved may present conflicting pictures of this situation. In the present case, however, the Parties agree to a remarkably great extent on the localities taken by the UPDF, the places where Ugandan troops were present, were actually under the authority of Uganda. This is mainly a factual issue.

40. The lack of clarity may, however, also be due to non-factual considerations. As one author points out: “[o]ccupation’ has... acquired a pejorative connotation, and as a result, occupants would tend to prefer euphemistic titles to portray their position.” This author further observes that at the time of the adoption of the Hague Regulations it was generally assumed that, upon gaining control, the occupant would establish its authority over the occupied territory by introducing some kind of direct and therefore easily identifiable administration. In a period when war or the use of force as such was not legally objectionable, the notion of occupation as a term of art was not held in disrepute either. And thus the establishment of an administrative system by the occupant was seen as quite normal.

41. Partly as a result of the outlawing of war, that practice has become the exception rather than the rule. Occupants feel more and more inclined to make use of arrangements where authority is said to be exercised by transitional governments or rebel movements or where the occupant simply refrains from establishing an administrative system.

“In these cases, the occupants would tend not to acknowledge the applicability of the law of occupation to their own or their surrogate’s activities, and when using surrogate institutions, would deny any international responsibility for the latter’s actions.”

42. In the present case, the Court was confronted with both these factual and non-factual issues. Uganda denied its responsibility under the law of occupation firstly on the ground that its troops were too thinly spread to be able to exercise authority. It argued secondly that actual authority was vested in the Congolese rebel movements, which carried out virtually all administrative functions.

43. The Court has deemed it its task

“to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government” (Judgment, para. 173; emphasis added).

44. It is in particular this element of “substitution of the occupant’s authority for that of the territorial power” which leads in my opinion to an unwarranted narrowing of the criteria of the law of belligerent occupation as these have been interpreted in customary law since 1907.

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45. Article 41 of the “Oxford Manual” adopted in 1880 by the Institut de droit international already stated:

“Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its authority therein, and the invading State is alone in a position to maintain order there. The limits within which this state of affairs exists determine the extent and duration of the occupation.” (Emphasis added.)

It is noteworthy that these criteria have remained virtually unaltered. In modern national manuals on the law of armed conflict these criteria are expressed in similar terms; they are, firstly, that

“military occupation presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of exercising its authority, and [secondly] that the invader is in a position to substitute its own authority for that of the former government.”

46. In the present case the first criterion is certainly met; even if the actual authority of the DRC Government in the north-eastern part of the country was already decidedly weak before the invasion by the UPDF, that Government indisputably was rendered incapable of exercising the authority it still had as a result of that invasion. By occupying the nerve centres of governmental authority — which in the specific geographical circumstances were the airports and military bases — the UPDF effectively barred the DRC from exercising its authority over the territories concerned.

47. The Court, without explicitly mentioning this criterion, nevertheless seems to assume that it has been met. It concentrates, however, on the second criterion, the actual exercise of authority by the Ugandan armed forces and concludes that it has not been provided with “any specific evidence . . . that authority was exercised by [them] in any areas other than in Ituri district”. It seems to adopt the view that in these areas authority was exercised by the rebel movements which cannot be considered to have been controlled by Uganda. (Judgment, para. 177.)

48. The Court in my view did not give sufficient consideration to the fact that it was the Ugandan armed invasion which enabled the Congolese rebel movements to bring the north-eastern provinces under their control. Had there been no invasion, the central Government would have been in a far better position to resist these rebel movements. Uganda’s invasion was therefore crucial for the situation as it developed after the outbreak of the civil war. As the decisive factor in the elimination of the

DRC’s authority in the invaded area, Uganda actually replaced it with its own authority.

49. I am, therefore, of the opinion that it is irrelevant from a legal point of view whether it exercised this authority directly or left much of it to local forces or local authorities. As long as it effectively occupied the locations which the DRC Government would have needed to re-establish its authority, Uganda had effective, and thus factual, authority. Its argument that it cannot be considered to have been an effective occupying Power, in view of the limited number of its troops, cannot therefore be upheld.

50. As long as Uganda maintained its hold on these locations, it remained the effective authority and thus the occupying Power, until a new state of affairs developed. Such a new state of affairs was effected by the Lusaka Ceasefire Agreement of 10 July 1999. In normal circumstances, a ceasefire agreement as such does not change the legal situation, at least as long as the occupying Power remains in control. But the Lusaka Agreement is, as the Court states,

“more than a mere ceasefire agreement, in that it lays down various ‘principles’ (Art. III) which cover both the internal situation within the DRC and its relations with its neighbours” (Judgment, para. 97).

51. The Lusaka Agreement laid the foundation for the re-establishment of an integrated Congolese State structure. For this purpose the status of the two most important rebel movements — the MLC and the RCD — now called the “armed opposition”, was modified; they became formal participants in the open national dialogue (Art. III, para. 19). This new position was reflected in their signing of the agreement as separate parties per the attached list.

52. In my opinion the “upgraded” status of the two rebel movements directly affected Uganda’s position as occupying Power. These move-

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9 See also Oppenheim-Lauterpacht, International Law, 7th ed., 1962, p. 435:

“When the legitimate sovereign is prevented from exercising his powers, and the occupant, being able to assert his authority, actually establishes an administration over a territory, it matters not with what means, and in what ways, his authority is exercised.” (Emphasis added.)

See also H. P. Gasser in D. Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflict, 1995, p. 243:

“Even if the stated strategic goal of an invasion of foreign territory is not to gain control of the area or its inhabitants, but ‘merely’ to secure against attacks on the invader’s own territory close to the border, the invading power still bears responsibility for the parts of the territory actually controlled. Similarly, neither the claimed short duration of the occupation nor the absence of military administration for the occupied territory makes any difference.” (Emphasis added.)
53. The Lusaka Agreement certainly did not automatically bring to an end Uganda's status as occupying Power since that status is based on control in fact. The recognition of the formal status of the RCD and MLC cannot, however, be disregarded. After Lusaka, territorial authority could no longer be seen as vested exclusively in the central Government but as being shared with "armed opposition" movements which had been recognized as part of the national authority.

54. Only in those places where it remained in full and effective control, like Ituri district, did Uganda retain its status as occupying Power and in this respect, the Court's view that Uganda occupied Ituri district only until the date its troops withdrew. As for the other areas where it had occupied Power from the date when it seized the various locations as the occupying Power from the Lusaka Agreement, it cannot be said that its military occupation was the result of legal force. The occupation of which the authority was also exercised by the rebel movements.

55. Whereas my disagreement with the way in which the Court interpreted the criteria for applicability of the law of belligerent occupation is to a certain extent merely technical in nature without legal consequence. I have more substantive reservations as to the way in which the phenomenon of "occupation" is dealt with in the "dispositif".

56. In the first paragraph of the operative part of its judgment the Court finds that Uganda, by engaging in military activities against the DRC, has violated its obligation under the principle of non-use of force. It thus has breached its obligations under the law of non-use of force. The occupation of Ituri was the result of its illegal use of force.

57. The law on belligerent occupation was originally set up as a "balancing mechanism" between the interests of the ousted sovereign and the occupying Power. The latter's obligation as temporary authority to restore and ensure public order while respecting the laws in force (Art. 43, Hague Regulations) and its powers with respect to property (Arts. 48 ff.) reflect this balancing mechanism. It was only in 1949 that the rules on occupation were extended in the Fourth Geneva Convention by adding a number of provisions regarding the treatment of the population of occupied territory.

58. In their formulation the rules on occupation form an important part of the jus in bello or international humanitarian law. The main purpose of that law is to protect the interests of the belligerent parties. It does not differentiate into account the interests of the non-belligerent parties. The recognition of the jus ad bellum and the jus in bello are reflected in the formulation of Chapter VI. The Court has found that Uganda has violated its obligations under the jus ad bellum, in particular in regard to the district of Ituri, the occupation of which was the result of its illegal use of force.

59. In the present case, the Court has found that Uganda has violated its obligations under the jus in bello. The Court has also found that its military activities, in particular in regard to the district of Ituri, the occupation of which was the result of its illegal use of force, is illegal. The occupation resulting from an illegal use of force is characterized here in terms of the origin of the result as illegal. The illegality of the occupation results from the illegality of the use of force, not from the consequences of that use of force. This is also true of the occupation of Ituri in the context of its military operations against the DRC, which resulted from the occupation of Ituri in the context of its military operations against the DRC, which was illegal because it was the result of an unlawful act.

60. Whereas my disagreement with the way in which the Court interpreted the criteria for applicability of the law of belligerent occupation is to a certain extent merely technical in nature without legal consequence. I have more substantive reservations as to the way in which the phenomenon of "occupation" is dealt with in the "dispositif".

61. In his report for the Centennial of the First Hague Peace Conference Professor Christopher Greenwood has dealt with the implications of the contemporary jus ad bellum and jus in bello, which have become almost synonymous with aggression and oppression.

62. Earlier I drew attention to the fact that the reluctance of Governments to declare the law of belligerent occupation applicable may be due to the impression that "occupation" has become almost synonymous with aggression and oppression.

63. I am aware that this impression is lent credibility by Article 3 of General Assembly resolution 3314 (XXIX) on the Definition of Aggression. The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack (Art. 45, Hague Regulations) is characterized in terms of its origin as illegal, not from the consequences of that use of force. This is also true of the occupation of Ituri in the context of its military operations against the DRC, which resulted from the occupation of Ituri in the context of its military operations against the DRC, which was illegal because it was the result of an unlawful act.
This resolution, as important as it may be from a legal point of view, does not in all its terms reflect customary law. The reference to military occupation as an act of aggression is in my opinion less than felicitous. Professor Greenwood says that “[t]he law of belligerent occupation has had a poor record of compliance for most of the 20th century”. In his view the principal problem is not one of a deficiency in the law but rather the reluctance of States to admit that the law applies at all. I regret that in the first paragraph of the dispositif the Court may have contributed to this reluctance on the part of belligerent parties to declare the law of occupation applicable.

D. Provisional Measures

66. In its fifth submission the DRC requested the Court to declare that Uganda had violated the Court’s Order on provisional measures of 1 July 2000. In paragraph 7 of the dispositif the Court acceded to this request.

For a number of reasons I do not find the Court’s reasoning in support of this ruling to be cogent.

67. The provisional measures indicated by the Court in its Order of 1 July 2000 were three in number and were addressed to both Parties. The Parties were first called upon to prevent and refrain from any action, in particular armed action, which might prejudice the rights of the other Party or might aggravate or extend the dispute. They were further ordered to take all measures to comply with their obligations under international law and with Security Council resolution 1304 (2000) of 16 June 2000. Finally, they were instructed to take all measures necessary to ensure full respect within the zone of conflict for human rights and for international humanitarian law.

68. It deserves mentioning that, whereas the Applicant requested the Court to indicate provisional measures addressed to Uganda, the Court decided proprio motu to indicate measures for both Parties, as there existed a serious risk of events occurring which might aggravate or extend the dispute or make it more difficult to resolve (I.C.J. Reports 2000, p. 21, para. 44).


“[I]t could be argued in view of the way in which the paragraph has been construed that the military occupation or the annexation presupposes the existence of an act of aggression in the form of an invasion or attack and that it would therefore not have been necessary to include them separately in this paragraph.”


69. During the written and oral proceedings hardly any attention was paid by the Parties to the Order of 1 July 2000. The DRC’s submissions in its Reply, dated 29 May 2002, made no reference to it. The request for a ruling that Uganda had violated the provisions of the Order appeared for the first time in the final submissions.

70. In paragraph 264 of the Judgment the Court notes “that the DRC put forward no specific evidence demonstrating that after July 2000 Uganda committed acts in violation of each of the three provisional measures indicated by the Court”.

71. This observation would have sufficed to dismiss the DRC’s submission, just as the Court did in respect of a similar submission in its Judgment in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria : Equatorial Guinea intervening). There the Court stated that it was for Cameroon to show that Nigeria acted in violation of the provisional measures indicated in the Order of 15 March 1996 but that Cameroon had not established the facts which it bore the burden of proving (I.C.J. Reports 2002, p. 453, paras. 321-322). In this respect the Court relied on its earlier statement that it is

“the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved” (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984, p. 437, para. 101).

72. In the present case, however, the Court does not do so because it has already found (in its consideration of the DRC’s second claim) that Uganda is responsible for acts in violation of human rights and international humanitarian law throughout the period when Ugandan troops were present in the DRC, including the period subsequent to the issuance of the Order on provisional measures.

The Court therefore concludes that Uganda did not comply with that Order.

73. In paragraph 265 the Court notes that the provisional measures were addressed to both Parties and that its finding as to Uganda’s non-compliance is “without prejudice to the question as to whether the DRC did not also fail to comply with the provisional measures indicated by the Court”.

74. In view of the fact that the Court deemed it necessary to recall that the purpose of these provisional measures was to protect the rights of either of the Parties pending the determination of the merits (para. 263) the formulation chosen by the Court seems to indicate an awareness that this purpose has been respected neither by Uganda nor by
the DRC even though the latter question was not raised by Uganda and was thus not for the Court to decide.

75. In these circumstances it would in my view have been judicially sound not to include in the dispositif a finding that Uganda did not comply with the Order on provisional measures.

I have no doubt whatsoever that Uganda breached its obligations under the Order. This is sufficiently demonstrated in the part of the Judgment dealing with the DRC’s second submission and the Court’s finding on that submission. But the Court is also “painfully aware” that many atrocities have been committed by other parties as well (Judgment, para. 221).

76. In short, in view of the fact that the DRC has not provided any specific evidence of Uganda’s violation of the Order and taking into account the purpose of provisional measures being the protection of the legal interests of either party, I sincerely regret that the Court has decided to include in the dispositif of the Judgment the finding that one of them has violated the Order of 1 July 2000, in particular since the Court in no way excludes that such violation has also been committed by the other Party.

77. There is no need for the Court to decide on each and every submission presented by the Parties. In the present case, for example, the dispositif does not deal with the Congolese requests for cessation and for guarantees and assurances, which only have been considered in the reasoning. Paragraphs 264 and 265 of the Judgment were sufficient to make clear the Court’s position in respect of the DRC’s submission on provisional measures.

78. The Court’s decision to include a finding in the dispositif is in my view an illustration of the lack of balance I have referred to earlier. For these reasons — and not because I disagree with the finding itself — I felt constrained to vote against paragraph 7 of the dispositif.

E. The First Counter-Claim

79. I share the Court’s view that it is useful to divide Uganda’s first counter-claim into three periods. I agree with the Court that the counter-claim is without merit as regards the second and the third period. The following comments thus relate only to the period prior to May 1997 and only to the merits of that part of the counter-claim.

80. In paragraphs 298 and 299 of the Judgment the Court concludes that Uganda has not produced satisfactory evidence that Zaire (as the DRC was then called) actually supported the Ugandan rebel movements which were active on Zairean territory. I have no difficulty with the Court’s view on that matter.

81. In paragraph 300 of the Judgment the Court deals with the question whether Zaire had acted in conformity with its duty of vigilance, which in its words is “a different issue”. In this respect the Court takes note of Uganda’s argument that the rebel groups were able to operate “unimpeded” in the border area because of the almost complete absence of central government presence or authority in the region during President Mobutu’s 32-year term in office. The Court continues by saying that neither Zaire nor Uganda was in a position to put an end to the activities of the anti-Ugandan and anti-Zairean rebel movements operating in the area. Then it finds that, in the light of the evidence before it, it cannot, however, conclude that the absence of action of Zaire’s Government is tantamount to “tolerating” or “acquiescing” in their activities and that, consequently, this part of Uganda’s counter-claim cannot be upheld.

82. But surely it is not Uganda that has to provide evidence that Zaire was in a position to exercise control over its borders and thus to take action. Nor was counsel for the DRC persuasive when he argued that Uganda itself recognized “the impossibility of effectively policing” the common border. It is for the State under a duty of vigilance to show what efforts it has made to fulfil that duty and what difficulties it has met. In my view the DRC has only been successful in sufficiently substantiating an “almost complete absence” of government presence or authority for the period from October 1996 to May 1997, the time of the first civil war. But I have found no evidence in the case file nor in relevant reports that the Government in Kinshasa was not in a position to exercise its authority in the eastern part of the country for the whole of the relevant period and thus was unable to discharge its duty of vigilance before October 1996; the DRC has not even tried to provide such evidence.

83. I therefore fail to understand the factual ground for the Court’s conclusion that “the part of Uganda’s first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be upheld” (Judgment, para. 301). In my view the logical conclusion would have been that the DRC has failed to provide evidence that it took credible measures to prevent rebel movements from carrying out transborder attacks or was unable to do so and that the first part of the counter-claim thus must be upheld.

84. Let me add that factual circumstances, such as geographical con-
ditions (mountainous terrain) may explain a lack of result but can never justify inadequate efforts or the failure to make efforts.

(Signed) P. H. Kooijmans.
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Separate Opinion of Judge Elaraby, I.C.J. Reports 2005
SEPARATE OPINION OF JUDGE ELARABY

Agreement with the findings of the Court — Treatment by the Court of the prohibition of the use of force — Failure to address the Democratic Republic of the Congo’s claim of aggression — Centrality of this claim to the Democratic Republic of the Congo’s case — Prohibition of aggression in international law — General Assembly resolution 3314 (XXIX) — Authority of the Court to determine whether there has been a violation of the prohibition of aggression — Clear instance of aggression in the facts found to be established by the Court — Relevance of the Court’s dicta in Nicaragua — Importance of consistency in the Court’s jurisprudence.

1. My vote in favour of the Judgment reflects my support for its conclusions. I do however deem it appropriate to place on record certain considerations which I find absent in the Judgment. While I fully concur with the Court’s findings that there were grave violations of the principle of the non-use of force in international relations, I believe the Court should have explicitly upheld the Democratic Republic of the Congo’s claim that such unlawful use of force amounted to aggression.

2. The issues arising in this case are manifold and complex, touching upon some of the most sensitive questions of international law. The Democratic Republic of the Congo has alleged that Uganda violated Article 2, paragraph 4, of the Charter of the United Nations. It claims that armed activities of Uganda constitute a breach of this general prohibition of the use of force. It alleges furthermore that these armed activities constitute aggression.

3. At each stage of the current proceedings, the Democratic Republic of the Congo has emphasized the gravity of the use of force exercised by Uganda in breach of its obligations under international law. In its Application initiating proceedings in the instant case, the Democratic Republic of the Congo alleges that:


4. Furthermore, in its Memorial, the Democratic Republic of the Congo declares:

“Because all direct means of settling the dispute have failed, the Democratic Republic of the Congo is asking the Court to fulfill its role as guarantor of law, justice and peace and to condemn Uganda for the policy of aggression it has conducted against the Democratic Republic of the Congo since 2 August 1998.” (Memorial of the Democratic Republic of the Congo (MDRC), p. 6, para. 0.10.)

In its Memorial, the Applicant elaborates upon this, declaring that “the gravity of the violation of the prohibition of the use of force” is such as to make it “characterizable as aggression” (MDRC, pp. 176-179, paras. 4.40-4.50). In its submissions, the Democratic Republic of the Congo asks the Court to find “the principle of non-use of force in international relations, including the prohibition of aggression” (MDRC, p. 273, para. 1) amongst the principles of international law violated by Uganda.

5. In its Reply to the Counter-Memorial of Uganda, the Democratic Republic of the Congo once again emphasizes its claim of Ugandan aggression:

“[The wording of the Democratic Republic of Congo’s Application] shows very clearly what the essential subject-matter of the Application is: the principle of Ugandan aggression. The details of that aggression, including the looting of natural resources and associated atrocities, are not considered in isolation, as separate acts.” (Reply of the Democratic Republic of the Congo (RDRC), p. 11, para. 1.16.)

In its presentation of the military intervention of Uganda, the Democratic Republic of the Congo states:

“[Given the gravity of the Ugandan military intervention, the DRC concluded that it was faced with real aggression within the meaning of the definition given to this term by the General Assembly of the United Nations]” (RDRC, p. 60, para. 2.01).

6. In the course of the oral pleadings, the Democratic Republic of the Congo reiterated its claim and referred to Ugandan military activities towards the Democratic Republic of the Congo and cited General Assembly resolution 3314 (XXIX) on the definition of aggression.

7. The activities alleged of Uganda generally — and especially the
form and nature of its use of force — are extremely serious in nature. The Court holds that:

“...the unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.” (Judgment, para. 165.)

8. Thus while the Court uses exceptionally strong language to emphasize the gravity of the use of force in this case, it fails to consider the additional claim of the Democratic Republic of the Congo that such acts, on account of their very seriousness as well as their specific characteristics, constitute aggression. Aggression is the core and the very essence of the use of force prohibited under Article 2, paragraph 4, of the Charter. As the Preamble of the Definition of Aggression states, “aggression is the most serious and dangerous form of the illegal use of force”.

9. In view of the submissions of the Applicant, and the gravity of the violations recognized by the Court, I feel it is incumbent upon the Court to respond to the serious allegation put forward by the Democratic Republic of the Congo that the activities of Uganda also constitute aggression as prohibited under international law.

10. Aggression is not a novel concept in international law. In the aftermath of the Second World War, the Nuremberg Tribunal stated that “to initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole” (Judgment of 1 October 1946, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November-1 October 1946, Vol. 1, p. 186). The founding of the United Nations was a landmark and a turning point in the outlawing of the use of force. The Charter of the United Nations lays down, in Article 2, paragraph 4, a general prohibition on “the threat and use of force” in States’ international relations. Article 39 confers upon the Security Council the authority to make a determination of the “existence of any threat to the peace, breach of the peace, or act of aggression” in order to make recommendations and take action under other provisions of Chapter VII for the maintenance of international peace and security.

11. It does not follow however that the identification of aggression is solely within the purview of the Security Council. The Court has confirmed the principle that the Security Council’s responsibilities relating to the maintenance of international peace and security are “primary” not exclusive” (Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 163), it is clear that aggression — as a legal as well as a political concept — can be of equal concern to other competent organs of the United Nations, including the Court as “the principal judicial organ of the United Nations” (Art. 92, Charter of the United Nations). Although the term’s use in political and popular discourse is often highly charged, it nevertheless remains that aggression is a legal concept with legal connotations and legal consequences, matters which fall clearly within the remit of the Court, particularly when the circumstances of a case coming before the Court call for a decision thereon. There is now general recognition that, as Judge Lachs wrote in the Lockerbie cases,”

“the dividing line between political and legal disputes is blurred, as law becomes ever more frequently an integral part of international controversies” (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 27; 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), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 139).

12. The General Assembly and its subsidiary organs worked for many years to achieve an appropriate and effective definition of what constitutes aggression. The culmination of such efforts came with the adoption of the General Assembly Declaration on the Definition of Aggression (resolution 3314 (XXIX)). This resolution sets out a general definition of the term in Article 1, while also citing a non-exhaustive list of situations which amount to aggression in Article 3. Although this definition is not without its problems and at the time certain Member States had reservations about certain aspects thereof, it was nonetheless adopted without a vote by the General Assembly of the United Nations and marks a noteworthy success in achieving by consensus a definition of aggression.

13. The definition does not claim to be either completely exhaustive or authoritative. Yet it does offer an invaluable guide to the scope of aggression and an elucidation of the meaning of this term in international relations. As the Preamble of the Declaration emphasizes,

“the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim”.

14. The Preamble to the Definition of Aggression in resolution 3314 (XXIX) also aptly clarifies that aggression “must be considered in the
light of all the circumstances of each particular case". It is to this con-
sideration that I now turn. Examining the activities by Uganda against
the Democratic Republic of the Congo found to have taken place in the
current case, it is, in my view, clear that such activities amount to aggres-
sion. They fall clearly within the scope of Article 1 of the definition:

“[a]ggression is the use of armed force by a State against the sov-
ereignty, territorial integrity or political independence of another
State, or in any other manner inconsistent with the Charter of the
United Nations, as set out in this Definition”.

15. In the Nicaragua case, aggression was considered by the Court in the
context of an armed attack possibly giving rise to self-defence under cus-
tomary international law. Although the Court found in that case that no
such armed attack had been proven, the Court held that

“[t]his description contained in Article 3, paragraph (g), of the Defi-
nition of Aggression annexed to General Assembly resolution 3314
(XXIX), may be taken to reflect customary international law” (Mili-
tary and Paramilitary Activities in and against Nicaragua (Nicara-
guha v. United States of America), Merits, Judgment, I.C.J. Reports

16. The gravity of the factual circumstances and context of the present
case dwarfs that of the Nicaragua case. The acknowledgment by the
Court of the customary international law status of the definition of aggres-
sion is of considerable importance to the instant case and in par-
ticular to the Democratic Republic of the Congo’s claim that Uganda has
violated the prohibition of aggression in international law. Indeed the
definition of aggression applies a fortiori to the situation at hand: the full
force of the Charter provisions are applicable; the nature and form of the
activities under consideration fall far more clearly within the scope of the
definition; the evidence before the Court is more complete and both
Parties have been present at all stages of the proceedings.

17. These factors, allied with the central position of this claim within
the Application and the pleadings of the Democratic Republic of the
Congo, require the Court to adhere to its judicial responsibility to adju-
dicate on a normative basis. The Court’s dicta on this point are of a
broader significance as they establish a normative test which should be
operational across the board. The same yardstick should be used in every
case to gauge the unlawful use of force by any State. Article 38 (b) of the
Statute mandates the Court to apply “international custom, as evidence of a
general practice accepted as law”. By dint of its dicta in the Nicaragua
case, the Court should, in my view, have embarked on a determination as to whether the egregious use of force by Uganda falls within the
customary rule of international law as embodied in General Assembly
resolution 3314 (XXIX).

18. Thus it was my expectation that the Court’s dicta in the Nicaragua
case, even if construed as obiter would be followed in the instant case by
qualifying the grave use of force by Uganda as amounting to aggression.
Rarely if ever has the Court been asked to pronounce upon a situation
where such grave violations of the prohibition of the use of force have
been committed. This makes it all the more important for the Court to
consider the question carefully and — in the light of its dicta in the Nica-
ragua case — to respond positively to the Democratic Republic of the
Congo’s allegation that Ugandan armed activities against and on its
territory amount to aggression and constitute a breach of its obligations
under international law.

19. The consistency of the Court’s dicta and holdings should be
observed and maintained. It is appropriate to point out that the consist-
ency of the case law practice and jurisprudence of the Court is not con-
fined to the dispositif of the judgments. Shabtai Rosenne noted that there
is “general desire for consistency and stability in the Court’s case-law
when the Court is dealing with legal issues which have been before it in
previous cases” (The Law and Practice of the International Court, 1920-

The Court has emphasized this point in the case concerning the
Continental Shelf by noting that

“the justice of which equity is an emanation, is not abstract justice
but justice according to the rule of law; which is to say that its appli-
cation should display consistency and a degree of predictability;
even though it looks with particularity to the peculiar circumstances
of an instant case, it also looks beyond it to principles of more
general application” (Continental Shelf (Libyan Arab Jamahiriya

As a general rule, such consistency has hitherto been maintained. On this
point, Judge Shahabuddeen remarked, the Court’s “jurisprudence has
developed in the direction of a strong tendency to adhere closely to pre-
vious holdings” (Precedent in the World Court, 1996, p. 238).

20. As remarked at the outset, I concur with the Court’s findings in the
present case, including its finding relating to the use of force. I am
unable, however, to appreciate any compelling reason for the Court to
refrain from finding that Uganda’s actions did indeed amount to aggres-
sion. The International Court of Justice has not been conceived as a
penal court, yet its dicta have wide-ranging effects in the international
community’s quest to deter potential aggressors and to overcome the culture of impunity. Given the centrality of the claim of aggression to the Democratic Republic of the Congo’s Application as well as the seriousness of the violation of the use of force in the present case and the broader importance of repressing aggression in international relations, I have appended this separate opinion to respond fully to the Democratic Republic of the Congo’s submission on this point.

(Signed) Nabil ELARABY.
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Separate Opinion of Judge Simma, I.C.J. Reports 2005
SEPARATE OPINION OF JUDGE SIMMA

The Court should have called the Ugandan invasion of a large part of the DRC’s territory an act of aggression. — The Court should not have avoided dealing with the issue of self-defence against large-scale cross-boundary armed attacks by non-State actors but rather it should have taken the opportunity to clarify a matter to the confused state of which it has itself contributed — Against the background of current attempts to deprive certain persons of the protection due to them under international humanitarian and human rights law, the Court should have found that the private persons maltreated at Kinshasa Airport in August 1998 did enjoy such protection, and that Uganda would have had standing to raise a claim in their regard irrespective of their nationality.

1. Let me emphasize at the outset that I agree with everything the Court is saying in its Judgment. Rather, what I am concerned about are certain issues on which the Court decided to say nothing. The first two matters in this regard fall within the ambit of the use of force in the context of the claims of the Democratic Republic of the Congo; the third issue concerns the applicability of international humanitarian and human rights law to a certain part of Uganda’s second counter-claim.

1. The Use of Force by Uganda as an Act of Aggression

2. One deliberate omission characterizing the Judgment will strike any politically alert reader: it is the way in which the Court has avoided dealing with the explicit request of the DRC to find that Uganda, by its massive use of force against the Applicant has committed an act of aggression. In this regard I associate myself with the criticism expressed in the separate opinion of Judge Elaraby. After all, Uganda invaded a part of the territory of the DRC of the size of Germany and kept it under its own control, or that of the various Congolese warlords it befriended, for several years, helping itself to the immense natural riches of these tumulted regions. In its Judgment the Court cannot but acknowledge of course that by engaging in these “military activities” Uganda “violated the principle of non-use of force in international relations and the principle of non-intervention” (Judgment, para. 345 (1)). The Judgment gets toughest in paragraph 165 of its reasoning where it states that “[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter”. So, why not call a spade a spade? If there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military adventures the Court had to deal with in earlier cases, as in Corfu Channel, Military and Paramilitary Activities in and against Nicaragua or Oil Platforms, border on the insignificant.

3. It is true that the United Nations Security Council, despite adopting a whole series of resolutions on the situation in the Great Lakes region (cf. paragraph 150 of the Judgment) has never gone as far as expressly qualifying the Ugandan invasion as an act of aggression, even though it must appear as a textbook example of the first one of the definitions of “this most serious and dangerous form of the illegal use of force” laid down in General Assembly resolution 3314 (XXIX). The Council will have had its own — political — reasons for refraining from such a determination. But the Court, as the principal judicial organ of the United Nations, does not have to follow that course. Its very raison d’être is to arrive at decisions based on law and nothing but the law, keeping the political context of the cases before it in mind, of course, but not desisting from stating what is manifest out of regard for such non-legal considerations. This is the division of labour between the Court and the political organs of the United Nations envisaged by the Charter.

2. Self-Defence against Large-Scale Armed Attacks by Non-State Actors

4. I am in agreement with the Court’s finding in paragraph 146 of the Judgment that the “armed attacks” to which Uganda referred when claiming to have acted in self-defence against the DRC were perpetrated not by the Congolese armed forces but rather by the Allied Democratic Forces (ADF), that is, from a rebel group operating against Uganda from Congolese territory. The Court stated that Uganda could provide no satisfactory proof that would have sustained its allegation that these attacks emanated from armed bands or regulars sent by or on behalf of the DRC. Thus these attacks are not attributable to the DRC.

5. The Court, however, then finds, that for these reasons the legal and factual circumstances for the exercise of a right to self-defence by Uganda against the DRC were not present (Judgment, para. 147). Accordingly, the Court continues, it has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary interna-
tional law provides for a right of self-defence against large-scale attacks by irregular forces (Judgment, para. 147).

6. Thus, the reasoning on which the Judgment relies in its findings on the first submission by the DRC appears to be as follows:
— since the submission of the DRC requests the Court (only) to find that it was Uganda’s use of force against the DRC which constituted an act of aggression, and
— since the Court does not consider that the military activities carried out from Congolese territory onto the territory of the Respondent by anti-Ugandan rebel forces are attributable to the DRC,
— and since therefore Uganda’s claim that its use of force against the DRC was justified as an exercise of self-defence, cannot be upheld,
it suffices for the Court to find Uganda in breach of the prohibition of the use of force enshrined in the United Nations... military activities of the anti-Ugandan groups as such, or of the Ugandan countermeasures against these hostile acts.

7. What thus remains unanswered by the Court is the question whether, even if not attributable to the DRC, such activities could have been repelled by Uganda through engaging these groups also on Congolese territory, if necessary, provided that the rebel attacks were of a scale sufficient to reach the threshold of an “armed attack” within the meaning of Article 51 of the United Nations Charter.

8. Like Judge Kooijmans in paragraphs 25 ff. of his separate opinion, I submit that the Court should have taken the opportunity presented by the present case to clarify the state of the law on questions of use of force and self-defence which are problematic less for the things they say than for the questions they leave open, prominently among them the issue of self-defence against armed attacks by non-State actors.

9. From the Nicaragua case onwards the Court has made several pronouncements on questions of use of force and self-defence which are problematic less for the things they say than for the questions they leave open, prominently among them the issue of self-defence against armed attacks by non-State actors.

10. The most recent — and most pertinent — statement in this context is to be found in the (extremely succinct) discussion by the Court in its Wall Opinion of the Israeli argument that the separation barrier under

11. Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying opinio juris, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the “Bush doctrine” justifying the pre-emptive use of force. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as “armed attacks” within the meaning of Article 51.

12. In his separate opinion, Judge Kooijmans points to the fact that the almost complete absence of governmental authority in the whole or part of the territory of certain States has unfortunately become a phenomenon as familiar as international terrorism (separate opinion of Judge Kooijmans, para. 30). I fully agree with his conclusions that, if armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further, that it “would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require” (ibid.)

13. I also subscribe to Judge Kooijmans’s opinion that the lawfulness

of the conduct of the attacked State in the face of such an armed attack by a non-State group must be put to the same test as that applied in the case of a claim of self-defence against a State, namely, does the scale of the armed action by the irregulars amount to an armed attack and, if so, is the defensive action by the attacked State in conformity with the requirements of necessity and proportionality? (Separate opinion of Judge Kooijmans, para. 31.)

14. In applying this test to the military activities of Uganda on Congolese territory from August 1998 onwards, Judge Kooijmans concludes — and I agree — that, while the activities that Uganda conducted in August in an area contiguous to the border may still be regarded as keeping within these limits, the stepping up of Ugandan military operations starting with the occupation of the Kisangani airport and continuing thereafter, leading the Ugandan forces far into the interior of the DRC, assumed a magnitude and duration that could not possibly be justified any longer by reliance on any right of self-defence. Thus, at this point, our view meets with, and shares, the Court’s final conclusion that Uganda’s military intervention constitutes “a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter” (Judgment, para. 165).

15. What I wanted to demonstrate with the preceding reasoning is that the Court could well have afforded to approach the question of the use of armed force on a large scale by non-State actors from the perspective of necessity and proportionality as described in Article 2, paragraph 4, of the Charter. In this way, the Court could have recognized that the victims of the attacks at the Ndjili International Airport were entitled to the protection of international law. The Court has, instead, limited itself to the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter. This, in my view, is not in conformity with the requirements of necessity and proportionality.


In its second counter-claim, Uganda alleged, inter alia, that by maltreating certain individuals other than Ugandan diplomats when they attempted to leave the country following the outbreak of the armed conflict, the DRC violated its obligations under the “international minimal standard relating to the treatment of foreign nationals lawfully on State territory”, as well as “universally recognized standards of human rights concerning the security of the human person” (Counter-Memorial of Uganda (CMU), paras. 405-407). The Court concluded in paragraph 335 of its Judgment that in presenting this part of the counter-claim Uganda was attempting to exercise its right to diplomatic protection with regard to its nationals. It followed that Uganda would need to meet the conditions necessary for the exercise of diplomatic protection as recognized in general international law, that is, the requirement of Ugandan nationality of the individuals concerned and the prior exhaustion of local remedies. The Court observed that no specific documentation could be found in the case file identifying the persons as Ugandan nationals. The Court thus decided that, this condition not being met, the part of Uganda’s counter-claim under consideration here was inadmissible. It thus upheld the objection of the DRC to this effect (Judgment, para. 345 (11)).

17. My vote in favour of this part of the Judgment only extends to the inadmissibility of Uganda’s claim to diplomatic protection, since I agree with the Court’s finding that the preconditions for a claim of diplomatic protection by Uganda were not met. I am of the view, however, that the Court’s reasoning should not have finished at this point. Rather, the Court should have recognized that the victims of the attacks at the Ndjili International Airport remained legally protected against such maltreatment irrespective of their nationality, by other branches of international law, namely international human rights and, particularly, international humanitarian law. In its Judgment the Court has made a laudable effort to apply the rules developed in these fields to the situation of persons of varying nationality and status finding themselves in the war zones, in a comprehensive manner as possible. The only group of people that remains unprotected by the legal shield thus devised by the Court are the 17 unfortunate individuals encountering the fury of the Congolese soldiers at the airport in Kinshasa.

18. I have to admit that the way in which Uganda presented and argued the part of its second counter-claim devoted to this group struck me as somewhat careless, both with regard to the evidence that Uganda mustered and to the quality of its legal reasoning. Such superficiality might stem from the attempts of more or less desperate counsel to find issues out of which they think they could construe what to them might look like a professionally acceptable counter-claim, instead of genuine concern for the fate of the persons concerned.

3 This is not the first case giving me this impression; cf. my separate opinion in the case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, pp. 342-343, para. 36.

3 This is not the first case giving me this impression; cf. my separate opinion in the case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, pp. 342-343, para. 36.
19. Be this as it may, I will take the opportunity of Uganda's claim concerning the events at the airport further to develop the thesis presented at the outset, namely that it would have been possible for the Court in its Judgment to embrace the situation in which these individuals found themselves, on the basis of international humanitarian and human rights law, and that no legal void existed in their regard. The reader might ask himself why I should give much attention to an incident which happened more than seven years ago, whose gravity must certainly pale beside the unspeakable atrocities committed in the war in the Congo. I will be very clear: I consider that legal arguments clarifying that in situations like the one before us no gaps exist in the law that would deprive the affected persons of any legal protection, have, unfortunately, never been as important as at present, in the face of certain recent deplorable developments.

20. Let me, first, turn to the relevance of international humanitarian law to the incident at Ndjili International Airport.

To begin with, the fact that the airport was not a site of major hostilities in the armed conflict between the DRC and Uganda does not present a barrier to the application of international humanitarian law to the events which happened there. There are two reasons for this.

21. First, the key issue in finding whether international humanitarian law should apply also in peaceful areas of the territory of a belligerent State is whether those areas are somehow connected to the conflict. This was indeed the case with Ndjili International Airport because the individuals maltreated there found themselves in a situation of evacuation from armed conflict. The Note of Protest sent by the Embassy of Uganda to the Ministry of Foreign Affairs of the DRC on 21 August 1998 — which the Court considers reliable evidence in paragraph 339 of its Judgment — states that individuals and Ugandan diplomats were at Ndjili International Airport in the context of an evacuation (CMU, Ann. 23). This evacuation was necessary due to the armed conflict taking place in the DRC. Therefore, the events at the airport were factually connected to the armed conflict. The airport was not a random peaceful location completely unconnected to that conflict. Quite the contrary, it was the point of departure for an evacuation rendered necessary precisely by the armed conflict. During that evacuation, the airport became the scene of violence by Congolese forces against the evacuees.

22. Article 80 (1) of the Rules of Court states that: “A counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court.” (Emphasis added.) In its Order of 29 November 2001, the Court found the second counter-claim admissible under the

Article 80 “direct connection” test, stating that “each Party holds the other responsible for various acts of oppression allegedly accompanying an illegal use of force; . . . these are facts of the same nature, and . . . the Parties' claims form part of the same factual complex” (para. 40; emphasis added). Therefore the Court had already determined, in its Order under Article 80, that the events at the airport formed part of the “same factual complex” as the armed conflict which constitutes the basis of the main claim. Hence, international humanitarian law should apply to the counter-claim as it does to the main claim.

23. Second, the application of international humanitarian law to the events at the airport would be consistent with the understanding of the scope of international humanitarian law developed by the ICTY Appeals Chamber. In Prosecutor v. Tadić, the Appeals Chamber stated:

“Armed conflict exists whenever there is a resort to armed force between States or protracted armed violence 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 armed 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.” (No. IT-94-1, Decision of the Appeals Chamber on the defence motion for interlocutory appeal on jurisdiction, para. 70 (2 October 1995); emphasis added.)

The Appeals Chamber also noted that “the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities” (ibid., para. 67). Later in the same case, a Trial Chamber analysed the phrase “when committed in armed conflict”, which qualifies the unlawful acts set out in Article 5 of the Statute of the ICTY, and concluded that “it is not necessary that the acts occur in the heat of battle” (Prosecutor v. Duško Tadić, No. IT-94-1-T, Trial Chamber, Opinion and Judgment, para. 632 (7 May 1997)). Similarly, a Trial Chamber of the ICTY has stated that “there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable” (Prosecutor v. Delalić, Mucić, Delić, & Landzo, No. IT-96-21-T, Trial Chamber Judgment, para. 185 (16 November 1998)).

24. I turn, next, to the substantive rules of international humanitarian
law applicable to the persons in question. The provision which first comes to mind is Article 4 of the Fourth Geneva Convention of 1949. According to Article 4, persons who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals" are considered "protected persons" under the Convention. If the individuals maltreated by the DRC at Ndjili International Airport were considered protected persons under Article 4 of the Fourth Geneva Convention, the behaviour of the Congolese soldiers would have violated several provisions of that Convention, including Article 27 (requiring that protected persons "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity"), Article 32 (prohibiting the infliction of physical suffering on protected persons), Article 33 (prohibiting reprisals against protected persons and their property), and Article 36 (requiring that evacuations of protected persons be carried out safely).

25. However, the qualification of the 17 individuals at the airport as "protected persons" within the meaning of Article 4 meets with great difficulties. As I stated above, Uganda was not able to prove that these persons were its own nationals; in fact we have no information whatsoever as to their nationality. In this regard, Article 4 of the Fourth Geneva Convention states that:

"Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they find themselves[note 4]. The Commentary emphasizes that "[i]f . . . there were . . . cases in which the status of . . . protected person were denied to certain individuals, the protection of Article 75 must be applied to them as a minimum"[note 5].

26. But this is not the end of the matter. The gap thus left by Geneva Convention Article 4 has in the meantime been — deliberately — closed by Article 75 of Protocol I Additional to the Geneva Conventions of 1949. This provision enshrines the fundamental guarantees of international humanitarian law and reads in pertinent part as follows:

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article . . .

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

(iii) corporal punishment;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, . . ."

The Commentary of the International Committee of the Red Cross to Article 75 specifically notes that this provision was meant to provide protection to individuals who, by virtue of the exceptions listed in Article 4 of the Fourth Geneva Convention, did not qualify as "protected persons". Thus, the Commentary makes clear that Article 75 provides protection to both nationals of States not parties to the conflict and nationals of allied States, even if their home State happened to have normal diplomatic representation in the State in whose hands they find themselves[note 4]. The Commentary emphasizes that "[i]f . . . there were . . . cases in which the status of . . . protected person were denied to certain individuals, the protection of Article 75 must be applied to them as a minimum"[note 5].

27. The conclusion just arrived at has been confirmed recently in an Opinion of the European Commission for Democracy through Law (Venice Commission) established by the Council of Europe[note 6]. This Opinion was prepared to answer the question whether the new challenges posed by international terrorism, and the claims made by the United States in the wake of September 11 to the effect that the United States could deny certain persons the protection of the Geneva Conventions because they were "enemy unlawful combatants", rendered necessary a further development of international humanitarian law. According to the Venice Commission, Article 75 of Protocol I Additional to the Geneva Conventions, as well as common Article 3 to the Geneva Conventions (on which infra)

"are based on the assumption that nationals of States which are not

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[Note 2: Ibid., p. 867.]
Parties to the conflict or nationals of co-belligerent States do not need the full protection of GC IV since they are normally even better protected by the rules on diplomatic protection. Should, however, diplomatic protection not be (properly) exercised on behalf of such third party nationals, International Humanitarian Law provides for protection under Article 75 P I and common Article 3 so that such persons do not remain without certain minimum rights.\footnote{Op. cit. footnote 6, para. 38.}

Thus, also according to the Venice Commission, there is "in respect of these matters... no legal void in international law".\footnote{Ibid., para. 85.}

28. Further, it can safely be concluded that the fundamental guarantees enshrined in Article 75 of Additional Protocol I are also embodied in customary international law.\footnote{For a highly relevant reference in this regard (cf. supra, para. 19), United States Army, Operational Law Handbook (2002), International and Operational Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, issued 15 June 2001, Chap. 2, p. 5. See also, more generally, A. Roberts, "The Laws of War in the War on Terror", Israel Yearbook on Human Rights, Vol. 32 (2002), pp. 192-245.}

29. Attention must also be drawn to Article 3 common to all four Geneva Conventions, which defines certain rules to be applied in armed conflicts of a non-international character. As the Court stated in the Nicaragua case:

"There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22...)." (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 114, para. 218.)

As such, the Court in Nicaragua found these rules applicable to the international dispute before it. The same is valid in the present case. In this regard, the decision of the Tadić Appeals Chamber discussed above is also of note. In relation to common Article 3, it stated that "the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations" (Prosecutor v. Tadić, Decision of the Appeals Chamber on the defence motion for interlocutory appeal on jurisdiction, para. 69; see supra, para. 23).

30. In addition to constituting breaches of international humanitarian law, the maltreatment of the persons in question at Ndjili International Airport was also in violation of international human rights law. In paragraph 216 of its Judgment, the Court recalls its finding in the Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, according to which "the protection offered by human rights conventions does not cease in case of armed conflict..." (I.C.J. Reports 2004, p. 178, para. 106). In its Advisory Opinion, the Court continued:

"As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law." (Ibid.)

In my view, the maltreatment of the individuals at the airport falls under the third category of the situations mentioned: it is a matter of both international humanitarian and international human rights law.

31. Applying international human rights law to the individuals maltreated by the DRC at Ndjili International Airport, the conduct of the DRC would violate provisions of the International Covenant on Civil and Political Rights of 19 December 1966, the African Charter on Human and Peoples' Rights of 27 June 1981, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, to all of which both the DRC and Uganda are parties. Specifically, under the International Covenant on Civil and Political Rights, the conduct of the DRC would violate Article 7 ("No one shall be subjected to... cruel, inhuman or degrading treatment or punishment"), Article 9, paragraph 1 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"), Article 10, paragraph 1 ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"), and Article 12, paragraphs 1 and 2 ("1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement... 2. Everyone shall be free to leave any country, including his own").

Under the African Charter, the conduct of the DRC would violate Article 4 ("Human beings are inviolable. Every human being shall be entitled to respect for... the integrity of his person. No one may be arbitrarily deprived of this right"), Article 5 ("Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly... cruel, inhuman or degrading punishment and..."
treatment shall be prohibited”), Article 6 (“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”), as well as Article 12, paragraphs 1 and 2 (“1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. 2. Every individual shall have the right to leave any country including his own, and to return to his country . . .”). Finally, although the conduct of the DRC at Ndjili International Airport did not rise to the level of torture, it was nevertheless in violation of Article 16, paragraph 1, of the Convention against Torture which reads as follows:

“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

32. The jurisdiction of the Court being firmly established, there remains the issue of standing to raise violations of international humanitarian and human rights law in the case of persons who may not have the nationality of the claimant State. In the present case, regarding Uganda’s counter-claim, the issue does not present itself in a technical sense because Uganda has not actually pleaded a violation of either of these branches of international law in relation to the persons in question. But if Uganda had chosen to raise these violations before the Court, it would undoubtedly have had standing to bring such claims.

33. As to international humanitarian law, Uganda would have had standing because, as the Court emphasized in its Advisory Opinion on the Wall:

“Article I of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’ It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.” (I.C.J. Reports 2004, pp. 199-200, para. 158.)

The Court concluded that given the character and the importance of the rights and obligations involved, there is an obligation on all States parties to the Convention to respect and ensure respect for violations of the international humanitarian law codified in the Convention (ibid., p. 200, paras. 158-159). The same reasoning is applicable in the instant case.

There cannot be any doubt that the obligation (not only to respect but also to ensure respect for international humanitarian law applies to the obligations enshrined both in common Article 3 and in Protocol I Additional to the Geneva Conventions.

34. The ICRC Commentary to common Article 1 of the Conventions arrives at the same result in its analysis of the obligation to respect and to ensure respect, where it is stated that:

“in the event of a Power failing to fulfil its obligations [under the Convention], the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.”

Thus, regardless of whether the maltreated individuals were Ugandans or not, Uganda had the right — indeed the duty — to raise the violations of international humanitarian law committed against the private persons at the airport. The implementation of a State party’s international legal duty to ensure respect by another State party for the obligations arising under humanitarian treaties by way of raising it before the International Court of Justice is certainly one of the most constructive avenues in this regard.

35. As to the question of standing of a claimant State for violations of human rights committed against persons which might or might not possess the nationality of that State, the jurisdiction of the Court not being at issue, the contemporary law of State responsibility provides a positive answer as well. The International Law Commission’s 2001 draft on Responsibility of States for Internationally Wrongful Acts provides not only for the invocation of responsibility by an injured State (which quality Uganda would possess if it had been able to establish the Ugandan nationality of the individuals at the airport) but also for the possibility that such responsibility can be invoked by a State other than an injured State. In this regard, Article 48 of the draft reads as follows:

“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:

The obligation breached is owed to a group of States including the State of origin of the armed group and is established for the protection of a collective interest of the group; or

The obligation breached is owed to the international community as a whole.

Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

1. Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

2. 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.

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.

The obligations deriving from the human rights treaties cited above and breached by the DRC are instances par excellence of obligations that are owed to a group of States including Uganda, and are established for the protection of a collective interest of the States parties to the Covenant.

36. With regard to the customary requirement of the exhaustion of local remedies, the condition only applies if effective remedies are available in the State of origin of the armed group and are applicable to the violation in question.

37. In summary of this issue, Uganda would have had standing to bring and the Court would have had jurisdiction to decide upon a claim under international humanitarian law and international human rights law for the protection of the individuals at the airport, irrespective of the nationality of these individuals. The specific construction of the rights and obligations under the Fourth Geneva Convention as well as the relevant provisions of Protocol I Additional to the Geneva Conventions of 1949 as amended by Protocol II of 1977, Protocol III of 1977, and Protocol IV of 1979, would not have gone beyond the facts as alleged.
stated in the Commentaries to its Articles on the Responsibility of States for Internationally Wrongful Acts that there are certain rights in the protection of which, by reason of their importance, “all States have a legal interest . . .” (A/56/10 at p. 278)\(^1\).

41. If the international community allowed such interest to erode in the face not only of violations of obligations \textit{erga omnes} but of outright attempts to do away with these fundamental duties, and in their place to open black holes in the law in which human beings may be "disappeared" and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me, would become much less worthwhile.

\textit{(Signed) Bruno Simma.}

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\(^1\) Concerning the specific question of standing in case of breaches of obligations \textit{erga omnes} the Institute of International Law, in a resolution on the topic of obligations of this nature adopted at its Krakow Session of 2005, accepted the following provisions:

\textit{Article 3}

In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation \textit{erga omnes} and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation.

\textit{Article 4}

The International Court of Justice or other international judicial institution should give a State to which an obligation \textit{erga omnes} is owed the possibility to participate in proceedings pending before the Court or that institution and relating to that obligation. Specific rules should govern this participation.
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Declaration of Judge Tomka, I.C.J. Reports 2005
DECLARATION OF JUDGE TOMKA

DUTY OF VIGILANCE — FAILURE TO TAKE ACTION

1. The Court rejected the first counter-claim of the Republic of Uganda (paragraph 9 of the dispositif). While voting on this paragraph, I was faced with a dilemma. I concur with the views of the Court concerning the counter-claim relating to the second period, when Zaire did not comply with its duty of vigilance on its territory to prevent attacks against Uganda. Zaire should have taken effective measures to prevent the commission of serious violations of international humanitarian law on its territory.

2. Sovereignty of a State does not involve only rights but also obligations. The State has an obligation not to allow its territory to be used for acts contrary to the laws and customs of war. This obligation is essential for the maintenance of international peace and security.

3. The duty of vigilance required Zaire to exert all good efforts to prevent its territory from being used to the detriment of Uganda. Whether Zaire complied with such a duty should be determined on the basis of Zaire's conduct, not its motives. The duty of vigilance does not require Zaire to prevent all acts of violence on its territory, but to prevent acts that could be harmful to other States.

4. The DRC has not provided the Court with credible information on any such bona fide effort. Therefore, I am unable to concur with the view of the majority that the absence of action by Zaire, in the first period up to May 1997, is not a failure to comply with its obligation of vigilance. In such a case, it would be for the State which has the duty of vigilance (i.e., the DRC in the present case) to demonstrate that it exerted all good efforts to prevent the activities (i.e., the anti-Ugandan rebellion) against its neighbour.

5. The DRC has not provided the Court with information on the activities of the rebel groups in the border area. Therefore, I am unable to concur with the view of the majority that the absence of action by Zaire, in the first period up to May 1997, is not a failure to comply with its obligation of vigilance.

6. The Court's finding in paragraph 9 of the dispositif is not in line with the majority's view. While I agree with the Court's finding that Zaire failed to comply with its duty of vigilance, I disagree with the Court's finding that Zaire's failure to comply with its duty of vigilance is not a failure to take action. In my view, Zaire's failure to comply with its duty of vigilance is a failure to take action.
with respect to the major part of the first counter-claim, nevertheless I cannot agree with its finding with respect to one of the elements of the counter-claim. That is sufficient, in my view, for upholding the counter-claim. So, at the end, I felt to be left with no other choice than to vote against paragraph 9 of the dispositif. Needless to say that what I consider to be a breach by the Democratic Republic of the Congo of its duty of vigilance cannot be compared to the magnitude of Uganda’s breach of the prohibition of the use of force.

II. Grave Breaches of International Humanitarian Law — Obligation to Prosecute

7. The Court has found that Uganda has breached its obligations under international humanitarian law (paragraph 3 of the dispositif). When considering the allegation of breaches of international humanitarian law obligations by the Uganda Peoples’ Defence Forces (UPDF), the Court, being convinced that they were committed, qualifies these breaches as grave (see paragraphs 207 and 208).

8. The Court has also determined the legal consequences of Uganda’s breaches of its international legal obligations, including the obligations under international humanitarian law (see the dispositif, paragraph 6, and also paragraphs 251-261). In doing that, the Court took as a point of departure the fourth final submission of the DRC (see paragraphs 25 and 252) and determined these consequences under the general rules of international law on responsibility of States for internationally wrongful acts.

9. Nevertheless, since grave breaches of international humanitarian law were committed, there is another legal consequence which has not been raised by the DRC and on which the Court remains silent. That consequence is provided for in international humanitarian law. There should be no doubt that Uganda, as party to both the Geneva Conventions of 1949 and the Additional Protocol I of 1977 remains under the obligation to bring those persons who have committed these grave breaches before its own courts (Article 146 of the Fourth Geneva Convention, and Article 85 of the Protocol I Additional to the Geneva Conventions).

III. Self-Defence and the Non-Use of Force

10. The order in which the Court, in the present case, has dealt with legal issues relating to self-defence and the prohibition of the use of force is worthy of note. The Court having first made its findings on the facts concerning Uganda’s use of force (paras. 55 et seq.), then moves to the analysis of relevant legal norms. In this analysis, leaving aside the issue of the alleged consent by the DRC to Uganda’s military presence on the former’s territory, the consideration of self-defence precedes that of the prohibition of the use of force. One may consider that order understandable since if, according to Article 51 of the Charter,

“[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”

then a lawful exercise of the right to self-defence cannot constitute a breach of any relevant article of the United Nations Charter (in concreto, Art. 2, para. 4), and there would be no point in analysing the latter. Only once the Court concludes that “the legal and factual circumstances for the exercise of a right of self-defence by Uganda . . . were not present” (para. 147), is it incumbent upon it to consider, and to make findings on, the prohibition of the use of force (paras. 148 et seq.).

11. The prohibition on the use of force cannot be read without having regard to the Charter provisions on self-defence. The provisions on self-defence, in fact, delineate the scope of rules prohibiting the use of force. If a measure in question constitutes a lawful measure of self-defence, it necessarily falls outside the ambit of the prohibition. In other words, the prohibition of the use of force is not applicable to the use of force in lawfully exercised self-defence.

12. The order in which the Court considers self-defence and the prohibition of the use of force in the present case is thus different from that in which it considered them 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. 98-106, paras. 187-201; and pp. 118-123, paras. 227-238), although it does not lead to different conclusions.

(Signed) Peter Tomka.
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Declaration of Judge ad hoc Verhoeven, I.C.J. Reports 2005
DECLARATION OF JUDGE AD HOC VERHOEVEN

[Translation]


1. As witnessed by my votes on the various elements of the dispositif of the Judgment, I essentially concur in the conclusions reached by the Court. Nevertheless, it is easily understandable in a complex case, where the facts are sometimes difficult to ascertain, that some misgiving might be felt as to certain grounds for decision, or at least that markedly different reasoning might have been preferred on certain points. There is no need to dwell on this. It is enough that agreement prevails on the dispositif and the essential grounds underlying it. This notwithstanding, I think it useful to raise a few points concerning several questions which, while not addressed very explicitly in the Judgment, are not so removed from as to render them inappropriate for discussion, even briefly, in this declaration.

2. The first question concerns the so-called "declaratory" nature of a decision; this was underscored more than once by the Applicant, which elsewhere characterized the decision as being one "of principle". These qualifiers are not very illuminating in themselves, given the multitude of meanings ascribed to the words used in them. The gist of the principal claim cannot nevertheless be readily grasped. It aims at holding the Respondent responsible for the instances of wrongful use of force attributable to it, but the claim separates the finding of a violation of law from reparation for the ensuing injury. Thus, it is only in a subsequent phase of the proceedings, once there has been a finding of unlawful conduct, that the Court is called upon to decide the form and extent of the reparation, failing agreement thereon between the parties. It is not certain that the term "declaratory" — which appears nowhere in the Judgment — adequately reflects this separation. In essence, there is however no doubt as to the latter’s legality. This is clearly shown by, for example, the Court’s Judgment 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, p. 149, para. 292 (15)), even though, for reasons otherwise left unexplained, the Court did not grant the interim award which had been sought in that case (ibid., p. 143, para. 285). In the present proceedings, the Respondent is moreover hardly in a position to attack the propriety of severing the two elements, since its counter-claims are presented in like fashion.

In an international community, where, more than elsewhere, negotiated solutions are to be preferred to those imposed by third parties, even independent and impartial ones, it is understandable that the Court should not be disinclined to rule initially solely on the "principle" of the lawfulness of the acts or conduct complained of. This does not however mean that the parties are free to make selective use of the Court as they please. True, they are not required to have recourse to the Court; but, if they do submit to it, they cannot disregard its fundamental characteristics. In this regard the present case offers a glimpse of the constraints — or at least some of them — by which the Parties are bound when they thus seek to sever the finding of responsibility per se from its concrete implications. The fact that the Court does not rule on this point does not mean that its Judgment is devoid of significance in this regard.

(a) The first constraint stems from the existence of facts — given legal characterization — without which there is no cause of action on the claim and beyond the scope of which a judicial decision is not vested with the authority of res judicata. In the case concerning Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), the Court declined to make "a declaration of principle that Iceland is under an obligation to make compensation to the Federal Republic [of Germany] in respect of all unlawful acts of interference with fishing vessels of the Federal Republic" (I.C.J. Reports 1974, p. 204, para. 74) alleged to have been harassed by Icelandic coastal patrol boats seeking to prevent them from conducting their fishing activities in a maritime area which had been declared exclusive. The reason for the Court’s refusal is not entirely clear. In a case primarily involving a disputed delimitation, the main ground for decision appears however to have been that the Court had no knowledge of the injurious acts, in the absence of which a decision ordering reparation, even one in principle, would be meaningless. Thus, the Court needed only to hold that the disputed extension of a zone from which the Icelandic authorities sought to bar foreign vessels was not enforceable against the Applicant, implicitly referring the question of reparation for the alleged damage to a fresh Application — not to a subsequent phase of the proceedings initiated by the original Application.

In the present case the existence of the injuries is beyond doubt. What is distinctive here however is that the Court has treated them by category, as it were, without ruling on each injurious "incident". It is difficult to see how the Court could have proceeded otherwise, given the multiplicity of injuries and the circumstances in which they arose. The authority of its decision as res judicata is not, in principle, affected by this, nor is that authority more circumscribed than that of a traditional interim judgment deferring the final determination of reparation owed to a later time. In reality, the form and
amount of reparation will not be the only questions to be decided by the Court if the Parties fail to agree on them; it will also be for the Court to establish, in regard to those “accidents” falling within the category of those declared by the Court as not covered by the, causal nexus between an injury suffered and an act by the Respondent engaging its responsibility. The Court has ruled, the causal nexus between an injury suffered and an act by the Respondent engaging its responsibility. The Court has ruled, the causal nexus between an injury suffered and an act by the Respondent engaging its responsibility.

(b) It is also my view that a request to defer the decision on reparation should not be granted in the absence of persuasive reasons. It would be out of keeping with the dignity and true interest of the Court to allow, in all cases, the oral proceedings to be deferred without a good reason. For the same reason, I do not believe an application should be granted where it is not established that there are genuine reasons for suspending the proceedings. For the same reason, I do not believe an application should be granted where it is not established that there are genuine reasons for suspending the proceedings.

There is no difficulty with the Congo’s principal claim and Uganda’s first counter-claim in this respect. It is easy to see why the Applicant, owing to the long conflict between the Parties and its consequences, should seek a finding of responsibility on the part of the Respondent, which it accuses of failing to observe the non-use of force, and to “respect and ensure respect for” the laws and principles referred to above. Thus, when the Court held in point 3 of the dispositif that the evidence needed for a decision on reparation from turning the Court may be be deemed, it is easy to see why the Applicant, owing to the long conflict between the Parties and its consequences, should seek a finding of responsibility on the part of the Respondent, which it accuses of failing to observe the non-use of force, and to “respect and ensure respect for” the laws and principles referred to above. 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tarian law and human rights draw their inspiration. But this holds particularly true when a State uses force in violation of the *jus ad bellum*, because it must assume responsibility for the consequences of the unrest and chaos unleashed, as in the present case, by its military intervention.

5. In point 5 of the dispositif the Court “finds” that Uganda is under an obligation to make reparation to the Congo for the injury caused, referring to the damage resulting from the violations of law found in points 1, 3 and 4 of the dispositif. There is nothing out of the ordinary about this *per se*. And it is clearly elementary that unilateral use of force, when illegal, engages the responsibility of the author. At the time when there were essentially no restrictions on the use of force, it was understandable that war reparations should by nature escape the rules of responsibility. However, ever since the Charter of the United Nations clearly banned the use of force, it is difficult to see how a State having used armed force otherwise than in self-defence can elude its obligation to make reparation for the injury it has caused. It must be stressed that this injury comprises all the damage deriving from the violation of the prohibition on the use of force, regardless of whether it stems from acts or practices which in themselves comply with the rules of the law of war. It may be that breach of these rules augments the responsibility deriving from the violation of the *jus ad bellum*; be that as it may, compliance with the *jus in bello* is never sufficient to release a party from the obligation to make good all consequences of its violation of the *jus ad bellum*.

Where occupation is unlawful because it results from the use of force otherwise than in self-defence, the occupying State bears an obligation, for example, to make reparation for all ensuing damage, even if it has acted in accordance with the Fourth Geneva Convention (1949) and with the Regulations annexed to the Fourth Hague Convention (1907). Contrary to the suggestion by the Respondent, an occupant enjoys no right or prerogative under those Regulations by which it can avoid responsibility in respect of an occupation established in violation of the *jus ad bellum*. This is one of the basic consequences of the contemporary prohibition on the use of force. It does not follow that a State legally using force may breach the *jus in bello*; the only point is that a State unlawfully using force cannot plead compliance with the *jus in bello* to avoid having to make reparation for the injury resulting from its military actions.

As basic as it is, this application of the law of responsibility can on occasion give rise to difficulties. Some are technical. For example, in the context of an armed conflict the causal connection between the injury and the violation of the law will often be difficult to prove, at least under the standards traditionally applied for this purpose. Others are more fundamental. There can, for instance, be some injustice in requiring a people, particularly a (very) poor one, to pay a debt, possibly a (very) heavy one, born of the errant conduct of leaders over whom it had little, or no, hold. The concern is one of long standing and is justified. It will no doubt require international law one day to establish the conditions and limits governing payment of State debts. Alone, it offers no basis for calling into question the principle that a State having unlawfully used force must make reparation for all the consequences of its “wrongdoing”.

( Signed) Joe Verhoeven.
Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Dissenting Opinion of Judge ad hoc Kateka, I.C.J. Reports 2005
Dissenting Opinion of Judge Ad Hoc Kateka

Disagreement with the Judgment on its key findings — Treatment of evidence not even-handed — Decision on Respondent’s defences of consent and self-defence mistaken — Kisangani events — Serious accusations of violations of human rights and international humanitarian law need higher standard of proof — Reliance on United Nations reports concerning alleged exploitation of DRC’s natural resources — Ruling on violation of provisional measures unnecessary — Unjustified treatment of Uganda’s counter-claims.

1. I find myself in disagreement with the Court’s Judgment on key aspects on the use of force, violations of human rights and international humanitarian law and the alleged unlawful exploitation of the DRC’s natural resources. With regret, I am therefore constrained to vote against several of the operative clauses of the dispositif. Before explaining my reasons for disagreeing with parts of the Judgment, I wish to comment on some evidentiary issues and on the background to the case.

I. Evidentiary Issues and Background to the Case

2. The Court enjoys freedom and flexibility with regard to the consideration of evidence. In this case, as the Court acknowledges, both Parties have presented it with a vast amount of evidentiary materials. It has therefore to assess the probative value of the documents and eliminate from further consideration those it deems unreliable. This is not an easy task, as it calls for choice. In this exercise of choice, a judge is guided by an “inner conviction” (inevitably influenced by one’s background and experience), which should prick the conscience so that one lives up to the requirement of Article 20 of the Court’s Statute. As judge ad hoc, I am mindful of the words of Judge Lauterpacht that I am bound to exercise my function impartially and conscientiously while also discharging the special obligation to endeavour to ensure, so far as is reasonable, that argument in favour of the Party that appointed me “is reflected — though not necessarily accepted — in [this] dissenting opinion” (Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 409, para. 6).

3. In my view, the Court has not been even-handed in its treatment of the materials submitted by the two Parties. For example, the Court terms as “a bundle of news reports of variable reliability” (Judgment, para. 136), which the Court does not find weighty and convincing. This is evidence adduced by Uganda to establish the Sudan’s involvement in aiding anti-Ugandan elements in the DRC. This is a whole set of over 140 documents, which is published in Volume IV of the DRC’s Reply. Earlier, in paragraph 68 of the Judgment, the Court regards as “an interested source” and rejects evidence proffered by the DRC from the same volume in the context of the Kitona airborne operation. This being the case, one would expect the Court to regard it as a case of “statement against interest” and treat favourably the documents from the same volume that Uganda relies upon.

4. The volume in question is a collection by the Integrated Regional Information Network (IRIN). The sources for the information include United Nations agencies, NGOs and other international organizations and media reports. One would have expected this Office for the Coordination of Humanitarian Affairs (OCHA) affiliated network to be given more credence than it gets, especially when the press information is “wholly consistent and concordant as to the main facts and circumstances of the case” (United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 10, para. 13).

But the Court excludes this large amount of materials noting that it lacks corroboration. This is in spite of the fact that the information about the Sudan, that is in this volume, is from different media from all over the world.

5. A further illustration of the unequal treatment of the Parties is depicted when the Court cites an ICG report of August 1998 that the Court acknowledges as “independent”. The report, according to the Court, does seem to suggest some Sudanese support for the ADF’s activities (ADF is a virulent anti-Ugandan rebel group). The Court goes on to quote the report: “It also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border.” (Judgment, para. 135.) This theme of the DRC’s inability recurs throughout the Judgment. The Court does not examine this report any further to see if the DRC can be held responsible for the unlawful use of force against Uganda. But the Court holds Uganda internationally responsible for unlawful exploitation of the DRC’s resources in spite of the Court’s finding that it was not governmental policy of Uganda to do so (Judgment, paras. 242 and 250).

6. The Court continues with its tendency to discount evidence in favour of Uganda when it dismisses a key report as of no relevance to Uganda’s case. This is in connection with Uganda’s contention of incorporation into Kabila’s army of thousands of ex-FAR and Interahamwe...
In May 1998. A United States Department report, which is also set aside by the Court, condemned the DRC’s recruitment and training of former perpetrators of the Rwandan genocide. By declaring the report as irrelevant, the Court seems to be unaware of the fourth objective of Uganda’s High Command document that states: “To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR, which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.” (Judgment, para. 109.)

7. In short, “the Court has chosen to deprecate [Uganda’s evidence], to omit any consequential statement of the law”, to paraphrase Judge Schwebel’s words in his dissenting opinion in the Nicaragua case (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 272, para. 16). To this end, more examples can be quoted to illustrate how the Court has dealt unevenly with the Parties. The Court, in one part of the Judgment (para. 132), is satisfied that the evidence does show a series of attacks occurring within the relevant time frame against Uganda. However, the Court observes that these facts are not denied by the DRC, but its position is that the ADF alone was responsible for the events.

8. At the start of its substantive consideration of the Parties’ contentions, the Court expresses its awareness of the complex and tragic situation which has long prevailed in the Great Lakes region. The Court notes, however, that its task is to respond, on the basis of international law, to the particular legal dispute brought before it. The Court concludes, “[a]s it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that” (Judgment, para. 26).

9. However, the task of the Court cannot be in a vacuum. The existing realities must be taken into consideration. In this particular case, the realities include the genocide that happened in Rwanda in 1994. The effects of this genocide still reverberate in the region to this day. One of the root causes of this crisis has been ethnicity, which was exploited by the colonialists during colonial times. An additional factor is the terrible history of unscrupulous dictators — all of whom had support from abroad. In the case of the DRC, it has led to the land of Patrice Lumumba not to experience peace for most of the time since independence. It is only now that there is hope for such peace.

II. THE USE OF FORCE

10. I voted against the first paragraph of the dispositif, which finds that Uganda has violated the principle of non-use of force in international relations, by engaging in military activities against the DRC, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC.

11. This omnibus clause creates confusion by mixing up jus ad bellum with jus in bello. A finding on Uganda engaging in military activities against the DRC should have been separated from that of occupation. I am of the opinion that the finding on occupation has been invoked by the Court to justify its findings of violations of human rights and international humanitarian law.

12. In this regard, it bears recalling that the first of the DRC’s final submissions requests the Court to adjudge and declare:

“1. That the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo . . . has violated . . . the principle of non-use of force in international relations, including the prohibition of aggression . . .”

(Judgment, para. 25.)

The Court has not found Uganda responsible for aggression against the DRC. It has reached a finding short of aggression by using the language of “extending military, logistic, economic and financial support to irregular forces . . .” (para. 1 of the dispositif). This phraseology evokes the memory of the dictum in the case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment, I.C.J. Reports 1986, p. 14). The dictum left open the definition of “armed attack” as applied in the Charter of the United Nations and under customary international law.

13. In this regard, it has been stated thus “that actions by irregulars can constitute an armed attack” is not challenged, and

“the controversy centres on the degree of state involvement that is necessary to make the actions attributable to the state and to justify action in self-defence in particular cases” (Christine Gray, International Law and the Use of Force, 2000, p. 97).

Given the controversy that still persists, I am of the view that the Court should have taken the opportunity to clarify the question of the use of force in self-defence. This is more so in view of the fact that irregular forces lie at the heart of the dispute between the Parties in this case.

14. Following the Nicaragua Judgment, the Court was criticized for stating in its dictum that the provision of weapons and logistical support to private groups did not amount to an armed attack. The gist of the

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1 “Aggression is the use of armed force by a State, against the sovereignty, territorial integrity or political independence of another State.” (General Assembly resolution 3314 (XXIX), Art. 1.)
Court’s language in the present case has the same effect as that in the Nicaragua Judgment (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14). In this respect, some publicists contend that the use of force below the threshold of an “armed attack” is covered by the general principle of non-intervention (B. Simma (ed.), The Charter of the United Nations — A Commentary, 2nd ed., 2002).

15. In the context of irregulars, others such as Sir Robert Jennings hold the view that the provision of arms and logistical support amount to armed attack. “Accordingly, it seems to me that to say that the provision of arms, coupled with ‘logistical or other support’ is not armed attack is going much too far.” (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits. Judgment, I.C.J. Reports 1986, p. 543; dissenting opinion of Judge Sir Robert Jennings.) This is the meaning I put to the words of the Court in the first paragraph of the dispositif. However, I apply them — see below — to the deeds of the DRC in support of anti-Uganda insurgents.

16. In its analysis of the question of the use of force, the Court has not put much weight to Uganda’s two arguments for circumstances precluding wrongfulness, namely, consent and self-defence. As a result of this, the Court has arrived, in my view, at a mistaken conclusion that Uganda has violated the principle of non-use of force by engaging in military activities against the DRC. An examination of Uganda’s arguments below reveals the contrary.

17. Uganda contends that its armed forces were present in the DRC from May 1997 to August 1998 and from July 1999 to June 2003 with the consent of the DRC, pursuant to oral agreements with President Laurent-Désiré Kabila in May and December 1997, the bilateral Protocol of April 1998, the multilateral Lusaka Agreement of July 1999 and the bilateral Luanda Agreement of September 2002. For the period not covered by the DRC’s consent, i.e., from mid-September 1998 to mid-July 1999, Uganda contends that its military forces in the Congo during this ten-month period were there pursuant to the lawful exercise of the right to self-defence.

18. Concerning the defence of consent, I find myself in disagreement with the Court’s conclusion that the consent of the DRC was withdrawn at the Victoria Summit of 8 August 1998. The Court, in my view, has chosen the date of 8 August rather arbitrarily. For there could be several other dates such as (a) 2 August 1998 when the DRC claimed that Uganda invaded it, beginning with a major operation at Kitona. But the Court has rightly concluded that it has not been established that Uganda participated in the attack at Kitona; (b) the date of 28 July 1998, when President Kabila issued a statement terminating the Rwandan military presence, “with effect from this Monday, 27 July 1998”. However, the Court has found that the presence of the Ugandan forces in the DRC did not become unlawful by virtue of President Kabila’s statement; (c) 13 August 1998 when the United Nations’ Permanent Representative of the DRC told a press conference that Uganda had invaded the DRC; (d) 11 September 1998 when Uganda invoked the right of self-defence, following the publication of its High Command document, which was implemented by operation “Safe Haven”.

19. From the above dates, a reasonable inference can be drawn that the statements attributed to the various leaders of the DRC merely expressed complaints concerning the situation in the DRC. They were not meant to withdraw the consent for the continued presence of Uganda’s military forces in the Congo. In this regard, it bears stressing that Uganda took the initiative leading to the Victoria Falls Summits I and II of August and September 1998, respectively. A communiqué addressed to the security concerns of the DRC and those of its neighbours was issued.

20. Regrettably, as an indication of the persistent uneven treatment of the Parties, the Court has not given a correct interpretation to the Lusaka Ceasefire Agreement of 10 July 1999. For example, there is the Court’s misleading argument that the arrangements made at Lusaka addressed certain “realities on the ground” and represented “an agreed modus operandi” without the DRC consenting to the presence of Ugandan troops (Judgment, para. 99). This argument would seem to suggest that the parties to the Lusaka Agreement were merely dealing with a de facto situation of disarming rebels and withdrawing of foreign troops. However, as the Court acknowledges, the Agreement shows that it was more than a ceasefire agreement (Judgment, para. 97). It addresses the key aspect of the conflict by the parties to the Lusaka Agreement, recognizing that the root cause of the conflict was the use of Congolese territory by armed bands, seeking to destabilize or overthrow neighbouring Governments.

21. In order to address the root cause of the conflict, Chapter 12 of Annex A provides that the Parties agreed

“(a) Not to arm, train, harbour on its territory, or render any form of support to subversive elements or armed opposition movements for the purpose of destabilizing the others;

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(d) To address the problem of armed groups in the Democratic Republic of Congo in accordance with the terms of the [Lusaka] Agreement.” (Counter-Memorial of Uganda (CMU), Vol. II, Ann. 45, Ann. A, Chap. 12.)

Even the Secretary-General of the United Nations recognized the
problem of armed groups as particularly difficult and sensitive when he stated in a report that “[i]t lies at the core of the conflict in the subregion and undermines the security of all the States concerned” (CMU, Vol. III, Ann. 46, para. 21).

22. Thus, while agreeing with the Court that the Lusaka Agreement did not have a retrospective effect, I do not share the Court’s view that the calendar for withdrawal (of foreign forces) and its relationship to the series of major events did not constitute consent by the Congo to the presence of Ugandan forces for at least 180 days from 10 July 1999 and beyond that time if the envisaged necessary major events did not occur. As counsel for Uganda argued during the oral pleadings, there is a linkage between the disarmament of the armed groups and the subsequent withdrawal of armed forces of foreign States from the DRC. This is borne out by paragraph 12 of Annex B to the Ceasefire Agreement, where the timetable shows that the withdrawal of foreign forces would not occur until after a successful conclusion of the Congolese national dialogue (D-Day\(^2\) + 90 days), the disarmament of armed groups (D-Day + 120 days) and the orderly withdrawal of all foreign forces (D-Day + 180 days) (CMU, Vol. II, Ann. 45, Ann. B). Indeed there was a delay in the implementation of the Agreement because the inter-Congolese dialogue did not start as envisaged in the timetable.

23. The Court, having reached a wrong interpretation, in my view, of the Lusaka Agreement, proceeds to state that the Luanda Agreement of September 2002, a bilateral agreement between the DRC and Uganda, alters the terms of the multilateral Lusaka Agreement. I am of the view that the other parties to the Lusaka Agreement (i.e., Angola, Namibia, Rwanda and Zimbabwe) would have objected if the bilateral alteration caused problems. The Luanda Agreement gave impetus to the stalled implementation of the Lusaka Agreement. I differ once again with the Court’s conclusion that the various treaties involving the DRC and Uganda did not constitute consent to the presence of Ugandan troops in the territory of the DRC after July 1999. “Lusaka” and more explicitly “Luanda” continued the validation in law of Uganda’s military presence in the DRC.

24. As regards the right of self-defence, the Court has regrettably come to the conclusion that the legal and factual circumstances for the exercise of this right by Uganda were not present. Accordingly, it refuses to respond to the Parties’ contentions as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, it holds that the preconditions for the exercise of self-defence do not exist in the circumstances of the present case. However, it finds it appropriate to observe in an obiter dictum that the taking of airports and towns many hundreds of kilometres from Uganda’s border would not seem proportionate to the series of transborder attacks Uganda claimed had given rise to the right of self-defence, nor to be necessary to that end.

25. The refusal by the Court to delve into the question of self-defence arises from its rejection of the evidence submitted by Uganda. The Court relies on the Porter Commission Report as the main evidence on this issue. The role of Brigadier-General James Kazini is central to the Court’s findings — on when operation “Safe Haven” commenced and on the question of the occupation of Ituri. Uganda’s argument of the alternative view concerning the armed bands is set aside.

26. Thus it seems, in the interest of judicial economy, that the Court has excluded much of the evidence submitted by Uganda on the question of self-defence. This leads the Court to apply insufficient law to insufficient facts; hence the failure by the Court to discharge its judicial function in this respect. For example on the issue of the Sudan, the Court recognizes that an ICG independent report of August 1998 (“North Kivu into the Quagmire”) seems to suggest some Sudanese support for the ADF’s activities. However, the Court acknowledges that the report also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border. This is a rather surprising position of the Court. If the report implies the Sudan’s involvement with the ADF, the Court should have examined it further and linked it to other reports for corroboration purposes. Instead the Court simply quotes the report as stating that the ADF was exploiting the incapacity of the Congolese Armed Forces (FAC) in controlling areas of North Kivu with neighbour Uganda.

27. The Court should have been alerted by the ICG report so as to take into account other corroborating reports of the Sudan’s support for anti-Uganda rebels. Such similar documents are another ICG report of 1999 (“How Kabila Lost His Way”), which the Court regards as not constituting reliable evidence. No reason is given as to why the report is not reliable despite its stating that the DRC had effectively admitted the threat to Uganda’s security posed by the Sudan. Annex 108 of the DRC’s Reply quotes reports that indicate that the Sudan had been flying military supplies from Juba to Kabila forces in Isiro and Dongo. The same reports refer to 4,000 Sudanese soldiers being engaged in the conflict. It is worth noting that Isiro is 320 km from Uganda’s borders with the DRC.

28. One could cite more examples about the Sudanese “connection”
with the DRC and its destabilizing effect on Uganda. It suffices for one to cite the factor of the Lord’s Resistance Army (LRA). In its Judgment, the Court refers to a Ugandan military intelligence report, which states that in August 1998 the Sudan airlifted insurgents from the WNBf and LRA to fight alongside Congolese forces against RPA and RCD rebels. The Court observes that, even were that proven, the Congo was entitled so to have acted. One is led to remark that it would be a strange concept of self-defence that would allow the airlifting of rebels to the DRC by the Sudan to murder civilians in either Rwanda or Uganda, which countries were in conflict with the DRC. And yet, the Court concludes that there was no tripartite conspiracy between the DRC, the Sudan and the anti-Uganda rebels.

29. As regards the LRA, I wish to underscore the inter-connectivity of the events in the Great Lakes region. The Sudan had been sponsoring the LRA that for nearly 20 years had caused massive and grave violations of human rights and international humanitarian law in northern Uganda. This has led the Prosecutor of the International Criminal Court to indict five leaders of the LRA for crimes against humanity. The Sudan was ferrying the LRA rebels to the DRC in order to create “another frontier” in its conflict with Uganda. It has also been said that Zaire’s attempt to evict Congolese Tutsi triggered the Congo crisis. These examples show that the situation in the DRC has an internal, regional and international dimension. Another dimension of the inter-connectivity of events in the region is that the Hima people are to be found in the DRC, Rwanda, Burundi and Uganda. The various pogroms in Rwanda and Burundi led to massive inflows of refugees into Uganda and Tanzania in the 1960s. Hence instability in one country creates instability in another owing to the ethnic composition of the people. In this situation it is not easy to tell whether a person belongs to this or that ethnic group.

30. In this regard, the Court fails to recognize the inter-connectivity of the conflict when it discounts a United States State Department statement of October 1998, condemning the DRC’s recruitment and training of former perpetrators of the Rwandan genocide. This lack of awareness by the Court displays itself by not reacting to Uganda’s complaints about the DRC’s conflation of Uganda and Rwanda in this case. Notwithstanding the fact that Uganda has shown several times in its argument its rejection of offers by Rwanda to participate in joint operations in the DRC, the Applicant in its pleadings, and the Court in its treatment of the evidence, have both unwittingly maintained the impression of not appreciating that Rwanda and Uganda are two different States.

31. As already stated, insurgent activity is at the heart of the conflict in the region. Even to this day, MONUC is still struggling in joint operations with the DRC to disarm the various rebel groups, both local and foreign (Reuters report of 11 November 2005 on an operation in North Kivu province). The DRC, in its Reply, acknowledges that anti-Ugandan armed groups have been operating from this territory for years: “As they had always done in the past, the forces of the ADF continued to seek refuge in Congolese territory.” (Reply of the Democratic Republic of the Congo (RDRC), Vol. I, para. 3.15.) As if this was right, the DRC argues that no one, and certainly not their Ugandan counterparts, have ever held the Congolese authorities responsible for any of these actions. This implies acquiescence on Uganda’s part.

32. However, Uganda had protested the massacres at Kichwamba Technical School of 8 June 1998 in which 33 students were killed and 106 abducted, an attack at Benyangule village on 26 June 1998 in which 11 persons were killed or wounded, the abduction of 19 seminarians at Kiburara on 5 July 1998 and an attack on Kasese town on 1 August 1998, in which three persons were killed. In spite of all this evidence of brutal and deadly attacks, the Court merely comments that “[t]he DRC does not deny that a number of attacks took place, but its position is that the ADF alone was responsible for them” (Judgment, para. 133). The Court concludes that there is no satisfactory proof of the involvement in these attacks, direct or indirect of the Government of the DRC:

“The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression ... The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.” (Judgment, para. 146.)

33. Here the Court seems to reconfirm its 1986 dictum in the Nicaragua case concerning insurgent activities and what amounts to an “armed attack”. The DRC, in its Reply already referred to, reasserts that the fact of simply tolerating or financing irregular forces is not sufficient to establish a full scale “armed attack”: “For this to be established,” the DRC argues, “Uganda must prove that the DRC was ‘substantially involved’ in the acts of irregular forces and hence that the Congolese Government had given specific instructions or directions to them or had actually controlled the performance of such acts” (RRDC, Vol. I, para. 3.135).
In its 1986 *Nicaragua* Judgment, the Court stated the following:

“The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 103, para. 195.)

34. The Court has thus stuck to its limited interpretation of Article 3 (g) of General Assembly resolution 3314 (XXIX). By so doing, it is encouraging that impunity in that proof of the element of “substantial involvement”, which implies awareness and substantial participation, will be invoked — as the DRC has done in its pleadings in this case — by culprits to avoid responsibility for wrongful acts. We have already referred to the alternative view, which Uganda advanced in the context of self-defence. Even if the Court found that Uganda had not established the legal and factual circumstances for the exercise of a right of self-defence, it should have found that military support by the DRC for anti-Uganda insurgents constitutes unlawful intervention. Instead of doing this, the Court finds that Uganda’s first counter-claim, by which Uganda contends that, since 1994, it has been the victim of military operations and other destabilizing activities carried out by hostile armed groups based in the DRC, cannot be upheld.

35. Thus the effort of Zaire’s President Mobutu (cited in the counter-claim) to overthrow President Museveni’s Government since 1994 — and even earlier since 1986 — is subversive activity, which not only constitutes unlawful intervention in Uganda’s affairs, but also is cumulatively tantamount to an armed attack upon Uganda. In my view this, along with incessant rebel attacks in the post “Zaire era”, would entitle Uganda to exercise the right of self-defence.

36. In this regard, both the Applicant and the Court have advanced the argument of the DRC’s inability to rein in anti-Uganda rebels. In its conclusion on the part of Uganda’s first counter-claim, alleging Congolese responsibility for tolerating the rebel movements prior to May 1997, the Court states:

“During the period under consideration both anti-Ugandan and anti-Zaïrean rebel groups operated in this area. Neither Zaïre nor Uganda were in a position to put an end to their activities. However . . . the Court cannot conclude that the absence of action

37. From the constant references in the Court’s Judgment to the DRC’s inability to control anti-Uganda rebels, one may be forgiven forgetting the impression that the DRC was facing problems of controlling its territory, at least in the eastern part of its territory. Thus reasons of geography, incapacity or distance have been invoked to avoid attribution of responsibility to the DRC for violations of its obligations to its neighbours, in particular Uganda. Here, a quote from the “Commentary” on the United Nations Charter is apt:

“A special situation arises, if a State is not reluctant but incapable of impeding acts of terrorism committed by making use of its territory. Although such terrorist acts are not attributable to the State, the State victim of the acts is not precluded from reacting by military means against the terrorists within the territory of the other State. Otherwise, a so-called failed State would turn out to be a safe haven for terrorists, certainly not what Articles 2 (4) and 51 of the Charter are aiming at.” (B. Simma (ed.), *The Charter of the United Nations — A Commentary*, 2nd ed., 2002, Vol. I, p. 802, para. 36.)

38. The Court has concluded that Article 51 of the United Nations Charter does not allow the use of force to protect perceived security interests beyond the strict confines there laid down. It adds that other means are available to a concerned State, in which the role of the Security Council will be paramount. It has not elaborated as to whether Uganda was entitled to the use of force on a threshold below “armed attack”. Uganda had been calling for the United Nations Security Council to send a peacekeeping force to the DRC. It is not enough for the Court to refer
Uganda to the Security Council. It bears mentioning that many tragic situations have occurred on the African continent due to inaction by the Council.

39. Equally, the Court has accused Uganda of not reporting to the Security Council events that it had regarded as requiring it to react in self-defence. In this connection, I wish to quote from Judge Schwebel’s dissenting opinion in the *Nicaragua* case:

“A State cannot be deprived, and cannot deprive itself, of its inherent right [nothing in the Charter shall impair that inherent right, including the requirement of reporting to the Security Council the measures taken] of individual or collective self-defence because of its failure to report measures taken in the exercise of that right to the Security Council.” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 377, para. 230.)

This reporting requirement has been abused by aggressor States to justify themselves that by reporting, they had complied with Article 51 of the Charter concerning self-defence. Hence this requirement should be handled with caution when it comes to issues of self-defence. In practice, in some cases, some States are not aware that they are required to report measures taken. While this is not an excuse, it should be regarded as an extenuating circumstance.

40. I have voted in favour of the second operative clause of the *dispositif* concerning the events in Kisangani. My vote in favour is in respect of the hostilities between Ugandan and Rwandan military forces in Kisangani. The mere fighting violated the sovereignty and territorial integrity of the DRC. I cannot, however, in good conscience, pronounce myself on the violations of human rights and international humanitarian law because there were such violations by the many parties to the DRC conflict, including the DRC. In this regard, my voting in favour of the fifth and sixth operative paragraphs of the *dispositif* is only in respect of the events in Kisangani. As I state below, I disagree with the Court’s findings on violations of human rights and international humanitarian law and the unlawful exploitation of the DRC’s natural resources and thus cannot support a general finding for the making of reparation to the DRC on these matters.

41. I also agree with the Court on the admissibility of the DRC’s claims in relation to Uganda’s responsibility for the events in Kisangani. It is not necessary for Rwanda to be a party to this case in order for the Court to determine whether Uganda’s conduct violated rules of international law. While the indispensable third party principle does not apply here, one must reiterate that the DRC’s conflation of Rwanda and Uganda is uncalled for.

### III. HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW

42. The Court has found that Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of abuses, failed to discriminate between civilian and military targets and to protect the civilian population, trained child soldiers, incited ethnic conflict and failed to take measures to end such conflict; as well as by its failure as the occupying Power to take measures to respect and ensure respect for human rights and international humanitarian law in the district of Ituri, violated its obligations under international human rights law and international humanitarian law.

43. I have voted against this over-arching finding which mixes up several issues. The finding contains serious accusations against Uganda. As such a higher standard of proof is required: “A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here.” (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 17.) It would also seem pertinent to cite the observation by Judge Higgins in her separate opinion in the *Oil Platforms* case:

> “Beyond a general agreement that the graver the charge the more confidence must there be in the evidence relied on, there is thus little help parties appearing before the Court (who already will know they bear the burden of proof) as to what is likely to satisfy the Court.” (*Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 234, para. 33.)

44. At the outset of considering this finding by the Court, it bears repeating that there were massive and egregious violations of human rights and international humanitarian law in the DRC. As already observed, the DRC itself is not absolved from blame. Various reports in the public domain state that vile crimes have been perpetrated in the DRC. Four million people have died since the conflict began there. As counsel for Uganda stated during the oral proceedings:

> “a… balanced picture… without angels and without demons. It is not a picture without victims, however, because both Uganda and
the DRC are victims. Victims yes, but entirely innocent, no, because there is no one in this picture who is totally without blame.” (CR 2005/6, p. 58.)

45. As evidence of the serious accusation against Uganda for the violation of human rights and international humanitarian law, the Court relies on the sixth MONUC report of February 2001 and the MONUC’s special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004). The Court proceeds to state that the United Nations documents are corroborated by other credible sources of NGOs, such as the HRW’s report of July 2003, which is available at http://hrw.org/reports/2003/ituri0703. For its part, Uganda asserts that the reports are unreliable and partisan (cites ASADHO, a Congolese NGO as a case in point). Uganda makes the following arguments that (a) MONUC did not have a mission (on the ground) appropriate to investigations of a specifically legal character; (b) the MONUC report makes assumptions about the causes of the Hema-Lendu conflict, assumptions which have no historical basis; (c) Uganda finds it anomalous and open to serious question the supposition that in Ituri Uganda forces should be associated with patterns of abuse when this did not occur in other regions. In my view, these are cogent reasons which the Court should have taken into serious consideration before reaching its finding that Uganda violated human rights and international humanitarian law in the DRC.

46. I find it remarkable that the DRC accuses Uganda of carrying out a deliberate policy of terror. Wisely, the Court did not endorse this rather excessive charge. On the basis of the “clean hands” theory — the principle that an unlawful action cannot serve as the basis of an action in law — the DRC should be debarred from raising such accusations.

47. Having in mind the seriousness of the accusations levelled by the DRC, the Court should have been more cautious and demanded satisfactory evidence before concluding that the UPDF killed, tortured, and committed other forms of inhumane treatment against the Congolese civilian population. Relying on reports of the Special Rapporteurs and MONUC reports is not advisable. As is known, on a number of occasions, reports of the Special Rapporteurs of the Human Rights Commission have generated controversies of a political and legal nature. Instead of helping to find a solution to the situation in question, the reports were ignored by some of the addressees on the grounds that they lacked objectivity. In some cases, the writers of the United Nations reports have no access to the countries concerned. In other cases, they are ill-informed and thus end up writing speculative reports as will be illustrated in the next section of this opinion.

48. In this regard, I am troubled by the Court’s finding that there is persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in the Ituri region. It is strange that Uganda, which had its military presence elsewhere in the DRC, should be accused of such a charge only in Ituri. Allegations against Uganda of inciting ethnic conflict between the Hema and Lendu are based on a mistaken view of the area in question where 18 different ethnic groups live side by side. Uganda acknowledges the long-standing rivalry between the Hema and Lendu. Such rivalry had led to massacres of civilians. Uganda stood to gain nothing by inciting ethnic conflict. As explained earlier, the spread of the different ethnic groups in the Great Lakes region is such that based on history and recent experience, it would be folly for any country to try to fan ethnic rivalry. It would boomerang.

49. From the United Nations reports, it seems that the rebel groups in the DRC are the ones that recruited child soldiers and ferried them to Uganda. For example, the RCD-ML is said to have halted its military recruitment campaign due to the growing protest of UNICEF and MONUC. Indeed, Uganda granted access to UNICEF to the children at Kyankwanzi (RDRC, Ann. 32, para. 85). Once again, in my view, there is no evidence to justify the Court’s conclusion that Uganda recruited child soldiers in the DRC.

IV. THE UNLAWFUL EXPLOITATION OF NATURAL RESOURCES

50. I have voted against the fourth operative clause of the dispositif that finds that Uganda violated obligations owed to the DRC under international law, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the DRC and by its failure to comply with its obligations as occupying Power in the Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources.

51. Counsel for the DRC stated during the oral pleadings that “this is the very first time that the Court has been called upon to address the responsibilities of a State for the illegal exploitation of natural resources which are located in the territory of another State which it occupies” (CR 2005/5, p. 15).

Counsel for Uganda agreed with this observation. Hence given the nature and the gravity of the charge, a higher standard of proof is required on the part of the Applicant to prove that the Respondent committed these acts of plunder and pillage. The DRC cited various sources for its evidence, including the United Nations Panel reports on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC.
also cited the Porter Commission, which was set up by the Government of Uganda to investigate allegations made in United Nations Panel reports, as confirming the accusation of unlawful exploitation of Congolese natural resource.

52. There is a lot of doubt concerning the reliability of the United Nations Panel reports. Even the Porter Commission Report, on which the DRC and the Court rely for evidence on exploitation, criticized the methodology followed by the United Nations Panels. It states that "it would seem that the majority of evidence likely to be obtained by such a methodology [of flexible data collection] would be either hearsay, biased or pure gossip, all untested" (Porter Commission Report, p. 7). Thus the United Nations Panel report of 12 April 2001 cites "some sources" as saying that the Presidents of Rwanda and Uganda and the late President Kabila were shareholders in BCDI (Banque de commerce de développement et d'industrie, located in Kigali). The Panel then concludes in the same paragraph, "but this was not the case" (RDRC, Vol. III, Ann. 69, para. 29). In paragraph 52, the Panel report alleges that some members of President Museveni's family were shareholders of DGLI (The Dara Great Lakes Industries, of which DARA Forest is a subsidiary). Then the Panel adds "although more investigation is needed" (ibid., Ann. 69, para. 52).

53. This is the type of gossip that emerges from these United Nations documents. Thus the Court was forced to rely on the Porter Commission Report, which according to the Court provides sufficient and convincing evidence. Here one must caution again over reliance on a single source as evidence to prove allegations, not only of unlawful exploitation of the DRC's natural resources, but also of the use of force. In any case, the Porter Commission found that there was no Ugandan governmental policy to exploit the DRC's natural resources. The Commission also found that individual soldiers engaged in commercial activities and looting were acting in a purely private capacity.

54. In this respect, I find myself in disagreement with the Court's conclusion that Uganda is internationally responsible for the acts of exploitation of the DRC's natural resources and has violated its obligation of due diligence in regard to these acts, of failing to comply with its obligation as an occupying Power in Ituri. The Ugandan soldiers, who committed acts of looting, did so in violation of orders from the highest Ugandan authorities. In his radio message of 15 December 1998 to COs and all UPDF units in the DRC, President Museveni said the following:

"1. Ensure that there is no officer or man of our forces in Congo who engages in business.

2. Also report to me any other public servant whether currently based in Congo or not who tries to engage in business in Congo." (Rejoinder of Uganda (RU), Vol. III, Ann. 31.)

Hence, in my view, individual acts of UPDF soldiers, committed in their private capacity and in violation of orders, cannot lead to attribution of wrongful acts. Paragraph 8 of the Commentary to Article 7 of the draft Articles of the International Law Commission 2001 distinguishes between unauthorized, but still "official" conduct, on the one hand and "private" conduct on the other.

55. As noted earlier, the Court reached a finding of occupation in order to rationalize its finding on human rights and international humanitarian law. It has done the same in respect of the alleged unlawful exploitation of the DRC's natural resources. From this finding, it is easy to invoke jus in bello in order to engage Uganda's international responsibility for acts and omissions of Ugandan troops in the DRC. Uganda has argued that it did not control the rebel groups that were in charge of parts of eastern Congo in general and in Ituri in particular. Its limited military presence could not have made this possible. In any case, the Respondent just — as I do — does not find the contention of occupation to be proven.

56. The Court has rightly, in my view, not accepted part of the DRC's final submission on the violation of the Congo's permanent sovereignty over its natural resources (PSNR) because this has not been proven. The PSNR concept is embodied in General Assembly resolution 1803 (XVII) of 1962. The PSNR was adopted in the era of decolonization and the assertion of the rights of newly independent States. It thus would be inappropriate to invoke this concept in a case involving two African countries. This remark is made without prejudice to the right of States to own and dispose of their natural resources as they wish.

V. LEGAL CONSEQUENCES

57. In its fourth submission, the DRC requests the Court to adjudge and declare that Uganda ceases all continuing internationally wrongful acts, adopt specific guarantees and assurances of non-repetition and make reparation for all injury caused. In this regard, I agree with the Court that there is no evidence of continuing illegal acts on the part of Uganda in the DRC. As such, there is no need for the Court to make any
ruling on cessation. Uganda, as the DRC acknowledges, withdrew its troops from the DRC on 2 June 2003. There is therefore no need for specific guarantees and assurances of non-repetition. The Court has taken judicial notice of the Tripartite Agreement on Regional Security in the Great Lakes of 26 October 2004. This Agreement between the DRC, Rwanda and Uganda provides for obligation to respect the sovereignty and territorial integrity of the countries in the region and cessation of any support for armed groups or militias.

58. Concerning reparation, this could follow at a subsequent phase of the proceedings, if the Parties fail to reach agreement after negotiations.

VI. COMPLIANCE WITH THE COURT’S ORDER ON PROVISIONAL MEASURES

59. The DRC requests the Court to adjudge and declare that Uganda has violated the Order of the Court on provisional measures of 1 July 2000 by not complying with the three provisional measures, namely, (a) refrain from armed action in the DRC; (b) compliance with obligations under international law, in particular the United Nations and OAU Charters and Security Council resolution 1304 (2000); and (c) respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.

60. The Court notes that the DRC put forward no specific evidence demonstrating that after July 2000 Uganda committed acts in violation of each of the three provisional measures. However, the Court finds that Uganda has violated provisional measures concerning human rights and international humanitarian law through actions of Ugandan troops during the period of their presence in the DRC, including the period from 1 July 2000.

61. The Court’s finding that Uganda did not comply with the Order of the Court on provisional measures of 1 July 2000 shows, as indicated earlier, lack of concern for the action taken, not in good faith, by the Applicant to raise this issue against the Respondent when the Applicant itself has committed grave violations of human rights and international humanitarian law. Thus, I am constrained not to support the position of the Court on its finding. The Court, in my view, should not have dealt with the violation of the provisional measures. I have already referred to the “clean hands” theory, which I deem to be apt on this issue as well.

62. Uganda’s first counter-claim relates to acts of aggression allegedly committed by the DRC. The second relates to attacks on Uganda’s diplomatic premises and personnel in Kinshasa and on Ugandan nationals. The third counter-claim was ruled inadmissible by the Order of the Court of 29 November 2001.

63. I agree with the Court’s reasoning, which rejects Uganda’s claim that the DRC is not entitled at the merits phase of the proceedings to raise objections to the admissibility to the counter-claims submitted by Uganda. In the Oil Platforms case the Court ruled that Iran was entitled to challenge “the ‘admissibility’ of the [United States’] counter-claim” on the merits (Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 210, para. 105).

64. I have voted in favour of operative clause 8 of the dispositif by which the Court rejects objections of the DRC to the admissibility of the first counter-claim submitted by Uganda. Before proceeding with further consideration of this counter-claim, I wish to make a general comment on the way the Court has treated this claim of Uganda which is the Applicant in this context and the DRC is the Respondent. It is a matter of regret that the Court agrees with the DRC’s division of the first counter-claim into three periods. The Court invokes the excuse of “practical purposes” in agreeing to divide the counter-claim into three periods: (a) the Mobutu era, i.e., before May 1997; (b) the Kabila period, i.e., May 1997-August 1998; (c) the period after 2 August 1998.

65. This “slicing” technique of the first counter-claim is to the disadvantage of Uganda because as the Applicant in this respect points out “the DRC is seeking to limit Uganda’s counter-claim”. Uganda maintains that Zaire and the DRC are not distinct entities and by virtue of the State continuity principle, it is precisely the same legal person, which is responsible for the acts complained of in the first counter-claim. The division of the counter-claim makes it difficult to follow the reasoning of the Court. Admissibility issues are mixed with those of merits. It would have been better if the first counter-claim had been dealt with in its entirety, without dividing it into three periods.

66. I have voted against paragraph 9 of the dispositif by which the Court finds that the first counter-claim submitted by Uganda cannot be upheld. I find myself in disagreement with the Court’s dismissal of the evidence submitted by Uganda — for the first period of the first counter-claim — when it argues that evidence is of “limited probative value” when it is “neither relied on by the other Party nor corroborated by impartial, neutral sources” (Judgment, para. 298). This observation of the Court concerns President Museveni’s address to the Ugandan Parlia-
ment on 28 May 2000 entitled “Uganda’s Role in the Democratic Republic of the Congo”. Evidence by the NGO Human Rights Watch (HRW) is regarded as “too general to support a claim of Congolese involvement...” (Judgment, p. 298). I do not share the Court’s characterization and treatment of this evidence.

67. In relation to the second period of the first counter-claim, the Court finds that Uganda has failed to provide conclusive evidence of actual support for anti-Ugandan rebel groups by the DRC. The Court notes, with approval, the improved relations between the two Parties. The Court should have remembered its earlier observation that “[t]he political climate between States does not alter their legal rights” (Judgment, para. 294). The Court comments that this period is marked by clear action by the DRC against rebels. If it had accepted evidence by Uganda, it would have noted the “dual role” by the Congolese highest authorities of seeming to co-operate with Uganda while at the same time fraternizing with the Sudan and anti-Ugandan rebels.

68. Regarding the second counter-claim, I have voted in favour of rejecting the DRC’s objection to the admissibility of the part of the claim relating to the breach of the 1961 Vienna Convention on Diplomatic Relations (paragraph 10 of the dispositif). I agree with the Court’s reasoning in its interpretation of the Order of 29 November 2001.

69. I have voted against operative paragraph 11 of the dispositif, which upholds the objection of the DRC to the admissibility of the part of the second counter-claim relating to the maltreatment of persons other than Ugandan diplomats at Ndjili Airport on 20 August 1998. The invocation by Uganda of the international minimum standard relating to the treatment of foreign nationals is considered by the Court as an exercise of diplomatic protection. Thus according to the Court, Uganda would need to meet the conditions necessary for the exercise of diplomatic protection, namely, the requirement of Ugandan nationality of the claimants and the prior exhaustion of local remedies. The Court avoids dealing with the issue of these persons on the grounds that it has not been established that they were Ugandan nationals. In my view, the Court should have invoked international humanitarian law to protect the rights of these persons. The Court would seem not to have given enough weight to violations of the rights of these persons at Ndjili Airport by the DRC.

70. I voted in favour of operative paragraph 12, which finds that the DRC has violated obligations owed to Uganda under the 1961 Vienna Convention on Diplomatic Relations by Congo’s armed forces, maltreating Ugandan diplomats and other individuals at the embassy premises, maltreating Ugandan diplomats at Ndjili Airport, as well as its failure to provide the Ugandan Embassy and Ugandan diplomats with effective protection and failure to protect archives and property from seizure.

I also agree with the Court that it will only be at a subsequent phase, failing an agreement between the Parties, that the issue of reparation to Uganda will be settled by the Court.

(Signed) J. L. KATEKA.
Eritrea-Ethiopia Claims Commission - Partial Award:

*Jus Ad Bellum* - Ethiopia’s Claims 1-8,
19 December 2005, United Nations
Reports of International Arbitral Awards, vol. XXVI
Jurisdiction of the Commission—jurisdiction to decide whether the use of force against Ethiopia violated rules of international law about resort of force, the *jus ad bellum*—no jurisdiction over the determination of origins of the conflict.

Use of force—no right to recourse to force based on a valid claim to a disputed territory—obligation to report its own use of force to the Security Council in case of self-defence—localised border encounters between small infantry units with loss of life, not considered as an armed attack opening right to self-defence under the United Nations Charter—no right to use force or invoking self-defence for settling territorial disputes—only an explicit affirmation of the existence of war between belligerents considered to be a declaration of war under international law—a resolution condemning invasion and demanding the unconditional and immediate withdrawal of enemy forces not considered as a declaration of war.

Compétence de la Commission—compétence pour décider si l'emploi de la force contre l'Éthiopie viole les règles de droit international en matière de recours à la force, le *jus ad bellum*—pas de compétence relative à la détermination des origines du conflit.

Emploi de la force—pas de droit de recourir à la force sur la base de la revendication fondée d'un territoire contesté—obligation de signaler son propre emploi de la force au Conseil de sécurité en cas de légitime-défense—des affrontements frontaliers localisés entre de petites unités d'infanterie entraînant des pertes humaines ne sont pas considérés comme une attaque armée donnant droit à la légitime-défense selon la Charte des Nations Unies—pas de droit de recours à la force ou d'invoquer la légitime-défense pour le règlement des différends territoriaux—seule une affirmation explicite de l'existence d'un état de guerre entre belligérants est considérée comme une déclaration de guerre selon le droit international—une résolution condamnant l'invasion et exigeant le retrait inconditionnel et immédiat des forces ennemies n'est pas considérée comme une déclaration de guerre.
ERITREA-ETHIOPIA CLAIMS COMMISSION

PARTIAL AWARD

Jus Ad Bellum
Ethiopia’s Claims 1–8
between
The Federal Democratic Republic of Ethiopia
and
The State of Eritrea

By the Claims Commission, composed of:
Hans van Houtte, President
George H. Aldrich
John R. Crook
James C. N. Paul
Lucy Reed

The Hague, December 19, 2005

PARTIAL AWARD—Jus ad Bellum—Ethiopia’s Claims 1–8
between the Claimant,
The Federal Democratic Republic of Ethiopia
and
The State of Eritrea, represented by:

Government of Ethiopia
Ambassador Fisseha Yimer, Permanent Representative of the Federal Democratic Republic of Ethiopia to the United Nations, Geneva, Co-Agent
Mr. Habtom Abraha, Consul General, Ethiopian Mission in The Netherlands
Mr. Ibrahim Idris, Director, Legal Affairs General Directorate, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Addis Ababa
Mr. Reta Alemu, First Secretary, Coordinator, Claims Team, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Addis Ababa
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Professor Sean D. Murphy, George Washington University School of Law, Washington, D.C.; Member of the State Bar of Maryland
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Ms. Virginia C. Dailey, Hunton & Williams LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the State Bar of Florida
Mr. Thomas R. Snider, Hunton & Williams LLP, Washington, D.C.; Member of the Bar of the District of Columbia; Member of the State Bar of Massachusetts

and the Respondent,
The State of Eritrea, represented by:

Government of Eritrea
His Excellency, Mohammed Suleiman Ahmed, Ambassador of the State of Eritrea to The Netherlands
Professor Lea Brilmayer, Co-Agent for the Government of Eritrea, Legal Advisor to the Office of the President of Eritrea; Howard M. Holtzmann Professor of International Law, Yale Law School
Ms. Lorraine Charlton, Deputy Legal Advisor to the Office of the President of Eritrea

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Ms. Lori Danielle Tully, Esq.
Ms. Cristina Villarino Villa, Esq.
I. INTRODUCTION

1. This Claim (included as a component of all of Ethiopia’s Claims 1–8) has been brought to the Commission by the Claimant, the Federal Democratic Republic of Ethiopia (“Ethiopia”), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 (“the Agreement”). The Claimant asks the Commission to find the Respondent, the State of Eritrea (“Eritrea”), liable for loss, damage and injury suffered by the Claimant, including loss, damage and injury suffered by the Claimant’s nationals, as a result of the alleged use of force against the Claimant in violation of the rules of international law regulating the resort to force, the *jus ad bellum*, in May and June 1998. The Claimant requests monetary compensation.

2. The Respondent asserts that it fully complied with international law in its resort to military operations.

II. JURISDICTION

3. Eritrea asserted that the Commission has no jurisdiction over this issue, because the Agreement, in Article 3, assigns the responsibility to address it to another body. The Commission finds that argument unpersuasive. Article 3 provides for the creation of an “independent and impartial body” to be appointed by the Secretary-General of the Organization of African Unity in consultation with the Secretary-General of the United Nations, and defines its task in the following terms:

In order to determine the origins of the conflict, an investigation will be carried out on the incidents of 6 May 1998 and on any other incident prior to that date which could have contributed to a misunderstanding between the parties regarding their common border, including the incidents of July and August 1997.

The Commission understands that the independent body authorized by Article 3 has never been constituted.

4. The terms “origins of the conflict” and “misunderstanding between the parties regarding their common border” are not the same as the legal issue posed by Ethiopia for adjudication in this Claim, that is, whether Eritrea’s actions in May and June 1998 involved the unlawful resort to force against Ethiopia resulting in liability in accordance with applicable rules of international law. Determination of the origins of the conflict and the nature of any misunderstandings about the border, had they been made by the impartial body anticipated by Article 3, could have been helpful in promoting reconciliation and border delimitation, but they certainly would not have answered the question of the legality of Eritrea’s resort to force. The factual inquiries called for by Article 3 were largely different from the factual determinations this Commission must make in assessing Ethiopia’s claim under Article 5. Moreover, it seems clear that Article 3 was carefully drafted to direct the impartial body to inquire into matters of fact, not to make any determinations of law. This Commission is the only body assigned by the Agreement with the duty of deciding claims of liability for violations of international law.

5. Upon first reading, the last sentence of Article 5 of the Agreement might well be thought to exclude the Commission’s jurisdiction over rules of international law regulating the resort to force. That sentence provides that “[t]he Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law” (emphasis added). However, at an early stage of the proceedings, the Parties agreed upon an interpretation of that sentence limiting it to claims solely for the costs of the enumerated activities, and the Commission agreed to respect that interpretation. That agreed interpretation was recorded in point 5 of the Commission’s letter to the Parties of July 24, 2001. Consequently, the Commission has jurisdiction pursuant to Article 5 over Ethiopia’s *jus ad bellum* Claim.

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1 Both Parties utilized the terminology of *jus ad bellum* to describe the law governing the initial resort to force between them. At the hearing of this Claim in April 2005, Ethiopia confirmed that it meant by this the use of force contrary to the Charter of the United Nations, June 26, 1945, 59 Stat. p. 1031, 3 Bevans p. 1153 (hereinafter UN Charter).

2 Point 5 of the Commission’s July 24, 2001 letter to the Parties states:

The Commission notes the agreement of the Parties that the last sentence of Article 5, paragraph 1 of the Agreement of 12 December 2000, despite its wording, was intended to mean that claims of compensation for all costs of military operations, all costs of preparing for military operations, and all costs of the use of force are excluded from the jurisdiction of the Commission, without exception. Consequently, the Commission shall respect that interpretation of the provision.
III. THE MERITS

6. Ethiopia claimed that Eritrea carried out a series of unlawful armed attacks against it, beginning on May 12, 1998, in violation of the *jus ad bellum*, and made this an element of all eight of the Claims it submitted to the Commission. The Commission, in ordering filing schedules, decided to hear that Claim along with Ethiopia’s Claims concerning alleged violations of applicable international law, including the *jus in bello*, in the Western and Eastern Fronts (Ethiopia’s Claims 1 and 3). Consequently, this Claim was heard in the Commission’s April 11–15, 2005 hearings on liability.


8. In essence, Ethiopia contended that Eritrea planned and carried out these attacks against Ethiopia in violation of its obligations under international law, including notably the requirement of Article 2, paragraph 4, of the Charter of the United Nations (“UN Charter”) that all Members refrain from the threat or use of force against the territorial integrity or political independence of any State. Ethiopia alleged that, between May 12 and June 11, 1998, Eritrea launched a “full scale” invasion of Ethiopia at many points along their mutual border from Badme in the west to Bure in the east.

9. In addition to its jurisdictional objections, dealt with above, Eritrea denied Ethiopia’s allegations on the merits. In its written pleadings, Eritrea made the following three main defensive assertions: (a) that Ethiopia was unlawfully occupying Eritrean territory in the area around Badme, which was the area of much of the initial hostilities in May 1998, citing the decision of the Eritrea-Ethiopia Boundary Commission of April 13, 2002; (b) that Ethiopian armed militia near Badme carried out forcible incursions into Eritrea in early May 1998 and fired on Eritrean forces on May 6 and 7, killing eight Eritrean soldiers and setting off fighting between small units in the area during the next several days; and (c) that it was Ethiopia that declared war on Eritrea on May 13, 1998. On the last day of the hearing, Eritrea argued that its actions in taking Badme and adjacent areas on May 12, 1998 were lawful measures of self-defense, consistent with Article 51 of the UN Charter, taken in response to the

9. In addition to its jurisdictional objections, dealt with above, Eritrea denied Ethiopia’s allegations on the merits. In its written pleadings, Eritrea made the following three main defensive assertions: (a) that Ethiopia was unlawfully occupying Eritrean territory in the area around Badme, which was the area of much of the initial hostilities in May 1998, citing the decision of the Eritrea-Ethiopia Boundary Commission of April 13, 2002; (b) that Ethiopian armed militia near Badme carried out forcible incursions into Eritrea in early May 1998 and fired on Eritrean forces on May 6 and 7, killing eight Eritrean soldiers and setting off fighting between small units in the area during the next several days; and (c) that it was Ethiopia that declared war on Eritrea on May 13, 1998. On the last day of the hearing, Eritrea argued that its actions in taking Badme and adjacent areas on May 12, 1998 were lawful measures of self-defense, consistent with Article 51 of the UN Charter, taken in response to the

10. The Commission cannot accept the legal position that seems to underlie the first of these Eritrean contentions—that recourse to force by Eritrea would have been lawful because some of the territory concerned was territory to which Eritrea had a valid claim. It is true that the boundary between Eritrea and Ethiopia in the area of Badme was never marked in the years when Eritrea was an Italian colony, during Eritrea’s subsequent incorporation into Ethiopia, or after Eritrean independence in 1993, and it is clear that the Parties had differing conceptions of the boundary’s location. However, the practice of States and the writings of eminent publicists show that self-defense cannot be invoked to settle territorial disputes. In that connection, the Commission notes that border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law.

11. The Commission turns next to Eritrea’s second line of argument. In general, recourse to the use of armed force by one State against another is unlawful unless it is used in self-defense or occurs with the sanction of the Security Council pursuant to Chapter VII of the UN Charter. As the text of Article 51 of the Charter makes clear, the predicate for a valid claim of self-defense under the Charter is that the use of force was necessary in response to unlawful acts threatening the territorial integrity or independence of the State in question. In that connection, the Commission notes that Eritrea did not report its use of armed force against Ethiopia on May 12, 1998 to the Security Council as measures taken in self-defense.


15. The area initially invaded by Eritrean forces on that day were all either within undisputed Ethiopian territory or within territory that was peacefully administered by Ethiopia and that later forces were obliged to withdraw in 2000 under the Cease-Fire Agreement of June 18, 2000. In its Partial Award in 2000 under the Cease-Fire Agreement of June 18, 2000, the Commission held that the best available evidence of the area effectively administered by Ethiopia in 2000 is not available. In the same Partial Award, the Commission explained that redrawing the boundary line would not define the area effectively administered by Ethiopia in 2000, and that the area effectively administered by Ethiopia in 2000 is not available.

16. Consequently, the Commission holds that Eritrea violated Article 2, paragraph 4, of the Charter of the United Nations by resorting to armed force with respect to the events in the vicinity of Badme that occurred during the period from May 6–12, 1998.

17. This leaves Eritrea’s third line of argument, based on Ethiopia’s alleged declaration of war on May 13, 1998, the Ethiopian Council of Ministers and demanded the unconditional and immediate withdrawal of Eritrean forces from Ethiopia. The same principle governs application of the jus ad bellum.

18. The Parties disagreed regarding the nature of this body. Ethiopia contended that the Parties entered into a series of bilateral agreements that established a process of consultations regarding questions related to the boundary and that Ethiopia was determined to act in self-defense against armed attack by either State against the other within the meaning of Article 51 of the UN Charter. Moreover, the evidence included references to other high-level contacts and conversations between the Parties in the days prior to May 12, 1998, as well as suggestions of military preparations on both sides of the border. Thus, the evidence in the proceedings, and the Commission is constrained to act on the basis of the record available to it.
Commission notes that the Parties subsequently maintained diplomatic relations and some economic relations, both of which would appear inconsistent with a formal declaration of war.

18. Ethiopia also contended that the unlawful armed attack by Eritrea that began on May 12 included all of Eritrea’s subsequent attacks in May and June 1998 into Ethiopian territory along other parts of the border between the two States, as it considered those attacks to be a continuous second phase of a “30-day offensive” by Eritrea. It alleged that those attacks occurred across the Mareb River and at Zalambessa on the Central Front and at Adi Murug and Bure on the Eastern Front. In essence, Ethiopia contended that Eritrea carried out a program of pre-planned and coordinated armed attacks in multiple locations in violation of international law. This contention, however, has not been proved.

19. The evidence indicated that Eritrea’s armed forces were more fully mobilized than those of Ethiopia and thus had the initiative in the first several months of the war, but that does not prove that Eritrea’s actions, other than those in the areas of what became known as the Western Front addressed in this Partial Award, were predetermined. Based on the evidence before it, the Commission cannot resolve whether the Eritrean military operations from mid-May to mid-June 1998 in what became the Central and Eastern Fronts were pre-planned attacks, as Ethiopia contends, or were determined by developing military demands as both Parties sought to control key corridors of attack and defense. After it became clear that Ethiopia would not acquiesce in Eritrea’s captures of territory on the Western Front. What is clear is that, once the armed attack in the Badme area occurred and Ethiopia decided to act in self-defense, a war resulted that proved impossible to restrict to the areas where that initial attack was made.

20. In view of these holdings establishing Eritrea’s liability for the unlawful armed attack on the Western Front that began on May 12, 1998, the Commission will request further briefing in the damages phase concerning the scope of the damages for which Eritrea is liable by reason of that attack, in addition to those damages following from the Commission’s other Partial Awards.

IV. AWARD

In view of the foregoing, the Commission determines as follows:

A. Jurisdiction

1. The Commission has jurisdiction over the Claimant’s *jus ad bellum* Claim.

B. Findings on Liability for Violation of International Law

1. The Respondent violated Article 2, paragraph 4, of the Charter of the United Nations by resorting to armed force on May 12, 1998 and the immediately following days to attack and occupy the town of Badme, then under peaceful administration by the Claimant, as well as other territory in the Claimant’s Tahtay Adiabo and Laelay Adiabo Weredas.

2. The Claimant’s contention that subsequent attacks by the Respondent along other parts of their common border were pre-planned and coordinated unlawful uses of force fails for lack of proof.

3. The scope of damages for which the Respondent is liable because of its violation of the *jus ad bellum* will be determined in the damages phase of these proceedings.

Done at The Hague, this 19th day of December 2005

[Signed] President Hans van Houtte

[Signed] George H. Aldrich

[Signed] John R. Crook

[Signed] James C.N. Paul

[Signed] Lucy Reed