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STUDY MATERIALS PART IV

Codification Division of the United Nations Office of Legal Affairs

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INTERNATIONAL LAW
FELLOWSHIP PROGRAMME

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27 July 2011

RULES OF INTERNATIONAL LAW GOVERNING
SELF-DETERMINATION
JUDGE ABDULQAWI YUSUF

Codification Division of the United Nations Office of Legal Affairs

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RULES OF INTERNATIONAL LAW GOVERNING SELF-DETERMINATION
JUDGE ABDULQAWI YUSUF

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1. S. Kumar Banerjee, "The Concept of Permanent Sovereignty over Natural Resources – An Analysis", *The Indian Journal of International Law*, vol. 8 (1968), p 515-546
2. Allen Buchanan, *Justice, Legitimacy, and Self-Determination – Moral Foundations for International Law*, (New York, Oxford University Press Inc., 2003)
3. Antonio Cassese, *Self-determination of peoples: A Legal Reappraisal*, (Cambridge, Cambridge University Press, 1999)
4. Matthew Craven, "Statehood, Self-determination and Recognition", in Malcolm D. Evans (ed.) *International Law*, (Oxford, Oxford University Press, 2010)
5. James Crawford, *The Creation of States in International Law*, 2nd ed., (New York, Oxford University Press Inc., 2006)
6. Morton Halperin, David Scheffer and Patricia Small, *Self-Determination in the New World Order, Carnegie Endowment for International Peace*, (Washington D.C., Carnegie Endowment, 1992)
7. Robert H. Jackson, *Quasi-States: Sovereignty, International Relations, and The Third World*, (Cambridge, Cambridge University Press, 1990)
8. Edward McWhinney, *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law: Failed States, Nation-Building, and the Alternative, Federal Option*, (Leiden, Martinus Nijhoff Publishers, 2007)
9. Oji Umzurike, *The African Charter on Human and Peoples' Rights*, (Martinus Nijhoff Publishers, 1997)
10. Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (New York, Cambridge University Press, 2007)

**Declaration on the granting of independence to
colonial countries and peoples (General Assembly
resolution 1514 (XV) of 14 December 1960)**

should be admitted to membership in the United Nations,³¹

Having considered the application for membership of the Republic of Mali,³²

Decides to admit the Republic of Mali to membership in the United Nations.

876th plenary meeting,
28 September 1960.

1492 (XV). Admission of the Federation of Nigeria to membership in the United Nations

The General Assembly,

Having received the recommendation of the Security Council of 7 October 1960 that the Federation of Nigeria should be admitted to membership in the United Nations,³³

Having considered the application for membership of the Federation of Nigeria,³⁴

Decides to admit the Federation of Nigeria to membership in the United Nations.

893rd plenary meeting,
7 October 1960.

1495 (XV). Co-operation of Member States

The General Assembly,

Deeply concerned by the increase in world tensions,

Considering that the deterioration in international relations constitutes a grave risk to world peace and co-operation,

Conscious that both in the General Assembly and in the world at large it is necessary to arrest this trend in international relations and to contribute towards greater harmony among nations irrespective of the differences in their political and economic systems,

1. Urges that all countries, in accordance with the Charter of the United Nations, refrain from actions likely to aggravate international tensions;

2. Reaffirms the conviction that the strength of the United Nations rests on the co-operation of its Member States which should be forthcoming in full measure so that the Organization becomes a more effective instrument for the safeguarding of peace and for the promotion of the economic and social advancement of all peoples;

3. Urges further that immediate and constructive steps should be adopted in regard to the urgent problems concerning the peace of the world and the advancement of its peoples;

4. Appeals to all Member States to use their utmost endeavours to these ends.

907th plenary meeting,
17 October 1960.

1503 (XV). Report of the International Atomic Energy Agency

The General Assembly

Takes note of the report of the International Atomic

³¹ *Ibid.*, document A/4514.

³² *Ibid.*, document A/4512.

³³ *Ibid.*, document A/4533.

³⁴ *Ibid.*, document A/4527.

³⁵ Annual report of the Board of Governors to the General Conference, 1 July 1959-30 June 1960, Vienna, July 1960 (A/4531 and Corr.1 and Add.1).

Energy Agency to the General Assembly for the year 1959-1960.³⁵

943rd plenary meeting,
12 December 1960.

1513 (XV). Report of the Security Council

The General Assembly

Takes note of the report of the Security Council to the General Assembly covering the period from 16 July 1959 to 15 July 1960.³⁶

943rd plenary meeting,
12 December 1960.

1514 (XV). Declaration on the granting of independence to colonial countries and peoples

The General Assembly,

Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

Considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law,

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trends towards freedom in such territories which have not yet attained independence,

³⁶ Official Records of the General Assembly, Fifteenth Session, Supplement No. 2 (A/4494).

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end

Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without

any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

*947th plenary meeting,
14 December 1960.*

1592 (XV). The situation in the Republic of the Congo

The General Assembly,

Having considered the item entitled "The situation in the Republic of the Congo",

Noting that the previous resolutions of the Security Council and the General Assembly on this subject are still in effect,

Decides to keep this item on the agenda of its resumed fifteenth session.

*958th plenary meeting,
20 December 1960.*

* * *

Note

Appointment of the Peace Observation Commission (item 18)

At its 960th plenary meeting on 20 December 1960, the General Assembly decided to reappoint, for the calendar years 1961 and 1962, the present members of the Peace Observation Commission. The Commission is therefore composed as follows: CHINA, CZECHOSLOVAKIA, FRANCE, HONDURAS, INDIA, IRAQ, ISRAEL, NEW ZEALAND, PAKISTAN, SWEDEN, UNION OF SOVIET SOCIALIST REPUBLICS, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, UNITED STATES OF AMERICA and URUGUAY.

Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter (General Assembly resolution 1541(XV) of 15 December 1960, annex)

1. *Takes note* of the report of the Secretary-General on offers of study and training facilities under General Assembly resolutions 845 (IX);

2. *Reaffirms* its resolution 1471 (XIV) of 12 December 1959;

3. *Invites once again* the Administering Members concerned to take all necessary measures to ensure that scholarships and training facilities offered by Member States are utilized by the inhabitants of the Non-Self-Governing Territories, and to render every assistance to those persons who have applied for, or have been granted, scholarships or fellowships, particularly with regard to facilitating their travel formalities;

4. *Requests* all Administering Members which have not already done so to give the fullest publicity in the Territories under their administration to all offers of study and training facilities made by Member States;

5. *Urges* Member States to increase the number of scholarships offered;

6. *Requests* the Member States offering scholarships to take into account the necessity of furnishing complete information about the scholarships offered, and, whenever possible, the need to provide travel funds to prospective students;

7. *Requests* the Secretary-General and the specialized agencies to give such assistance as is possible and as may be sought by the Member States concerned and by the applicants;

8. *Further requests* the Secretary-General to prepare for the sixteenth session of the General Assembly a report on the actual use of scholarships and training facilities offered by Member States to students from the Non-Self-Governing Territories.

948th plenary meeting,
15 December 1960.

1541 (XV). Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter

The General Assembly,

Considering the objectives set forth in Chapter XI of the Charter of the United Nations,

Bearing in mind the list of factors annexed to General Assembly resolution 742 (VIII) of 27 November 1953,

Having examined the report of the Special Committee of Six on the Transmission of Information under Article 73 e of the Charter,¹² appointed under General Assembly resolution 1467 (XIV) of 12 December 1959 to study the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e of the Charter and to report on the results of its study to the Assembly at its fifteenth session,

1. *Expresses its appreciation* of the work of the Special Committee of Six on the Transmission of Information under Article 73 e of the Charter;

2. *Approves* the principles set out in section V, part B, of the report of the Committee, as amended and as they appear in the annex to the present resolution;

3. *Decides* that these principles should be applied in the light of the facts and the circumstances of each

case to determine whether or not an obligation exists to transmit information under Article 73 e of the Charter.

948th plenary meeting,
15 December 1960.

ANNEX

PRINCIPLES WHICH SHOULD GUIDE MEMBERS IN DETERMINING WHETHER OR NOT AN OBLIGATION EXISTS TO TRANSMIT THE INFORMATION CALLED FOR IN ARTICLE 73 e OF THE CHARTER OF THE UNITED NATIONS

Principle I

The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type. An obligation exists to transmit information under Article 73 e of the Charter in respect of such territories whose peoples have not yet attained a full measure of self-government.

Principle II

Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a "full measure of self-government". As soon as a territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under Article 73 e continues.

Principle III

The obligation to transmit information under Article 73 e of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law.

Principle IV

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

Principle V

Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 e of the Charter.

Principle VI

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.

Principle VII

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely

¹² *Ibid.*, agenda item 38, document A/4526.

expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

Principle VIII

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

Principle IX

Integration should have come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

(b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.

Principle X

The transmission of information in respect of Non-Self-Governing Territories under Article 73 e of the Charter is subject to such limitation as security and constitutional considerations may require. This means that the extent of the information may be limited in certain circumstances, but the limitation in Article 73 e cannot relieve a Member State of the obligations of Chapter XI. The "limitation" can relate only to the quantum of information of economic, social and educational nature to be transmitted.

Principle XI

The only constitutional considerations to which Article 73 e of the Charter refers are those arising from constitutional relations of the territory with the Administering Member. They refer to a situation in which the constitution of the territory gives it self-government in economic, social and educational matters through freely elected institutions. Nevertheless, the responsibility for transmitting information under Article 73 e continues, unless these constitutional relations preclude the Government or parliament of the Administering Member from receiving statistical and other information of a technical nature relating to economic, social and educational conditions in the territory.

Principle XII

Security considerations have not been invoked in the past. Only in very exceptional circumstances can information on economic, social and educational conditions have any security aspect. In other circumstances, therefore, there should be no necessity to limit the transmission of information on security grounds.

1542 (XV). Transmission of information under Article 73 e of the Charter

The General Assembly,

Recalling that, by resolution 742 (VIII) of 27 November 1953, the General Assembly approved a list of factors to be used as a guide in determining whether a Territory is or is no longer within the scope of Chapter XI of the Charter of the United Nations,

Recalling also that differences of views arose among Member States concerning the status of certain territories under the administrations of Portugal and Spain and described by these two States as "overseas provinces" of the metropolitan State concerned, and that with a view to resolving those differences the General Assembly, by resolution 1467 (XIV) of 12 December 1959, appointed the Special Committee of Six on the Transmission of Information under Article 73 e of the Charter to study the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e,

Recognizing that the desire for independence is the rightful aspiration of peoples under colonial subjugation and that the denial of their right to self-determination constitutes a threat to the well-being of humanity and to international peace,

Recalling with satisfaction the statement of the representative of Spain at the 1048th meeting of the Fourth Committee that his Government agrees to transmit information to the Secretary-General in accordance with the provisions of Chapter XI of the Charter,

Mindful of its responsibilities under Article 14 of the Charter,

Being aware that the Government of Portugal has not transmitted information on the territories under its administration which are enumerated in operative paragraph 1 below and has not expressed any intention of doing so, and because such information as is otherwise available in regard to the conditions in these territories gives cause for concern,

1. Considers that, in the light of the provisions of Chapter XI of the Charter, General Assembly resolution 742 (VIII) and the principles approved by the Assembly in resolution 1541 (XV) of 15 December 1960, the territories under the administration of Portugal listed hereunder are Non-Self-Governing Territories within the meaning of Chapter XI of the Charter:

- (a) The Cape Verde Archipelago;
- (b) Guinea, called Portuguese Guinea;
- (c) São Tomé and Príncipe, and their dependencies;
- (d) São João Batista de Ajudá;
- (e) Angola, including the enclave of Cabinda;
- (f) Mozambique;
- (g) Goa and dependencies, called the State of India;
- (h) Macau and dependencies;
- (i) Timor and dependencies;

2. Declares that an obligation exists on the part of the Government of Portugal to transmit information under Chapter XI of the Charter concerning these territories and that it should be discharged without further delay;

3. Requests the Government of Portugal to transmit to the Secretary-General information in accordance with the provisions of Chapter XI of the Charter on the conditions prevailing in the territories under its administration enumerated in paragraph 1 above;

4. Requests the Secretary-General to take the necessary steps in pursuance of the declaration of the Government of Spain that it is ready to act in accordance with the provisions of Chapter XI of the Charter;

5. Invites the Governments of Portugal and Spain to participate in the work of the Committee on Information from Non-Self-Governing Territories in accordance

**Final Act of the Conference on Security and
Co-operation in Europe, 1975**

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HELSINKI 1975

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Follow-up to the Conference

About the text of the Helsinki Final Act

Signatures

A selection of contemporary photographs appears between pages 66 and 67.
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Questions relating to Security in Europe

The States participating in the Conference on Security and Co-operation in Europe,

Reaffirming their objective of promoting better relations among themselves and ensuring conditions in which their people can live in true and lasting peace free from any threat to or attempt against their security;

Convinced of the need to exert efforts to make détente both a continuing and an increasingly viable and comprehensive process, universal in scope, and that the implementation of the results of the Conference on Security and Cooperation in Europe will be a major contribution to this process;

Considering that solidarity among peoples, as well as the common purpose of the participating States in achieving the aims as set forth by the Conference on Security and Cooperation in Europe, should lead to the development of better and closer relations among them in all fields and thus to overcoming the confrontation stemming from the character of their past relations, and to better mutual understanding;

Mindful of their common history and recognizing that the existence of elements common to their traditions and values can assist them in developing their relations, and desiring to search, fully taking into account the individuality and diversity of their positions and views, for possibilities of joining their efforts with a view to overcoming distrust and increasing confidence, solving the problems that separate them and cooperating in the interest of mankind;

Recognizing the indivisibility of security in Europe as well as their common interest in the development of cooperation throughout Europe and among selves and expressing their intention to pursue efforts accordingly;

Recognizing the close link between peace and security in Europe and in the world as a whole and conscious of the need for each of them to make its contribution to the strengthening of world peace and security and to the promotion of fundamental rights, economic and social progress and well-being for all peoples;

Have adopted the following:

1

(a) Declaration on Principles Guiding Relations between Participating States

The participating States,

Reaffirming their commitment to peace, security and justice and the continuing development of friendly relations and co-operation;

Recognizing that this commitment, which reflects the interest and aspirations of peoples, constitutes for each participating State a present and future responsibility, heightened by experience of the past;

The Conference on Security and Co-operation in Europe, which opened at Helsinki on 3 July 1973 and continued at Geneva from 18 September 1973 to 21 July 1975, was concluded at Helsinki on 1 August 1975 by the High Representatives of Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia.

During the opening and closing stages of the Conference the participants were addressed by the Secretary-General of the United Nations as their guest of honour. The Director-General of UNESCO and the Executive Secretary of the United Nations Economic Commission for Europe addressed the Conference during its second stage.

During the meetings of the second stage of the Conference, contributions were received, and statements heard, from the following non-participating Mediterranean States on various agenda items: the Democratic and Popular Republic of Algeria, the Arab Republic of Egypt, Israel, the Kingdom of Morocco, the Syrian Arab Republic, Tunisia.

Motivated by the political will, in the interest of peoples, to improve and intensify their relations and to contribute in Europe to peace, security, justice and cooperation as well as to rapprochement among themselves and with the other States of the world,

Determined, in consequence, to give full effect to the results of the Conference and to assure, among their States and throughout Europe, the benefits deriving from those results and thus to broaden, deepen and make continuing and lasting the process of détente,

The High Representatives of the participating States have solemnly adopted the following:

Reaffirming, in conformity with their membership in the United Nations and in accordance with the purposes and principles of the United Nations, their full and active support for the United Nations and for the enhancement of its role and effectiveness in strengthening international peace, security and justice, and in promoting the solution of international problems, as well as the development of friendly relations and cooperation among States;

Expressing their common adherence to the principles which are set forth below and are in conformity with the Charter of the United Nations, as well as their common will to act, in the application of these principles, in conformity with the purposes and principles of the Charter of the United Nations;

Declare their determination to respect and put into practice, each of them in its relations with all other participating States, irrespective of their political, economic or social systems as well as of their size, geographical location or level of economic development, the following principles, which all are of primary significance, guiding their mutual relations:

I. Sovereign equality, respect for the rights inherent in sovereignty

The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence. They will also respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations.

Within the framework of international law, all the participating States have equal rights and duties. They will respect each other's right to define and conduct as it wishes its relations with other States in accordance with international law and in the spirit of the present Declaration. They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement. They also have the right to belong or not to belong to international organizations, to be or not to be a party to bilateral or multilateral treaties including the right to be or not to be a party to treaties of alliance; they also have the right to neutrality.

II. Refraining from the threat or use of force

The participating States will refrain in their mutual relations, as well as in their international relations in general, 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 and with the present Declaration. No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle.

Accordingly, the participating States will refrain from any acts constituting a threat of force or direct or indirect use of force against another participating State.

Likewise they will refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights. Likewise they will also refrain in their mutual relations from any act of reprisal by force.

No such threat or use of force will be employed as a means of settling disputes, or questions likely to give rise to disputes, between them.

III. Inviolability of frontiers

The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.

IV. Territorial integrity of States

The participating States will respect the territorial integrity of each of the participating States.

Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force.

The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal.

V. Peaceful settlement of disputes

The participating States will settle disputes among them by peaceful means in such a manner as not to endanger international peace and security, and justice.

They will endeavour in good faith and a spirit of cooperation to reach a rapid and equitable solution on the basis of international law.

For this purpose they will use such means as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice including any settlement procedure agreed to in advance of disputes to which they are parties.

In the event of failure to reach a solution by any of the above peaceful means, the parties to a dispute will continue to seek a mutually agreed way to settle the dispute peacefully.

Participating States, parties to a dispute among them, as well as other participating States, will refrain from any action which might aggravate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult.

VI. Non-intervention in internal affairs

The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.

They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating State.

They will likewise in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.

Accordingly, they will, inter alia, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State.

VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief

The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.

They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.

Within this framework the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States.

They will constantly respect these rights and freedoms in their mutual relations and will endeavour jointly and separately, including in co-operation with the United Nations, to promote universal and effective respect for them.

They confirm the right of the individual to know and act upon his rights and duties in this field.

In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound.

VIII. Equal rights and self-determination of peoples

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.

IX. Cooperation among States

The participating States will develop their co-operation with one another and with all States in all fields in accordance with the purposes and principles of the Charter of the United Nations. In developing their co-operation the participating States will place special emphasis on the fields as set forth within the framework of the Conference on Security and Co-operation in Europe, with each of them making its contribution in conditions of full equality.

They will endeavour, in developing their co-operation as equals, to promote mutual understanding and confidence, friendly and good-neighbourly relations among themselves, international peace, security and justice. They will equally endeavour, in developing their cooperation, to improve the well-being of peoples and contribute to the fulfilment of their aspirations through, inter alia, the benefits resulting from increased mutual knowledge and from progress and achievement in the economic, scientific, technological, social, cultural and humanitarian fields. They will take steps to promote conditions favourable to making these benefits available to all; they will take into account the interest of all in the narrowing of differences in the levels of economic development, and in particular the interest of developing countries throughout the world.

They confirm that governments, institutions, organizations and persons have a relevant and positive role to play in contributing toward the achievement of these aims of their cooperation.

They will strive, in increasing their cooperation as set forth above, to develop closer relations among themselves on an improved and more enduring basis for the benefit of peoples.

X. Fulfilment in good faith of obligations under international law

The participating States will fulfil in good faith their obligations under international law, both those obligations arising from the generally recognized principles and rules of international law and those obligations arising from treaties or other agreements, in conformity with international law, to which they are parties.

In exercising their sovereign rights, including the right to determine their laws and regulations, they will conform with their legal obligations under international law; they will furthermore pay due regard to and implement the provisions in the Final Act of the Conference on Security and Cooperation in Europe.

The participating States confirm that in the event of a conflict between the obligations of the members of the United Nations under the Charter of the United Nations and their obligations under any treaty or other international agreement, their obligations under the Charter will prevail, in accordance with Article 103 of the Charter of the United Nations.

All the principles set forth above are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others.

The participating States express their determination fully to respect and apply these principles, as set forth in the present Declaration, in all aspects, to their mutual relations and cooperation in order to ensure to each participating State the benefits resulting from the respect and application of these principles by all.

The participating States, paying due regard to the principles above and, in particular, to the first sentence of the tenth principle, "Fulfillment in good faith of obligations under international law", note that the present Declaration does not affect their rights and obligations, nor the corresponding treaties and other agreements and arrangements.

The participating States express the conviction that respect for these principles will encourage the development of normal and friendly relations and the progress of co-operation among them in all fields. They also express the conviction that respect for these principles will encourage the development of political contacts among them which in time would contribute to better mutual understanding of their positions and views.

The participating States declare their intention to conduct their relations with all other States in the spirit of the principles contained in the present Declaration.

(b) **Matters related to giving effect to certain of the above Principles**

(i) **The participating States,**

Reaffirming that they will respect and give effect to refraining from the threat or use of force and convinced of the necessity to make it an effective norm of international life,

Declare that they are resolved to respect and carry out, in their relations with one another, *inter alia*, the following provisions which are in conformity with the Declaration on Principles Guiding Relations between Participating States:

- To give effect and expression, by all the ways and forms which they consider appropriate, to the duty to refrain from the threat or use of force in their relations with one another.
- To refrain from any use of armed forces inconsistent with the purposes and principles of the Charter of the United Nations and the provisions of the Declaration on Principles Guiding Relations between Participating States, against another participating State, in particular from invasion of or attack on its territory.
- To refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights.
- To refrain from any act of economic coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.
- To take effective measures which by their scope and by their nature constitute steps towards the ultimate achievement of general and complete disarmament under strict and effective international control.
- To promote, by all means which each of them considers appropriate, a climate of confidence and respect among peoples consonant with their duty to refrain from propaganda for wars of aggression or for any threat or use of force inconsistent with the purposes of the United Nations and with the Declaration on Principles Guiding Relations between Participating States, against another participating State.
- To make every effort to settle exclusively by peaceful means any dispute between them, the continuance of which is likely to endanger the maintenance of international peace and security in Europe, and to seek, first of all, a solution through the peaceful means set forth in Article 33 of the United Nations Charter.
- To refrain from any action which could hinder the peaceful settlement of disputes between the participating States.

(ii) **The participating States,**

Reaffirming their determination to settle their disputes as set forth in the Principle of Peaceful Settlement of Disputes;

Convinced that the peaceful settlement of disputes is a complement to refraining from the threat or use of force, both being essential though not exclusive factors for the maintenance and consolidation of peace and security;

Desiring to reinforce and to improve the methods at their disposal for the peaceful settlement of disputes;

1. Are resolved to pursue the examination and elaboration of a generally acceptable method for the peaceful settlement of disputes aimed at complementing existing methods, and to continue to this end to work upon the "Draft Convention on a European System for the Peaceful Settlement of Disputes" submitted by Switzerland during the second stage of the Conference on Security and Co-operation in Europe, as well as other proposals relating to it and directed towards the elaboration of such a method.
2. Decide that, on the invitation of Switzerland, a meeting of experts of all the participating States will be convoked in order to fulfil the mandate described in paragraph 1 above within the framework and under the procedures of the follow-up to the Conference laid down in the chapter "Follow-up to the Conference".
3. This meeting of experts will take place after the meeting of the representatives appointed by the Ministers of Foreign Affairs of the participating States, scheduled according to the chapter "Follow-up to the Conference" for 1977; the results of the work of this meeting of experts will be submitted to Governments.

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2.

Document on confidence-building measures and certain aspects of security and disarmament

The participating States,

Desirous of eliminating the causes of tension that may exist among them and thus of contributing to the strengthening of peace and security in the world;

Determined to strengthen confidence among them and thus to contribute to increasing stability and security in Europe;

Determined further to refrain in their mutual relations, as well as in their international relations in general, 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 and with the Declaration on Principles Guiding Relations between Participating States as adopted in this Final Act;

Recognizing the need to contribute to reducing the dangers of armed conflict and of misunderstanding or miscalculation of military activities which could give rise to apprehension, particularly in a situation where the participating States lack clear and timely information about the nature of such activities;

Taking into account considerations relevant to efforts aimed at lessening tension and promoting disarmament;

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Recognizing that the exchange of observers by invitation at military manoeuvres will help to promote contacts and mutual understanding;

Having studied the question of prior notification of major military movements in the context of confidence-building;

Recognizing that there are other ways in which individual States can contribute further to their common objectives;

Convinced of the political importance of prior notification of major military manoeuvres for the promotion of mutual understanding and the strengthening of confidence, stability and security;

Accepting the responsibility of each of them to promote these objectives and to implement this measure, in accordance with the accepted criteria and modalities, as essentials for the realization of these objectives;

Recognizing that this measure deriving from political decision rests upon a voluntary basis;

Have adopted the following:

I

Prior notification of major military manoeuvres

They will notify their major military manoeuvres to all other participating States through usual diplomatic channels in accordance with the following provisions:

Notification will be given of major military manoeuvres exceeding a total of 25,000 troops, independently or combined with any possible air or naval components (in this context the word "troops" includes amphibious and airborne troops). In the case of independent manoeuvres of amphibious or airborne troops, or of combined manoeuvres involving them, these troops will be included in this total. Furthermore, in the case of combined manoeuvres which do not reach the above total but which involve land forces together with significant numbers of either amphibious or airborne troops, or both, notification can also be given.

Notification will be given of major military manoeuvres which take place on the territory, in Europe, of any participating State as well as, if applicable, in the adjoining sea area and air space.

In the case of a participating State whose territory extends beyond Europe, prior notification need be given only of manoeuvres which take place in an area within 250 kilometres from its frontier facing or shared with any other European participating State, the participating State need not, however, give notification in cases in which that area is also contiguous to the participating State's frontier facing or shared with a non-European non-participating State.

Notification will be given 21 days or more in advance of the start of the manoeuvre or in the case of a manoeuvre arranged at shorter notice at the earliest possible opportunity prior to its starting date.

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Notification will contain information of the designation, if any, the general purpose of and the States involved in the manoeuvre, the type or types and numerical strength of the forces engaged, the area and estimated time-frame of its conduct. The participating States will also, if possible, provide additional relevant information, particularly that related to the components of the forces engaged and the period of involvement of these form.

Prior notification of other military manoeuvres

The participating States recognize that they can contribute further to strengthening confidence and increasing security and stability, and to this end may also notify smaller-scale military manoeuvres to other participating States, with special regard for those near the area of such manoeuvres.

To the same end, the participating States also recognize that they may notify other military manoeuvres conducted by them.

Exchange of observers

The participating States will invite other participating States, voluntarily and on a bilateral basis, in a spirit of reciprocity and goodwill towards all participating States, to send observers to attend military manoeuvres.

The inviting State will determine in each case the number of observers, the procedures and conditions of their participation, and give other information which it may consider useful. It will provide appropriate facilities and hospitality.

The invitation will be given as far ahead as is conveniently possible through usual diplomatic channels.

Prior notification of major military movements

In accordance with the Final Recommendations of the Helsinki Consultations the participating States studied the question of prior-notification of major military movements as a measure to strengthen confidence.

Accordingly, the participating States recognize that they may, at their own discretion and with a view to contributing to confidence-building, notify their major military movements.

In the same spirit, further consideration will be given by the States participating in the Conference on Security and Cooperation in Europe to the question of prior notification of major military movements, bearing in mind, in particular, the experience gained by the implementation of the measures which are set forth in this document.

Other confidence-building measures

The participating States recognize that there are other means by which their common objectives can be promoted.

In particular, they will, with due regard to reciprocity and with a view to better mutual understanding, promote exchanges by invitation among their military delegations.

* * *

In order to make a fuller contribution to their common objective of confidence/building, the participating States, when conducting their military activities in the area covered by the provisions for the prior notification of major military manoeuvres, will duly take into account and respect this objective.

They also recognize that the experience gained by the implementation of the provisions set forth above, together with further efforts, could lead to developing and enlarging measures aimed at strengthening confidence.

II

Questions relating to disarmament

The participating States recognize the interest of all of them in efforts aimed at lessening military confrontation and promoting disarmament which are designed to complement political détente in Europe and to strengthen their security. They are convinced of the necessity to take effective measures in these fields which by their scope and by their nature constitute steps towards the ultimate achievement of general and complete disarmament under strict and effective international control, and which should result in strengthening peace and security throughout the world.

III

General considerations

Having considered the views expressed on various subjects related to the strengthening of security in Europe through joint efforts aimed at promoting détente and disarmament, the participating States, when engaged in such efforts, will, in this context, proceed, in particular, from the following essential considerations:

- The complementary nature of the political and military aspects of security;
- The interrelation between the security of each participating State and security in Europe as a whole and the relationship which exists, in the broader context of world security, between security in Europe and security in the Mediterranean area;
- Respect for the security interests of all States participating in the Conference on Security and Co-operation in Europe inherent in their sovereign equality;
- The importance that participants in negotiating fora see to it that information about relevant developments, progress and results is provided on an appropriate basis to other States participating in the Conference on Security and Co-operation in Europe and, in return, the justified interest of any of those States in having their views considered.

Co-operation in the Field of Economics, of Science and Technology and of the Environment

The participating States,

Convinced that their efforts to develop cooperation in the fields of trade, industry, science and technology, the environment and other areas of economic activity contribute to the reinforcement of peace and security in Europe and in the world as a whole,

Recognizing that cooperation in these fields would promote economic and social progress and the improvement of the conditions of life,

Aware of the diversity of their economic and social systems,

Reaffirming their will to intensify such cooperation between one another, irrespective of their systems,

Recognizing that such cooperation, with due regard for the different levels of economic development, can be developed, on the basis of equality and mutual satisfaction of the partners, and of reciprocity permitting, as a whole, an equitable distribution of advantages and obligations of comparable scale, with respect for bilateral and multilateral agreements,

Taking into account the interests of the developing countries throughout the world, including those among the participating countries as long as they are developing from the economic point of view; reaffirming their will to co-operate for the achievement of the aims and objectives established by the appropriate bodies of the United Nations in the pertinent documents concerning development, it being understood that each participating State maintains the positions it has taken on them; giving special attention to the least developed countries

Convinced that the growing world-wide economic interdependence calls for increasing common and effective efforts towards the solution of major world economic problems such as food, energy, commodities, monetary and financial problems, and therefore emphasizes the need for promoting stable and equitable international economic relations, thus contributing to the continuous and diversified economic development of all countries,

Having taken into account the work already undertaken by relevant international organizations and wishing to take advantage of the possibilities offered by these organizations, in particular by the United Nations Economic Commission for Europe, for giving effect to the provisions of the final documents of the Conference,

Considering that the guidelines and concrete recommendations contained in the following texts are aimed at promoting further development of their mutual economic relations, and convinced that their cooperation in this field should take place in full respect for the principles guiding relations among participating States as set forth in the relevant document,

Have adapted the following:

1. Commercial Exchanges

General provisions

The participating States,

Conscious of the growing role of international trade as one of the most important factors in economic growth and social progress,

Recognizing that trade represents an essential sector of their co-operation, and bearing in mind that the provisions contained in the above preamble apply in particular to this sector,

Considering that the volume and structure of trade among the participating States do not in all cases correspond to the possibilities created by the current level of their economic, scientific and technological development,

are resolved to promote, on the basis of the modalities of their economic cooperation, the expansion of their mutual trade in goods and services, and to ensure conditions favourable to such development;

recognize the beneficial effects which can result for the development of trade from the application of most favoured nation treatment;

will encourage the expansion of trade on as broad a multilateral basis as possible' thereby endeavouring to utilize the various economic and commercial possibilities;

recognize the importance of bilateral and multilateral intergovernmental and other agreements for the long-term development of trade;

note the importance of monetary and financial questions for the development of international trade, and will endeavour to deal with them with a view to contributing to the continuous expansion of trade;

will endeavour to reduce or progressively eliminate all kinds of obstacles to the development of trade;

will foster a steady growth of trade while avoiding as far as possible abrupt fluctuations in their trade;

consider that their trade in various products should be conducted in such a way as not to cause or threaten to cause serious injury - and should the situation arise, market disruption - in domestic markets for these products and in particular to the detriment of domestic producers of like or directly competitive products; as regards the concept of market disruption, it is understood that it should not be invoked in a way inconsistent with the relevant provisions of their international agreements; if they resort to safeguard measures, they will do so in conformity with their commitments in this field arising from international agreements to which they are parties and will take account of the interests of the parties directly concerned;

will give due attention to measures for the promotion of trade and the diversification of its structure;

note that the growth and diversification of trade would contribute to widening the possibilities of choice of products;

consider it appropriate to create favourable conditions for the participation of firms, organizations and enterprises in the development of trade.

Business contacts and facilities

The participating States,

Conscious, of the importance of the contribution which an improvement of business contacts, and the accompanying growth of confidence in business relationships, could make to the development of commercial and economic relations,

will take measures further to improve conditions for the expansion of contacts between representatives of official bodies, of the different organizations, enterprises, firms and banks concerned with foreign trade, in particular, where useful, between sellers and users of products and services, for the purpose of studying commercial possibilities, concluding contracts, ensuring their implementation and providing after-sales services;

will encourage organizations, enterprises and firms concerned with foreign trade to take measures to accelerate the conduct of business negotiations;

will further take measures aimed at improving working conditions of representatives of foreign organizations, enterprises, firms and banks concerned with external trade, particularly as follows:

- by providing the necessary information, including information on legislation and procedures relating to the establishment and operation of permanent representation by the above mentioned bodies;
- by examining as favourably as possible requests for the establishment of permanent representation and of offices for this purpose, including, where appropriate, the opening of joint offices by two or more firms.
- by encouraging the provision, on conditions as favourable as possible and equal for all representatives of the above/mentioned bodies, of hotel accommodation, means of communication, and of other facilities normally required by them, as well as of suitable business and residential premises for purposes of permanent representation;
- recognize the importance of such measures to encourage greater participation by small and medium sized firms in trade between participating States.

Economic and commercial information

The participating States,

Conscious of the growing role of economic and commercial information in the development of international trade,

Considering that economic information should be of such a nature as to allow adequate market analysis and to permit the preparation of medium and long term forecasts, thus contributing to the establishment of a continuing flow of trade and a better utilization of commercial possibilities,

Expressing their readiness to improve the quality and increase the quantity and supply of economic and relevant administrative information,

Considering that the value of statistical information on the international level depends to a considerable extent on the possibility of its comparability,

will promote the publication and dissemination of economic and commercial information at regular intervals and as quickly as possible, in particular:

statistics concerning production, national income, budget, consumption and productivity;

- foreign trade statistics drawn up on the basis of comparable classification including breakdown by product with indication of volume and value, as well as country of origin or destination;

- laws and regulations concerning foreign trade;

- information allowing forecasts of development of the economy to assist in trade promotion, for example, information on the general orientation of national economic plans and programmes;

- other information to help businessmen in commercial contacts, for example, periodic directories, lists, and where possible, organizational charts of firms and organizations concerned with foreign trade;

will in addition to the above encourage the development of the exchange of economic and commercial information through, where appropriate, joint commissions for economic, scientific and technical cooperation, national and joint chambers of commerce, and other suitable bodies;

will support a study, in the framework of the United Nations Economic Commission for Europe, of the possibilities of creating a multilateral system of notification of laws and regulations concerning foreign trade and changes therein;

will encourage international work on the harmonization of statistical nomenclatures, notably in the United Nations Economic Commission for Europe.

Marketing

The participating States,

Recognizing the importance of adapting production to the requirements of foreign markets in order to ensure the expansion of international trade,

Conscious of the need of exporters to be as fully familiar as possible with and take account of the requirements of potential users,

will encourage organizations, enterprises and firms concerned with foreign trade to develop further the knowledge and techniques required for effective marketing;

will encourage the improvement of conditions for the implementation of measures to promote trade and to satisfy the needs of users in respect of imported products, in particular through market research and advertising measures as well as, where useful, the establishment of supply facilities, the furnishing of spare parts, the functioning of after sales services, and the training of the necessary local technical personnel;

will encourage international cooperation in the field of trade promotion, including marketing, and the work undertaken on these subjects within the international bodies, in particular the United Nations Economic Commission for Europe.

2. Industrial co-operation and projects of common interest

Industrial co-operation

Considering that industrial co-operation, being motivated by economic considerations, can

- create lasting ties thus strengthening long-term overall economic co-operation,
- contribute to economic growth as well as to the expansion and diversification of international trade and to a wider utilization of modern technology,
- lead to the mutually advantageous utilization of economic complementarities through better use of all factors of production, and
- accelerate the industrial development of all those who take part in such cooperation, propose to encourage the development of industrial cooperation between the competent organizations, enterprises and firms of their countries;
- consider that industrial co-operation may be facilitated by means of inter-governmental and other bilateral and multilateral agreements between the interested parties;

note that in promoting industrial cooperation they should bear in mind the economic structures and the development levels of their countries;

note that industrial cooperation is implemented by means of contracts concluded between competent organizations, enterprises and firms on the basis of economic considerations;

express their willingness to promote measures designed to create favourable conditions for industrial co-operation;

recognize that industrial co-operation covers a number of forms of economic relations going beyond the framework of conventional trade, and that in concluding contracts on industrial co-operation the partners will determine jointly the appropriate forms and conditions of co-operation, taking into account their mutual interests and capabilities;

recognize further that, if it is in their mutual interest, concrete forms such as the following may be useful for the development of industrial cooperation: joint production and sale, specialization in production and sale, construction, adaptation and modernization of industrial plants, cooperation for the setting up of complete industrial installations with a view to thus obtaining part of the resultant products, mixed companies, exchanges of <<know-how>>, of technical information, of patents and of licences, and joint industrial research within the framework of specific co-operation projects;

recognize that new forms of industrial co-operation can be applied with a view to meeting specific needs;

note the importance of economic, commercial, technical and administrative information such as to ensure the development of industrial co-operation;

Consider it desirable:

- to improve the quality and the quantity of information relevant to industrial co-operation, in particular the laws and regulations, including those relating to foreign exchange, general orientation of national economic plans and programmes as well as programme priorities and economic conditions of the market; and
- to disseminate as quickly as possible published documentation thereon;
- will encourage all forms of exchange of information and communication of experience relevant to industrial co-operation, including through contacts between potential partners and, where appropriate, through joint commissions for economic, industrial, scientific and technical co-operation, national and joint chambers of commerce, and other suitable bodies;
- consider it desirable, with a view to expanding industrial co-operation, to encourage the exploration of co-operation possibilities and the implementation of co-operation projects and will take measures to this end, *inter alia*, by facilitating and increasing all forms of business contacts between competent organizations, enterprises and firms and between their respective qualified personnel;

note that the provisions adopted by the Conference relating to business contacts in the economic and commercial fields also apply to foreign organizations, enterprises and firms engaged in industrial co-operation, taking into account the specific conditions of this co-operation, and will endeavour to ensure, in particular, the existence of appropriate working conditions for personnel engaged in the implementation of co-operation projects;

consider it desirable that proposals for industrial co-operation projects should be sufficiently specific and should contain the necessary economic and technical data, in particular preliminary estimates of the cost of the project. Information on the form of co-operation envisaged, and market possibilities, to enable potential partners to proceed with initial studies and to arrive at decisions in the shortest possible time;

will encourage the parties concerned with industrial co-operation to take measures to accelerate the conduct of negotiations for the conclusion of co-operation contracts,

recommend further the continued examination - for example within the framework of the United Nations Economic Commission for Europe - of means of improving the provision of information to those concerned on general conditions of industrial co-operation and guidance on the preparation of contracts in this field;

consider it desirable to further improve conditions for the implementation of industrial co-operation projects, in particular with respect to:

- the protection of the interests of the partners in industrial co-operation projects, including the legal protection of the various kinds of property involved;
 - the consideration, in ways that are compatible with their economic systems, of the needs and possibilities of industrial co-operation within the framework of economic policy and particularly in national economic plans and programmes;
- consider it desirable that the partners, when concluding industrial co-operation contracts, should devote due attention to provisions concerning the extension of the necessary mutual assistance and the provision of the necessary information during the implementation of these contracts, in particular with a view to attaining the required technical level and quality of the products resulting from such cooperation;

recognize the usefulness of an increased participation of small and medium sized firms in industrial co-operation projects.

Projects of common interest

The participating States,

Considering that their economic potential and their natural resources permit, through common efforts, long-term co-operation in the implementation, including at the regional or sub-regional level, of major projects that these may contribute to the speeding-up of the economic development of the countries participating therein,

Considering it desirable that the competent organizations, enterprises and firms of all countries should be given the possibility of indicating their interest in participating in such projects, and, in case of agreement, of taking part in their implementation,

Noting that the provisions adopted by the Conference relating to industrial co-operation are also applicable to projects of common interest,

regard it as necessary to encourage, where appropriate, the investigation by competent and interested organizations, enterprises and firms of the possibilities for the carrying out of projects of common interest in the fields of energy resources and of the exploitation of raw materials, as well as of transport and communications;

regard it as desirable that organizations, enterprises and firms exploring the possibilities of taking part in projects of common interest exchange with their potential partners, through the appropriate channels, the requisite economic, legal, financial and technical information pertaining to these projects;

consider that the fields of energy resources, in particular, petroleum, natural gas and coal, and the extraction and processing of mineral raw materials, in particular, iron ore and bauxite, are suitable ones for strengthening long-term economic co-operation and for the development of trade which could result;

consider that possibilities for projects of common interest with a view to long-term economic co-operation also exist in the following fields:

- exchanges of electrical energy within Europe with a view to utilizing the capacity of the electrical power stations as rationally as possible;
 - co-operation in research for new sources of energy and, in particular, in the field of nuclear energy;
 - development of road networks and co-operation aimed at establishing a coherent navigable network in Europe;
 - co-operation in research and the perfecting of equipment for multimodal transport operations and for the handling of containers;
- recommend that the States interested in projects of common interest should consider under what conditions it would be possible to establish them, and if they so desire, create the necessary conditions for their actual implementation.

3. Provisions concerning trade and industrial co-operation

Harmonization of standards

The participating States,

Recognizing the development of international harmonization of standards and technical regulations and of international co-operation in the field of certification as an important means of eliminating technical obstacles to international trade and industrial co-operation, thereby facilitating their development and increasing productivity,

reaffirm their interest to achieve the widest possible international harmonization of standards and technical regulations,

express their readiness to promote international agreements and other appropriate arrangements on acceptance of certificates of conformity with standards and technical regulations;

consider it desirable to increase international co-operation on standardization, in particular by supporting the activities of intergovernmental and other appropriate organizations in this field.

Arbitration

The participating States,

Considering that the prompt and equitable settlement of disputes which may arise from commercial transactions relating to goods and services and contracts for industrial co-operation would contribute to expanding and facilitating trade and co-operation,

Considering that arbitration is an appropriate means of settling such disputes,

recommend, where appropriate, to organizations, enterprises and firms in their countries, to include arbitration clauses in commercial contracts and industrial co-operation contracts, or in special agreements;

recommend that the provisions on arbitration should provide for arbitration under a mutually acceptable set of arbitration rules, and permit arbitration in a third country, taking into account existing intergovernmental and other agreements in this field.

Specific bilateral arrangements

The participating States,

Conscious of the need to facilitate trade and to promote the application of new forms of industrial co-operation,

will consider favourably the conclusion, in appropriate cases, of specific bilateral agreements concerning various problems of mutual interest in the fields of commercial exchanges and industrial co-operation, in particular with a view to avoiding double taxation and to facilitating the transfer of profits and the return of the value of the assets invested.

4. Science and technology

The participating States,

Convinced that scientific and technological co-operation constitutes an important contribution to the strengthening of security and co-operation among them, in that it assists the effective solution of problems of common interest and the improvement of the conditions of human life,

Considering that in developing such co-operation, it is important to promote the sharing of information and experience, facilitating the study and transfer of scientific and technological achievements, as well as the access to such achievements on a mutually advantageous basis and in fields of co-operation agreed between interested parties,

Considering that it is for the potential partners, i.e. the competent organizations, institutions, enterprises, scientists and technologists of the participating States to determine the opportunities for mutually beneficial co-operation and to develop its details,

Affirming that such co-operation can be developed and implemented bilaterally and multilaterally at the governmental and non-governmental levels, for example, through intergovernmental and other agreements, international programmes, cooperative projects and commercial channels, while utilizing also various forms of contacts, including direct and individual contacts,

Aware of the need to take measures further to improve scientific and technological co-operation between them,

Possibilities for improving co-operation

Recognize that possibilities exist for further improving scientific and technological co-operation, and to this end, express their intention to remove obstacles to such co-operation, in particular through:

- the improvement of opportunities for the exchange and dissemination of scientific and technological information among the parties interested in scientific and technological research and co-operation including information related to the organization and implementation of such co-operation;
- the expeditious implementation and improvement in organization, including programmes, of international visits of scientists and specialists in connexion with exchanges, conferences and co-operation;
- the wider use of commercial channels and activities for applied scientific and technological research and for the transfer of achievements obtained in this field while providing information on and protection of intellectual and industrial property rights;

Fields of co-operation

Consider that possibilities to expand co-operation exist within the areas given below as examples, noting that it is for potential partners in the participating countries to identify and develop projects and arrangements of mutual interest and benefit:

Agriculture

Research into new methods and technologies for increasing the productivity of crop cultivation and animal husbandry; the application of chemistry to agriculture; the design, construction and utilization of agricultural machinery; technologies of irrigation and other agricultural land improvement works;

Energy

New technologies of production, transport and distribution of energy aimed at improving the use of existing fuels and sources of hydroenergy, as well as research in the field of new energy sources, including nuclear, solar and geothermal energy;

New technologies, rational use of resources

Research on new technologies and equipment designed in particular to reduce energy consumption and to minimize or eliminate waste;

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Transport technology

Research on the means of transport and the technology applied to the development and operation of international, national and urban transport networks including container transport as well as transport safety;

Physics

Study of problems in high energy physics and plasma physics; research in the field of theoretical and experimental nuclear physics;

Chemistry

Research on problems in electrochemistry and the chemistry of polymers, of natural products, and of metals and alloys, as well as the development of improved chemical technology, especially materials processing; practical application of the latest achievements of chemistry to industry, construction and other sectors of the economy;

Meteorology and hydrology

Meteorological and hydrological research, including methods of collection, evaluation and transmission of data and their utilization for weather forecasting and hydrology forecasting;

Oceanography

Oceanographic research, including the study of air/sea interactions;

Seismological research

Study and forecasting of earthquakes and associated geological changes; development and research of technology of seism-resisting constructions;

Research on glaciology, permafrost and problems of life under conditions of cold

Research on glaciology and permafrost; transportation and construction technologies; human adaptation to climatic extremes and changes in the living conditions of indigenous populations;

Computer, communication and information technologies

Development of computers as well as of telecommunications and information systems; technology associated with computers and telecommunications, including their use for management systems, for production processes, for automation, for the study of economic problems, in scientific research and for the collection, processing and dissemination of information;

Space research

Space exploration and the study of the earth's natural resources and the natural environment by remote sensing in particular with the assistance of satellites and rocket-probes;

Medicine and public health

Research on cardiovascular, tumour and virus diseases, molecular biology, neurophysiology; development and testing of new drugs; study of contemporary problems of pediatrics, gerontology and the organization and techniques of medical services;

Environmental research

Research on specific scientific and technological problems related to human environment.

Forms and methods of co-operation

Express their view that scientific and technological co-operation should, in particular, employ the following forms and methods:

- exchange and circulation of books, periodicals and other scientific and technological publications and papers among interested organizations, scientific and technological institutions, enterprises and scientists and technologists, as well as participation in international programmes for the abstracting and indexing of publications;

- exchanges and visits as well as other direct contacts and communications among scientists and technologists, on the basis of mutual agreement and other arrangements, for such purposes as consultations, lecturing and conducting research, including the use of laboratories, scientific libraries, and other documentation centres in connexion therewith;
- holding of international and national conferences, symposia, seminars, courses and other meetings of a scientific and technological character, which would include the participation of foreign scientists and technologists;
- joint preparation and implementation of programmes and projects of mutual interest on the basis of consultation and agreement among all parties concerned, including, where possible and appropriate, exchanges of experience and research results, and correlation of research programmes, between scientific and technological research institutions and organizations;
- use of commercial channels and methods for identifying and transferring technological and scientific developments, including the conclusion of mutually beneficial co-operation arrangements between firms and enterprises in fields agreed upon between them and for carrying out, where appropriate, joint research and development programmes and projects;

consider it desirable that periodic exchanges of views and information take place on scientific policy, in particular on general problems of orientation and administration of research and the question of a better use of large-scale scientific and experimental equipment on a co-operative basis;

recommend that, in developing co-operation in the field of science and technology, full use be made of existing practices of bilateral and multilateral cooperation, including that of a regional or sub-regional character, together with the forms and methods of co-operation described in this document;

recommend further that more effective utilization be made of the possibilities and capabilities of existing international organizations, intergovernmental and non-governmental, concerned with science and technology, for improving exchanges of information and experience, as well as for developing other forms of cooperation in fields of common interest, for example:

- in the United Nations Economic Commission for Europe, study of possibilities for expanding multilateral co-operation, taking into account models for projects and research used in various international organizations; and for sponsoring conferences, symposia, and study and working groups such as those which would bring together younger scientists and technologists with eminent specialists in their field;
- through their participation in particular international scientific and technological co-operation programmes, including those of UNESCO and other international organizations, pursuit of continuing progress towards the objectives of such programmes, notably those of UNISIST with particular respect to information policy guidance, technical advice, information contributions and data processing.

5. Environment

The participating States,

Affirming that the protection and improvement of the environment, as well as the protection of nature and the rational utilization of its resources in the interests of present and future generations, is one of the tasks of major importance to the well-being of peoples and the economic development of all countries and that many environmental problems, particularly in Europe, can be solved effectively only through close international co-operation,

Acknowledging that each of the participating States, in accordance with the principles of international law, ought to ensure, in a spirit of co-operation, that activities carried out on its territory do not cause degradation of the environment in another State or in areas lying beyond the limits of national jurisdiction,

Considering that the success of any environmental policy presupposes that all population groups and social forces, aware of their responsibilities, help to protect and improve the environment, which necessitates continued and thorough educative action, particularly with regard to youth.

Affirming that experience has shown that economic development and technological progress must be compatible with the protection of the environment and the preservation of historical and cultural values; that damage to the environment is best avoided by preventive measures; and that the ecological balance must be preserved in the exploitation and management of natural resources,

Aims of co-operation

Agree to the following aims of co-operation, in particular:

- to study, with a view to their solution, those environmental problems which, by their nature, are of a multilateral, bilateral, regional or sub-regional dimension; as well as to encourage the development of an interdisciplinary approach to environmental problems;
- to increase the effectiveness of national and international measures for the protection of the environment, by the comparison and, if appropriate, the harmonization of methods of gathering and analyzing facts, by improving the knowledge of pollution phenomena and rational utilization of natural resources, by the exchange of information, by the harmonization of definitions and the adoption, as far as possible, of a common terminology in the field of the environment;
- to take the necessary measures to bring environmental policies closer together and, where appropriate and possible, to harmonize them;
- to encourage, where possible and appropriate, national and international efforts by their interested organizations, enterprises and firms in the development, production and improvement of equipment designed for monitoring, protecting and enhancing the environment.

Fields of co-operation

To attain these aims, the participating States will make use of every suitable opportunity to co-operate in the field of environment and, in particular, within the areas described below as examples:

Control of air pollution

Desulphurization of fossil fuels and exhaust gases, pollution control of heavy metals, particles, aerosols, nitrogen oxides, in particular those emitted by transport, power stations, and other industrial plants; systems and methods of observation and control of air pollution and its effects, including long-range transport of air pollutants;

Water pollution control and fresh water utilization

Prevention and control of water pollution, in particular of transboundary rivers and international lakes; techniques for the improvement of the quality of water and further development of ways and means for industrial and municipal sewage effluent purification; methods of assessment of fresh water resources and the improvement of their utilization, in particular by developing methods of production which are less polluting and lead to less consumption of fresh water;

Protection of the marine environment

Protection of the marine environment of participating States, and especially the Mediterranean Sea, from pollutants emanating from land-based sources and those from ships and other vessels, notably the harmful substances listed in Annexes I and II to the London Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matters; problems of maintaining marine ecological balances and food chains, in particular such problems as may arise from the exploration and exploitation of biological and mineral resources of the seas and the sea-bed;

Land utilization and soils

Problems associated with more effective use of lands, including land amelioration, reclamation and recultivation; control of soil pollution, water and air erosion, as well as other forms of soil degradation; maintaining and increasing the productivity of soils with due regard for the possible negative effects of the application of chemical fertilizers and pesticides;

Nature conservation and nature reserves

Protection of nature and nature reserves; conservation and maintenance of existing genetic resources, especially rare animal and plant species; conservation of natural ecological systems; establishment of nature reserves and other protected landscapes and areas, including their use for research, tourism, recreation and other purposes;

Improvement of environmental conditions in areas of human settlement

Environmental conditions associated with transport, housing, working areas, urban development and planning, water supply and sewage disposal systems; assessment of harmful effects of noise, and noise control methods; collection, treatment and utilization of wastes, including the recovery and recycling of materials; research on substitutes for non-biodegradable substances;

Fundamental research, monitoring, forecasting and assessment of environmental changes

Study of changes in climate, landscapes and ecological balances under the impact of both natural factors and human activities; forecasting of possible genetic changes in flora and fauna as a result of environmental pollution; harmonization of statistical data, development of scientific concepts and systems of monitoring networks, standardized methods of observation, measurement and assessment of changes in the biosphere; assessment of the effects of environmental pollution levels and degradation of the environment upon human health; study and development of criteria and standards for various environmental pollutants and regulation regarding production and use of various products;

Legal and administrative measures

Legal and administrative measures for the protection of the environment including procedures for establishing environmental impact assessments.

Forms and methods of co-operation

The participating States declare that problems relating to the protection and improvement of the environment will be solved on both a bilateral and a multilateral, including regional and sub-regional, basis, making full use of existing pattern and forms of co-operation. They will develop co-operation in the field of the environment in particular by taking into consideration the Stockholm Declaration on the Human Environment, relevant resolutions of the United Nations General Assembly and the United Nations Economic Commission for Europe symposium on environmental problems.

The participating States are resolved that co-operation in the field of the environment will be implemented in particular through:

- exchanges of scientific and technical information, documentation and research results, including information on the means of determining the possible effects on the environment of technical and economic activities;
- organization of conferences, symposia and meetings of experts;
- exchanges of scientists, specialists and trainees;
- joint preparation and implementation of programmes and projects for the study and solution of various problems of environmental protection,

- harmonization, where appropriate and necessary, of environmental protection standards and norms, in particular with the object of avoiding possible difficulties in trade which may arise from efforts to resolve ecological problems of production processes and which relate to the achievement of certain environmental qualities in manufactured products,
- consultations on various aspects of environmental protection, as agreed upon among countries concerned, especially in connexion with problems which could have international consequences.

The participating States will further develop such co-operation by:

- promoting the progressive development, codification and implementation of international law as one means of preserving and enhancing the human environment, including principles and practices, as accepted by them, relating to pollution and other environmental damage caused by activities within the jurisdiction or control of their States affecting other countries and regions;
- supporting and promoting the implementation of relevant international Conventions to which they are parties, in particular those designed to prevent and combat marine and fresh water pollution, recommending States to ratify Conventions which have already been signed, as well as considering possibilities of accepting other appropriate Conventions to which they are not parties at present;
- advocating the inclusion, where appropriate and possible, of the various areas of co-operation into the programmes of work of the United Nations Economic Commission for Europe, supporting such co-operation within the framework of the Commission and of the United Nations Environment Programme, and taking into account the work of other competent international organizations of which they are members,
- making wider use, in all types of co-operation, of information already available from national and international sources, including internationally agreed criteria, and utilizing the possibilities and capabilities of various competent international organizations.

The participating States agree on the following recommendations on specific measures:

- to develop through international co-operation an extensive programme for the monitoring and evaluation of the long-range transport of air pollutants, starting with sulphur dioxide and with possible extension to other pollutants, and to this end to take into account basic elements of a co-operation programme which were identified by the experts who met in Oslo in December 1974 at the invitation of the Norwegian Institute of Air Research;
- to advocate that within the framework of the United Nations Economic Commission for Europe a study be carried out of procedures and relevant experience relating to the activities of Governments in developing the capabilities of their countries to predict adequately environmental consequences of economic activities and technological development.

6. Co-operation in other areas *Development of transport*

The participating States,

Considering that the improvement of the conditions of transport constitutes one of the factors essential to the development of co-operation among them,

Considering that it is necessary to encourage the development of transport and the solution of existing problems by employing appropriate national and international means,

Taking into account the work being carried out on these subjects by existing international organizations, especially by the Inland Transport Committee of the United Nations Economic Commission for Europe,

note that the speed of technical progress in the various fields of transport makes desirable a development of co-operation and an increase in exchanges of information among them;

declare themselves in favour of a simplification and a harmonization of administrative formalities in the field of international transport, in particular at frontiers;

consider it desirable to promote, while allowing for their particular national circumstances in this sector, the harmonization of administrative and technical provisions concerning safety in road, rail, river, air and sea transport;

express their intention to encourage the development of international inland transport of passengers and goods as well as the possibilities of adequate participation in such transport on the basis of reciprocal advantage;

declare themselves in favour, with due respect for their rights and international commitments, of the elimination of disparities arising from the legal provisions applied to traffic on inland waterways which are subject to international conventions and, in particular, of the disparity in the application of those provisions; and to this end invite the member States of the Central Commission for the Navigation of the Rhine, of the Danube Commission and of other bodies to develop the work and studies now being carried out, in particular within the United Nations Economic Commission for Europe;

express their willingness, with a view to improving international rail transport and with due respect for their rights and international commitments, to work towards the elimination of difficulties arising from disparities in existing international legal provisions governing the reciprocal railway transport of passengers and goods between their territories;

express the desire for intensification of the work being carried out by existing international organizations in the field of transport, especially that of the Inland Transport Committee of the United Nations Economic Commission for Europe, and express their intention to contribute thereto by their efforts;

consider that examination by the participating States of the possibility of their accession to the different conventions or to membership of international organizations specializing in transport matters, as well as their efforts to implement conventions when ratified, could contribute to the strengthening of their co-operation in this field.

Promotion of tourism

The participating States,

Aware of the contribution made by international tourism to the development of mutual understanding among peoples, to increased knowledge of other countries' achievements in various fields, as well as to economic, social and cultural progress,

Recognizing the interrelationship between the development of tourism and measures taken in other areas of economic activity,

express their intention to encourage increased tourism on both an individual and group basis in particular by:

- encouraging the improvement of the tourist infrastructure and co-operation in this field;
 - encouraging the carrying out of joint tourist projects including technical cooperation, particularly where this is suggested by territorial proximity and the convergence of tourist interests;
 - encouraging the exchange of information, including relevant laws and regulations, studies, data and documentation relating to tourism, and by improving statistics with a view to facilitating their comparability;
 - dealing in a positive spirit with questions connected with the allocation of financial means for tourist travel abroad, having regard to their economic possibilities, as well as with those connected with the formalities required for such travel, taking into account other provisions on tourism adopted by the Conference;
 - facilitating the activities of foreign travel agencies and passenger transport companies in the promotion of international tourism;
 - encouraging tourism outside the high season;
 - examining the possibilities of exchanging specialists and students in the field of tourism, with a view to improving their qualifications;
 - promoting conferences and symposia on the planning and development of tourism;
- consider it desirable to carry out in the appropriate international framework, and with the co-operation of the relevant national bodies, detailed studies on tourism, in particular:

- a comparative study on the status and activities of travel agencies as well as on ways and means of achieving better co-operation among them;
 - a study of the problems raised by the seasonal concentration of vacations, with the ultimate objective of encouraging tourism outside peak periods;
 - studies of the problems arising in areas where tourism has injured the environment;
- consider also that interested parties might wish to study the following questions:
- uniformity of hotel classification; and
 - tourist routes comprising two or more countries;
- will endeavour, where possible, to ensure that the development of tourism does not injure the environment and the artistic, historic and cultural heritage in their respective countries;
- will pursue their co-operation in the field of tourism bilaterally and multilaterally with a view to attaining the above objectives.

Economic and social aspects of migrant labour

The participating States,

Considering that the movements of migrant workers in Europe have reached substantial proportions, and that they constitute an important economic, social and human factor for host countries as well as for countries of origin,

Recognizing that workers' migrations have also given rise to a number of economic, social, human and other problems in both the receiving countries and the countries of origin,

Taking due account of the activities of the competent international organizations, more particularly the International Labour Organisation, in this area,

are of the opinion that the problems arising bilaterally from the migration of workers in Europe as well as between the participating States should be dealt with by the parties directly concerned, in order to resolve these problems in their mutual interest, in the light of the concern of each State involved to take due account of the requirements resulting from its socio-economic situation, having regard to the obligation of each State to comply with the bilateral and multilateral agreements to which it is party, and with the following aims in view:

to encourage the efforts of the countries of origin directed towards increasing the possibilities of employment for their nationals in their own territories, in particular by developing economic co-operation appropriate for this purpose and suitable for the host countries and the countries of origin concerned;

to ensure, through collaboration between the host country and the country of origin, the conditions under which the orderly movement of workers might take place, while at the same time protecting their personal and social welfare and, if appropriate, to organize the recruitment of migrant workers and the provision of elementary language and vocational training;

to ensure equality of rights between migrant workers and nationals of the host countries with regard to conditions of employment and work and to social security, and to endeavour to ensure that migrant workers may enjoy satisfactory living conditions, especially housing conditions;

to endeavour to ensure, as far as possible, that migrant workers may enjoy the same opportunities as nationals of the host countries of finding other suitable employment in the event of unemployment;

to regard with favour the provision of vocational training to migrant workers and, as far as possible, free instruction in the language of the host country, in the framework of their employment;

to confirm the right of migrant workers to receive, as far as possible, regular information in their own language, covering both their country of origin and the host country;

to ensure that the children of migrant workers established in the host country have access to the education usually given there, under the same conditions as the children of that country and, furthermore, to permit them to receive supplementary education in their own language, national culture, history and geography;

to bear in mind that migrant workers, particularly those who have acquired qualifications, can by returning to their countries after a certain period of time help to remedy any deficiency of skilled labour in their country of origin;

to facilitate, as far as possible, the reuniting of migrant workers with their families;

to regard with favour the efforts of the countries of origin to attract the savings of migrant workers, with a view to increasing, within the framework of their economic development, appropriate opportunities for employment, thereby facilitating the reintegration of these workers on their return home.

Training of personnel

The participating States,

Conscious of the importance of the training and advanced training of professional staff and technicians for the economic development of every country,

declare themselves willing to encourage co-operation in this field notably by promoting exchange of information on the subject of institutions, programmes and methods of training and advanced training open to professional staff and technicians in the various sectors of economic activity and especially in those of management, public planning, agriculture and commercial and banking techniques;

consider that it is desirable to develop, under mutually acceptable conditions, exchanges of professional staff and technicians, particularly through training activities, of which it would be left to the competent and interested bodies in the participating States to discuss the modalities - duration, financing, education and qualification levels of potential participants;

declare themselves in favour of examining, through appropriate channels, the possibilities of cooperating on the organization and carrying out of vocational training on the job, more particularly in professions involving modern techniques.

Questions relating to Security and Co-operation in the Mediterranean

The participating States,

Conscious of the geographical, historical, cultural, economic and political aspects of their relationship with the non-participating Mediterranean States,

Convinced that security in Europe is to be considered in the broader context of world security and is closely linked with security in the Mediterranean area as a whole, and that accordingly the process of improving security should not be confined to Europe but should extend to other parts of the world, and in particular to the Mediterranean area,

Believing that the strengthening of security and the intensification of co-operation in Europe would stimulate positive processes in the Mediterranean region, and expressing their intention to contribute towards peace, security and justice in the region, in which ends the participating States and the non-participating Mediterranean States have a common interest,

Recognizing the importance of their mutual economic relations with the nonparticipating Mediterranean States, and conscious of their common interest in the further development of co-operation,

Noting with appreciation the interest expressed by the non-participating Mediterranean States in the Conference since its inception, and having duly taken their contributions into account,

Declare their intention:

- to promote the development of good-neighbourly relations with the non-participating Mediterranean States in conformity with the purposes and principles of the Charter of the United Nations, on which their relations are based, and with the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States and accordingly, in this context, to conduct their relations with the non-participating Mediterranean States in the spirit of the principles set forth in the Declaration on Principles Guiding Relations between Participating States;

- to seek, by further improving their relations with the non-participating Mediterranean States, to increase mutual confidence, so as to promote security and stability in the Mediterranean area as a whole;

- to encourage with the non-participating Mediterranean States the development of mutually beneficial co-operation in the various fields of economic activity, especially by expanding commercial exchanges, on the basis of a common awareness of the necessity for stability and progress in trade relations, of their mutual economic interests, and of differences in the levels of economic development, thereby promoting their economic advancement and well-being;

- to contribute to a diversified development of the economies of the non-participating Mediterranean countries, whilst taking due account of their national development

objectives, and to cooperate with them, especially in the sectors of industry, science and technology, in their efforts to achieve a better utilization of their resources, thus promoting a more harmonious development of economic relations;

- to intensify their efforts and their co-operation on a bilateral and multilateral basis with the non-participating Mediterranean States directed towards the improvement of the environment of the Mediterranean, especially the safeguarding of the biological resources and ecological balance of the sea, by appropriate measures including the prevention and control of pollution; to this end, and in view of the present situation, to cooperate through competent international organizations and in particular within the United Nations Environment Programme (UNEP);

- to promote further contacts and co-operation with the non-participating Mediterranean States in other relevant fields.

In order to advance the objectives set forth above, the participating States also declare their intention of maintaining and amplifying the contacts and dialogue as initiated by the CSCE with the non-participating Mediterranean States to include all the States of the Mediterranean, with the purpose of contributing to peace, reducing armed forces in the region, strengthening security, lessening tensions in the region, and widening the scope of co-operation, ends in which all share a common interest, as well as with the purpose of defining further common objectives.

The participating States would seek, in the framework of their multilateral efforts, to encourage progress and appropriate initiatives and to proceed to an exchange of views on the attainment of the above purposes.

Co-operation in Humanitarian and Other Fields

The participating States,

Desiring to contribute to the strengthening of peace and understanding among peoples and to the spiritual enrichment of the human personality without distinction as to race, sex, language or religion,

Conscious that increased cultural and educational exchanges, broader dissemination of information, contacts between people, and the solution of humanitarian problems will contribute to the attainment of these aims,

Determined therefore to cooperate among themselves, irrespective of their political, economic and social systems, in order to create better conditions in the above fields, to develop and strengthen existing forms of co-operation and to work out new ways and means appropriate to these aims,

Convinced that this co-operation should take place in full respect for the principles guiding relations among participating States as set forth in the relevant document,

Have adopted the following:

1. Human Contacts

The participating States,

Considering the development of contacts to be an important element in the strengthening of friendly relations and trust among peoples,

Affirming, in relation to their present effort to improve conditions in this area, the importance they attach to humanitarian considerations,

Desiring in this spirit to develop, with the continuance of détente, further efforts to achieve continuing progress in this field

And conscious that the questions relevant hereto must be settled by the States concerned under mutually acceptable conditions,

Make it their aim to facilitate freer movement and contacts, individually and collectively, whether privately or officially, among persons, institutions and organizations of the participating States, and to contribute to the solution of the humanitarian problems that arise in that connexion,

Declare their readiness to these ends to take measures which they consider appropriate and to conclude agreements or arrangements among themselves, as may be needed, and

Express their intention now to proceed to the implementation of the following:

(a) Contacts and Regular Meetings on the Basis of Family Ties

In order to promote further development of contacts on the basis of family ties the participating States will favourably consider applications for travel with the purpose of allowing persons to enter or leave their territory temporarily, and on a regular basis if desired, in order to visit members of their families.

Applications for temporary visits to meet members of their families will be dealt with without distinction as to the country of origin or destination: existing requirements for travel documents and visas will be applied in this spirit. The preparation and issue of such documents and visas will be effected within reasonable time limits, cases of urgent necessity - such as serious illness or death - will be given priority treatment. They will take such steps as may be necessary to ensure that the fees for official travel documents and visas are acceptable.

They confirm that the presentation of an application concerning contacts on the basis of family ties will not modify the rights and obligations of the applicant or of members of his family.

(b) Reunification of Families

The participating States will deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their family, with special attention being given to requests of an urgent character - such as requests submitted by persons who are ill or old.

They will deal with applications in this field as expeditiously as possible

They will lower where necessary the fees charged in connexion with these applications to ensure that they are at a moderate level.

Applications for the purpose of family reunification which are not granted may be renewed at the appropriate level and will be reconsidered at reasonably short intervals by the authorities of the country of residence or destination, whichever is concerned, under such circumstances fees will be charged only when applications are granted.

Persons whose applications for family reunification are granted may bring with them or ship their household and personal effects; to this end the participating States will use all possibilities provided by existing regulations.

Until members of the same family are reunited meetings and contacts between them may take place in accordance with the modalities for contacts on the basis of family ties.

The participating States will support the efforts of Red Cross and Red Crescent Societies concerned with the problems of family reunification.

They confirm that the presentation of an application concerning family reunification will not modify the rights and obligations of the applicant or of members of his family.

The receiving participating State will take appropriate care with regard to employment for persons from other participating States who take up permanent residence in that State in connexion with family reunification with its citizens and see that they are afforded opportunities equal to those enjoyed by its own citizens for education, medical assistance and social security.

(c) Marriage between Citizens of Different States

The participating States will examine favourably and on the basis of humanitarian considerations requests for exit or entry permits from persons who have decided to marry a citizen from another participating State.

The processing and issuing of the documents required for the above purposes and for the marriage will be in accordance with the provisions accepted for family reunification.

In dealing with requests from couples from different participating States, once married, to enable them and the minor children of their marriage to transfer their permanent residence to a State in which either one is normally a resident, the participating States will also apply the provisions accepted for family reunification.

(d) Travel for Personal or Professional Reasons

The participating States intend to facilitate wider travel by their citizens for personal or professional reasons and to this end they intend in particular:

- gradually to simplify and to administer flexibly the procedures for exit and entry;
 - to ease regulations concerning movement of citizens from the other participating States in their territory, with due regard to security requirements.
- They will endeavour gradually to lower, where necessary, the fees for visas and official travel documents.

They intend to consider, as necessary, means - including, in so far as appropriate, the conclusion of multilateral or bilateral consular conventions or other relevant agreements or understandings - for the improvement of arrangements to provide consular services, including legal and consular assistance.

* * *

They confirm that religious faiths, institutions and organizations, practising within the constitutional framework of the participating States, and their representatives can, in the field of their activities, have contacts and meetings among themselves and exchange information.

(e) Improvement of Conditions for Tourism on an Individual or Collective Basis

The participating States consider that tourism contributes to a fuller knowledge of the life, culture and history of other countries, to the growth of understanding among peoples, to the improvement of contacts and to the broader use of leisure. They intend to promote the development of tourism, on an individual or collective basis, and, in particular, they intend:

- to promote visits to their respective countries by encouraging the provision of appropriate facilities and the simplification and expediting of necessary formalities relating to such visits;
- to increase, on the basis of appropriate agreements or arrangements where necessary, co-operation in the development of tourism, in particular by considering bilaterally possible ways to increase information relating to travel to other countries and to the reception and service of tourists, and other related questions of mutual interest.

(f) Meetings among Young People

The participating States intend to further the development of contacts and exchanges among young people by encouraging:

- increased exchanges and contacts on a short or long term basis among young people working, training or undergoing education through bilateral or multilateral agreements or regular programmes in all cases where it is possible;
- study by their youth organizations of the question of possible agreements relating to frameworks of multilateral youth co-operation;
- agreements or regular programmes relating to the organization of exchanges of students, of international youth seminars, of courses of professional training and foreign language study;
- the further development of youth tourism and the provision to this end of appropriate facilities;
- the development, where possible, of exchanges, contacts and co-operation on a bilateral or multilateral basis between their organizations which represent wide circles of young people working, training or undergoing education;
- awareness among youth of the importance of developing mutual understanding and of strengthening friendly relations and confidence among peoples.

(g) Sport

In order to expand existing links and co-operation in the field of sport the participating States will encourage contacts and exchanges of this kind, including sports meetings and competitions of all sorts, on the basis of the established international rules, regulations and practice.

(h) Expansion of Contacts

By way of further developing contacts among governmental institutions and non-governmental organizations and associations, including women's organizations, the participating States will facilitate the convening of meetings as well as travel by delegations, groups and individuals.

2. Information

The participating States,

Conscious of the need for an ever wider knowledge and understanding of the various aspects of life in other participating States,

Acknowledging the contribution of this process to the growth of confidence between peoples,

Desiring, with the development of mutual understanding between the participating States and with the further improvement of their relations, to continue further efforts towards progress in this field,

Recognizing the importance of the dissemination of information from the other participating States and of a better acquaintance with such information,

Emphasizing therefore the essential and influential role of the press, radio, television, cinema and news agencies and of the journalists working in these fields,

Make it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and the exchange of information with other countries, and, to improve the conditions under which journalists from one participating State exercise their profession in another participating State, and

Express their intention in particular:

(a) Improvement of the Circulation of, Access to, and Exchange of Information

(i) Oral Information

- To facilitate the dissemination of oral information through the encouragement of lectures and lecture tours by personalities and specialists from the other participating States, as well as exchanges of opinions at round table meetings, seminars, symposia, summer schools, congresses and other bilateral and multilateral meetings.

(ii) Printed Information

- To facilitate the improvement of the dissemination, on their territory, of newspapers and printed publications, periodical and non-periodical, from the other participating States. For this purpose:

they will encourage their competent firms and organizations to conclude agreements and contracts designed gradually to increase the quantities and the number of titles of newspapers and publications imported from the other participating States. These agreements and contracts should in particular mention the speediest conditions of delivery and the use of the normal channels existing in each country for the distribution of its own publications and newspapers, as well as forms and means of payment agreed between the parties making it possible to achieve the objectives aimed at by these agreements and contracts;

where necessary, they will take appropriate measures to achieve the above objectives and to implement the provisions contained in the agreements and contracts.

- To contribute to the improvement of access by the public to periodical and non-periodical printed publications imported on the bases indicated above. In particular:

they will encourage an increase in the number of places where these publications are on sale,

they will facilitate the availability of these periodical publications during congresses, conferences, official visits and other international events and to tourists during the season,

they will develop the possibilities for taking out subscriptions according to the modalities particular to each country;

they will improve the opportunities for reading and borrowing these publications in large public libraries and their reading rooms as well as in university libraries.

They intend to improve the possibilities for acquaintance with bulletins of official information issued by diplomatic missions and distributed by those missions on the basis of arrangements acceptable to the interested parties.

(iii) Filmed and Broadcast Information

- To promote the improvement of the dissemination of filmed and broadcast information. To this end:

they will encourage the wider showing and broadcasting of a greater variety of recorded and filmed information from the other participating States, illustrating the various aspects of life in their countries and received on the basis of such agreements or arrangements as may be necessary between the organizations and firms directly concerned;

they will facilitate the import by competent organizations and firms of recorded audio-visual material from the other participating States.

The participating States note the expansion in the dissemination of information broadcast by radio, and express the hope for the continuation of this process, so as to meet the interest of mutual understanding among peoples and the aims set forth by this Conference.

(b) Co-operation in the Field of Information

- To encourage co-operation in the field of information on the basis of short or long term agreements or arrangements. In particular:
 - they will favour increased co-operation among mass media organizations, including press agencies, as well as among publishing houses and organizations;
 - they will favour co-operation among public or private, national or international radio and television organizations, in particular through the exchange of both live and recorded radio and television programmes, and through the joint production and the broadcasting and distribution of such programmes;
 - they will encourage meetings and contacts both between journalists organizations and between journalists from the participating States;
 - they will view favourably the possibilities of arrangements between periodical publications as well as between newspapers from the participating States, for the purpose of exchanging and publishing articles;
 - they will encourage the exchange of technical information as well as the organization of joint research and meetings devoted to the exchange of experience and views between experts in the field of the press, radio and television.

(c) Improvement of Working Conditions for Journalists

- The participating States, desiring to improve the conditions under which journalists from one participating State exercise their profession in another participating State, intend in particular to:
- examine in a favourable spirit and within a suitable and reasonable time scale requests from journalists for visas;
 - grant to permanently accredited journalists of the participating States, on the basis of arrangements, multiple entry and exit visas for specified periods;
 - facilitate the issue to accredited journalists of the participating States of permits for stay in their country of temporary residence and, if and when these are necessary, of other official papers which it is appropriate for them to have;
 - ease, on a basis of reciprocity, procedures for arranging travel by journalists of the participating States in the country where they are exercising their profession, and to provide progressively greater opportunities for such travel, subject to the observance of regulations relating to the existence of areas closed for security reasons;
 - ensure that requests by such journalists for such travel receive, in so far as possible, an expeditious response, taking into account the time scale of the request;
 - increase the opportunities for journalists of the participating States to communicate personally with their sources, including organizations and official institutions;

- grant to journalists of the participating States the right to import, subject only to its being taken out again, the technical equipment (photographic, cinematographic, tape recorder, radio and television) necessary for the exercise of their profession;⁵⁾
- enable journalists of the other participating States, whether permanently or temporarily accredited, to transmit completely, normally and rapidly by means recognized by the participating States to the information organs which they represent, the results of their professional activity, including tape recordings and undeveloped film, for the purpose of publication or of broadcasting on the radio or television.

The participating States reaffirm that the legitimate pursuit of their professional activity will neither render journalists liable to expulsion nor otherwise penalize them. If an accredited journalist is expelled, he will be informed of the reasons for this act and may submit an application for re-examination of his case.

3. Co-operation and Exchanges in the Field of Culture

The participating States

Considering that cultural exchanges and co-operation contribute to a better comprehension among people and among peoples, and thus promote a lasting understanding among States,

Confirming the conclusions already formulated in this field at the multilateral level, particularly at the Intergovernmental Conference on Cultural Policies in Europe, organized by UNESCO in Helsinki in June 1972, where interest was manifested in the active participation of the broadest possible social groups in an increasingly diversified cultural life,

Desiring, with the development of mutual confidence and the further improvement of relations between the participating States, to continue further efforts toward progress in this field,

Disposed in this spirit to increase substantially their cultural exchanges, with regard both to persons and to cultural works, and to develop among them an active co-operation, both at the bilateral and the multilateral level, in all the fields of culture,

Convinced that such a development of their mutual relations will contribute to the enrichment of the respective cultures, while respecting the originality of each, as well as to the reinforcement among them of a consciousness of common values, while continuing to develop cultural co-operation with other countries of the world,

⁵⁾ While recognizing that appropriate local personnel are employed by foreign journalists in many instances, the participating States note that the above provisions would be applied, subject to the observance of the appropriate rules, to persons from the other participating States, who are regularly and professionally engaged as technicians, photographers or cameramen of the press, radio, television or cinema.

Declare that they jointly set themselves the following objectives:

- (a) to develop the mutual exchange of information with a view to a better knowledge of respective cultural achievements,
- (b) to improve the facilities for the exchange and for the dissemination of cultural property,
- (c) to promote access by all to respective cultural achievements,
- (d) to develop contacts and co-operation among persons active in the field of culture,
- (e) to seek new fields and forms of cultural co-operation,

Thus *give expression* to their common will to take progressive, coherent and long-term action in order to achieve the objectives of the present declaration; and

Express their intention now to proceed to the implementation of the following:

Extension of Relations

To expand and improve at the various levels co-operation and links in the field of culture, in particular by:

- concluding, where appropriate, agreements on a bilateral or multilateral basis, providing for the extension of relations among competent State institutions and non-governmental organizations in the field of culture, as well as among people engaged in cultural activities, taking into account the need both for flexibility and the fullest possible use of existing agreements, and bearing in mind that agreements and also other arrangements constitute important means of developing cultural cooperation and exchanges;
- contributing to the development of direct communication and co-operation among relevant State institutions and non-governmental organizations, including, where necessary, such communication and co-operation carried out on the basis of special agreements and arrangements;
- encouraging direct contacts and communications among persons engaged in cultural activities, including, where necessary, such contacts and communications carried out on the basis of special agreements, and arrangements.

Mutual Knowledge

Within their competence to adopt, on a bilateral and multilateral level, appropriate measures which would give their peoples a more comprehensive and complete mutual knowledge of their achievements in the various fields of culture, and among them:

- to examine jointly, if necessary with the assistance of appropriate international organizations, the possible creation in Europe and the structure of a bank of cultural data, which would collect information from the participating countries and make it available to its correspondents on their request, and to convene for this purpose a meeting of experts from interested States;
- to consider, if necessary in conjunction with appropriate international organizations, ways of compiling in Europe an inventory of documentary films of a cultural or scientific nature from the participating States;
- to encourage more frequent book exhibitions and to examine the possibility of organizing periodically in Europe a large-scale exhibition of books from the participating States;
- to promote the systematic exchange, between the institutions concerned and publishing houses, of catalogues of available books as well as of pre-publication material which will include, as far as possible, all forthcoming publications; and also to promote the exchange of material between firms publishing encyclopaedias, with a view to improving the presentation of each country;
- to examine jointly questions of expanding and improving exchanges of information in the various fields of culture, such as theatre, music, library work as well as the conservation and restoration of cultural property.

Exchanges and Dissemination

To contribute to the improvement of facilities for exchanges and the dissemination of cultural property, by appropriate means, in particular by:

- studying the possibilities for harmonizing and reducing the charges relating to international commercial exchanges of books and other cultural materials, and also for new means of insuring works of art in foreign exhibitions and for reducing the risks of damage or loss to which these works are exposed by their movement;
- facilitating the formalities of customs clearance, in good time for programmes of artistic events, of the works of art, materials and accessories appearing on lists agreed upon by the organizers of these events;
- encouraging meetings among representatives of competent organizations and relevant firms to examine measures within their field of activity - such as the simplification of orders, time limits for sending supplies and modalities of payment - which might facilitate international commercial exchanges of books;
- promoting the loan and exchange of films among their film institutes and film libraries;
- encouraging the exchange of information among interested parties concerning events of a cultural character foreseen in the participating States, in fields where this is most appropriate, such as music, theatre and the plastic and graphic arts, with a view to contributing to the compilation and publication of a calendar of such events, with the assistance, where necessary, of the appropriate international organizations;

- encouraging a study of the impact which the foreseeable development, and a possible harmonization among interested parties, of the technical means used for the dissemination of culture might have on the development of cultural co-operation and exchanges, while keeping in view the preservation of the diversity and originality, of their respective cultures;
- encouraging, in the way they deem appropriate, within their cultural policies, the further development of interest in the cultural heritage of the other participating States, conscious of the merits and the value of each culture;
- endeavouring to ensure the full and effective application of the international agreements and conventions on copyrights and on circulation of cultural property to which they are party or to which they may decide in the future to become party.

Access

To promote fuller mutual access by all to the achievements - works, experiences and performing arts - in the various fields of culture of their countries, and to that end to make the best possible efforts, in accordance with their competence, more particularly:

- to promote wider dissemination of books and artistic works, in particular by such means as:
 - facilitating, while taking full account of the international copyright conventions to which they are party, international contacts and communications between authors and publishing houses as well as other cultural institutions, with a view to a more complete mutual access to cultural achievements;
 - recommending that, in determining the size of editions, publishing houses take into account also the demand from the other participating States, and that rights of sale in other participating States be granted, where possible, to several sales organizations of the importing countries, by agreement between interested partners;
 - encouraging competent organizations and relevant firms to conclude agreements and contracts and contributing, by this means, to a gradual increase in the number and diversity of works by authors from the other participating States available in the original and in translation in their libraries and bookshops;
 - promoting, where deemed appropriate, an increase in the number of sales outlets where books by authors from the other participating States, imported in the original on the basis of agreements and contracts, and in translation, are for sale;
 - promoting, on a wider scale, the translation of works in the sphere of literature and other fields of cultural activity, produced in the languages of the other participating States, especially from the less widely-spoken languages, and the publication and dissemination of the translated works by such measures as:

- encouraging more regular contacts between interested publishing houses;
 - developing their efforts in the basic and advanced training of translators;
 - encouraging, by appropriate means, the publishing houses of their countries to publish translations;
 - facilitating the exchange between publishers and interested institutions of lists of books which might be translated;
 - promoting between their countries the professional activity and co-operation of translators;
 - carrying out joint studies on ways of further promoting translations and their dissemination;
 - improving and expanding exchanges of books, bibliographies and catalogue cards between libraries;
- to envisage other appropriate measures which would permit, where necessary by mutual agreement among interested parties, the facilitation of access to their respective cultural achievements, in particular in the field of books;
 - to contribute by appropriate means to the wider use of the mass media in order to improve mutual acquaintance with the cultural life of each;
 - to seek to develop the necessary conditions for migrant workers and their families to preserve their links with their national culture, and also to adapt themselves to their new cultural environment;
 - to encourage the competent bodies and enterprises to make a wider choice and effect wider distribution of full-length and documentary films from the other participating States, and to promote more frequent non-commercial showings, such as premières, film weeks and festivals, giving due consideration to films from countries whose cinematographic works are less well known;
 - to promote, by appropriate means, the extension of opportunities for specialists from the other participating States to work with materials of a cultural character from film and audio-visual archives, within the framework of the existing rules for work on such archival materials;
 - to encourage a joint study by interested bodies, where appropriate with the assistance of the competent international organizations, of the expediency and the conditions for the establishment of a repertory of their recorded television programmes of a cultural nature, as well as of the means of viewing them rapidly in order to facilitate their selection and possible acquisition.

Contacts and Co-operation

To contribute, by appropriate means, to the development of contacts and co-operation in the various fields of culture, especially among creative artists and people engaged in cultural activities, in particular by making efforts to:

- promote for persons active in the field of culture, travel and meetings including, where necessary, those carried out on the basis of agreements, contracts or other special arrangements and which are relevant to their cultural co-operation;
- encourage in this way contacts among creative and performing artists and artistic groups with a view to their working together, making known their works in other participating States or exchanging views on topics relevant to their common activity;
- encourage, where necessary through appropriate arrangements, exchanges of trainee and specialists and the granting of scholarships for basic and advanced training in various fields of culture such as the arts and architecture, museums and libraries, literary studies and translation, and contribute to the creation of favourable conditions of reception in their respective institutions;
- encourage the exchange of experience in the training of organizers of cultural activities as well as of teachers and specialists in fields such as theatre, opera, ballet, music and fine arts;
- continue to encourage the organization of international meetings among creative artists, especially young creative artists, on current questions of artistic and literary creation which are of interest for joint study;
- study other possibilities for developing exchanges and co-operation among persons active in the field of culture, with a view to a better mutual knowledge of the cultural life of the participating States.

Fields and Forms of Co-operation

To encourage the search for new fields and forms of cultural co-operation, to these ends contributing to the conclusion among interested parties, where necessary, of appropriate agreements and arrangements, and in this context to promote:

- joint studies regarding cultural policies, in particular in their social aspects, and as they relate to planning, town-planning, educational and environmental policies, and the cultural aspects of tourism;
- the exchange of knowledge in the realm of cultural diversity, with a view to contributing thus to a better understanding by interested parties of such diversity where it occurs;
- the exchange of information, and as may be appropriate, meetings of experts, the elaboration and the execution of research programmes and projects, as well as their joint evaluation, and the dissemination of the results, on the subjects indicated above;
- such forms of cultural co-operation and the development of such joint projects as: international events in the fields of the plastic and graphic arts, cinema, theatre, ballet, music, folklore, etc.; book fairs and exhibitions, joint performances of operatic and dramatic works, as well as performances given by soloists, instrumental ensembles,

orchestras, choirs and other artistic groups, including those composed of amateurs, paying due attention to the organization of international cultural youth events and the exchange of young artists;

the inclusion of works by writers and composers from the other participating States in the repertoires of soloists and artistic ensembles;

the preparation, translation and publication of articles, studies and monographs, as well as of low-cost books and of artistic and literary collections, suited to making better known respective cultural achievements, envisaging for this purpose meetings among experts and representatives of publishing houses;

the co-production and the exchange of films and of radio and television programmes, by promoting, in particular, meetings among producers, technicians and representatives of the public authorities with a view to working out favourable conditions for the execution of specific joint projects and by encouraging, in the field of co-production, the establishment of international filming teams;

the organization of competitions for architects and town-planners, bearing in mind the possible implementation of the best projects and the formation, where possible, of international teams;

the implementation of joint projects for conserving, restoring and showing to advantage works of art, historical and archaeological monuments and sites of cultural interest, with the help, in appropriate cases, of international organizations of a governmental or non-governmental character as well as of private institutions - competent and active in these fields - envisaging for this purpose:

periodic meetings of experts of the interested parties to elaborate the necessary proposals, while bearing in mind the need to consider these questions in a wider social and economic context;

the publication in appropriate periodicals of articles designed to make known and to compare, among the participating States, the most significant achievements and innovations;

a joint study with a view to the improvement and possible harmonization of the different systems used to inventory and catalogue the historical monuments and places of cultural interest in their countries;

the study of the possibilities for organizing international courses for the training of specialists in different disciplines relating to restoration.

* * *

National minorities or regional cultures. The participating States, recognizing the contribution that national minorities or regional cultures can make to co-operation among them in various fields of culture, intend, when such minorities or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members.

4. Co-operation and Exchanges in the Field of Education

The participating States,

Conscious that the development of relations of an international character in the fields of education and science contributes to a better mutual understanding and is to the advantage of all peoples as well as to the benefit of future generations,

Prepared to facilitate, between organizations, institutions and persons engaged in education and science, the further development of exchanges of knowledge and experience as well as of contacts, on the basis of special arrangements where these are necessary,

Desiring to strengthen the links among educational and scientific establishments and also to encourage their co-operation in sectors of common interest, particularly where the levels of knowledge and resources require efforts to be concerted internationally, and

Convinced that progress in these fields should be accompanied and supported by a wider knowledge of foreign languages,

Express to these ends their intention in particular:

(a) Extension of Relations

To expand and improve at the various levels co-operation and links in the fields of education and science, in particular by:

- concluding, where appropriate, bilateral or multilateral agreements providing for co-operation and exchanges among State institutions, non-governmental bodies and persons engaged in activities in education and science, bearing in mind the need both for flexibility and the fuller use of existing agreements and arrangements;
- promoting the conclusion of direct arrangements between universities and other institutions of higher education and research, in the framework of agreements between governments where appropriate;
- encouraging among persons engaged in education and science direct contacts and communications" including those based on special agreements or arrangements where these are appropriate.

(b) Access and Exchanges

To improve access, under mutually acceptable conditions, for students, teachers and scholars of the participating States to each other's educational, cultural and scientific institutions, and to intensify exchanges among these institutions in all areas of common interest, in particular by:

- increasing the exchange of information on facilities for study and courses open to foreign participants, as well as on the conditions under which they will be admitted and received;
- facilitating travel between the participating States by scholars, teachers and students for purposes of study, teaching and research as well as for improving knowledge of each other's educational, cultural and scientific achievements;
- encouraging the award of scholarships for study, teaching and research in their countries to scholars, teachers and students of other participating States;
- establishing, developing or encouraging programmes providing for the broader exchange of scholars, teachers and students, including the organization of symposia, seminars and collaborative projects, and the exchanges of educational and scholarly information such as university publications and materials from libraries;
- promoting the efficient implementation of such arrangements and programmes by providing scholars, teachers and students in good time with more detailed information about their placing in universities and institutes and the programmes envisaged for them; by granting them the opportunity to use relevant scholarly, scientific and open archival materials; and by facilitating their travel within the receiving State for the purpose of study or research as well as in the form of vacation tours on the basis of the usual procedures;
- promoting a more exact assessment of the problems of comparison and equivalence of academic degrees and diplomas by fostering the exchange of information on the organization, duration and content of studies, the comparison of methods of assessing levels of knowledge, and academic qualifications, and, where feasible, arriving at the mutual recognition of academic degrees and diplomas either through governmental agreements, where necessary, or direct arrangements between universities and other institutions of higher learning and research;
- recommending, moreover, to the appropriate international organizations that they should intensify their efforts to reach a generally acceptable solution to the problems of comparison and equivalence between academic degrees and diplomas.

(c) Science

Within their competence to broaden and improve co-operation and exchanges in the field of science, in particular:

To increase, on a bilateral or multilateral basis, the exchange and dissemination of scientific information and documentation by such means as:

- making this information more widely available to scientists and research workers of the other participating States through, for instance, participation in international information-sharing programmes or through other appropriate arrangements;
- broadening and facilitating the exchange of samples and other scientific materials used particularly for fundamental research in the fields of natural sciences and medicine;

- inviting scientific institutions and universities to keep each other more fully and regularly informed about their current and contemplated research work in fields of common interest.

To facilitate the extension of communications and direct contacts between universities, scientific institutions and associations as well as among scientists and research workers, including those based where necessary on special agreements or arrangements, by such means as:

- further developing exchanges of scientists and research workers and encouraging the organization of preparatory meetings or working groups on research topics of common interest;
- encouraging the creation of joint teams of scientists to pursue research projects under arrangements made by the scientific institutions of several countries;
- assisting the organization and successful functioning of international conferences and seminars and participation in them by their scientists and research workers;
- furthermore envisaging, in the near future, a "Scientific Forum" in the form of a meeting of leading personalities in science from the participating States to discuss interrelated problems of common interest concerning current and future developments in science, and to promote the expansion of contacts, communications and the exchange of information between scientific institutions and among scientists;
- foreseeing, at an early date, a meeting of experts representing the participating States and their national scientific institutions, in order to prepare such a "Scientific Forum" in consultation with appropriate international organizations, such as UNESCO and the ECE;
- considering in due course what further steps might be taken with respect to the "Scientific Forum".

To develop in the field of scientific research, on a bilateral or multilateral basis, the co-ordination of programmes carried out in the participating States and the organization of joint programmes, especially in the areas mentioned below, which may involve the combined efforts of scientists and in certain cases the use of costly or unique equipment. The list of subjects in these areas is illustrative; and specific projects would have to be determined subsequently by the potential partners in the participating States, taking account of the contribution which could be made by appropriate international organizations and scientific institutions:

- *exact and natural sciences*, in particular fundamental research in such fields as mathematics, physics, theoretical physics, geophysics, chemistry, biology, ecology and astronomy;

medicine, in particular basic research into cancer and cardiovascular diseases, studies on the diseases endemic in the developing countries, as well as medico-social research with special emphasis on occupational diseases, the rehabilitation of the handicapped and the care of mothers, children and the elderly;

- *the humanities and social sciences*, such as history, geography, philosophy, psychology, pedagogical research, linguistics, sociology, the legal, political and economic sciences; comparative studies on social, socioeconomic and cultural phenomena which are of common interest to the participating States, especially the problems of human environment and urban development; and scientific studies on the methods of conserving and restoring monuments and works of art.

(d) *Foreign Languages and Civilizations*

To encourage the study of foreign languages and civilizations as an important means of expanding communication among peoples for their better acquaintance with the culture of each country, as well as for the strengthening of international co-operation; to this end to stimulate, within their competence, the further development and improvement of foreign language teaching and the diversification of choice of languages taught at various levels, paying due attention to less widely-spread or studied languages, and in particular:

- to intensify co-operation aimed at improving the teaching of foreign languages through exchanges of information and experience concerning the development and application of effective modern teaching methods and technical aids, adapted to the needs of different categories of students, including methods of accelerated teaching; and to consider the possibility of conducting, on a bilateral or multilateral basis, studies of new methods of foreign language teaching;
- to encourage co-operation between institutions concerned, on a bilateral or multilateral basis, aimed at exploiting more fully the resources of modern educational technology in language teaching, for example through comparative studies by their specialists and, where agreed, through exchanges or transfers of audio-visual materials, of materials used for preparing textbooks, as well as of information about new types of technical equipment used for teaching languages;
- to promote the exchange of information on the experience acquired in the training of language teachers and to intensify exchanges on a bilateral basis of language teachers and students as well as to facilitate their participation in summer courses in languages and civilizations, wherever these are organized;
- to encourage co-operation among experts in the field of lexicography with the aim of defining the necessary terminological equivalents, particularly in the scientific and technical disciplines, in order to facilitate relations among scientific institutions and specialists;
- to promote the wider spread of foreign language study among the different types of secondary education establishments and greater possibilities of choice between an increased number of European languages; and in this context to consider, wherever appropriate, the possibilities for developing the recruitment and training of teachers as well as the organization of the student groups required;
- to favour, in higher education, a wider choice in the languages offered to language students and greater opportunities for other students to study various foreign languages; also to facilitate, where desirable, the organization of courses in languages and civilizations, on the basis of special arrangements as necessary to be given by foreign lecturers, particularly from European countries having less widely-spread or studied languages;

- to promote, within the framework of adult education, the further development of specialized programmes, adapted to various needs and interests, for teaching foreign languages to their own inhabitants and the languages of host countries to interested adults from other countries; in this context to encourage interested institutions to cooperate, for example, in the elaboration of programmes for teaching by radio and television and by accelerated methods, and also, where desirable, in the definition of study objectives for such programmes, with a view to arriving at comparable levels of language proficiency;

- to encourage the association, where appropriate, of the teaching of foreign languages with the study of the corresponding civilizations and also to make further efforts to stimulate interest in the study of foreign languages, including relevant out-of-class activities.

(e) *Teaching Methods*

To promote the exchange of experience, on a bilateral or multilateral basis, in teaching methods at all levels of education, including those used in permanent and adult education, as well as the exchange of teaching materials, in particular by:

- further developing various forms of contacts and co-operation in the different fields of pedagogical science, for example through comparative or joint studies carried out by interested institutions or through exchanges of information on the results of teaching experiments;

- intensifying exchanges of information on teaching methods used in various educational systems and on results of research into the processes by which pupils and students acquire knowledge, taking account of relevant experience in different types of specialized education;

- facilitating exchanges of experience concerning the organization and functioning of education intended for adults and recurrent education, the relationships between these and other forms and levels of education, as well as concerning the means of adapting education, including vocational and technical training, to the needs of economic and social development in their countries;

- encouraging exchanges of experience in the education of youth and adults in international understanding, with particular reference to those major problems of mankind whose solution calls for a common approach and wider international co-operation;

- encouraging exchanges of teaching materials - including school textbooks, having in mind the possibility of promoting mutual knowledge and facilitating the presentation of each country in such books - as well as exchanges of information on technical innovations in the field of education.

National minorities or regional cultures. The participating States, recognizing the contribution that national minorities or regional cultures can make to co-operation among them in various fields of education, intend, when such minorities or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members.

Follow-up to the Conference

The participating States,

Having considered and evaluated the progress made at the Conference on Security and Co-operation in Europe,

Considering further that, within the broader context of the world, the Conference is an important part of the process of improving security and developing co-operation in Europe and that its results will contribute significantly to this process,

Intending to implement the provisions of the Final Act of the Conference in order to give full effect to its results and thus to further the process of improving security and developing co-operation in Europe,

Convinced that, in order to achieve the aims sought by the Conference, they should make further unilateral, bilateral and multilateral efforts and continue, in the appropriate forms set forth below, the multilateral process initiated by the Conference,

1. *Declare their resolve, in the period following the Conference, to pay due regard to and implement the provisions of the Final Act of the Conference:*

(a) unilaterally, in all cases which lend themselves to such action;

(b) bilaterally, by negotiations with other participating States;

(c) multilaterally, by meetings of experts of the participating States, and also within the framework of existing international organizations, such as the United Nations Economic Commission for Europe and UNESCO, with regard to educational, scientific and cultural co-operation;

2. *Declare furthermore their resolve to continue the multilateral process initiated by the Conference:*

(a) by proceeding to a thorough exchange of views both on the implementation of the provisions of the Final Act and of the tasks defined by the Conference, as well as, in the context of the questions dealt with by the latter, on the deepening of their mutual relations, the improvement of security and the development of co-operation in Europe, and the development of the process of détente in the future;

(b) by organizing to these ends meetings among their representatives, beginning with a meeting at the level of representatives appointed by the Ministers of foreign Affairs. This meeting will define the appropriate modalities for the holding of other meetings which could include further similar meetings and the possibility of a new Conference;

3. The first of the meetings indicated above will be held at Belgrade in 1977. A preparatory meeting to organize this meeting will be held at Belgrade on 15 June 1977. The preparatory meeting will decide on the date, duration, agenda and other modalities of the meeting of representatives appointed by the Ministers of Foreign Affairs;

4. The rules of procedure, the working methods and the scale of distribution for the expenses of the Conference will, *mutatis mutandis*, be applied to the meetings envisaged in paragraphs 1 (c), 2 and 3 above. All the above-mentioned meetings will be held in the participating States in rotation. The services of a technical secretariat will be provided by the host country.

The original of this Final Act, drawn up in English, French, German, Italian, Russian and Spanish, will be transmitted to the Government of the Republic of Finland, which will retain it in its archives. Each of the participating States will receive from the Government of the Republic of Finland a true copy of this Final Act.

The text of this Final Act will be published in each participating State, which will disseminate it and make it known as widely as possible.

The Government of the Republic of Finland is requested to transmit to the Secretary-General of the United Nations the text of this Final Act, which is not eligible for registration under Article 102 of the Charter of the United Nations, with a view to its circulation to all the members of the Organization as an official document of the United Nations.

The Government of the Republic of Finland is also requested to transmit the text of this Final Act to the Director-General of UNESCO and to the Executive Secretary of the United Nations Economic Commission for Europe.

Wherefore, the undersigned High Representatives of the participating States, mindful of the high political significance which they attach to the results of the Conference, and declaring their determination to act in accordance with the provisions contained in the above texts, have subscribed their signatures below:

Done at Helsinki,
on 1st August
1975,
in the name of

African Charter on Human and Peoples' Rights, 1981



AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS

(Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)

Preamble

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations, and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other

hand that the reality and respect of peoples rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

Part I: Rights and Duties

Chapter I: Human and Peoples' Rights

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 10

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.

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 slavery, slave trade, torture, 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.

Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 12

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. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

Article 8

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17

1. Every individual shall have the right to education.
2. Every individual may freely, take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the

community shall be the duty of the State.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. 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.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Chapter II: Duties

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;

2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Article 24

All peoples shall have the right to a general satisfactory environment favorable to their development.

3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Part II: Measures of Safeguard

Chapter I: Establishment and Organization of the African
Commission on Human and Peoples' Rights

Article 30

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Article 31

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity.

Article 32

The Commission shall not include more than one national of the same state.

Article 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

Article 34

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States party to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

Article 35

1. The Secretary General of the Organization of African Unity shall invite States parties to the present Charter at least four months before the elections to nominate candidates;
2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

Article 36

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

Article 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

Article 38

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 39

1. In case of death or resignation of a member of the Commission the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.

2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.

3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

Article 40

Every member of the Commission shall be in office until the date his successor assumes office.

Article 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the costs of the staff and services.

Article 42

1. The Commission shall elect its Chairman and Vice Chairman for a two-year period. They shall be eligible for re-election.

2. The Commission shall lay down its rules of procedure.

3. Seven members shall form the quorum.

4. In case of an equality of votes, the Chairman shall have a casting vote.

5. The Secretary General may attend the meetings of the Commission. He shall not participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

Article 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

Article 44

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

Chapter II -- Mandate of the Commission

Article 45

The functions of the Commission shall be:

1. To promote Human and Peoples' Rights and in particular:

(a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.

(b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.

(c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.

4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

Chapter III -- Procedure of the Commission

Article 46

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

Communication from States

Article 47

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.

Article 48

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

Article 49

Notwithstanding the provisions of 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.

Article 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

Article 51

1. The Commission may ask the States concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

Article 52

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in 48, a report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government.

Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

Article 54

The Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report on its activities.

Other Communications

Article 55

1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

Article 56

Communications relating to human and peoples' rights referred to in 55 received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
4. Are not based exclusively on news discriminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

Article 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

Article 58

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may

request an in-depth study.

Article 59

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

Chapter IV -- Applicable Principles

Article 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

Article 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

Article 62

Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

Article 63

1. The present Charter shall be open to signature, ratification or adherence of the member states of the Organization of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the member states of the Organization of African Unity.

Part III: General Provisions

Article 64

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

Article 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of its instrument of ratification or adherence.

Article 66

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

Article 67

The Secretary General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.

Article 68

The present Charter may be amended if a State party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties

have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

Adopted by the eighteenth Assembly of Heads of State and Government June 1981 – Nairobi, Kenya

**Vienna Declaration and Programme of Action, World
Conference on Human Rights, 1993 (A/CONF.157/23)**

VIENNA DECLARATION AND PROGRAMME OF ACTION

The World Conference on Human Rights,

Considering that the promotion and protection of human rights is a matter of priority for the international community, and that the Conference affords a unique opportunity to carry out a comprehensive analysis of the international human rights system and of the machinery for the protection of human rights, in order to enhance and thus promote a fuller observance of those rights, in a just and balanced manner,

Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms,

Reaffirming their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights,

Reaffirming the commitment contained in Article 56 of the Charter of the United Nations to take joint and separate action, placing proper emphasis on developing effective international cooperation for the realization of the purposes set out in Article 55, including universal respect for, and observance of, human rights and fundamental freedoms for all,

Emphasizing the responsibilities of all States, in conformity with the Charter of the United Nations, to develop and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Recalling the Preamble to the Charter of the United Nations, in particular the determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women and of nations large and small,

Recalling also the determination expressed in the Preamble of the Charter of the United Nations to save succeeding generations from the scourge of war, to establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained, to promote social progress and better standards of life in larger freedom, to practice tolerance and good neighbourliness, and to employ international machinery for the promotion of the economic and social advancement of all peoples,

Emphasizing that the Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Considering the major changes taking place on the international scene and the aspirations of all the peoples for an international order based on the principles enshrined in the Charter of the United Nations, including promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, development, better standards of living and solidarity,

Deeply concerned by various forms of discrimination and violence, to which women continue to be exposed all over the world,

Recognizing that the activities of the United Nations in the field of human rights should be rationalized and enhanced in order to strengthen the United Nations machinery in this field and to further the objectives of universal respect for observance of international human rights standards,

Having taken into account the Declarations adopted by the three regional meetings at Tunis, San José and Bangkok and the contributions made by Governments, and bearing in mind the suggestions made by intergovernmental and non-governmental organizations, as well as the studies prepared by independent experts during the preparatory process leading to the World Conference on Human Rights,

Welcoming the International Year of the World's Indigenous People 1993 as a reaffirmation of the commitment of the international community to ensure their enjoyment of all human rights and fundamental freedoms and to respect the value and diversity of their cultures and identities,

Recognizing also that the international community should devise ways and means to remove the current obstacles and meet challenges to the full realization of all human rights and to prevent the continuation of human rights violations resulting thereof throughout the world,

Invoking the spirit of our age and the realities of our time which call upon the peoples of the world and all States Members of the United Nations to rededicate themselves to the global task of promoting and protecting all human rights and fundamental freedoms so as to secure full and universal enjoyment of these rights,

Determined to take new steps forward in the commitment of the international community with a view to achieving substantial progress in human rights endeavours with an increased and sustained effort of international cooperation and solidarity,

Solemnly adopts the Vienna Declaration and Programme of Action.

I

1. The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments

relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.

In this framework, enhancement of international cooperation in the field of human rights is essential for the full achievement of the purposes of the United Nations.

Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.

2. All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

3. Effective international measures to guarantee and monitor the implementation of human rights standards should be taken in respect of people under foreign occupation, and effective legal protection against the violation of their human rights should be provided, in accordance with human rights norms and international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 14 August 1949, and other applicable norms of humanitarian law.

4. The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community. The organs and specialized agencies related to human rights should therefore further enhance the coordination of their activities based on the consistent and objective application of international human rights instruments.

5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

6. The efforts of the United Nations system towards the universal respect for, and observance of, human rights and fundamental freedoms for all, contribute to the stability and well-being necessary for peaceful and friendly relations among nations, and to improved conditions for peace and security as well as social and economic development, in conformity with the Charter of the United Nations.

7. The processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the Charter of the United Nations, and international law.

8. Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.

9. The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development.

10. The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

As stated in the Declaration on the Right to Development, the human person is the central subject of development.

While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.

States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development.

Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.

11. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. The World Conference on Human Rights recognizes that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone.

Consequently, the World Conference on Human Rights calls on all States to adopt and vigorously implement existing conventions relating to the dumping of toxic and dangerous products and waste and to cooperate in the prevention of illicit dumping.

Everyone has the right to enjoy the benefits of scientific progress and its applications. The World Conference on Human Rights notes that certain advances, notably in the biomedical and life sciences as well as in information technology, may have potentially adverse consequences for the integrity, dignity and human rights of the individual, and calls for international cooperation to ensure that human rights and dignity are fully respected in this area of universal concern.

12. The World Conference on Human Rights calls upon the international community to make all efforts to help alleviate the external debt burden of developing countries, in order to supplement the efforts of the Governments of such countries to attain the full realization of the economic, social and cultural rights of their people.

13. There is a need for States and international organizations, in cooperation with non-governmental organizations, to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights. States should eliminate all violations of human rights and their causes, as well as obstacles to the enjoyment of these rights.

14. The existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community.

15. Respect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law. The speedy and comprehensive elimination of all forms of racism and racial discrimination, xenophobia and related intolerance is a priority task for the international community. Governments should take effective measures to prevent and combat them. Groups, institutions, intergovernmental and non-governmental organizations and individuals are urged to intensify their efforts in cooperating and coordinating their activities against these evils.

16. The World Conference on Human Rights welcomes the progress made in dismantling apartheid and calls upon the international community and the United Nations system to assist in this process.

The World Conference on Human Rights also deplores the continuing acts of violence aimed at undermining the quest for a peaceful dismantling of apartheid.

17. The acts, methods and practices of terrorism in all its forms and manifestations as well as linkage in some countries to drug trafficking are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments. The international community should take the necessary steps to enhance cooperation to prevent and combat terrorism.

18. The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.

The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women.

The World Conference on Human Rights urges Governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection and promotion of human rights of women and the girl-child.

19. Considering the importance of the promotion and protection of the rights of persons belonging to minorities and the contribution of such promotion and protection to the political and social stability of the States in which such persons live,

The World Conference on Human Rights reaffirms the obligation of States to ensure that persons belonging to minorities may exercise fully and effectively all human rights and fundamental freedoms without any discrimination and in full equality before the law in accordance with the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

The persons belonging to minorities have the right to enjoy their own culture, to profess and practise their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination.

20. The World Conference on Human Rights recognizes the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them. Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.

21. The World Conference on Human Rights, welcoming the early ratification of the Convention on the Rights of the Child by a large number of States and noting the recognition of the human rights of children in the World Declaration on the Survival, Protection and Development of Children and Plan of Action adopted by the World Summit for Children, urges universal ratification of the Convention by 1995 and its effective implementation by States parties through the adoption of all the necessary legislative, administrative and other measures and the allocation to the maximum extent of the available resources. In all actions concerning children, non-discrimination and the best interest of the child should be primary considerations and the views of the child given due weight. National and international mechanisms and programmes should be strengthened for the defence and protection of children, in particular, the girl-child, abandoned children, street children, economically and sexually exploited children, including through child pornography, child prostitution or sale of organs, children victims of diseases including acquired immunodeficiency syndrome, refugee and displaced children, children in detention, children in armed conflict, as well as children victims of famine and drought and other emergencies. International cooperation and solidarity should be promoted to support the implementation of the Convention and the rights of the child should be a priority in the United Nations system-wide action on human rights.

The World Conference on Human Rights also stresses that the child for the full and harmonious development of his or her personality should grow up in a family environment which accordingly merits broader protection.

22. Special attention needs to be paid to ensuring non-discrimination, and the equal enjoyment of all human rights and fundamental freedoms by disabled persons, including their active participation in all aspects of society.

23. The World Conference on Human Rights reaffirms that everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one's own country. In this respect it stresses the importance of the Universal Declaration of Human Rights, the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and regional instruments. It expresses its appreciation to States that continue to admit and host large numbers of refugees in their territories, and to the Office of the United Nations High

Commissioner for Refugees for its dedication to its task. It also expresses its appreciation to the United Nations Relief and Works Agency for Palestine Refugees in the Near East.

The World Conference on Human Rights recognizes that gross violations of human rights, including in armed conflicts, are among the multiple and complex factors leading to displacement of people.

The World Conference on Human Rights recognizes that, in view of the complexities of the global refugee crisis and in accordance with the Charter of the United Nations, relevant international instruments and international solidarity and in the spirit of burden-sharing, a comprehensive approach by the international community is needed in coordination and cooperation with the countries concerned and relevant organizations, bearing in mind the mandate of the United Nations High Commissioner for Refugees. This should include the development of strategies to address the root causes and effects of movements of refugees and other displaced persons, the strengthening of emergency preparedness and response mechanisms, the provision of effective protection and assistance, bearing in mind the special needs of women and children, as well as the achievement of durable solutions, primarily through the preferred solution of dignified and safe voluntary repatriation, including solutions such as those adopted by the international refugee conferences. The World Conference on Human Rights underlines the responsibilities of States, particularly as they relate to the countries of origin.

In the light of the comprehensive approach, the World Conference on Human Rights emphasizes the importance of giving special attention including through intergovernmental and humanitarian organizations and finding lasting solutions to questions related to internally displaced persons including their voluntary and safe return and rehabilitation.

In accordance with the Charter of the United Nations and the principles of humanitarian law, the World Conference on Human Rights further emphasizes the importance of and the need for humanitarian assistance to victims of all natural and man-made disasters.

24. Great importance must be given to the promotion and protection of the human rights of persons belonging to groups which have been rendered vulnerable, including migrant workers, the elimination of all forms of discrimination against them, and the strengthening and more effective implementation of existing human rights instruments. States have an obligation to create and maintain adequate measures at the national level, in particular in the fields of education, health and social support, for the promotion and protection of the rights of persons in vulnerable sectors of their populations and to ensure the participation of those among them who are interested in finding a solution to their own problems.

25. The World Conference on Human Rights affirms that extreme poverty and social exclusion constitute a violation of human dignity and that urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, including those related to the problem of development, in order to promote the human rights of the poorest, and to put an end to extreme poverty and social exclusion and to promote the enjoyment of the fruits of social progress. It

30. The World Conference on Human Rights also expresses its dismay and condemnation that gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in different parts of the world. Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law.
31. The World Conference on Human Rights calls upon States to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles to trade relations among States and impedes the full realization of the human rights set forth in the Universal Declaration of Human Rights and international human rights instruments, in particular the rights of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and the necessary social services. The World Conference on Human Rights affirms that food should not be used as a tool for political pressure.
32. The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues.
33. The World Conference on Human Rights reaffirms that States are duty-bound, as stipulated in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and in other international human rights instruments, to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms. The World Conference on Human Rights emphasizes the importance of incorporating the subject of human rights education programmes and calls upon States to do so. Education should promote understanding, tolerance, peace and friendly relations between the nations and all racial or religious groups and encourage the development of United Nations activities in pursuance of these objectives. Therefore, education on human rights and the dissemination of proper information, both theoretical and practical, play an important role in the promotion and respect of human rights with regard to all individuals without distinction of any kind such as race, sex, language or religion, and this should be integrated in the education policies at the national as well as international levels. The World Conference on Human Rights notes that resource constraints and institutional inadequacies may impede the immediate realization of these objectives.
34. Increased efforts should be made to assist countries which so request to create the conditions whereby each individual can enjoy universal human rights and fundamental freedoms. Governments, the United Nations system as well as other multilateral organizations are urged to increase considerably the resources allocated to programmes aiming at the establishment and strengthening of national legislation, national institutions and related infrastructures which uphold the rule of law and democracy, electoral

- is essential for States to foster participation by the poorest people in the decision-making process by the community in which they live, the promotion of human rights and efforts to combat extreme poverty.
26. The World Conference on Human Rights welcomes the progress made in the codification of human rights instruments, which is a dynamic and evolving process, and urges the universal ratification of human rights treaties. All States are encouraged to accede to these international instruments; all States are encouraged to avoid, as far as possible, the resort to reservations.
27. Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions concerned with the administration of justice should be properly funded, and an increased level of both technical and financial assistance should be provided by the international community. It is incumbent upon the United Nations to make use of special programmes of advisory services on a priority basis for the achievement of a strong and independent administration of justice.
28. The World Conference on Human Rights expresses its dismay at massive violations of human rights especially in the form of genocide, "ethnic cleansing" and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. While strongly condemning such abhorrent practices it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped.
29. The World Conference on Human Rights expresses grave concern about continuing human rights violations in all parts of the world in disregard of standards as contained in international human rights instruments and international humanitarian law and about the lack of sufficient and effective remedies for the victims.
- The World Conference on Human Rights is deeply concerned about violations of human rights during armed conflicts, affecting the civilian population, especially women, children, the elderly and the disabled. The Conference therefore calls upon States and all parties to armed conflicts strictly to observe international humanitarian law, as set forth in the Geneva Conventions of 1949 and other rules and principles of international law, as well as minimum standards for protection of human rights, as laid down in international conventions.
- The World Conference on Human Rights reaffirms the right of the victims to be assisted by humanitarian organizations, as set forth in the Geneva Conventions of 1949 and other relevant instruments of international humanitarian law, and calls for the safe and timely access for such assistance.

assistance, human rights awareness through training, teaching and education, popular participation and civil society.

The programmes of advisory services and technical cooperation under the Centre for Human Rights should be strengthened as well as made more efficient and transparent and thus become a major contribution to improving respect for human rights. States are called upon to increase their contributions to these programmes, both through promoting a larger allocation from the United Nations regular budget, and through voluntary contributions.

35. The full and effective implementation of United Nations activities to promote and protect human rights must reflect the high importance accorded to human rights by the Charter of the United Nations and the demands of the United Nations human rights activities, as mandated by Member States. To this end, United Nations human rights activities should be provided with increased resources.

36. The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.

The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level.

37. Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities.

The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist.

38. The World Conference on Human Rights recognizes the important role of non-governmental organizations in the promotion of all human rights and in humanitarian activities at national, regional and international levels. The World Conference on Human Rights appreciates their contribution to increasing public awareness of human rights issues, to the conduct of education, training and research in this field, and to the promotion and protection of all human rights and fundamental freedoms. While recognizing that the primary responsibility for standard-setting lies with States, the conference also appreciates the contribution of non-governmental organizations to this process. In this respect, the World Conference on Human Rights emphasizes the importance of continued dialogue and cooperation between Governments and non-governmental organizations. Non-governmental organizations and their

members genuinely involved in the field of human rights should enjoy the rights and freedoms recognized in the Universal Declaration of Human Rights, and the protection of the national law. These rights and freedoms may not be exercised contrary to the purposes and principles of the United Nations. Non-governmental organizations should be free to carry out their human rights activities, without interference, within the framework of national law and the Universal Declaration of Human Rights.

39. Underlining the importance of objective, responsible and impartial information about human rights and humanitarian issues, the World Conference on Human Rights encourages the increased involvement of the media, for whom freedom and protection should be guaranteed within the framework of national law.

II

A. Increased coordination on human rights within the United Nations system

1. The World Conference on Human Rights recommends increased coordination in support of human rights and fundamental freedoms within the United Nations system. To this end, the World Conference on Human Rights urges all United Nations organs, bodies and the specialized agencies whose activities deal with human rights to cooperate in order to strengthen, rationalize and streamline their activities, taking into account the need to avoid unnecessary duplication. The World Conference on Human Rights also recommends to the Secretary-General that high-level officials of relevant United Nations bodies and specialized agencies at their annual meeting, besides coordinating their activities, also assess the impact of their strategies and policies on the enjoyment of all human rights.

2. Furthermore, the World Conference on Human Rights calls on regional organizations and prominent international and regional finance and development institutions to assess also the impact of their policies and programmes on the enjoyment of human rights.

3. The World Conference on Human Rights recognizes that relevant specialized agencies and bodies and institutions of the United Nations system as well as other relevant intergovernmental organizations whose activities deal with human rights play a vital role in the formulation, promotion and implementation of human rights standards, within their respective mandates, and should take into account the outcome of the World Conference on Human Rights within their fields of competence.

4. The World Conference on Human Rights strongly recommends that a concerted effort be made to encourage and facilitate the ratification of and accession or succession to international human rights treaties and protocols adopted within the framework of the United Nations system with the aim of universal acceptance. The Secretary-General, in consultation with treaty bodies, should consider opening a dialogue with States not having acceded to these human rights treaties, in order to identify obstacles and to seek ways of overcoming them.

5. The World Conference on Human Rights encourages States to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them.

6. The World Conference on Human Rights, recognizing the need to maintain consistency with the high quality of existing international standards and to avoid proliferation of human rights instruments, reaffirms the guidelines relating to the elaboration of new international instruments contained in General Assembly resolution 41/120 of 4 December 1986 and calls on the United Nations human rights bodies, when considering the elaboration of new international standards, to keep those guidelines in mind, to consult with human rights treaty bodies on the necessity for drafting new standards and to request the Secretariat to carry out technical reviews of proposed new instruments.

7. The World Conference on Human Rights recommends that human rights officers be assigned if and when necessary to regional offices of the United Nations Organization with the purpose of disseminating information and offering training and other technical assistance in the field of human rights upon the request of concerned Member States. Human rights training for international civil servants who are assigned to work relating to human rights should be organized.

8. The World Conference on Human Rights welcomes the convening of emergency sessions of the Commission on Human Rights as a positive initiative and that other ways of responding to acute violations of human rights be considered by the relevant organs of the United Nations system.

Resources

9. The World Conference on Human Rights, concerned by the growing disparity between the activities of the Centre for Human Rights and the human, financial and other resources available to carry them out, and bearing in mind the resources needed for other important United Nations programmes, requests the Secretary-General and the General Assembly to take immediate steps to increase substantially the resources for the human rights programme from within the existing and future regular budgets of the United Nations, and to take urgent steps to seek increased extrabudgetary resources.

10. Within this framework, an increased proportion of the regular budget should be allocated directly to the Centre for Human Rights to cover its costs and all other costs borne by the Centre for Human Rights, including those related to the United Nations human rights bodies. Voluntary funding of the Centre's technical cooperation activities should reinforce this enhanced budget; the World Conference on Human Rights calls for generous contributions to the existing trust funds.

11. The World Conference on Human Rights requests the Secretary-General and the General Assembly to provide sufficient human, financial and other

resources to the Centre for Human Rights to enable it effectively, efficiently and expeditiously to carry out its activities.

12. The World Conference on Human Rights, noting the need to ensure that human and financial resources are available to carry out the human rights activities, as mandated by intergovernmental bodies, urges the Secretary-General, in accordance with Article 101 of the Charter of the United Nations, and Member States to adopt a coherent approach aimed at securing that resources commensurate to the increased mandates are allocated to the Secretariat. The World Conference on Human Rights invites the Secretary-General to consider whether adjustments to procedures in the programme budget cycle would be necessary or helpful to ensure the timely and effective implementation of human rights activities as mandated by Member States.

Centre for Human Rights

13. The World Conference on Human Rights stresses the importance of strengthening the United Nations Centre for Human Rights.

14. The Centre for Human Rights should play an important role in coordinating system-wide attention for human rights. The focal role of the Centre can best be realized if it is enabled to cooperate fully with other United Nations bodies and organs. The coordinating role of the Centre for Human Rights also implies that the office of the Centre for Human Rights in New York is strengthened.

15. The Centre for Human Rights should be assured adequate means for the system of thematic and country rapporteurs, experts, working groups and treaty bodies. Follow-up on recommendations should become a priority matter for consideration by the Commission on Human Rights.

16. The Centre for Human Rights should assume a larger role in the promotion of human rights. This role could be given shape through cooperation with Member States and by an enhanced programme of advisory services and technical assistance. The existing voluntary funds will have to be expanded substantially for these purposes and should be managed in a more efficient and coordinated way. All activities should follow strict and transparent project management rules and regular programme and project evaluations should be held periodically. To this end, the results of such evaluation exercises and other relevant information should be made available regularly. The Centre should, in particular, organize at least once a year information meetings open to all Member States and organizations directly involved in these projects and programmes.

Adaptation and strengthening of the United Nations machinery for human rights, including the question of the establishment of a United Nations High Commissioner for Human Rights

17. The World Conference on Human Rights recognizes the necessity for a continuing adaptation of the United Nations human rights machinery to the current and future needs in the promotion and protection of human rights, as reflected in the present Declaration and within the framework of a balanced

23. The World Conference on Human Rights stresses that all persons who perpetrate or authorize criminal acts associated with ethnic cleansing are individually responsible and accountable for such human rights violations, and that the international community should exert every effort to bring those legally responsible for such violations to justice.

24. The World Conference on Human Rights calls on all States to take immediate measures, individually and collectively, to combat the practice of ethnic cleansing to bring it quickly to an end. Victims of the abhorrent practice of ethnic cleansing are entitled to appropriate and effective remedies.

2. Persons belonging to national or ethnic, religious and linguistic minorities

25. The World Conference on Human Rights calls on the Commission on Human Rights to examine ways and means to promote and protect effectively the rights of persons belonging to minorities as set out in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. In this context, the World Conference on Human Rights calls upon the Centre for Human Rights to provide, at the request of Governments concerned and as part of its programme of advisory services and technical assistance, qualified expertise on minority issues and human rights, as well as on the prevention and resolution of disputes, to assist in existing or potential situations involving minorities.

26. The World Conference on Human Rights urges States and the international community to promote and protect the rights of persons belonging to national or ethnic, religious and linguistic minorities in accordance with the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

27. Measures to be taken, where appropriate, should include facilitation of their full participation in all aspects of the political, economic, social, religious and cultural life of society and in the economic progress and development in their country.

Indigenous people

28. The World Conference on Human Rights calls on the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to complete the drafting of a declaration on the rights of indigenous people at its eleventh session.

29. The World Conference on Human Rights recommends that the Commission on Human Rights consider the renewal and updating of the mandate of the Working Group on Indigenous Populations upon completion of the drafting of a declaration on the rights of indigenous people.

30. The World Conference on Human Rights also recommends that advisory services and technical assistance programmes within the United Nations system respond positively to requests by States for assistance which would be of direct benefit to indigenous people. The World Conference on Human Rights

and sustainable development for all people. In particular, the United Nations human rights organs should improve their coordination, efficiency and effectiveness.

18. The World Conference on Human Rights recommends to the General Assembly that when examining the report of the Conference at its forty-eighth session, it begin, as a matter of priority, consideration of the question of the establishment of a High Commissioner for Human Rights for the promotion and protection of all human rights.

B. Equality, dignity and tolerance

1. Racism, racial discrimination, xenophobia and other forms of intolerance

19. The World Conference on Human Rights considers the elimination of racism and racial discrimination, in particular in their institutionalized forms such as apartheid or resulting from doctrines of racial superiority or exclusivity or contemporary forms and manifestations of racism, as a primary objective for the international community and a worldwide promotion programme in the field of human rights. United Nations organs and agencies should strengthen their efforts to implement such a programme of action related to the third decade to combat racism and racial discrimination as well as subsequent mandates to the same end. The World Conference on Human Rights strongly appeals to the international community to contribute generously to the Trust Fund for the Programme for the Decade for Action to Combat Racism and Racial Discrimination.

20. The World Conference on Human Rights urges all Governments to take immediate measures and to develop strong policies to prevent and combat all forms and manifestations of racism, xenophobia or related intolerance, where necessary by enactment of appropriate legislation, including penal measures, and by the establishment of national institutions to combat such phenomena.

21. The World Conference on Human Rights welcomes the decision of the Commission on Human Rights to appoint a Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. The World Conference on Human Rights also appeals to all States parties to the International Convention on the Elimination of All Forms of Racial Discrimination to consider making the declaration under article 14 of the Convention.

22. The World Conference on Human Rights calls upon all Governments to take all appropriate measures in compliance with their international obligations and with due regard to their respective legal systems to counter intolerance and related violence based on religion or belief, including practices of discrimination against women and including the desecration of religious sites, recognizing that every individual has the right to freedom of thought, conscience, expression and religion. The Conference also invites all States to put into practice the provisions of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

further recommends that adequate human and financial resources be made available to the Centre for Human Rights within the overall framework of strengthening the Centre's activities as envisaged by this document.

31. The World Conference on Human Rights urges States to ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them.

32. The World Conference on Human Rights recommends that the General Assembly proclaim an international decade of the world's indigenous people, to begin from January 1994, including action-orientated programmes, to be decided upon in partnership with indigenous people. An appropriate voluntary trust fund should be set up for this purpose. In the framework of such a decade, the establishment of a permanent forum for indigenous people in the United Nations system should be considered.

Migrant workers

33. The World Conference on Human Rights urges all States to guarantee the protection of the human rights of all migrant workers and their families.

34. The World Conference on Human Rights considers that the creation of conditions to foster greater harmony and tolerance between migrant workers and the rest of the society of the State in which they reside is of particular importance.

35. The World Conference on Human Rights invites States to consider the possibility of signing and ratifying, at the earliest possible time, the International Convention on the Rights of All Migrant Workers and Members of Their Families.

3. The equal status and human rights of women

36. The World Conference on Human Rights urges the full and equal enjoyment by women of all human rights and that this be a priority for Governments and for the United Nations. The World Conference on Human Rights also underlines the importance of the integration and full participation of women as both agents and beneficiaries in the development process, and reiterates the objectives established on global action for women towards sustainable and equitable development set forth in the Rio Declaration on Environment and Development and chapter 24 of Agenda 21, adopted by the United Nations Conference on Environment and Development (Rio de Janeiro, Brazil, 3-14 June 1992).

37. The equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity. These issues should be regularly and systematically addressed throughout relevant United Nations bodies and mechanisms. In particular, steps should be taken to increase cooperation and promote further integration of objectives and goals between the Commission and the Status of Women, the Commission on Human Rights, the Committee for the Elimination of Discrimination against Women, the United Nations Development Fund for Women, the United Nations Development Programme and other United Nations agencies. In this context, cooperation and

coordination should be strengthened between the Centre for Human Rights and the Division for the Advancement of Women.

38. In particular, the World Conference on Human Rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. The World Conference on Human Rights calls upon the General Assembly to adopt the draft declaration on violence against women and urges States to combat violence against women in accordance with its provisions. Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.

39. The World Conference on Human Rights urges the eradication of all forms of discrimination against women, both hidden and overt. The United Nations should encourage the goal of universal ratification by all States of the Convention on the Elimination of All Forms of Discrimination against Women by the year 2000. Ways and means of addressing the particularly large number of reservations to the Convention should be encouraged. Inter alia, the Committee on the Elimination of Discrimination against Women should continue its review of reservations to the Convention. States are urged to withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law.

40. Treaty monitoring bodies should disseminate necessary information to enable women to make more effective use of existing implementation procedures in their pursuits of full and equal enjoyment of human rights and non-discrimination. New procedures should also be adopted to strengthen implementation of the commitment to women's equality and the human rights of women. The Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women should quickly examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The World Conference on Human Rights welcomes the decision of the Commission on Human Rights to consider the appointment of a special rapporteur on violence against women at its fiftieth session.

41. The World Conference on Human Rights recognizes the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life span. In the context of the World Conference on Women and the Convention on the Elimination of All Forms of Discrimination against Women, as well as the Proclamation of Tehran of 1968, the World Conference on Human Rights reaffirms, on the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels.

42. Treaty monitoring bodies should include the status of women and the human rights of women in their deliberations and findings, making use of gender-specific data. States should be encouraged to supply information on the situation of women de jure and de facto in their reports to treaty monitoring bodies. The World Conference on Human Rights notes with satisfaction that the Commission on Human Rights adopted at its forty-ninth session resolution 1993/46 of 8 March 1993 stating that rapporteurs and working groups in the field of human rights should also be encouraged to do so. Steps should also be taken by the Division for the Advancement of Women in cooperation with other United Nations bodies, specifically the Centre for Human Rights, to ensure that the human rights activities of the United Nations regularly address violations of women's human rights, including gender-specific abuses. Training for United Nations human rights and humanitarian relief personnel to assist them to recognize and deal with human rights abuses particular to women and to carry out their work without gender bias should be encouraged.

43. The World Conference on Human Rights urges Governments and regional and international organizations to facilitate the access of women to decision-making posts and their greater participation in the decision-making process. It encourages further steps within the United Nations Secretariat to appoint and promote women staff members in accordance with the Charter of the United Nations, and encourages other principal and subsidiary organs of the United Nations to guarantee the participation of women under conditions of equality.

44. The World Conference on Human Rights welcomes the World Conference on Women to be held in Beijing in 1995 and urges that human rights of women should play an important role in its deliberations, in accordance with the priority themes of the World Conference on Women of equality, development and peace.

4. The rights of the child

45. The World Conference on Human Rights reiterates the principle of "First Call for Children" and, in this respect, underlines the importance of major national and international efforts, especially those of the United Nations Children's Fund, for promoting respect for the rights of the child to survival, protection, development and participation.

46. Measures should be taken to achieve universal ratification of the Convention on the Rights of the Child by 1995 and the universal signing of the World Declaration on the Survival, Protection and Development of Children and Plan of Action adopted by the World Summit for Children, as well as their effective implementation. The World Conference on Human Rights urges States to withdraw reservations to the Convention on the Rights of the Child contrary to the object and purpose of the Convention or otherwise contrary to international treaty law.

47. The World Conference on Human Rights urges all nations to undertake measures to the maximum extent of their available resources, with the support of international cooperation, to achieve the goals in the World Summit Plan of Action. The Conference calls on States to integrate the Convention on the

Rights of the Child into their national action plans. By means of these national action plans and through international efforts, particular priority should be placed on reducing infant and maternal mortality rates, reducing malnutrition and illiteracy rates and providing access to safe drinking water and to basic education. Whenever so called for, national plans of action should be devised to combat devastating emergencies resulting from natural disasters and armed conflicts and the equally grave problem of children in extreme poverty.

48. The World Conference on Human Rights urges all States, with the support of international cooperation, to address the acute problem of children under especially difficult circumstances. Exploitation and abuse of children should be actively combated, including by addressing their root causes. Effective measures are required against female infanticide, harmful child labour, sale of children and organs, child prostitution, child pornography, as well as other forms of sexual abuse.

49. The World Conference on Human Rights supports all measures by the United Nations and its specialized agencies to ensure the effective protection and promotion of human rights of the girl child. The World Conference on Human Rights urges States to repeal existing laws and regulations and remove customs and practices which discriminate against and cause harm to the girl child.

50. The World Conference on Human Rights strongly supports the proposal that the Secretary-General initiate a study into means of improving the protection of children in armed conflicts. Humanitarian norms should be implemented and measures taken in order to protect and facilitate assistance to children in war zones. Measures should include protection for children against indiscriminate use of all weapons of war, especially anti-personnel mines. The need for aftercare and rehabilitation of children traumatized by war must be addressed urgently. The Conference calls on the Committee on the Rights of the Child to study the question of raising the minimum age of recruitment into armed forces.

51. The World Conference on Human Rights recommends that matters relating to human rights and the situation of children be regularly reviewed and monitored by all relevant organs and mechanisms of the United Nations system and by the supervisory bodies of the specialized agencies in accordance with their mandates.

52. The World Conference on Human Rights recognizes the important role played by non-governmental organizations in the effective implementation of all human rights instruments and, in particular, the Convention on the Rights of the Child.

53. The World Conference on Human Rights recommends that the Committee on the Rights of the Child, with the assistance of the Centre for Human Rights, be enabled expeditiously and effectively to meet its mandate, especially in view of the unprecedented extent of ratification and subsequent submission of country reports.

Enforced disappearances

62. The World Conference on Human Rights, welcoming the adoption by the General Assembly of the Declaration on the Protection of All Persons from Enforced Disappearance, calls upon all States to take effective legislative, administrative, judicial or other measures to prevent, terminate and punish acts of enforced disappearances. The World Conference on Human Rights reaffirms that it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators.

6. The rights of the disabled person

63. The World Conference on Human Rights reaffirms that all human rights and fundamental freedoms are universal and thus unreservedly include persons with disabilities. Every person is born equal and has the same rights to life and welfare, education and work, living independently and active participation in all aspects of society. Any direct discrimination or other negative discriminatory treatment of a disabled person is therefore a violation of his or her rights. The World Conference on Human Rights calls on Governments, where necessary, to adopt or adjust legislation to assure access to these and other rights for disabled persons.

64. The place of disabled persons is everywhere. Persons with disabilities should be guaranteed equal opportunity through the elimination of all socially determined barriers, be they physical, financial, social or psychological, which exclude or restrict full participation in society.

65. Recalling the World Programme of Action concerning Disabled Persons, adopted by the General Assembly at its thirty-seventh session, the World Conference on Human Rights calls upon the General Assembly and the Economic and Social Council to adopt the draft standard rules on the equalization of opportunities for persons with disabilities, at their meetings in 1993.

C. Cooperation, development and strengthening of human rights

66. The World Conference on Human Rights recommends that priority be given to national and international action to promote democracy, development and human rights.

67. Special emphasis should be given to measures to assist in the strengthening and building of institutions relating to human rights, strengthening of a pluralistic civil society and the protection of groups which have been rendered vulnerable. In this context, assistance provided upon the request of Governments for the conduct of free and fair elections, including assistance in the human rights aspects of elections and public information about elections, is of particular importance. Equally important is the assistance to be given to the strengthening of the rule of law, the promotion of freedom of expression and the administration of justice, and to the real and effective participation of the people in the decision-making processes.

5. Freedom from torture

54. The World Conference on Human Rights welcomes the ratification by many Member States of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and encourages its speedy ratification by all other Member States.

55. The World Conference on Human Rights emphasizes that one of the most atrocious violations against human dignity is the act of torture, the result of which destroys the dignity and impairs the capability of victims to continue their lives and their activities.

56. The World Conference on Human Rights reaffirms that under human rights law and international humanitarian law, freedom from torture is a right which must be protected under all circumstances, including in times of internal or international disturbance or armed conflicts.

57. The World Conference on Human Rights therefore urges all States to put an immediate end to the practice of torture and eradicate this evil forever through full implementation of the Universal Declaration of Human Rights as well as the relevant conventions and, where necessary, strengthening of existing mechanisms. The World Conference on Human Rights calls on all States to cooperate fully with the Special Rapporteur on the question of torture in the fulfilment of his mandate.

58. Special attention should be given to ensure universal respect for, and effective implementation of, the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations.

59. The World Conference on Human Rights stresses the importance of further concrete action within the framework of the United Nations with the view to providing assistance to victims of torture and ensure more effective remedies for their physical, psychological and social rehabilitation. Providing the necessary resources for this purpose should be given high priority, *inter alia*, by additional contributions to the United Nations Voluntary Fund for the Victims of Torture.

60. States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law.

61. The World Conference on Human Rights reaffirms that efforts to eradicate torture should, first and foremost, be concentrated on prevention and, therefore, calls for the early adoption of an optional protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which is intended to establish a preventive system of regular visits to places of detention.

development and, in cooperation with Governments, in all relevant aspects of development cooperation.

74. The World Conference on Human Rights appeals to Governments, competent agencies and institutions to increase considerably the resources devoted to building well-functioning legal systems able to protect human rights, and to national institutions working in this area. Actors in the field of development cooperation should bear in mind the mutually reinforcing interrelationship between development, democracy and human rights. Cooperation should be based on dialogue and transparency. The World Conference on Human Rights also calls for the establishment of comprehensive programmes, including resource banks of information and personnel with expertise relating to the strengthening of the rule of law and of democratic institutions.

75. The World Conference on Human Rights encourages the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Covenant on Economic, Social and Cultural Rights.

76. The World Conference on Human Rights recommends that more resources be made available for the strengthening or the establishment of regional arrangements for the promotion and protection of human rights under the programmes of advisory services and technical assistance of the Centre for Human Rights. States are encouraged to request assistance for such purposes as regional and subregional workshops, seminars and information exchanges designed to strengthen regional arrangements for the promotion and protection of human rights in accord with universal human rights standards as contained in international human rights instruments.

77. The World Conference on Human Rights supports all measures by the United Nations and its relevant specialized agencies to ensure the effective promotion and protection of trade union rights, as stipulated in the International Covenant on Economic, Social and Cultural Rights and other relevant international instruments. It calls on all States to abide fully by their obligations in this regard contained in international instruments.

D. Human rights education

78. The World Conference on Human Rights considers human rights education, training and public information essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace.

79. States should strive to eradicate illiteracy and should direct education towards the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. The World Conference on Human Rights calls on all States and institutions to include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all learning institutions in formal and non-formal settings.

80. Human rights education should include peace, democracy, development and social justice, as set forth in international and regional human rights

68. The World Conference on Human Rights stresses the need for the implementation of strengthened advisory services and technical assistance activities by the Centre for Human Rights. The Centre should make available to States upon request assistance on specific human rights issues, including the preparation of reports under human rights treaties as well as for the implementation of coherent and comprehensive plans of action for the promotion and protection of human rights. Strengthening the institutions of human rights and democracy, the legal protection of human rights, training of officials and others, broad-based education and public information aimed at promoting respect for human rights should all be available as components of these programmes.

69. The World Conference on Human Rights strongly recommends that a comprehensive programme be established within the United Nations in order to help States in the task of building and strengthening adequate national structures which have a direct impact on the overall observance of human rights and the maintenance of the rule of law. Such a programme, to be coordinated by the Centre for Human Rights, should be able to provide, upon the request of the interested Government, technical and financial assistance to national projects in reforming penal and correctional establishments, education and training of lawyers, judges and security forces in human rights, and any other sphere of activity relevant to the good functioning of the rule of law. That programme should make available to States assistance for the implementation of plans of action for the promotion and protection of human rights.

70. The World Conference on Human Rights requests the Secretary-General of the United Nations to submit proposals to the United Nations General Assembly, containing alternatives for the establishment, structure, operational modalities and funding of the proposed programme.

71. The World Conference on Human Rights recommends that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights.

72. The World Conference on Human Rights reaffirms that the universal and inalienable right to development, as established in the Declaration on the Right to Development, must be implemented and realized. In this context, the World Conference on Human Rights welcomes the appointment by the Commission on Human Rights of a thematic working group on the right to development and urges that the Working Group, in consultation and cooperation with other organs and agencies of the United Nations system, promptly formulate, for early consideration by the United Nations General Assembly, comprehensive and effective measures to eliminate obstacles to the implementation and realization of the Declaration on the Right to Development and recommending ways and means towards the realization of the right to development by all States.

73. The World Conference on Human Rights recommends that non-governmental and other grass-roots organizations active in development and/or human rights should be enabled to play a major role on the national and international levels in the debate, activities and implementation relating to the right to

87. The World Conference on Human Rights recommends to the human rights treaty bodies, to the meetings of chairpersons of the treaty bodies and to the meetings of States parties that they continue to take steps aimed at coordinating the multiple reporting requirements and guidelines for preparing State reports under the respective human rights conventions and study the suggestion that the submission of one overall report on treaty obligations undertaken by each State would make these procedures more effective and increase their impact.
88. The World Conference on Human Rights recommends that the States parties to international human rights instruments, the General Assembly and the Economic and Social Council should consider studying the existing human rights treaty bodies and the various thematic mechanisms and procedures with a view to promoting greater efficiency and effectiveness through better coordination of the various bodies, mechanisms and procedures, taking into account the need to avoid unnecessary duplication and overlapping of their mandates and tasks.
89. The World Conference on Human Rights recommends continued work on the improvement of the functioning, including the monitoring tasks, of the treaty bodies, taking into account multiple proposals made in this respect, in particular those made by the treaty bodies themselves and by the meetings of the chairpersons of the treaty bodies. The comprehensive national approach taken by the Committee on the Rights of the Child should also be encouraged.
90. The World Conference on Human Rights recommends that States parties to human rights treaties consider accepting all the available optional communication procedures.
91. The World Conference on Human Rights views with concern the issue of impunity of perpetrators of human rights violations, and supports the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue.
92. The World Conference on Human Rights recommends that the Commission on Human Rights examine the possibility for better implementation of existing human rights instruments at the international and regional levels and encourages the International Law Commission to continue its work on an international criminal court.
93. The World Conference on Human Rights appeals to States which have not yet done so to accede to the Geneva Conventions of 12 August 1949 and the Protocols thereto, and to take all appropriate national measures, including legislative ones, for their full implementation.
94. The World Conference on Human Rights recommends the speedy completion and adoption of the draft declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms.
95. The World Conference on Human Rights underlines the importance of preserving and strengthening the system of special procedures, rapporteurs, representatives, experts and working groups of the Commission on Human Rights

- instruments, in order to achieve common understanding and awareness with a view to strengthening universal commitment to human rights.
81. Taking into account the World Plan of Action on Education for Human Rights and Democracy, adopted in March 1993 by the International Congress on Education for Human Rights and Democracy of the United Nations Educational, Scientific and Cultural Organization, and other human rights instruments, the World Conference on Human Rights recommends that States develop specific programmes and strategies for ensuring the widest human rights education and the dissemination of public information, taking particular account of the human rights needs of women.
82. Governments, with the assistance of intergovernmental organizations, national institutions and non-governmental organizations, should promote an increased awareness of human rights and mutual tolerance. The World Conference on Human Rights underlines the importance of strengthening the World Public Information Campaign for Human Rights carried out by the United Nations. They should initiate and support education in human rights and undertake effective dissemination of public information in this field. The advisory services and technical assistance programmes of the United Nations system should be able to respond immediately to requests from States for educational and training activities in the field of human rights as well as for special education concerning standards as contained in international human rights instruments and in humanitarian law and their application to special groups such as military forces, law enforcement personnel, police and the health profession. The proclamation of a United Nations decade for human rights education in order to promote, encourage and focus these educational activities should be considered.
- E. Implementation and monitoring methods
83. The World Conference on Human Rights urges Governments to incorporate standards as contained in international human rights instruments in domestic legislation and to strengthen national structures, institutions and organs of society which play a role in promoting and safeguarding human rights.
84. The World Conference on Human Rights recommends the strengthening of United Nations activities and programmes to meet requests for assistance by States which want to establish or strengthen their own national institutions for the promotion and protection of human rights.
85. The World Conference on Human Rights also encourages the strengthening of cooperation between national institutions for the promotion and protection of human rights, particularly through exchanges of information and experience, as well as cooperation with regional organizations and the United Nations.
86. The World Conference on Human Rights strongly recommends in this regard that representatives of national institutions for the promotion and protection of human rights convene periodic meetings under the auspices of the Centre for Human Rights to examine ways and means of improving their mechanisms and sharing experiences.

and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in order to enable them to carry out their mandates in all countries throughout the world, providing them with the necessary human and financial resources. The procedures and mechanisms should be enabled to harmonize and rationalize their work through periodic meetings. All States are asked to cooperate fully with these procedures and mechanisms.

96. The World Conference on Human Rights recommends that the United Nations assume a more active role in the promotion and protection of human rights in ensuring full respect for international humanitarian law in all situations of armed conflict, in accordance with the purposes and principles of the Charter of the United Nations.

97. The World Conference on Human Rights, recognizing the important role of human rights components in specific arrangements concerning some peace-keeping operations by the United Nations, recommends that the Secretary-General take into account the reporting, experience and capabilities of the Centre for Human Rights and human rights mechanisms, in conformity with the Charter of the United Nations.

98. To strengthen the enjoyment of economic, social and cultural rights, additional approaches should be examined, such as a system of indicators to measure progress in the realization of the rights set forth in the International Covenant on Economic, Social and Cultural Rights. There must be a concerted effort to ensure recognition of economic, social and cultural rights at the national, regional and international levels.

F. Follow-up to the World Conference on Human Rights

99. The World Conference on Human Rights on Human Rights recommends that the General Assembly, the Commission on Human Rights and other organs and agencies of the United Nations system related to human rights consider ways and means for the full implementation, without delay, of the recommendations contained in the present Declaration, including the possibility of proclaiming a United Nations decade for human rights. The World Conference on Human Rights further recommends that the Commission on Human Rights annually review the progress towards this end.

100. The World Conference on Human Rights requests the Secretary-General of the United Nations to invite on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights all States, all organs and agencies of the United Nations system related to human rights, to report to him on the progress made in the implementation of the present Declaration and to submit a report to the General Assembly at its fifty-third session, through the Commission on Human Rights and the Economic and Social Council. Likewise, regional and, as appropriate, national human rights institutions, as well as non-governmental organizations, may present their views to the Secretary-General on the progress made in the implementation of the present Declaration. Special attention should be paid to assessing the progress towards the goal of universal ratification of international human rights treaties and protocols adopted within the framework of the United Nations system.

Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights (General Assembly resolution 48/94 of 20 December 1993)



General Assembly

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Agenda item 108 (a)

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Third Committee (A/48/626)]

48/94.

Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights

The General Assembly,

Reaffirming its faith in the importance of the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in its resolution 1514 (XV) of 14 December 1960,

Reaffirming also the importance of the universal realization of the right of peoples to self-determination, national sovereignty and territorial integrity and of the speedy granting of independence to colonial countries and peoples as imperatives for the full enjoyment of all human rights,

Reaffirming further the obligation of all Member States to comply with the principles of the Charter of the United Nations and the resolutions of the United Nations regarding the exercise of the right to self-determination by peoples under colonial and foreign domination,

Recalling the Vienna Declaration and Programme of Action 1/ adopted at the World Conference on Human Rights,

Considering the urgent need of Namibia for assistance in its efforts to reconstruct and strengthen its fledgling economic and social structures,

1/ Report of the World Conference on Human Rights, Vienna, 14-25 June 1993 (A/CONF.157/24 (Part I)), chap. III.

/...

Recalling the Abuja Declaration on South Africa, adopted by the Assembly of Heads of State and Government of the Organization of African Unity at its twenty-seventh ordinary session, held at Abuja from 3 to 5 June 1991, 2/ and the statement on developments in South Africa, adopted by the Ad Hoc Committee of the Organization of African Unity on Southern Africa at its extraordinary session of the Ministers for Foreign Affairs, held on 29 September 1993, 3/

Affirming the need to exercise vigilance with respect to developments in South Africa to ensure that the common objective of the international community and the peoples of South Africa is achieved by the establishment of a united, democratic and non-racial South Africa without deviation or obstruction,

Recalling the signing of the General Peace Agreement for Mozambique 4/ at Rome on 4 October 1992, which provides for the termination of the armed conflict in that country,

Reaffirming the national unity and territorial integrity of the Comoros, Deeply concerned by Israel's continuing occupation of parts of southern Lebanon and its frequent attacks against Lebanese territory and people, as well as its refusal to implement Security Council resolution 425 (1978) of 19 March 1978,

Bearing in mind United Nations resolutions related to the question of Palestine,

Taking note of the recent positive evolution in the Middle East peace process, in particular the signing on 13 September 1993 of the Declaration of Principles on Interim Self-Government Arrangements 5/ by the Government of the State of Israel and the Palestine Liberation Organization,

1. Calls upon all States to implement fully and faithfully all the relevant resolutions of the United Nations regarding the exercise of the right to self-determination and independence by peoples under colonial and foreign domination;

2. Reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation, in all its forms and by all available means;

3. Reaffirms also the inalienable right of the Palestinian people and all peoples under foreign occupation and colonial domination to self-determination, independence and sovereignty;

2/ A/46/390, annex II.

3/ A/48/461-S/26514, annex.

4/ S/24635, annex.

5/ See A/48/486-S/26560.

/...

4. Calls upon those Governments which do not recognize the right to self-determination and independence of all peoples still under colonial domination, alien subjugation and foreign occupation to do so;

5. Calls upon Israel to refrain from violation of the fundamental rights of the Palestinian people and from denial of its right to self-determination;

6. Urges all States, the specialized agencies and organizations of the United Nations system, as well as other international organizations, to extend their support to the Palestinian people through its sole and legitimate representative, the Palestine Liberation Organization, in its struggle to regain its right to self-determination and independence in accordance with the Charter of the United Nations;

7. Urgently appeals to all States, the organizations of the United Nations system and other international organizations to render assistance to Namibia in order to enhance its efforts to promote democracy and economic development;

8. Strongly urges the Government of South Africa to take additional steps to implement fully the provisions of the statement on developments in South Africa, adopted on 29 September 1993 by the Ad Hoc Committee of the Organization of African Unity on Southern Africa, 3/ in order to achieve the objectives of the Declaration on Apartheid and its Destructive Consequences in Southern Africa; 6/

9. Calls upon all parties to refrain immediately from acts of violence and calls upon the Government of South Africa to exercise its responsibility to end the ongoing violence through, *inter alia*, strict adherence to the National Peace Accord signed on 14 September 1991; 7/

10. Calls upon all signatories to the National Peace Accord to manifest their commitment to peace by fully implementing its provisions, and calls upon other parties to contribute to the attainment of its objectives;

11. Strongly condemns the establishment and use of armed groups with a view to pitting them against the national liberation movements;

12. Demands that the Government of South Africa repeal the security legislation that remains in force, which inhibits free and peaceful political activity;

13. Requests the Secretary-General to act speedily to implement Security Council resolution 772 (1992) of 17 August 1992 in its entirety, including those parts pertaining to the investigation of criminal conduct and the monitoring of all armed formations in the country;

14. Demands the full application of the mandatory arms embargo against South Africa, imposed under Security Council resolution 418 (1977) of 4

6/ Resolution S-16/1, annex.

7/ See Centre against Apartheid, Notes and Documents, No. 23/91.

/...

November 1977, by all countries and more particularly by those countries which maintain military and nuclear cooperation with the Government of South Africa and continue to supply it with related matériel;

15. Appeals to the international community, pursuant to General Assembly resolution 47/82 of 16 December 1992, to continue to extend assistance to Lesotho to enable it to fulfil its international humanitarian obligations towards refugees;

16. Pays tribute to the Government and people of Angola for their noble contribution to the evolving climate of peace in southern Angola, and addresses its strongest appeal to the National Union for the Total Independence of Angola to undertake to commit itself to the peace process that will lead to a comprehensive settlement in Angola on the basis of the Peace Accords; 8/

17. Demands that the Government of South Africa pay compensation to Angola for damages caused, in accordance with the relevant resolutions and decisions of the Security Council;

18. Demands also that the Government of South Africa pay full and adequate compensation to Botswana for the loss of life and damage to property resulting from the unprovoked and unwarranted military attacks of 14 June 1985, 19 May 1986 and 20 June 1988 on the capital of Botswana;

19. Calls upon the international community to continue to extend its generous support to the ongoing efforts aimed at ensuring respect for and the successful implementation of the General Peace Agreement for Mozambique 4/ and at assisting the Government of Mozambique in the establishment of lasting peace and democracy and in the promotion of an effective programme of national reconstruction in that country;

20. Fully supports the Secretary-General in his efforts to implement the plan for the settlement of the question of Western Sahara by organizing, in cooperation with the Organization of African Unity, a referendum for the self-determination of the people of Western Sahara;

21. Notes the contacts between the Government of the Comoros and the Government of France in the search for a just solution to the problem of the integration of the Comorian island of Mayotte into the Comoros, in accordance with the resolutions of the Organization of African Unity and the United Nations on the question;

22. Strongly condemns the continued violation of the human rights of the peoples still under colonial domination and alien subjugation;

23. Calls for a substantial increase in all forms of assistance given by all States, United Nations organs, the specialized agencies and non-governmental organizations to the victims of racism, racial discrimination and apartheid through anti-apartheid organizations and national liberation movements recognized by the Organization of African Unity;

8/ See S/22609, annex.

/...

24. Reaffirms that the practice of using mercenaries against sovereign States and national liberation movements constitutes a criminal act, and calls upon the Governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territories and the transit of mercenaries through their territories to be punishable offences and prohibiting their nationals from serving as mercenaries, and to report on such legislation to the Secretary-General;

25. Demands the immediate and unconditional release of all persons detained or imprisoned as a result of their struggle for self-determination and independence, full respect for their fundamental individual rights and compliance with article 5 of the Universal Declaration of Human Rights, 9/ under which no one shall be subjected to torture or to cruel, inhuman or degrading treatment;

26. Expresses its appreciation for the material and other forms of assistance that peoples under colonial rule continue to receive from Governments, organizations of the United Nations system and other intergovernmental organizations, and calls for a substantial increase in that assistance;

27. Urges all States, the specialized agencies and other competent organizations of the United Nations system to do their utmost to ensure the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples and to intensify their efforts to support peoples under colonial, foreign and racist domination in their just struggle for self-determination and independence;

28. Decides to consider this question at its forty-ninth session under the item entitled "Right of peoples to self-determination".

85th plenary meeting
20 December 1993

**Protocol on Democracy and Good Governance
Supplementary to the Protocol relating to the
Mechanism For Conflict Prevention, Management,
Resolution, Peacekeeping and Security, Economic
Community of West African States, 2001
(Protocol A/SP1/12/01)**

PREAMBLE

WE, THE HEADS OF STATE AND GOVERNMENT OF THE MEMBER STATES OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS):

MINDFUL OF the ECOWAS Treaty signed in Cotonou on 24 July 1993, notably its Article 58;

MINDFUL OF the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security signed in Lome on 10 December 1999;

CONSIDERING all the issues enumerated or reaffirmed in the preamble to the Protocol of 10 December 1999 referred to above;

MINDFUL OF the principles set out in the OAU Solemn Declaration on Security, Stability, Development and Cooperation in Africa adopted in Abuja on 8 and 9 May 2000 and the Decision AHG. DEC 142 (XXV) on the framework for OAU's reaction to unconstitutional change of government, adopted in Algiers in July 1999;

CONSIDERING the Harare Declaration adopted by the Commonwealth on 20 October 1991 and the Bamako Declaration adopted by the member countries of the Francophonie on 3 November 2000;

CONSIDERING also the Cotonou Declaration adopted on 6 December 2000 at the end of the 4th international conference on new or restored democracies;

RECALLING that women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the African Charter on Human and Peoples Rights and the Convention on the Elimination of all forms of Discrimination Against Women;

Protocol A/SPI/12/01 on Democracy and Good Governance
Supplementary to the Protocol relating to the Mechanism
For Conflict Prevention, Management, Resolution,
Peacekeeping and Security

**Executive Secretariat
Dakar, December 2001**

MINDFUL of the ratification of the African Charter on Human and Peoples Rights and other international human rights instruments by the majority of the Member States and their solemn commitment to eliminate all forms of discrimination and harmful practices against women;

CONCERNED about the increasing wave of international terrorism;

CONCERNED also about the increasing incidence of conflicts caused by religious intolerance, political marginalisation and non-transparent elections;

HAVING OBSERVED that to become really effective, the Protocol of 10 December 1999 needs to be complemented through the incorporation of provisions concerning issues such as prevention of internal crises, democracy and good governance, the rule of law, and human rights;

HAVING DECIDED to enhance the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security;

HAVE AGREED AS FOLLOWS:

DEFINITIONS:

The terms and expressions used in the present Supplementary Protocol have the same meanings as those used in the Protocol of 10th December 1999.

The list of definitions is completed as follows:

"Treaty" means the Revised Treaty of the Economic Community of West African States (ECOWAS) signed in Cotonou on 24 July 1993;

"Protocol" means the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, signed in Lome on 10th December 1999;

"Supplementary Protocol" means the Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security;

"Community" means the Economic Community of West African States referred to under Article 2 of the Treaty;

"Member State" or "Member States" means a Member State or Member States of the Community as defined in paragraph 2 of Article 2 of the Treaty;

"Community citizen or citizens" means any national (s) of Member States who satisfy the conditions stipulated in the Protocol defining Community citizenship;

"Court of Justice" means the Court of Justice of the Community established under Article 15 of the Treaty;

"Authority" means the Authority of Heads of State and Government of the Economic Community of West African States established by Article 7 of the Treaty;

"Mediation and Security Council" means the Mediation and Security Council as defined by Article 8 of the Protocol;

"Defence and Security Commission" means the Defence and Security Commission as defined in Article 18 of the Protocol;

"Executive Secretary" means the ECOWAS Executive Secretary appointed in accordance with Article 18 of the Treaty;

"Executive Secretariat" means the Executive Secretariat established under Article 17 of the Treaty;

"Deputy Executive Secretary" means the Deputy Executive Secretary in charge of Political Affairs, Defence and Security as referred to in Article 16 of the Protocol;

“ECOMOG” means the ECOWAS Cease-fire Monitoring Group, which constitutes the Community’s intervention force as defined in Article 21 of the Protocol relating to the Mechanism etc;

“Armed Forces” includes the army, Airforce, Navy, and Gendarmerie;

“Security Forces” the Police, Gendarmerie, National Guards and other Forces assigned with security.

CHAPTER 1

PRINCIPLES

The provisions of this chapter complement and clarify the principles set out in Article 2 of the Protocol of 10 December 1999.

SECTION I: CONSTITUTIONAL CONVERGENCE PRINCIPLES

Article 1:

The following shall be declared as constitutional principles shared by all Member States:

- a) - Separation of powers - the Executive, Legislative and Judiciary.
- Empowerment and strengthening of parliaments and guarantee of parliamentary immunity.
- Independence of the Judiciary: Judges shall be independent in the discharge of their duties.
- The freedom of the members of the Bar shall be guaranteed; without prejudice to their penal or disciplinary responsibility in the event of contempt of court or breaches of the common law.

- b) Every accession to power must be made through free, fair and transparent elections.
- c) Zero tolerance for power obtained or maintained by unconstitutional means.
- d) Popular participation in decision-making, strict adherence to democratic principles and decentralisation of power at all levels of governance.
- e) The armed forces must be apolitical and must be under the command of a legally constituted political authority; no serving member of the armed forces may seek to run for elective political.
- f) Secularism and neutrality of the State in all matters relating to religion; freedom for each individual to practise, within the limits of existing laws, the religion of his/her choice everywhere on the national territory. The secularism shall extend to all parts of the State, but shall not deprive the State of the right to regulate, with due respect to human rights, the different religions practised on the national territory or to intervene when law and order break down as a result of any religious activity.
- g) The State and all its institutions belong to all the citizens; therefore none of their decisions and actions shall involve any form of discrimination, be it on an ethnic, racial, religion or regional basis.
- h) The rights set out in the African Charter on Human and People’s Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights.

In the absence of a court of special jurisdiction, the present Supplementary Protocol shall be regarded as giving the necessary powers to common or civil law judicial bodies.

- i) Political parties shall be formed and shall have the right to carry out their activities freely, within the limits of the law. Their formation and activities shall not be based on ethnic, religious, regional or racial considerations. They shall participate freely and without hindrance or discrimination in any electoral process. The freedom of the opposition shall be guaranteed.

Each Member State may adopt a system for financing political parties, in accordance with criteria set under the law.

- j) The freedom of association and the right to meet and organise peaceful demonstrations shall also be guaranteed.
- k) The freedom of the press shall be guaranteed.
- l) All former Heads of State shall enjoy a special status including freedom of movement. They shall enjoy special benefits compatible to their status as former Heads of State.

SECTION II: ELECTIONS

Article 2

1. No substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of Political actors.
2. All the elections shall be organised on the dates or at periods fixed by the Constitution or the electoral laws.

3. Member States shall take all appropriate measures to ensure that women have equal rights with men to vote and be voted for in elections, to participate in the formulation of government policies and the implementation thereof and to hold public offices and perform public functions at all levels of governance.

Article 3

The bodies responsible for organising the elections shall be independent or neutral and shall have the confidence of all the political actors. Where necessary, appropriate national consultations shall be organised to determine the nature and the structure of the bodies.

Article 4

1. Each ECOWAS Member State shall ensure the establishment of a reliable registry of births and deaths. A central registry shall be established in each Member State.
2. Member States shall cooperate in this area with a view to exchanging experiences and where necessary providing technical assistance to each other in the production of reliable voters' lists.

Article 5

The voters' lists shall be prepared in a transparent and reliable manner, with the collaboration of the political parties and voters who may have access to them whenever the need arises.

Article 6

The preparation and conduct of elections and the announcement of results shall be done in a transparent manner.

Article 7

Adequate arrangements shall be made to hear and dispose of all petitions relating to the conduct of elections and announcement of results.

Article 8

Member States shall use the services of civil society organisations involved in electoral matters to educate and enlighten the public on the need for peaceful elections devoid of all acts of violence.

Article 9

The party and/or candidate who loses the elections shall concede defeat to the political party and/or candidate finally declared the winner, following the guidelines and within the deadline stipulated by the law.

Article 10

All holders of power at all levels shall refrain from acts of intimidation or harassment against defeated candidates or their supporters.

SECTION III: ELECTION MONITORING AND ECOWAS ASSISTANCEArticle 11

The provisions of Article 42 of the Protocol of 10th December 1999 are hereby complemented by the provisions under this section.

Article 12

1. At the request of any Member State, ECOWAS may provide assistance in the conduct of any election.

2. Such assistance may take any form.
3. Also, ECOWAS may dispatch a monitoring team to the country concerned for the purpose of monitoring the elections.
4. The decision in this respect shall be taken by the Executive Secretary.

Article 13

1. As elections in a Member State approach, the Executive Secretary shall dispatch a fact-finding Mission to the Member State conducting an election.
2. This mission may be followed by an exploratory Mission aimed at:
 - collecting all texts governing the elections concerned;
 - gathering all information on the conditions under which the elections shall be conducted;
 - collecting all pertinent information relating to the contesting candidates or political parties;
 - meeting all candidates, political party leaders, government authorities and other competent bodies;
 - assessing the status of preparations for the elections;
 - gathering any other useful information that may provide a clear picture of the situation.

Article 14:

1. The Executive Secretary shall appoint the leader and the members of the Observer/Supervisory Mission, who shall be independent persons and nationals of Member States other than the Member State conducting the elections.
2. The Members of the Mission shall include women.
3. Staff of the Executive Secretariat shall be designated to assist the Mission.

Article 15:

1. The Observer/Supervisory Mission, with the documents collected by the exploratory Mission and the report prepared by the Mission, shall arrive in the Member State concerned at least forty-eight hours prior to the conduct of the elections.

2. The Observer/Supervisory Mission may be preceded by ECOWAS Staff, who shall prepare the meetings to be held between the Mission and the national authorities.

3. The Mission shall be expected to hold consultations with the relevant authorities of the host government for an exchange of views and in order to determine the mode of deployment in the host Member State.

4. It may establish co-operation links with NGO or any other observer teams while maintaining its autonomy.

5. The members of the Mission shall show restraint and refrain from making any individual statement. Any statement shall be made collectively and on behalf of the Mission by the team leader or a spokesperson appointed for this purpose.

Article 16:

1. The Mission shall remain in the country throughout the election period and until the election results are announced.
2. The Mission shall also submit a report to the Executive Secretary.
3. The Report shall comprise:
 - the Mission's own observations;
 - statements by witnesses;
 - its assessment of the conduct of the elections from the point of view of the national laws governing the elections and the universal principles in electoral matters;
 - its recommendations for the improvement of the conduct of future elections and monitoring Missions.

Article 17:

1. The Observer/Supervisory Mission's report shall be signed by all Members of the Mission and submitted to the Executive Secretary by the Mission's leader within fifteen (15) days with effect from the date of accomplishment of the Mission.
2. Before leaving the host country, the Mission shall convene a consultative meeting for the preparation of the report.
3. Any member of the Mission, who is unable to attend the meeting, shall submit a report in writing to the Mission's leader before leaving the country.
4. ECOWAS Staff shall assist the Mission in the preparation of the report.

Article 18:

The report shall be forwarded by the Executive Secretary, together with his own observations, if necessary, to the Mediation and Security Council for recommendations to be made to the country concerned and/or to all Member States, and for measures to be taken, where necessary.

SECTION IV. THE ROLE OF THE ARMED FORCES, THE POLICE AND THE SECURITY FORCES IN A DEMOCRACY

Article 19:

1. The armed forces and police shall be non-partisan and shall remain loyal to the nation. The role of the armed forces shall be to defend the independence and the territorial integrity of the State and its democratic institutions.

2. The police and other security agencies shall be responsible for the maintenance of law and order and the protection of persons and their properties.

3. The armed forces, the police and other security agencies shall participate in ECOMOG missions as provided for in Article 28 of the Protocol.

4. They may also, on the decision of the constitutionally constituted authorities, participate in peacekeeping missions under the auspices of the African Union or the United Nations.

5. Members of the armed forces may be drafted to participate in national development projects.

Article 20:

1. The armed forces, the police and other security agencies shall be under the authority of legally constituted civilian authorities.

2. The civilian authorities shall respect the apolitical nature of the armed forces and police. All political or trade union activities and propaganda shall be forbidden in the barracks and within the armed forces.

Article 21:

The armed and security forces personnel as citizens, shall be entitled to all the rights set out in the constitution, except as may be stated otherwise in their special regulations.

Article 22:

1. The use of arms to disperse non-violent meetings or demonstrations shall be forbidden. Whenever a demonstration becomes violent, only the use of minimal and/or proportionate force shall be authorised.

2. All cruel, inhuman and degrading treatment shall be forbidden.

3. The security forces, while carrying out investigations, shall not disturb or arrest family members or relations of the person presumed guilty or suspected of having committed an offence.

Article 23:

1. The armed forces, the police and other security agencies shall during their training receive instructions on the Constitution of their country, ECOWAS principles and regulations, human rights, humanitarian law and democratic principles. In this regard, seminars and meetings bringing together members of the armed forces, Police and other Security Agencies and other sectors of society shall be organised from time to time.

2. Joint training sessions shall also be arranged for members of the armed forces from different ECOWAS countries, the police, other security forces, university dons and members of the civil society.

Article 24:

1. The Member States undertake to strengthen their national agencies responsible for preventing and combating terrorism.
2. In accordance with Articles 3 (d) and 16 (1) of the Protocol, the Department of Political Affairs, Defence and Security of the Executive Secretariat shall initiate joint activities for the national agencies of Member States in charge of preventing and combating terrorism.

SECTION V: POVERTY ALLEVIATION AND PROMOTION OF SOCIAL DIALOGUE

Article 25:

Member States agree that poverty alleviation and promotion of social dialogue are important factors for peace.

Article 26:

Member States undertake to provide the basic human needs of their populations.

Article 27:

Member States undertake to fight poverty effectively in their respective countries and within the Community, especially by:

- creating an environment conducive to private investment and the development of a dynamic and competitive private sector;

- providing the instruments necessary for the enhancement of job creation and for the development of the social sector as a matter of priority;
- ensuring equitable distribution of resources and income in order to consolidate national unity and solidarity;
- enhancing the integration of economic, financial and banking activities through harmonisation of commercial and financial laws and establishment of Community multi-national corporations.

Article 28:

1. Employers associations and trade unions shall be organised and/or strengthened in each Member State and at the regional level of ECOWAS.
2. Member States shall promote social dialogue. In this regard, employers associations and workers unions shall meet regularly among themselves and with political and administrative authorities with a view to preventing social conflict.
3. There shall be associations of farmers, artisans and artists in each Member State and at the sub-regional level of ECOWAS.

SECTION VI: EDUCATION, CULTURE AND RELIGION

Article 29:

Education, culture and religion are essential factors for peace, stability and development in each Member State.

Article 30:

1. There shall be regular exchanges of students and academics between Member States.

2. Community institutions shall be established to provide training for students from the sub-region.
3. - In accordance with Article 36 of the Protocol, the Executive Secretariat shall, from now on, provide budgetary allocations for immediate funding of the programmes as contained in this Article.
- Each Member State shall in the shortest possible time also make a contribution for the take-off and implementation of the programmes contained in this Article;
- A percentage of the Community levy shall be allocated for the establishment of a fund for the implementation of the activities outlined in this Article;
4. A policy to promote women's education at all levels and in all fields of training shall be adopted and implemented in each Member State and at the level of ECOWAS.
5. Member States shall guarantee women equal rights with men in the field of education and in particular, shall ensure the same conditions for career and vocational guidance, access to the same curricula, access to opportunities to benefit from scholarships and other study grants. They shall also ensure the elimination of stereotyped concepts of roles of men and women at all levels and in all forms of education.

Article 31:

1. The culture of every group of people in each Member State shall be respected and developed.

2. The Executive Secretary shall take the necessary measures to organise, within the sub-region, periodic inter-state cultural events: festivals of arts and culture, symposia, various cultural events on literature, music, arts, and sports.
3. Member States undertake to take measures to eliminate or prevent religious conflicts and to promote religious tolerance and harmony. To this end, permanent structures for consultations among the different religions on the one hand and between the different religions and the State on the other hand, shall be established at national levels.
4. The Executive Secretary shall take the necessary measures to promote, through periodic meetings, consultations among the religious organisations of Member States.

SECTION VII: RULE OF LAW, HUMAN RIGHTS AND GOOD GOVERNANCE

Article 32:

Member States agree that good governance and press freedom are essential for preserving social justice, preventing conflict, guaranteeing political stability and peace and for strengthening democracy.

Article 33:

1. Member States recognise that the rule of law involves not only the promulgation of good laws that are in conformity with the provisions on human rights, but also a good judicial system, a good system of administration, and good management of the State apparatus.
2. They are also convinced that a system that guarantees the smooth running of the State and its administrative and judicial services, contributes to the consolidation of the rule of law.

Article 34:

1. Member States and the Executive Secretariat shall endeavour to adopt at national and regional levels, practical modalities for the enforcement of the rule of law, human rights, justice and good governance.
2. Member States shall ensure accountability, professionalism, transparency and expertise in the public and private sectors.

Article 35:

1. Member States shall establish independent national institutions to promote and protect human rights.
2. The Executive Secretariat shall take measures to strengthen their capacities. The institutions shall be organised into a regional network.

Within the framework of this network, each national institution shall systematically submit to the Executive Secretariat, any report on human rights violations observed on its territory.

Such reports and reactions of governments shall be widely disseminated through the most appropriate means.

Article 36:

Member States shall institutionalise a national mediation system.

Article 37:

1. Each Member State shall work towards ensuring pluralism of the information sector and the development of the media.

2. Each Member State may give financial assistance to privately-owned media. The distribution and allocation of such assistance shall be done by an independent national body or by a body freely instituted by the journalists themselves.

Article 38:

1. Member States undertake to fight corruption and manage their national resources in a transparent manner, ensuring that they are equitably distributed.
2. In this regard, Member States and the Executive Secretariat undertake to establish appropriate mechanisms to address issues of corruption within the Member States and at the Community level.

Article 39:

Protocol A/P.1/7/91 adopted in Abuja on 6 July 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed.

SECTION VIII: WOMEN, CHILDREN AND THE YOUTHArticle 40:

Member States agree that the development and promotion of the welfare of women are essential factors for development, progress and peace in the society. Consequently, they undertake to eliminate all forms of discrimination and harmful and degrading practices against women.

Article 41:

1. Member States shall guarantee children's rights and give them access to basic education.
2. Special laws shall be enacted in each Member State and at the level of the Community against child trafficking and child prostitution.
3. The Community shall adopt laws and regulations on Child Labour in line with the provisions of the International Labour Organisation (ILO).

Article 42:

1. Member States shall agree on rules to be adopted on the training and development of the youth.
2. Uniform laws shall be adopted within the Community to prevent and handle cases of juvenile delinquency.

Article 43:

The Executive Secretariat shall put in place all necessary structures within its establishment to ensure the effective implementation of common policies and programmes relating to the education and the promotion of the welfare of women and youth.

CHAPTER IIMODALITIES FOR IMPLEMENTATION AND SANCTIONSArticle 44:

1. This Article complements the provisions of Chapter V of the Protocol of 10th December 1999.

2. In order to give full force to the provision of Article 28 of this Supplementary Protocol and in accordance with Article 57 of the Treaty, a legal convention incorporating, if need be, Convention A/P.1/7/92 relating to mutual assistance in criminal matters, and the Convention A/P1/8/94 on Extradition shall be elaborated and adopted not later than twelve months after the entry into force of this Supplementary Protocol.

Article 45:

1. In the event that democracy is abruptly brought to an end by any means or where there is massive violation of Human Rights in a Member State, ECOWAS may impose sanctions on the State concerned.
2. The sanctions which shall be decided by the Authority may take the following forms, in increasing order of severity:
 - Refusal to support the candidates presented by the Member State concerned for elective posts in international organisations;
 - Refusal to organise ECOWAS meetings in the Member State concerned;
 - Suspension of the Member State concerned from all ECOWAS decision-making bodies. During the period of the suspension the Member State concerned shall be obliged to pay its dues for the period.
3. During the period of suspension, ECOWAS shall continue to monitor, encourage and support the efforts being made by the suspended Member State to return to normalcy and constitutional order;
4. On the recommendation of the Mediation and Security Council, a decision may be taken at the appropriate time to proceed as stipulated in Article 45 of the Protocol of 10th December 1999.

CHAPTER III

GENERAL AND FINAL PROVISIONS

Article 46:

This Supplementary Protocol shall form an integral part of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, signed in Lome on 10 December 1999.

Article 47: Amendments

1. Any Member State may submit proposals for the amendment or revision of this Supplementary Protocol.
2. Any such proposals shall be submitted to the Executive Secretary who shall notify other Member States not later than thirty days after the receipt of such proposals. Amendments or revisions shall not be considered by the Authority unless Member States shall have been given at least one month's notice thereof.
3. Amendments or revisions shall be adopted by the Authority.

Article 48: Withdrawal

1. Any Member State wishing to withdraw from this Supplementary Protocol shall give a one-year written notice to the Executive Secretary who shall inform Member States thereof. At the end of this period of one year, if such notice is not withdrawn, such a State shall cease to be a party to this Supplementary Protocol.
2. During the period of one year referred to in the preceding paragraph, such a Member State shall nevertheless continue to observe the provisions of this Supplementary Protocol and discharge its obligations thereunder.

Article 49: Entry into Force

This Supplementary Protocol shall enter into force upon ratification by a least nine (9) signatory States in accordance with the constitutional procedures of each Member State.

Article 50: Depository Authority

This Supplementary Protocol and all instruments of ratification shall be deposited with the Executive Secretariat which shall transmit certified true copies to all Member States and notify them of the dates of deposit of instruments of ratification by the Member States and shall register it with the Organisation of African Unity (OAU)/African Union (AU), as well as the United Nations (UN) and any other organisation as may be decided by the Council.

IN FAITH WHEREOF WE, THE HEADS OF STATE AND GOVERNMENT OF THE MEMBER STATES OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS) HAVE SIGNED THIS SUPPLEMENTARY PROTOCOL
IN SINGLE ORIGINAL IN THE ENGLISH, FRENCH AND PORTUGUESE LANGUAGES, ALL TEXTS BEING EQUALLY AUTHENTIC

DONE AT DAKAR ON THIS 21ST DAY OF DECEMBER 2001

**African Charter on Democracy,
Elections and Governance, 2007**

AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE

PREAMBLE

We, the Member States of the African Union (AU);

Inspired by the objectives and principles enshrined in the Constitutive Act of the African Union, particularly Articles 3 and 4, which emphasise the significance of good governance, popular participation, the rule of law and human rights;

Recognising the contributions of the African Union and Regional Economic Communities to the promotion, nurturing, strengthening and consolidation of democracy and governance;

Reaffirming our collective will to work relentlessly to deepen and consolidate the rule of law, peace, security and development in our countries;

Guided by our common mission to strengthen and consolidate institutions for good governance, continental unity and solidarity;

Committed to promote the universal values and principles of democracy, good governance, human rights and the right to development;

Cognizant of the historical and cultural conditions in Africa;

Seeking to entrench in the Continent a political culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies;

Concerned about the unconstitutional changes of governments that are one of the essential causes of insecurity, instability and violent conflict in Africa;

Determined to promote and strengthen good governance through the institutionalization of transparency, accountability and participatory democracy;

Convinced of the need to enhance the election observation missions in the role they play, particularly as they are an important contributory factor to ensuring the regularity, transparency and credibility of elections;

Desirous to enhance the relevant Declarations and Decisions of the OAU/AU (including the 1990 Declaration on the political and socio-economic situation in Africa and the fundamental changes taking place in the world, the 1995 Cairo Agenda for the Re-launch of Africa's Economic and Social Development, the 1999 Algiers Declaration on Unconstitutional Changes of Government, the 2000



Lomé Declaration for an OAU Response to Unconstitutional Changes of Government, the 2002 OAU/AU Declaration on Principles Governing Democratic Elections in Africa, the 2003 Protocol Relating to the Establishment of the Peace and Security Council of the African Union);

Committed to implementing Decision EX.CL/Dec.31(III) adopted in Maputo, Mozambique, in July 2003 and Decision EX.CL/124(V) adopted in Addis Ababa, Ethiopia, in May 2004 respectively, by the adoption of an African Charter on Democracy, Elections and Governance;

HAVE AGREED AS FOLLOWS:

Chapter 1 Definitions

Article 1

In this Charter, unless otherwise stated, the following expressions shall have the following meaning:

“AU” means the African Union;

“African Human Rights Commission” means the African Commission on Human and Peoples' Rights;

“African Peer Review Mechanism” AFRM means the African Peer Review Mechanism;

“Assembly” means the Assembly of Heads of State and Government of the African Union;

“Commission” means the Commission of the Union;

“Constitutive Act” means the Constitutive Act of the Union;

“Charter” means the African Charter on Democracy, Elections and Governance;

“Member States” means the Member States of the African Union;

“National Electoral Body” means a competent authority, established by the relevant legal instruments of a State Party, responsible for organizing and supervising elections;

“NEPAD” means the New Partnership for Africa's Development;

“Peace and Security Council” means the Peace and Security Council of the African Union;

“Regional Economic Communities” means the regional integration blocs of the African Union;

“State Party” means any Member State of the African Union which has ratified or acceded to this Charter and deposited the instruments for ratification or accession with the Chairperson of the African Union Commission;

“Union” means the African Union.



Chapter 2 Objectives

Article 2

The objectives of this Charter are to:

1. Promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights;
2. Promote and enhance adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the State Parties;
3. Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments;
4. Prohibit, reject and condemn unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development;
5. Promote and protect the independence of the judiciary;
6. Nurture, support and consolidate good governance by promoting democratic culture and practice, building and strengthening governance institutions and inculcating political pluralism and tolerance;
7. Encourage effective coordination and harmonization of governance policies amongst State Parties with the aim of promoting regional and continental integration;
8. Promote State Parties' sustainable development and human security;
9. Promote the fight against corruption in conformity with the provisions of the AU Convention on Preventing and Combating Corruption adopted in Maputo, Mozambique in July 2003;
10. Promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs;
11. Promote gender balance and equality in the governance and development processes;
12. Enhance cooperation between the Union, Regional Economic Communities and the International Community on democracy, elections and governance; and
13. Promote best practices in the management of elections for purposes of political stability and good governance.



Chapter 3 Principles

Article 3

State Parties shall implement this Charter in accordance with the following principles:

1. Respect for human rights and democratic principles;
2. Access to and exercise of state power in accordance with the constitution of the State Party and the principle of the rule of law;
3. Promotion of a system of government that is representative;
4. Holding of regular, transparent, free and fair elections;
5. Separation of powers;
6. Promotion of gender equality in public and private institutions;
7. Effective participation of citizens in democratic and development processes and in governance of public affairs;
8. Transparency and fairness in the management of public affairs;
9. Condemnation and rejection of acts of corruption, related offenses and impunity;
10. Condemnation and total rejection of unconstitutional changes of government;
11. Strengthening political pluralism and recognising the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law.

Chapter 4

Democracy, Rule of Law and Human Rights

Article 4

1. State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights.



2. State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people.

Article 5

State Parties shall take all appropriate measures to ensure constitutional rule, particularly constitutional transfer of power.

Article 6

State Parties shall ensure that citizens enjoy fundamental freedoms and human rights taking into account their universality, interdependence and indivisibility.

Article 7

State Parties shall take all necessary measures to strengthen the Organs of the Union that are mandated to promote and protect human rights and to fight impunity and endow them with the necessary resources.

Article 8

1. State Parties shall eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as any other form of intolerance.
2. State Parties shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalized and vulnerable social groups.
3. State Parties shall respect ethnic, cultural and religious diversity, which contributes to strengthening democracy and citizen participation.

Article 9

State Parties undertake to design and implement social and economic policies and programmes that promote sustainable development and human security.

Article 10

1. State Parties shall entrench the principle of the supremacy of the constitution in the political organization of the State.
2. State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum.
3. State Parties shall protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society.

Chapter 5 The Culture of Democracy and Peace

Article 11

The State Parties undertake to develop the necessary legislative and policy frameworks to establish and strengthen a culture of democracy and peace.

Article 12

State Parties undertake to implement programmes and carry out activities designed to promote democratic principles and practices as well as consolidate a culture of democracy and peace.

To this end, State Parties shall:

1. Promote good governance by ensuring transparent and accountable administration.
2. Strengthen political institutions to entrench a culture of democracy and peace.
3. Create conducive conditions for civil society organizations to exist and operate within the law.
4. Integrate civic education in their educational curricula and develop appropriate programmes and activities.

Article 13

State Parties shall take measures to ensure and maintain political and social dialogue, as well as public trust and transparency between political leaders and the people, in order to consolidate democracy and peace.



Chapter 6 Democratic Institutions

Article 14

1. State Parties shall strengthen and institutionalize constitutional civilian control over the armed and security forces to ensure the consolidation of democracy and constitutional order.
2. State Parties shall take legislative and regulatory measures to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law.
3. State Parties shall cooperate with each other to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law.

Article 15

1. State Parties shall establish public institutions that promote and support democracy and constitutional order.
2. State Parties shall ensure that the independence or autonomy of the said institutions is guaranteed by the constitution.

3. State Parties shall ensure that these institutions are accountable to competent national organs.
4. State Parties shall provide the above-mentioned institutions with resources to perform their assigned missions efficiently and effectively.

Article 16

State Parties shall cooperate at regional and continental levels in building and consolidating democracy through exchange of experiences.

Chapter 7 Democratic Elections

Article 17

State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa.



To this end, State Parties shall:

1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
2. Establish and strengthen national mechanisms that redress election-related disputes in a timely manner.
3. Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections.
4. Ensure that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them in through exclusively legal channels.

Article 18

1. State Parties may request the Commission, through the Democracy and Electoral Assistance Unit and the Democracy and Electoral Assistance Fund, to provide advisory services or assistance for strengthening and developing their electoral institutions and processes.

2. The Commission may at any time, in consultation with the State Party concerned, send special advisory missions to provide assistance to that State Party for strengthening its electoral institutions and processes.

Article 19

1. Each State Party shall inform the Commission of scheduled elections and invite it to send an electoral observer mission.

2. Each State Party shall guarantee conditions of security, free access to information, non-interference, freedom of movement and full cooperation with the electoral observer mission.

Article 20

The Chairperson of the Commission shall first send an exploratory mission during the period prior to elections. This mission shall obtain any useful information and documentation, and brief the Chairperson, stating whether the necessary conditions have been established and if the environment is conducive to the holding of transparent, free and fair elections in conformity with the principles of the Union governing democratic elections.



Article 21

1. The Commission shall ensure that these missions are independent and shall provide them with the necessary resources for that purpose.
2. Electoral observer missions shall be conducted by appropriate and competent experts in the area of election monitoring, drawn from continental and national institutions such as, but not limited to, the Pan-African Parliament, national electoral bodies, national legislatures and eminent persons taking due cognizance of the principles of regional representation and gender equality.
3. Electoral observer missions shall be conducted in an objective, impartial and transparent manner.
4. All electoral observer missions shall present the report of their activities to the Chairperson of the Commission within a reasonable time.
5. A copy of the report shall be submitted to the State Party concerned within a reasonable time.

Article 22

State Parties shall create a conducive environment for independent and impartial national monitoring or observation mechanisms.

Chapter 8

Sanctions in Cases of Unconstitutional Changes of Government

Article 23

State Parties agree that the use of, *inter alia*, the following illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union:

1. Any putsch or coup d'Etat against a democratically elected government.
2. Any intervention by mercenaries to replace a democratically elected government.
3. Any replacement of a democratically elected government by armed dissidents or rebels.
4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or



5. Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.

Article 24

When a situation arises in a State Party that may affect its democratic political institutional arrangements or the legitimate exercise of power, the Peace and Security Council shall exercise its responsibilities in order to maintain the constitutional order in accordance with relevant provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, hereinafter referred to as the Protocol.

Article 25

1. When the Peace and Security Council observes that there has been an unconstitutional change of government in a State Party, and that diplomatic initiatives have failed, it shall suspend the said State Party from the exercise of its right to participate in the activities of the Union in accordance with the provisions of articles 30 of the Constitutive Act and 7 (g) of the Protocol. The suspension shall take effect immediately.
2. However, the suspended State Party shall continue to fulfill its obligations to the Union, in particular with regard to those relating to respect of human rights.
3. Notwithstanding the suspension of the State Party, the Union shall maintain diplomatic contacts and take any initiatives to restore democracy in that State Party.
4. The perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.
5. Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.
6. The Assembly shall impose sanctions on any Member State that is proved to have instigated or supported unconstitutional change of government in another state in conformity with Article 23 of the Constitutive Act.
7. The Assembly may decide to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures.



8. State Parties shall not harbour or give sanctuary to perpetrators of unconstitutional changes of government.
9. State Parties shall bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition.
10. State Parties shall encourage conclusion of bilateral extradition agreements as well as the adoption of legal instruments on extradition and mutual legal assistance.

Article 26

The Peace and Security Council shall lift sanctions once the situation that led to the suspension is resolved.

Chapter 9 Political, Economic and Social Governance

Article 27

In order to advance political, economic and social governance, State Parties shall commit themselves to:

1. Strengthening the capacity of parliaments and legally recognised political parties to perform their core functions;
2. Fostering popular participation and partnership with civil society organizations;
3. Undertaking regular reforms of the legal and justice systems;
4. Improving public sector management;
5. Improving efficiency and effectiveness of public services and combating corruption;
6. Promoting the development of the private sector through, inter alia, enabling legislative and regulatory framework;
7. Development and utilisation of information and communication technologies;
8. Promoting freedom of expression, in particular freedom of the press and fostering a professional media;
9. Harnessing the democratic values of the traditional institutions; and
10. Preventing the spread and combating the impact of diseases such as Malaria, Tuberculosis, HIV/AIDS, Ebola fever, and Avian Flu.



Article 28

State Parties shall ensure and promote strong partnerships and dialogue between government, civil society and private sector.

Article 29

1. State Parties shall recognize the crucial role of women in development and strengthening of democracy.
2. State Parties shall create the necessary conditions for full and active participation of women in the decision-making processes and structures at all levels as a fundamental element in the promotion and exercise of a democratic culture.
3. State Parties shall take all possible measures to encourage the full and active participation of women in the electoral process and ensure gender parity in representation at all levels, including legislatures.

Article 30

State Parties shall promote citizen participation in the development process through appropriate structures.

Article 31

1. State Parties shall promote participation of social groups with special needs, including the Youth and people with disabilities, in the governance process.
2. State Parties shall ensure systematic and comprehensive civic education in order to encourage full participation of social groups with special needs in democracy and development processes.

Article 32

State Parties shall strive to institutionalize good political governance through:

1. Accountable, efficient and effective public administration;
2. Strengthening the functioning and effectiveness of parliaments;
3. An independent judiciary;
4. Relevant reforms of public institutions including the security sector;
5. Harmonious relationships in society including civil-military relations;
6. Consolidating sustainable multiparty political systems;



7. Organising regular, free and fair elections; and
8. Entrenching and respecting the principle of the rule of law.

Article 33

State Parties shall institutionalize good economic and corporate governance through, inter alia:

1. Effective and efficient public sector management;
2. Promoting transparency in public finance management;
3. Preventing and combating corruption and related offences;
4. Efficient management of public debt;
5. Prudent and sustainable utilization of public resources;
6. Equitable allocation of the nation's wealth and natural resources;
7. Poverty alleviation;
8. Enabling legislative and regulatory framework for private sector development;
9. Providing a conducive environment for foreign capital inflows;
10. Developing tax policies that encourage investment;
11. Preventing and combating crime;
12. Elaborating and implementing economic development strategies including private-public sector partnerships;
13. An efficient and effective tax system premised upon transparency and accountability.

Article 34

State Parties shall decentralize power to democratically elected local authorities as provided in national laws.

Article 35

Given the enduring and vital role of traditional authorities, particularly in rural communities, the State Parties shall strive to find appropriate ways and means to increase their integration and effectiveness within the larger democratic system.

Article 36

State Parties shall promote and deepen democratic governance by implementing the principles and core values of the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance and, where applicable, the African Peer Review Mechanism (APRM).



Article 37

State Parties shall pursue sustainable development and human security through achievement of NEPAD objectives and the United Nations Millennium Development Goals (MDGs).

Article 38

1. State Parties shall promote peace, security and stability in their respective countries, regions and in the continent by fostering participatory political systems with well-functioning and, if need be, inclusive institutions;
2. State Parties shall promote solidarity amongst Member States and support the conflict prevention and resolution initiatives that the Union may undertake in conformity with the Protocol establishing the Peace and Security Council.

Article 39

State Parties shall promote a culture of respect, compromise, consensus and tolerance as a means to mitigate conflicts, promote political stability and security, and to harness the creative energies of the African peoples.

Article 40

State Parties shall adopt and implement policies, strategies and programmes required to generate productive employment, mitigate the impact of diseases and alleviate poverty and eradicate extreme poverty and illiteracy.

Article 41

State Parties shall undertake to provide and enable access to basic social services to the people.

Article 42

State Parties shall implement policies and strategies to protect the environment to achieve sustainable development for the benefit of the present and future generations. In this regard, State Parties are encouraged to accede to the relevant treaties and other international legal instruments.



Article 43

1. State Parties shall endeavour to provide free and compulsory basic education to all, especially girls, rural inhabitants, minorities, people with disabilities and other marginalized social groups.
2. In addition, State Parties shall ensure the literacy of citizens above compulsory school age, particularly women, rural inhabitants, minorities, people with disabilities, and other marginalized social groups.

Chapter 10 Mechanisms for Application

Article 44

To give effect to the commitments contained in this Charter:

1. Individual State Party Level

State Parties commit themselves to implement the objectives, apply the principles and respect the commitments enshrined in this Charter as follows:

- (a) State Parties shall initiate appropriate measures including legislative, executive and administrative actions to bring State Parties' national laws and regulations into conformity with this Charter;
- (b) State Parties shall take all necessary measures in accordance with constitutional provisions and procedures to ensure the wider dissemination of the Charter and all relevant legislation as may be necessary for the implementation of its fundamental principles;
- (c) State Parties shall promote political will as a necessary condition for the attainment of the goals set forth in this Charter;
- (d) State Parties shall incorporate the commitments and principles of the Charter in their national policies and strategies.

2. Commission Level

A. At Continental Level

- (a) The Commission shall develop benchmarks for implementation of the commitments and principles of this Charter and evaluate compliance by State Parties;
- (b) The Commission shall promote the creation of favourable conditions for democratic governance in the African



Continent, in particular by facilitating the harmonization of policies and laws of State Parties;

- (c) The Commission shall take the necessary measures to ensure that the Democracy and Electoral Assistance Unit and the Democracy and Electoral Assistance Fund provide the needed assistance and resources to State Parties in support of electoral processes;
- (d) The Commission shall ensure that effect is given to the decisions of the Union in regard to unconstitutional change of government on the Continent.

B. At Regional Level

The Commission shall establish a framework for cooperation with Regional Economic Communities on the implementation of the principles of the Charter. In this regard, it shall commit the Regional Economic Communities (RECs) to:

- a) Encourage Member States to ratify or adhere to this Charter.
- b) Designate focal points for coordination, evaluation and monitoring of the implementation of the commitments and principles enshrined in this Charter in order to ensure massive participation of stakeholders, particularly civil society organizations, in the process.

Article 45

The Commission shall:

- (a) Act as the central coordinating structure for the implementation of this Charter;
- (b) Assist State Parties in implementing the Charter;
- (c) Coordinate evaluation on implementation of the Charter with other key organs of the Union including the Pan-African Parliament, the Peace and Security Council, the African Human Rights Commission, the African Court of Justice and Human Rights, the Economic, Social and Cultural Council, the Regional Economic Communities and appropriate national-level structures.



**Chapter 11
Final Clauses**

Article 46

In conformity with applicable provisions of the Constitutive Act and the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, the Assembly and the Peace and Security Council shall determine the appropriate measures to be imposed on any State Party that violates this Charter.

Article 47

1. This Charter shall be open for signature, ratification and accession by Member States of the Union in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission.

Article 48

This Charter shall enter into force thirty (30) days after the deposit of fifteen (15) Instruments of Ratification.

Article 49

1. State Parties shall submit every two years, from the date the Charter comes into force, a report to the Commission on the legislative or other relevant measures taken with a view to giving effect to the principles and commitments of the Charter;
2. A copy of the report shall be submitted to the relevant organs of the Union for appropriate action within their respective mandates;
3. The Commission shall prepare and submit to the Assembly, through the Executive Council, a synthesized report on the implementation of the Charter;
4. The Assembly shall take appropriate measures aimed at addressing issues raised in the report.



Article 50

1. Any State Party may submit proposals for the amendment or revision of this Charter;
2. Proposals for amendment or revision shall be submitted to the Chairperson of the Commission who shall transmit same to State Parties within thirty (30) days of receipt thereof;
3. The Assembly, upon the advice of the Executive Council, shall examine these proposals at its session following notification, provided all State Parties have been notified at least three (3) months before the beginning of the session;
4. The Assembly shall adopt amendments or revisions by consensus or failing which, by two-thirds majority;
5. The amendments or revisions shall enter into force when approved by two-thirds majority of State Parties.

Article 51

1. The Chairperson of the Commission shall be the depository of this Charter;
2. The Chairperson of the Commission shall inform all Member States of the signature, ratification, accession, entry into force, reservations, requests for amendments and approvals thereof;
3. Upon entry into force of this Charter, the Chairperson of the Commission shall register it with the Secretary General of the United Nations in accordance with Article 102 of the Charter of the United Nations.

Article 52

None of the provisions of the present Charter shall affect more favourable provisions relating to democracy, elections and governance contained in the national legislation of State Parties or in any other regional, continental or international conventions or agreements applicable in these State Parties.



Article 53

This Charter, drawn up in four (4) original texts, in Arabic, English, French and Portuguese languages, all four (4) being equally authentic, shall be deposited with the Chairperson of the Commission who shall transmit certified copies of same to all Member States and the United Nations General Secretariat.

**ADOPTED BY THE EIGHTH ORDINARY SESSION OF THE
ASSEMBLY, HELD IN ADDIS ABABA, ETHIOPIA,
30 JANUARY 2007**



**United Nations Declaration on the Rights of
Indigenous Peoples (General Assembly resolution
61/295 of 13 September 2007, annex)**



General Assembly

Distr.: General
2 October 2007

Sixty-first session
Agenda item 68

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/61/L.67 and Add.1)]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,¹ by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

*107th plenary meeting
13 September 2007*

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

¹ See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53)*, part one, chap. II, sect. A.

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights² and the International Covenant on Civil and Political Rights,² as well as the Vienna Declaration and Programme of

² See resolution 2200 A (XXI), annex.

Action,³ affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights⁴ and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the

³ A/CONF.157/24 (Part I), chap. III.

⁴ Resolution 217 A (III).

community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

**Legal Consequences for States of the Continued
Presence of South Africa in Namibia
(South West Africa) notwithstanding Security Council
Resolution 276 (1970), Advisory Opinion,
I.C.J. Reports 1971**

INTERNATIONAL COURT OF JUSTICE

YEAR 1971

1971
21 June
General List
No. 53

21 June 1971

LEGAL CONSEQUENCES FOR STATES OF THE
CONTINUED PRESENCE OF SOUTH AFRICA IN
NAMIBIA (SOUTH WEST AFRICA) NOTWITHSTANDING
SECURITY COUNCIL RESOLUTION 276 (1970)

Composition and competence of the Court—Propriety of the Court's giving the Opinion—Concept of mandates—Characteristics of the League of Nations Mandate for South West Africa—Situation on the dissolution of the League of Nations and the setting-up of the United Nations: survival of the Mandate and transference of supervision and accountability to the United Nations—Development of the Mandate prior to the termination of the Mandate—Revocability of the Mandate—Termination of the Mandate by the General Assembly—Action in the Security Council and effect of Security Council resolutions leading to the request for Opinion—Requests by South Africa to supply further factual information and for the holding of a plebiscite—Legal consequences for States

ADVISORY OPINION

Present: President Sir Muhammad Zafrulla Khan; Vice-President AMMOUN; Judges Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petřén, Lachs, Onyeama, Dillard, Ignacio-Pinto, De Castro, Morozov, Jiménez de Aréchaga; Registrar Aquarone.

Concerning the legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970),

THE COURT,

composed as above,

gives the following *Advisory Opinion*:

1. The question upon which the advisory opinion of the Court has been asked was laid before the Court by a letter dated 29 July 1970, filed in the Registry on 10 August, and addressed by the Secretary-General of the United Nations to the President of the Court. In his letter the Secretary-General informed the Court that, by resolution 284 (1970) adopted on 29 July 1970, certified true copies of the English and French texts of which were transmitted with his letter, the Security Council of the United Nations had decided to submit to the Court, with the request for an advisory opinion to be transmitted to the Security Council at an early date, the question set out in the resolution, which was in the following terms:

“*The Security Council,*

Reaffirming the special responsibility of the United Nations with regard to the territory and the people of Namibia,

Recalling Security Council resolution 276 (1970) on the question of Namibia,

Taking note of the report and recommendations submitted by the *Ad Hoc* Sub-Committee established in pursuance of Security Council resolution 276 (1970),

Taking further note of the recommendation of the *Ad Hoc* Sub-Committee on the possibility of requesting an advisory opinion from the International Court of Justice,

Considering that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking

1. *Decides* to submit in accordance with Article 96 (1) of the Charter, the following question to the International Court of Justice with the request for an advisory opinion which shall be transmitted to the Security Council at an early date:

‘What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?’

2. *Requests* the Secretary-General to transmit the present resolution to the International Court of Justice, in accordance with Article 65 of the Statute of the Court, accompanied by all documents likely to throw light upon the question.”

2. On 5 August 1970, that is to say, after the despatch of the Secretary-General's letter but before its receipt by the Registry, the English and French texts of resolution 284 (1970) of the Security Council were communicated to the President of the Court by telegram from the United Nations Secretariat. The President thereupon decided that the States Members of the United Nations were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute, and by an Order dated 5 August 1970, the President fixed 23 September 1970 as the time-limit within which the

Court would be prepared to receive written statements from them. The same day, the Registrar sent to the States Members of the United Nations the special and direct communication provided for in Article 66 of the Statute.

3. The notice of the request for advisory opinion, prescribed by Article 66, paragraph 1, of the Statute, was given by the Registrar to all States entitled to appear before the Court by letter of 14 August 1970.

4. On 21 August 1970, the President decided that in addition to the States Members of the United Nations, the non-member States entitled to appear before the Court were also likely to be able to furnish information on the question. The same day the Registrar sent to those States the special and direct communication provided for in Article 66 of the Statute.

5. On 24 August 1970, a letter was received by the Registrar from the Secretary for Foreign Affairs of South Africa, whereby the Government of South Africa, for the reasons therein set out, requested the extension to 31 January 1971 of the time-limit for the submission of a written statement. The President of the Court, by an Order dated 28 August 1970, extended the time-limit for the submission of written statements to 19 November 1970.

6. The Secretary-General of the United Nations, in two instalments, and the following States submitted to the Court written statements or letters setting forth their views: Czechoslovakia, Finland, France, Hungary, India, the Netherlands, Nigeria, Pakistan, Poland, South Africa, the United States of America, Yugoslavia. Copies of these communications were transmitted to all States entitled to appear before the Court, and to the Secretary-General of the United Nations, and, in pursuance of Articles 44, paragraph 3, and 82, paragraph 1, of the Rules of Court, they were made accessible to the public as from 5 February 1971.

7. The Secretary-General of the United Nations, in pursuance of Article 65, paragraph 2, of the Statute transmitted to the Court a dossier of documents likely to throw light upon the question, together with an Introductory Note; these documents were received in the Registry in instalments between 5 November and 29 December 1970.

8. Before holding public sittings to hear oral statements in accordance with Article 66, paragraph 2, of the Statute, the Court had first to resolve two questions relating to its composition for the further proceedings.

9. In its written statement, filed on 19 November 1970, the Government of South Africa had taken objection to the participation of three Members of the Court in the proceedings. Its objections were based on statements made or other participation by the Members concerned, in their former capacity as representatives of their Governments, in United Nations organs which were dealing with matters concerning South West Africa. The Court gave careful consideration to the objections raised by the Government of South Africa, examining each case separately. In each of them the Court reached the conclusion that the participation of the Member concerned in his former capacity as representative of his Government, to which objection was taken in the South African Government's written statement, did not attract the application of Article 17, paragraph 2, of the Statute of the Court. In making Order No. 2 of 26 January 1971, the Court found no reason to depart in the present advisory proceedings from the decision adopted by the Court in the Order of 18 March 1965 in the *South West Africa* cases (*Ethiopia v. South Africa; Liberia v. South Africa*) after hearing the same contentions as have now been advanced by the Government of South Africa. In deciding the other two objections, the

Court took into consideration that the activities in United Nations organs of the Members concerned, prior to their election to the Court, and which are referred to in the written statement of the Government of South Africa, do not furnish grounds for treating these objections differently from those raised in the application to which the Court decided not to accede in 1965, a decision confirmed by its Order No. 2 of 26 January 1971. With reference to Order No. 3 of the same date, the Court also took into consideration a circumstance to which its attention was drawn, although it was not mentioned in the written statement of the Government of South Africa, namely the participation of the Member concerned, prior to his election to the Court, in the formulation of Security Council resolution 246 (1968), which concerned the trial at Pretoria of thirty-seven South West Africans and which in its preamble took into account General Assembly resolution 2145 (XXI). The Court considered that this participation of the Member concerned in the work of the United Nations, as a representative of his Government, did not justify a conclusion different from that already reached with regard to the objections raised by the Government of South Africa. Account must also be taken in this respect of precedents established by the present Court and the Permanent Court wherein judges sat in certain cases even though they had taken part in the formulation of texts the Court was asked to interpret. (*P.C.I.J., Series A, No. 1, p. 11; P.C.I.J., Series C, No. 84, p. 535; P.C.I.J., Series E, No. 4, p. 270; P.C.I.J., Series E, No. 8, p. 251.*) After deliberation, the Court decided, by three Orders dated 26 January 1971, and made public on that date, not to accede to the objections which had been raised.

10. By a letter from the Secretary for Foreign Affairs dated 13 November 1970, the Government of South Africa made an application for the appointment of a judge *ad hoc* to sit in the proceedings, in terms of Article 31, paragraph 2, of the Statute of the Court. The Court decided, in accordance with the terms of Article 46 of the Statute of the Court, to hear the contentions of South Africa on this point in camera, and a closed hearing, at which representatives of India, the Netherlands, Nigeria and the United States of America were also present, was held for the purpose on 27 January 1971.

11. By an Order dated 29 January 1971, the Court decided to reject the application of the Government of South Africa. The Court thereafter decided that the record of the closed hearing should be made accessible to the public.

12. On 29 January 1971, the Court decided, upon the application of the Organization of African Unity, that that Organization was also likely to be able to furnish information on the question before the Court, and that the Court would therefore be prepared to hear an oral statement on behalf of the Organization.

13. The States entitled to appear before the Court had been informed by the Registrar on 27 November 1970 that oral proceedings in the case would be likely to open at the beginning of February 1971. On 4 February 1971, notification was given to those States which had expressed an intention to make oral statements, and to the Secretary-General of the United Nations and the Organization of African Unity, that 8 February had been fixed as the opening date. At 23 public sittings held between 8 February and 17 March 1971, oral statements were made to the Court by the following representatives:

for the Secretary-General of the United Nations:

Mr. C. A. Stavropoulos, Under-Secretary-General, Legal Counsel of the United Nations, and Mr. D. B. H. Vickers, Senior Legal Officer, Office of Legal Affairs;

for Finland:

Mr. E. J. S. Castrén, Professor of International Law in the University of Helsinki;

for the Organization of African Unity:

Mr. T. O. Elias, Attorney-General and Commissioner for Justice of Nigeria;

for India:

Mr. M. C. Chagla, M.P., Former Minister for Foreign Affairs in the Government of India;

for the Netherlands:

Mr. W. Riphaen, Legal Adviser to the Ministry of Foreign Affairs;

for Nigeria:

Mr. T. O. Elias, Attorney-General and Commissioner for Justice;

for Pakistan:

Mr. S. S. Pirzada, S.Pk., Attorney-General of Pakistan;

for South Africa:

Mr. J. D. Viall, Legal Adviser to the Department of Foreign Affairs,

Mr. D. P. de Villiers, S.C., Advocate of the Supreme Court of South Africa,

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

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

Mr. R. F. Botha, Member of the South African Bar,

Mr. M. Wiechers, Professor of Law in the University of South Africa;

for the Republic of Viet-Nam:

Mr. Le Tai Trien, Attorney-General, Supreme Court of Viet-Nam;

for the United States of America:

Mr. J. R. Stevenson, The Legal Adviser, Department of State.

14. Prior to the opening of the public sittings, the Court decided to examine first of all certain observations made by the Government of South Africa in its written statement, and in a letter dated 14 January 1971, in support of its submission that the Court should decline to give an advisory opinion.

15. At the opening of the public sittings on 8 February 1971, the President of the Court announced that the Court had reached a unanimous decision thereon. The substance of the submission of the Government of South Africa and the decision of the Court are dealt with in paragraphs 28 and 29 of the Advisory Opinion, below.

16. By a letter of 27 January 1971, the Government of South Africa had submitted a proposal to the Court regarding the holding of a plebiscite in the Territory of Namibia (South West Africa), and this proposal was elaborated in a further letter of 6 February 1971, which explained that the plebiscite was to determine whether it was the wish of the inhabitants "that the Territory should continue to be administered by the South African Government or should henceforth be administered by the United Nations".

17. At the hearing of 5 March 1971, the representative of South Africa explained further the position of his Government with regard to the proposed plebiscite, and indicated that his Government considered it necessary to adduce considerable evidence on the factual issues which it regarded as underlying the question before the Court. At the close of the hearing, on 17 March 1971, the President made the following statement:

"The Court has considered the request submitted by the representative of South Africa in his letter of 6 February 1971 that a plebiscite should be held in the Territory of Namibia (South West Africa) under the joint supervision of the Court and the Government of the Republic of South Africa.

The Court cannot pronounce upon this request at the present stage without anticipating, or appearing to anticipate, its decision on one or more of the main issues now before it. Consequently, the Court must defer its answer to this request until a later date.

The Court has also had under consideration the desire of the Government of the Republic to supply the Court with further factual material concerning the situation in Namibia (South West Africa). However, until the Court has been able first to examine some of the legal issues which must, in any event, be dealt with, it will not be in a position to determine whether it requires additional material on the facts. The Court must accordingly defer its decision on this matter as well.

If, at any time, the Court should find itself in need of further arguments or information, on these or any other matters, it will notify the governments and organizations whose representatives have participated in the oral hearings."

18. On 14 May 1971 the President sent the following letter to the representatives of the Secretary-General, of the Organization of African Unity and of the States which had participated in the oral proceedings:

"I have the honour to refer to the statement which I made at the end of the oral hearing on the advisory proceedings relating to the Territory of Namibia (South West Africa) on 17 March last . . . , to the effect that the Court considered it appropriate to defer until a later date its decision regarding the requests of the Government of the Republic of South Africa (a) for the holding in that Territory of a plebiscite under the joint supervision of the Court and the Government of the Republic; and (b) to be allowed to supply the Court with further factual material concerning the situation there.

I now have the honour to inform you that the Court, having examined the matter, does not find itself in need of further arguments or information, and has decided to refuse both these requests."

* * *

19. Before examining the merits of the question submitted to it the Court must consider the objections that have been raised to its doing so.

20. The Government of South Africa has contended that for several reasons resolution 284 (1970) of the Security Council, which requested

the advisory opinion of the Court, is invalid, and that, therefore, the Court is not competent to deliver the opinion. A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted. However, since in this instance the objections made concern the competence of the Court, the Court will proceed to examine them.

21. The first objection is that in the voting on the resolution two permanent members of the Security Council abstained. It is contended that the resolution was consequently not adopted by an affirmative vote of nine members, including the concurring votes of the permanent members, as required by Article 27, paragraph 3, of the Charter of the United Nations.

22. However, the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.

23. The Government of South Africa has also argued that as the question relates to a dispute between South Africa and other Members of the United Nations, South Africa, as a Member of the United Nations, not a member of the Security Council and a party to a dispute, should have been invited under Article 32 of the Charter to participate, without vote, in the discussion relating to it. It further contended that the proviso at the end of Article 27, paragraph 3, of the Charter, requiring members of the Security Council which are parties to a dispute to abstain from voting, should have been complied with.

24. The language of Article 32 of the Charter is mandatory, but the question whether the Security Council must extend an invitation in accordance with that provision depends on whether it has made a determination that the matter under its consideration is in the nature of a dispute. In the absence of such a determination Article 32 of the Charter does not apply.

25. The question of Namibia was placed on the agenda of the Security Council as a "situation" and not as a "dispute". No member State made any suggestion or proposal that the matter should be examined as a dispute, although due notice was given of the placing of the question

on the Security Council's agenda under the title "Situation in Namibia". Had the Government of South Africa considered that the question should have been treated in the Security Council as a dispute, it should have drawn the Council's attention to that aspect of the matter. Having failed to raise the question at the appropriate time in the proper forum, it is not open to it to raise it before the Court at this stage.

26. A similar answer must be given to the related objection based on the proviso to paragraph 3 of Article 27 of the Charter. This proviso also requires for its application the prior determination by the Security Council that a dispute exists and that certain members of the Council are involved as parties to such a dispute.

* * *

27. In the alternative the Government of South Africa has contended that even if the Court had competence to give the opinion requested, it should nevertheless, as a matter of judicial propriety, refuse to exercise its competence.

28. The first reason invoked in support of this contention is the supposed disability of the Court to give the opinion requested by the Security Council, because of political pressure to which the Court, according to the Government of South Africa, has been or might be subjected.

29. It would not be proper for the Court to entertain these observations, bearing as they do on the very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way.

30. The second reason advanced on behalf of the Government of South Africa in support of its contention that the Court should refuse to accede to the request of the Security Council is that the relevant legal question relates to an existing dispute between South Africa and other States. In this context it relies on the case of *Eastern Carelia* and argues that the Permanent Court of International Justice declined to rule upon the question referred to it because it was directly related to the main point of a dispute actually pending between two States.

31. However, that case is not relevant, as it differs from the present one. For instance one of the States concerned in that case was not at the time a Member of the League of Nations and did not appear before the Permanent Court. South Africa, as a Member of the United Nations, is bound by Article 96 of the Charter, which empowers the Security Council to request advisory opinions on any legal question. It has appeared before the Court, participated in both the written and oral pro-

ceedings and, while raising specific objections against the competence of the Court, has addressed itself to the merits of the question.

32. Nor does the Court find that in this case the Security Council's request relates to a legal dispute actually pending between two or more States. It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council's functions relating to the pacific settlement of a dispute pending before it between two or more States. The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions. This objective is stressed by the preamble to the resolution requesting the opinion, in which the Security Council has stated "that an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives of the Council is seeking". It is worth recalling that in its *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court stated: "The object of this request for an Opinion is to guide the United Nations in respect of its own action" (*I.C.J. Reports 1951*, p. 19).

33. The Court does not find either that in this case the advisory opinion concerns a dispute between South Africa and the United Nations. In the course of the oral proceedings Counsel for the Government of South Africa stated:

"... our submission is not that the question is a dispute, but that in order to answer the question the Court will have to decide legal and factual issues which are actually in dispute between South Africa and other States"

34. The fact that, in the course of its reasoning, and in order to answer the question submitted to it, the Court may have to pronounce on legal issues upon which radically divergent views exist between South Africa and the United Nations, does not convert the present case into a dispute nor bring it within the compass of Articles 82 and 83 of the Rules of Court. A similar position existed in the three previous advisory proceedings concerning South West Africa: in none of them did South Africa claim that there was a dispute, nor did the Court feel it necessary to apply the Rules of Court concerning "a legal question actually pending between two or more States". Differences of views among States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise.

35. In accordance with Article 83 of the Rules of Court, the question whether the advisory opinion had been requested "upon a legal question actually pending between two or more States" was also of decisive im-

portance in the Court's consideration of the request made by the Government of South Africa for the appointment of a judge *ad hoc*. As already indicated, the Court heard argument in support of that request and, after due deliberation, decided, by an Order of 29 January 1971, not to accede to it. This decision was based on the conclusion that the terms of the request for advisory opinion, the circumstances in which it had been submitted (which are described in para. 32 above), as well as the considerations set forth in paragraphs 33 and 34 above, were such as to preclude the interpretation that an opinion had been "requested upon a legal question actually pending between two or more States". Thus, in the opinion of the Court, South Africa was not entitled under Article 83 of the Rules of Court to the appointment of a judge *ad hoc*.

36. It has been urged that the possible existence of a dispute was a point of substance which was prematurely disposed of by the Order of 29 January 1971. Now the question whether a judge *ad hoc* should be appointed is of course a matter concerning the composition of the Bench and possesses, as the Government of South Africa recognized, absolute logical priority. It has to be settled prior to the opening of the oral proceedings, and indeed before any further issues, even of procedure, can be decided. Until it is disposed of the Court cannot proceed with the case. It is thus a logical necessity that any request for the appointment of a judge *ad hoc* must be treated as a preliminary matter on the basis of a *prima facie* appreciation of the facts and the law. This cannot be construed as meaning that the Court's decision thereon may involve the irrevocable disposal of a point of substance or of one related to the Court's competence. Thus, in a contentious case, when preliminary objections have been raised, the appointment of judges *ad hoc* must be decided before the hearing of those objections. That decision, however, does not prejudice the Court's competence if, for instance, it is claimed that no dispute exists. Conversely, to assert that the question of the judge *ad hoc* could not be validly settled until the Court had been able to analyse substantive issues is tantamount to suggesting that the composition of the Court could be left in suspense, and thus the validity of its proceedings left in doubt, until an advanced stage in the case.

37. The only question which was in fact settled with finality by the Order of 29 January 1971 was the one relating to the Court's composition for the purpose of the present case. That decision was adopted on the authority of Article 3, paragraph 1, of the Rules of Court and in accordance with Article 55, paragraph 1, of the Statute. Consequently, after the adoption of that decision, while differing views might still be held as to the applicability of Article 83 of the Rules of Court in the present case, the regularity of the composition of the Court for the

purposes of delivering the present Advisory Opinion, in accordance with the Statute and the Rules of Court, is no longer open to question.

38. In connection with the possible appointment of judges *ad hoc*, it has further been suggested that the final clause in paragraph 1 of Article 82 of the Rules of Court obliges the Court to determine as a preliminary question whether the request relates to a legal question actually pending between two or more States. The Court cannot accept this reading, which overstrains the literal meaning of the words "*avant tout*". It is difficult to conceive that an Article providing general guidelines in the relatively unschematic context of advisory proceedings should prescribe a rigid sequence in the action of the Court. This is confirmed by the practice of the Court, which in no previous advisory proceedings has found it necessary to make an independent preliminary determination of this question or of its own competence, even when specifically requested to do so. Likewise, the interpretation of the Rules of Court as imposing a procedure *in limine litis*, which has been suggested, corresponds neither to the text of the Article nor to its purpose, which is to regulate advisory proceedings without impairing the flexibility which Articles 66, paragraph 4, and 68 of the Statute allow the Court so that it may adjust its procedure to the requirements of each particular case. The phrase in question merely indicates that the test of legal pendency is to be considered "above all" by the Court for the purpose of exercising the latitude granted by Article 68 of the Statute to be guided by the provisions which apply in contentious cases to the extent to which the Court recognizes them to be applicable. From a practical point of view it may be added that the procedure suggested, analogous to that followed in contentious procedure with respect to preliminary objections, would not have dispensed with the need to decide on the request for the appointment of a judge *ad hoc* as a previous, independent decision, just as in contentious cases the question of judges *ad hoc* must be settled before any hearings on the preliminary objections may be proceeded with. Finally, it must be observed that such proposed preliminary decision under Article 82 of the Rules of Court would not necessarily have predetermined the decision which it is suggested should have been taken subsequently under Article 83, since the latter provision envisages a more restricted hypothesis: that the advisory opinion is requested *upon* a legal question actually pending and not that it *relates* to such a question.

39. The view has also been expressed that even if South Africa is not entitled to a judge *ad hoc* as a matter of right, the Court should, in the exercise of the discretion granted by Article 68 of the Statute, have allowed such an appointment, in recognition of the fact that South Africa's interests are specially affected in the present case. In this connection the Court wishes to recall a decision taken by the Permanent Court at a time when the Statute did not include any provision concerning advisory opinions, the entire regulation of the procedure in the matter being thus left to the Court (*P.C.I.J., Series E, No. 4, p. 76*). Confronted with a

request for the appointment of a judge *ad hoc* in a case in which it found there was no dispute, the Court, in rejecting the request, stated that "the decision of the Court must be in accordance with its Statute and with the Rules duly framed by it in pursuance of Article 30 of the Statute" (*Order of 31 October 1935, P.C.I.J., Series A/B, No. 65, Annex 1, p. 69 at p. 70*). It found further that the "exception cannot be given a wider application than is provided for by the Rules" (*ibid.*, p. 71). In the present case the Court, having regard to the Rules of Court adopted under Article 30 of the Statute, came to the conclusion that it was unable to exercise discretion in this respect.

40. The Government of South Africa has also expressed doubts as to whether the Court is competent to, or should, give an opinion, if, in order to do so, it should have to make findings as to extensive factual issues. In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a "legal question" as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues. The limitation of the powers of the Court contended for by the Government of South Africa has no basis in the Charter or the Statute.

41. The Court could, of course, acting on its own, exercise the discretion vested in it by Article 65, paragraph 1, of the Statute and decline to accede to the request for an advisory opinion. In considering this possibility the Court must bear in mind that: "A reply to a request for an Opinion should not, in principle, be refused." (*I.C.J. Reports 1951, p. 19*). The Court has considered whether there are any "compelling reasons", as referred to in the past practice of the Court, which would justify such a refusal. It has found no such reasons. Moreover, it feels that by replying to the request it would not only "remain faithful to the requirements of its judicial character" (*I.C.J. Reports 1960, p. 153*), but also discharge its functions as "the principal judicial organ of the United Nations" (Art. 92 of the Charter).

* * *

42. Having established that it is properly seized of a request for an advisory opinion, the Court will now proceed to an analysis of the question placed before it: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

43. The Government of South Africa in both its written and oral statements has covered a wide field of history, going back to the origin and functioning of the Mandate. The same and similar problems were

dealt with by other governments, the Secretary-General of the United Nations and the Organization of African Unity in their written and oral statements.

44. A series of important issues is involved: the nature of the Mandate, its working under the League of Nations, the consequences of the demise of the League and of the establishment of the United Nations and the impact of further developments within the new organization. While the Court is aware that this is the sixth time it has had to deal with the issues involved in the Mandate for South West Africa, it has nonetheless reached the conclusion that it is necessary for it to consider and summarize some of the issues underlying the question addressed to it. In particular, the Court will examine the substance and scope of Article 22 of the League Covenant and the nature of "C" mandates.

45. The Government of South Africa, in its written statement, presented a detailed analysis of the intentions of some of the participants in the Paris Peace Conference, who approved a resolution which, with some alterations and additions, eventually became Article 22 of the Covenant. At the conclusion and in the light of this analysis it suggested that it was quite natural for commentators to refer to "C" mandates as being in their practical effect not far removed from annexation". This view, which the Government of South Africa appears to have adopted, would be tantamount to admitting that the relevant provisions of the Covenant were of a purely nominal character and that the rights they enshrined were of their very nature imperfect and unenforceable. It puts too much emphasis on the intentions of some of the parties and too little on the instrument which emerged from those negotiations. It is thus necessary to refer to the actual text of Article 22 of the Covenant, paragraph 1 of which declares:

"1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant."

As the Court recalled in its 1950 Advisory Opinion on the *International Status of South-West Africa*, in the setting-up of the mandates system "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilization'" (*I.C.J. Reports 1950*, p. 131).

46. It is self-evident that the "trust" had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their

own and to possess a potentiality for independent existence on the attainment of a certain stage of development: the mandates system was designed to provide peoples "not yet" able to manage their own affairs with the help and guidance necessary to enable them to arrive at the stage where they would be "able to stand by themselves". The requisite means of assistance to that end is dealt with in paragraph 2 of Article 22:

"2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

This made it clear that those Powers which were to undertake the task envisaged would be acting exclusively as mandatories on behalf of the League. As to the position of the League, the Court found in its 1950 Advisory Opinion that: "The League was not, as alleged by [the South African] Government, a 'mandator' in the sense in which this term is used in the national law of certain States." The Court pointed out that: "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilisation." Therefore, the Court found, the League "had only assumed an international function of supervision and control" (*I.C.J. Reports 1950*, p. 132).

47. The acceptance of a mandate on these terms connoted the assumption of obligations not only of a moral but also of a binding legal character; and, as a corollary of the trust, "securities for [its] performance" were instituted (para. 7 of Art. 22) in the form of legal accountability for its discharge and fulfilment:

"7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge."

48. A further security for the performance of the trust was embodied in paragraph 9 of Article 22:

"9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates."

Thus the reply to the essential question, *quis custodiet ipsos custodes?*, was given in terms of the mandatory's accountability to international

organs. An additional measure of supervision was introduced by a resolution of the Council of the League of Nations, adopted on 31 January 1923. Under this resolution the mandatory Governments were to transmit to the League petitions from communities or sections of the populations of mandated territories.

49. Paragraph 8 of Article 22 of the Covenant gave the following directive:

“8. The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.”

In pursuance of this directive, a Mandate for German South West Africa was drawn up which defined the terms of the Mandatory's administration in seven articles. Of these, Article 6 made explicit the obligation of the Mandatory under paragraph 7 of Article 22 of the Covenant by providing that “The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5” of the Mandate. As the Court said in 1950: “the Mandatory was to observe a number of obligations, and the Council of the League was to supervise the administration and see to it that these obligations were fulfilled” (*I.C.J. Reports 1950*, p. 132). In sum the relevant provisions of the Covenant and those of the Mandate itself preclude any doubt as to the establishment of definite legal obligations designed for the attainment of the object and purpose of the Mandate.

50. As indicated in paragraph 45 above, the Government of South Africa has dwelt at some length on the negotiations which preceded the adoption of the final version of Article 22 of the League Covenant, and has suggested that they lead to a different reading of its provisions. It is true that as that Government points out, there had been a strong tendency to annex former enemy colonial territories. Be that as it may, the final outcome of the negotiations, however difficult of achievement, was a rejection of the notion of annexation. It cannot tenably be argued that the clear meaning of the mandate institution could be ignored by placing upon the explicit provisions embodying its principles a construction at variance with its object and purpose.

51. Events subsequent to the adoption of the instruments in question should also be considered. The Allied and Associated Powers, in their Reply to Observations of the German Delegation, referred in 1919 to “the mandatory Powers, which in so far as they may be appointed trustees by the League of Nations will derive no benefit from such trusteeship”. As to the Mandate for South West Africa, its preamble

recited that “His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations”.

52. Furthermore, the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination, applicable to all of them. The concept of the sacred trust was confirmed and expanded to all “territories whose peoples have not yet attained a full measure of self-government” (Art. 73). Thus it clearly embraced territories under a colonial régime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which “have not yet attained independence”. Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.

53. All these considerations are germane to the Court's evaluation of the present case. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—“the strenuous conditions of the modern world” and “the well-being and development” of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the “sacred trust”. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been

considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.

54. In the light of the foregoing, the Court is unable to accept any construction which would attach to "C" mandates an object and purpose different from those of "A" or "B" mandates. The only differences were those appearing from the language of Article 22 of the Covenant, and from the particular mandate instruments, but the objective and safeguards remained the same, with no exceptions such as considerations of geographical contiguity. To hold otherwise would mean that territories under "C" mandate belonged to the family of mandates only in name, being in fact the objects of disguised cessions, as if the affirmation that they could "be best administered under the laws of the Mandatory as integral portions of its territory" (Art. 22, para. 6) conferred upon the administering Power a special title not vested in States entrusted with "A" or "B" mandates. The Court would recall in this respect what was stated in the 1962 Judgment in the *South West Africa* cases as applying to all categories of mandate:

"The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations." (*I.C.J. Reports 1962*, p. 329.)

* * *

55. The Court will now turn to the situation which arose on the demise of the League and with the birth of the United Nations. As already recalled, the League of Nations was the international organization entrusted with the exercise of the supervisory functions of the Mandate. Those functions were an indispensable element of the Mandate. But that does not mean that the mandates institution was to collapse with the disappearance of the original supervisory machinery. To the question whether the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that an institution established for the fulfilment of a sacred trust cannot be presumed to lapse before the achievement of its purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution. That is why, in 1950, the Court remarked, in connection with the obligations corresponding to the sacred trust:

"Their *raison d'être* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory

organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon." (*I.C.J. Reports 1950*, p. 133.)

In the particular case, specific provisions were made and decisions taken for the transfer of functions from the organization which was to be wound up to that which came into being.

56. Within the framework of the United Nations an international trusteeship system was established and it was clearly contemplated that mandated territories considered as not yet ready for independence would be converted into trust territories under the United Nations international trusteeship system. This system established a wider and more effective international supervision than had been the case under the mandates of the League of Nations.

57. It would have been contrary to the overriding purpose of the mandates system to assume that difficulties in the way of the replacement of one régime by another designed to improve international supervision should have been permitted to bring about, on the dissolution of the League, a complete disappearance of international supervision. To accept the contention of the Government of South Africa on this point would have entailed the reversion of mandated territories to colonial status, and the virtual replacement of the mandates régime by annexation, so determinedly excluded in 1920.

58. These compelling considerations brought about the insertion in the Charter of the United Nations of the safeguarding clause contained in Article 80, paragraph 1, of the Charter, which reads as follows:

"1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

59. A striking feature of this provision is the stipulation in favour of the preservation of the rights of "any peoples", thus clearly including the inhabitants of the mandated territories and, in particular, their indigenous populations. These rights were thus confirmed to have an existence independent of that of the League of Nations. The Court, in the 1950 Advisory Opinion on the *International Status of South-West Africa*, relied on this provision to reach the conclusion that "no such rights of the peoples could be effectively safeguarded without inter-

national supervision and a duty to render reports to a supervisory organ" (*I.C.J. Reports 1950*, p. 137). In 1956 the Court confirmed the conclusion that "the effect of Article 80 (1) of the Charter" was that of "preserving the rights of States and peoples" (*I.C.J. Reports 1956*, p. 27).

60. Article 80, paragraph 1, of the Charter was thus interpreted by the Court as providing that the system of replacement of mandates by trusteeship agreements, resulting from Chapter XII of the Charter, shall not "be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples".

61. The exception made in the initial words of the provision, "Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded", established a particular method for changing the status quo of a mandate régime. This could be achieved only by means of a trusteeship agreement, unless the "sacred trust" had come to an end by the implementation of its objective, that is, the attainment of independent existence. In this way, by the use of the expression "until such agreements have been concluded", a legal hiatus between the two systems was obviated.

62. The final words of Article 80, paragraph 1, refer to "the terms of existing international instruments to which Members of the United Nations may respectively be parties". The records of the San Francisco Conference show that these words were inserted in replacement of the words "any mandate" in an earlier draft in order to preserve "any rights set forth in paragraph 4 of Article 22 of the Covenant of the League of Nations".

63. In approving this amendment and inserting these words in the report of Committee II/4, the States participating at the San Francisco Conference obviously took into account the fact that the adoption of the Charter of the United Nations would render the disappearance of the League of Nations inevitable. This shows the common understanding and intention at San Francisco that Article 80, paragraph 1, of the Charter had the purpose and effect of keeping in force all rights whatsoever, including those contained in the Covenant itself, against any claim as to their possible lapse with the dissolution of the League.

64. The demise of the League could thus not be considered as an unexpected supervening event entailing a possible termination of those rights, entirely alien to Chapter XII of the Charter and not foreseen by the safeguarding provisions of Article 80, paragraph 1. The Members of the League, upon effecting the dissolution of that organization, did not declare, or accept even by implication, that the mandates would be cancelled or lapse with the dissolution of the League. On the contrary,

paragraph 4 of the resolution on mandates of 18 April 1946 clearly assumed their continuation.

65. The Government of South Africa, in asking the Court to reappraise the 1950 Advisory Opinion, has argued that Article 80, paragraph 1, must be interpreted as a mere saving clause having a purely negative effect.

66. If Article 80, paragraph 1, were to be understood as a mere interpretative provision preventing the operation of Chapter XII from affecting any rights, then it would be deprived of all practical effect. There is nothing in Chapter XII—which, as interpreted by the Court in 1950, constitutes a framework for future agreements—susceptible of affecting existing rights of States or of peoples under the mandates system. Likewise, if paragraph 1 of Article 80 were to be understood as a mere saving clause, paragraph 2 of the same Article would have no purpose. This paragraph provides as follows:

"2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77."

This provision was obviously intended to prevent a mandatory Power from invoking the preservation of its rights resulting from paragraph 1 as a ground for delaying or postponing what the Court described as "the normal course indicated by the Charter, namely, conclude Trusteeship Agreements" (*I.C.J. Reports 1950*, p. 140). No method of interpretation would warrant the conclusion that Article 80 as a whole is meaningless.

67. In considering whether negative effects only may be attributed to Article 80, paragraph 1, as contended by South Africa, account must be taken of the words at the end of Article 76 (*d*) of the Charter, which, as one of the basic objectives of the trusteeship system, ensures equal treatment in commercial matters for all Members of the United Nations and their nationals. The proviso "subject to the provisions of Article 80" was included at the San Francisco Conference in order to preserve the existing right of preference of the mandatory Powers in "C" mandates. The delegate of the Union of South Africa at the Conference had pointed out earlier that "the 'open door' had not previously applied to the 'C' mandates", adding that "his Government could not contemplate its application to their mandated territory". If Article 80, paragraph 1, had no conservatory and positive effects, and if the rights therein preserved could have been extinguished with the disappearance of the League of Nations, then the proviso in Article 76 (*d*) *in fine* would be deprived of any practical meaning.

68. The Government of South Africa has invoked as "new facts" not fully before the Court in 1950 a proposal introduced by the Chinese delegation at the final Assembly of the League of Nations and another submitted by the Executive Committee to the United Nations Preparatory Commission, both providing in explicit terms for the transfer of supervisory functions over mandates from the League of Nations to United Nations organs. It is argued that, since neither of these two proposals was adopted, no such transfer was envisaged.

69. The Court is unable to accept the argument advanced. The fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed. There can be many reasons determining rejection or non-approval. For instance, the Chinese proposal, which was never considered but was ruled out of order, would have subjected mandated territories to a form of supervision which went beyond the scope of the existing supervisory authority in respect of mandates, and could have raised difficulties with respect to Article 82 of the Charter. As to the establishment of a Temporary Trusteeship Committee, it was opposed because it was felt that the setting up of such an organ might delay the negotiation and conclusion of trusteeship agreements. Consequently two United States proposals, intended to authorize this Committee to undertake the functions previously performed by the Mandates Commission, could not be acted upon. The non-establishment of a temporary subsidiary body empowered to assist the General Assembly in the exercise of its supervisory functions over mandates cannot be interpreted as implying that the General Assembly lacked competence or could not itself exercise its functions in that field. On the contrary, the general assumption appeared to be that the supervisory functions over mandates previously performed by the League were to be exercised by the United Nations. Thus, in the discussions concerning the proposed setting-up of the Temporary Trusteeship Committee, no observation was made to the effect that the League's supervisory functions had not been transferred to the United Nations. Indeed, the South African representative at the United Nations Preparatory Commission declared on 29 November 1945 that "it seemed reasonable to create an interim body as the Mandates Commission was now in abeyance and countries holding mandates should have a body to which they could report".

70. The Government of South Africa has further contended that the provision in Article 80, paragraph 1, that the terms of "existing international instruments" shall not be construed as altered by anything in Chapter XII of the Charter, cannot justify the conclusion that the duty to report under the Mandate was transferred from the Council of the

League to the United Nations.

71. This objection fails to take into consideration Article 10 in Chapter IV of the Charter, a provision which was relied upon in the 1950 Opinion to justify the transference of supervisory powers from the League Council to the General Assembly of the United Nations. The Court then said:

"The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from the provisions of Article 10 of the Charter, which authorizes the General Assembly to discuss any questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations." (*I.C.J. Reports 1950*, p. 137.)

72. Since a provision of the Charter—Article 80, paragraph 1—had maintained the obligations of the Mandatory, the United Nations had become the appropriate forum for supervising the fulfilment of those obligations. Thus, by virtue of Article 10 of the Charter, South Africa agreed to submit its administration of South West Africa to the scrutiny of the General Assembly, on the basis of the information furnished by the Mandatory or obtained from other sources. The transfer of the obligation to report, from the League Council to the General Assembly, was merely a corollary of the powers granted to the General Assembly. These powers were in fact exercised by it, as found by the Court in the 1950 Advisory Opinion. The Court rightly concluded in 1950 that—

"... the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it" (*I.C.J. Reports 1950*, p. 137).

In its 1955 Advisory Opinion on *Voiting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*, after recalling some passages from the 1950 Advisory Opinion, the Court stated:

"Thus, the authority of the General Assembly to exercise supervision over the administration of South-West Africa as a mandated Territory is based on the provisions of the Charter." (*I.C.J. Reports 1955*, p. 76.)

In the 1956 Advisory Opinion on *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, again after referring to certain passages from the 1950 Advisory Opinion, the Court stated:

“Accordingly, the obligations of the Mandatory continue unimpaired with this difference, that the supervisory functions exercised by the Council of the League of Nations are now to be exercised by the United Nations.” (I.C.J. Reports 1956, p. 27.)

In the same Opinion the Court further stated:

“... the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory” (ibid., p. 28).

* * *

73. With regard to the intention of the League, it is essential to recall that, at its last session, the Assembly of the League, by a resolution adopted on 12 April 1946, attributed to itself the responsibilities of the Council in the following terms:

“The Assembly, with the concurrence of all the Members of the Council which are represented at its present session: Decides that, so far as required, it will, during the present session, assume the functions falling within the competence of the Council.”

Thereupon, before finally dissolving the League, the Assembly on 18 April 1946, adopted a resolution providing as follows for the continuation of the mandates and the mandates system:

“The Assembly

3. Recognises that, on the termination of the League’s existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers.”

As stated in the Court’s 1962 Judgment:

“... the League of Nations in ending its own existence did not terminate the Mandates but ... definitely intended to continue them by its resolution of 18 April 1946” (I.C.J. Reports 1962, p. 334).

74. That the Mandate had not lapsed was also admitted by the Government of South Africa on several occasions during the early period of transition, when the United Nations was being formed and the League dissolved. In particular, on 9 April 1946, the representative of South Africa, after announcing his Government’s intention to transform South West Africa into an integral part of the Union, declared before the Assembly of the League:

“In the meantime, the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.

The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory.”

The Court referred to this statement in its Judgment of 1962, finding that “there could be no clearer recognition on the part of the Government of South Africa of the continuance of its obligations under the Mandate after the dissolution of the League of Nations” (I.C.J. Reports 1962, p. 340).

75. Similar assurances were given on behalf of South Africa in a memorandum transmitted on 17 October 1946 to the Secretary-General of the United Nations, and in statements to the Fourth Committee of the General Assembly on 4 November and 13 November 1946. Referring to some of these and other assurances the Court stated in 1950: “These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government.” (I.C.J. Reports 1950, p. 135.)

76. Even before the dissolution of the League, on 22 January 1946, the Government of the Union of South Africa had announced to the General Assembly of the United Nations its intention to ascertain the

views of the population of South West Africa, stating that "when that had been done, the decision of the Union would be submitted to the General Assembly for judgment". Thereafter, the representative of the Union of South Africa submitted a proposal to the Second Part of the First Session of the General Assembly in 1946, requesting the approval of the incorporation of South West Africa into the Union. On 14 December 1946 the General Assembly adopted resolution 65 (I) noting—

"... with satisfaction that the Union of South Africa, by presenting this matter to the United Nations, recognizes the interest and concern of the United Nations in the matter of the future status of territories now held under mandate"

and declared that it was—

"... unable to accede to the incorporation of the territory of South West Africa in the Union of South Africa".

The General Assembly, the resolution went on,

"Recommends that the mandated territory of South West Africa be placed under the international trusteeship system and invites the Government of the Union of South Africa to propose for the consideration of the General Assembly a trusteeship agreement for the aforesaid Territory."

A year later the General Assembly, by resolution 141 (II) of 1 November 1947, took note of the South African Government's decision not to proceed with its plan for the incorporation of the Territory. As the Court stated in 1950:

"By thus submitting the question of the future international status of the Territory to the 'judgment' of the General Assembly as the 'competent international organ', the Union Government recognized the competence of the General Assembly in the matter." (*I.C.J. Reports 1950*, p. 142.)

77. In the course of the following years South Africa's acts and declarations made in the United Nations in regard to South West Africa were characterized by contradictions. Some of these acts and declarations confirmed the recognition of the supervisory authority of the United Nations and South Africa's obligations towards it, while others clearly signified an intention to withdraw such recognition. It was only on 11 July 1949 that the South African Government addressed to the Secretary-General a letter in which it stated that it could "no longer see that any

real benefit is to be derived from the submission of special reports on South West Africa to the United Nations and [had] regretfully come to the conclusion that in the interests of efficient administration no further reports should be forwarded".

78. In the light of the foregoing review, there can be no doubt that, as consistently recognized by this Court, the Mandate survived the demise of the League, and that South Africa admitted as much for a number of years. Thus the supervisory element, an integral part of the Mandate, was bound to survive, and the Mandatory continued to be accountable for the performance of the sacred trust. To restrict the responsibility of the Mandatory to the sphere of conscience or of moral obligation would amount to conferring upon that Power rights to which it was not entitled, and at the same time to depriving the peoples of the Territory of rights which they had been guaranteed. It would mean that the Mandatory would be unilaterally entitled to decide the destiny of the people of South West Africa at its discretion. As the Court, referring to its Advisory Opinion of 1950, stated in 1962:

"The findings of the Court on the obligation of the Union Government to submit to international supervision are thus crystal clear. Indeed, to exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate." (*I.C.J. Reports 1962*, p. 334.)

79. The cogency of this finding is well illustrated by the views presented on behalf of South Africa, which, in its final submissions in the *South West Africa* cases, presented as an alternative submission, "in the event of it being held that the Mandate as such continued in existence despite the dissolution of the League of Nations",

"... that the Respondent's former obligations under the Mandate to report and account to, and to submit to the supervision, of the Council of the League of Nations, lapsed upon the dissolution of the League, and have not been replaced by any similar obligations relative to supervision by any organ of the United Nations or any other organization or body" (*I.C.J. Reports 1966*, p. 16).

The principal submission, however, had been:

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

80. In the present proceedings, at the public sitting of 15 March 1971, the representative of South Africa summed up his Government's position in the following terms:

"Our contentions concerning the falling away of supervisory and accountability provisions are, accordingly, absolute and unqualified. On the other hand, our contentions concerning the possible lapse of the Mandate as a whole are secondary and consequential and depend on our primary contention that the supervision and the accountability provisions fell away on the dissolution of the League.

In the present proceedings we accordingly make the formal submission that the Mandate has lapsed as a whole by reason of the falling away of supervision by the League, but for the rest we assume that the Mandate still continued . . .

. . . on either hypothesis we contend that after dissolution of the League there no longer was any obligation to report and account under the Mandate."

He thus placed the emphasis on the "falling-away" of the "supervisory and accountability provisions" and treated "the possible lapse of the Mandate as a whole" as a "secondary and consequential" consideration.

81. Thus, by South Africa's own admission, "supervision and accountability" were of the essence of the Mandate, as the Court had consistently maintained. The theory of the lapse of the Mandate on the demise of the League of Nations is in fact inseparable from the claim that there is no obligation to submit to the supervision of the United Nations, and vice versa. Consequently, both or either of the claims advanced, namely that the Mandate has lapsed and/or that there is no obligation to submit to international supervision by the United Nations, are destructive of the very institution upon which the presence of South Africa in Namibia rests, for:

"The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified." (*I.C.J. Reports 1950*, p. 133; cited in *I.C.J. Reports 1962*, p. 333.)

82. Of this South Africa would appear to be aware, as is evidenced by its assertion at various times of other titles to justify its continued presence in Namibia, for example before the General Assembly on 5 October 1966:

"South Africa has for a long time contended that the Mandate is no longer legally in force, and that South Africa's right to administer the Territory is not derived from the Mandate but from military conquest, together with South Africa's openly declared and consistent practice of continuing to administer the Territory as a sacred trust towards the inhabitants."

In the present proceedings the representative of South Africa maintained on 15 March 1971:

" . . . if it is accepted that the Mandate has lapsed, the South African Government would have the right to administer the Territory by reason of a combination of factors, being (a) its original conquest; (b) its long occupation; (c) the continuation of the sacred trust basis agreed upon in 1920; and, finally (d) because its administration is to the benefit of the inhabitants of the Territory and is desired by them. In these circumstances the South African Government cannot accept that any State or organization can have a better title to the Territory."

83. These claims of title, which apart from other considerations are inadmissible in regard to a mandated territory, lead by South Africa's own admission to a situation which vitiates the object and purpose of the Mandate. Their significance in the context of the sacred trust has best been revealed by a statement made by the representative of South Africa in the present proceedings on 15 March 1971: "it is the view of the South African Government that no legal provision prevents its annexing South West Africa." As the Court pointed out in its Advisory Opinion on the *International Status of South-West Africa*, "the principle of non-annexation" was "considered to be of paramount importance" when the future of South West Africa and other territories was the subject of decision after the First World War (*I.C.J. Reports 1950*, p. 131). What was in consequence excluded by Article 22 of the League Covenant is even less acceptable today.

* * *

84. Where the United Nations is concerned, the records show that, throughout a period of twenty years, the General Assembly, by virtue of the powers vested in it by the Charter, called upon the South African Government to perform its obligations arising out of the Mandate. On 9 February 1946 the General Assembly, by resolution 9 (I), invited all States administering territories held under mandate to submit trusteeship agreements. All, with the exception of South Africa, responded by placing the respective territories under the trusteeship system or offering

them independence. The General Assembly further made a special recommendation to this effect in resolution 65 (I) of 14 December 1946; on 1 November 1947, in resolution 141 (II), it "urged" the Government of the Union of South Africa to propose a trusteeship agreement; by resolution 227 (III) of 26 November 1948 it maintained its earlier recommendations. A year later, in resolution 337 (IV) of 6 December 1949, it expressed "regret that the Government of the Union of South Africa has withdrawn its previous undertaking to submit reports on its administration of the Territory of South West Africa for the information of the United Nations", reiterated its previous resolutions and invited South Africa "to resume the submission of such reports to the General Assembly". At the same time, in resolution 338 (IV), it addressed specific questions concerning the international status of South West Africa to this Court. In 1950, by resolution 449 (V) of 13 December, it accepted the resultant Advisory Opinion and urged the Government of the Union of South Africa "to take the necessary steps to give effect to the Opinion of the International Court of Justice". By the same resolution, it established a committee "to confer with the Union of South Africa concerning the procedural measures necessary for implementing the Advisory Opinion . . .". In the course of the ensuing negotiations South Africa continued to maintain that neither the United Nations nor any other international organization had succeeded to the supervisory functions of the League. The Committee, for its part, presented a proposal closely following the terms of the Mandate and providing for implementation "through the United Nations by a procedure as nearly as possible analogous to that which existed under the League of Nations, thus providing terms no more extensive or onerous than those which existed before". This procedure would have involved the submission by South Africa of reports to a General Assembly committee, which would further set up a special commission to take over the functions of the Permanent Mandates Commission. Thus the United Nations, which undoubtedly conducted the negotiations in good faith, did not insist on the conclusion of a trusteeship agreement; it suggested a system of supervision which "should not exceed that which applied under the Mandates System . . .". These proposals were rejected by South Africa, which refused to accept the principle of the supervision of its administration of the Territory by the United Nations.

85. Further fruitless negotiations were held from 1952 to 1959. In total, negotiations extended over a period of thirteen years, from 1946 to 1959. In practice the actual length of negotiations is no test of whether the possibilities of agreement have been exhausted; it may be sufficient to show that an early deadlock was reached and that one side adamantly refused compromise. In the case of Namibia (South West Africa) this

stage had patently been reached long before the United Nations finally abandoned its efforts to reach agreement. Even so, for so long as South Africa was the mandatory Power the way was still open for it to seek an arrangement. But that chapter came to an end with the termination of the Mandate.

86. To complete this brief summary of the events preceding the present request for advisory opinion, it must be recalled that in 1955 and 1956 the Court gave at the request of the General Assembly two further advisory opinions on matters concerning the Territory. Eventually the General Assembly adopted resolution 2145 (XXI) on the termination of the Mandate for South West Africa. Subsequently the Security Council adopted resolution 276 (1970), which declared the continued presence of South Africa in Namibia to be illegal and called upon States to act accordingly.

* * *

87. The Government of France in its written statement and the Government of South Africa throughout the present proceedings have raised the objection that the General Assembly, in adopting resolution 2145 (XXI), acted *ultra vires*.

88. Before considering this objection, it is necessary for the Court to examine the observations made and the contentions advanced as to whether the Court should go into this question. It was suggested that though the request was not directed to the question of the validity of the General Assembly resolution and of the related Security Council resolutions, this did not preclude the Court from making such an enquiry. On the other hand it was contended that the Court was not authorized by the terms of the request, in the light of the discussions preceding it, to go into the validity of these resolutions. It was argued that the Court should not assume powers of judicial review of the action taken by the other principal organs of the United Nations without specific request to that effect, nor act as a court of appeal from their decisions.

89. Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced to the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.

90. As indicated earlier, with the entry into force of the Charter of the United Nations a relationship was established between all Members of the United Nations on the one side, and each mandatory Power on the other. The mandatory Powers while retaining their mandates assumed,

under Article 80 of the Charter, *vis-à-vis* all United Nations Members, the obligation to keep intact and preserve, until trusteeship agreements were executed, the rights of other States and of the peoples of mandated territories, which resulted from the existing mandate agreements and related instruments, such as Article 22 of the Covenant and the League Council's resolution of 31 January 1923 concerning petitions. The mandatory Powers also bound themselves to exercise their functions of administration in conformity with the relevant obligations emanating from the United Nations Charter, which member States have undertaken to fulfil in good faith in all their international relations.

91. One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship.

92. The terms of the preamble and operative part of resolution 2145 (XXI) leave no doubt as to the character of the resolution. In the preamble the General Assembly declares itself "Convinced that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary" to the two basic international instruments directly imposing obligations upon South Africa, the Mandate and the Charter of the United Nations, as well as to the Universal Declaration of Human Rights. In another paragraph of the preamble the conclusion is reached that, after having insisted with no avail upon performance for more than twenty years, the moment has arrived for the General Assembly to exercise the right to treat such violation as a ground for termination.

93. In paragraph 3 of the operative part of the resolution the General Assembly "Declares that South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate". In paragraph 4 the decision is reached, as a consequence of the previous declaration "that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is *therefore* terminated . . ." (Emphasis added.) It is this part of the resolution which is relevant in the present proceedings.

94. In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach. For even if the mandate is viewed as having the character of an institution, as is maintained, it depends on those international agreements which created the system and regulated its application. As the Court indicated in 1962 "this Mandate, like practically all other similar Mandates" was "a special type of instrument composite in nature and instituting a novel international régime. It incorporates a definite agreement . . ." (*I.C.J. Reports 1962*, p. 331). The Court stated conclusively in that Judgment that the

Mandate " . . . in fact and in law, is an international agreement having the character of a treaty or convention" (*I.C.J. Reports 1962*, p. 330). The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject. In the light of these rules, only a material breach of a treaty justifies termination, such breach being defined as:

- "(a) a repudiation of the treaty not sanctioned by the present Convention; or
(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty" (Art. 60, para. 3).

95. General Assembly resolution 2145 (XXI) determines that both forms of material breach had occurred in this case. By stressing that South Africa "has, in fact, disavowed the Mandate", the General Assembly declared in fact that it had repudiated it. The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship.

* * *

96. It has been contended that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a mandate for misconduct of the mandatory and that no such power could therefore be exercised by the United Nations, since it could not derive from the League greater powers than the latter itself had. For this objection to prevail it would be necessary to show that the mandates system, as established under the League, excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5, of the Vienna Convention). The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded.

97. The Government of South Africa has contended that it was the intention of the drafters of the mandates that they should not be revocable even in cases of serious breach of obligation or gross misconduct on the part of the mandatory. This contention seeks to draw support from the fact that at the Paris Peace Conference a resolution was adopted in which the proposal contained in President Wilson's draft of the Covenant regarding a right of appeal for the substitution of the mandatory was not

included. It should be recalled that the discussions at the Paris Peace Conference relied upon by South Africa were not directly addressed to an examination of President Wilson's proposals concerning the regulation of the mandates system in the League Covenant, and the participants were not contesting these particular proposals. What took place was a general exchange of views, on a political plane, regarding the questions of the disposal of the former German colonies and whether the principle of annexation or the mandatory principle should apply to them.

98. President Wilson's proposed draft did not include a specific provision for revocation, on the assumption that mandates were revocable. What was proposed was a special procedure reserving "to the people of any such territory or governmental unit the right to appeal to the League for the redress or correction of any breach of the mandate by the mandatory State or agency or for the substitution of some other State or agency, as mandatory". That this special right of appeal was not inserted in the Covenant cannot be interpreted as excluding the application of the general principle of law according to which a power of termination on account of breach, even if unexpressed, must be presumed to exist as inherent in any mandate, as indeed in any agreement.

99. As indicated earlier, at the Paris Peace Conference there was opposition to the institution of the mandates since a mandate would be inherently revocable, so that there would be no guarantee of long-term continuance of administration by the mandatory Power. The difficulties thus arising were eventually resolved by the assurance that the Council of the League would not interfere with the day-to-day administration of the territories and that the Council would intervene only in case of a fundamental breach of its obligations by the mandatory Power.

100. The revocability of a mandate was envisaged by the first proposal which was made concerning a mandates system:

"In case of any flagrant and prolonged abuse of this trust the population concerned should be able to appeal for redress to the League, who should in a proper case assert its authority to the full, even to the extent of removing the mandate and entrusting it to some other State if necessary." (J. C. Smuts, *The League of Nations: A Practical Suggestion*, 1918, pp. 21-22.)

Although this proposal referred to different territories, the principle remains the same. The possibility of revocation in the event of gross violation of the mandate was subsequently confirmed by authorities on international law and members of the Permanent Mandates Commission

who interpreted and applied the mandates system under the League of Nations.

101. It has been suggested that, even if the Council of the League had possessed the power of revocation of the Mandate in an extreme case, it could not have been exercised unilaterally but only in co-operation with the mandatory Power. However, revocation could only result from a situation in which the Mandatory had committed a serious breach of the obligations it had undertaken. To contend, on the basis of the principle of unanimity which applied in the League of Nations, that in this case revocation could only take place with the concurrence of the Mandatory, would not only run contrary to the general principle of law governing termination on account of breach, but also postulate an impossibility. For obvious reasons, the consent of the wrongdoer to such a form of termination cannot be required.

102. In a further objection to General Assembly resolution 2145 (XXI) it is contended that it made pronouncements which the Assembly, not being a judicial organ, and not having previously referred the matter to any such organ, was not competent to make. Without dwelling on the conclusions reached in the 1966 Judgment in the *South West Africa* contentious cases, it is worth recalling that in those cases the applicant States, which complained of material breaches of substantive provisions of the Mandate, were held not to "possess any separate self-contained right which they could assert . . . to require the due performance of the Mandate in discharge of the 'sacred trust'" (*J.C.J. Reports 1966*, pp. 29 and 51). On the other hand, the Court declared that: ". . . any divergences of view concerning the conduct of a mandate were regarded as being matters that had their place in the political field, the settlement of which lay between the mandatory and the competent organs of the League" (*ibid.*, p. 45). To deny to a political organ of the United Nations which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking.

103. The Court is unable to appreciate the view that the General Assembly acted unilaterally as party and judge in its own cause. In the 1966 Judgment in the *South West Africa* cases, referred to above, it was found that the function to call for the due execution of the relevant provisions of the mandate instruments appertained to the League acting as an entity through its appropriate organs. The right of the League "in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the 'sacred trust'", was specifically recognized (*ibid.*, p. 29). Having regard to this finding, the United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the man-

datory with respect to its international obligations, and competent to act accordingly.

* * *

104. It is argued on behalf of South Africa that the consideration set forth in paragraph 3 of resolution 2145 (XXI) of the General Assembly, relating to the failure of South Africa to fulfil its obligations in respect of the administration of the mandated territory, called for a detailed factual investigation before the General Assembly could adopt resolution 2145 (XXI) or the Court pronounce upon its validity. The failure of South Africa to comply with the obligation to submit to supervision and to render reports, an essential part of the Mandate, cannot be disputed in the light of determinations made by this Court on more occasions than one. In relying on these, as on other findings of the Court in previous proceedings concerning South West Africa, the Court adheres to its own jurisprudence.

* * *

105. General Assembly resolution 2145 (XXI), after declaring the termination of the Mandate, added in operative paragraph 4 "that South Africa has no other right to administer the Territory". This part of the resolution has been objected to as deciding a transfer of territory. That in fact is not so. The pronouncement made by the General Assembly is based on a conclusion, referred to earlier, reached by the Court in 1950:

"The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed." (*I.C.J. Reports 1950*, p. 133.)

This was confirmed by the Court in its Judgment of 21 December 1962 in the *South West Africa* cases (*Ethiopia v. South Africa; Liberia v. South Africa*) (*I.C.J. Reports 1962*, p. 333). Relying on these decisions of the Court, the General Assembly declared that the Mandate having been terminated "South Africa has no other right to administer the Territory". This is not a finding on facts, but the formulation of a legal situation. For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.

* * *

106. By resolution 2145 (XXI) the General Assembly terminated the Mandate. However, lacking the necessary powers to ensure the withdrawal of South Africa from the Territory, it enlisted the co-operation of the Security Council by calling the latter's attention to the resolution, thus acting in accordance with Article 11, paragraph 2, of the Charter.

107. The Security Council responded to the call of the General Assembly. It "took note" of General Assembly resolution 2145 (XXI) in the preamble of its resolution 245 (1968); it took it "into account" in resolution 246 (1968); in resolutions 264 (1969) and 269 (1969) it adopted certain measures directed towards the implementation of General Assembly resolution 2145 (XXI) and, finally, in resolution 276 (1970), it reaffirmed resolution 264 (1969) and recalled resolution 269 (1969).

108. Resolution 276 (1970) of the Security Council, specifically mentioned in the text of the request, is the one essential for the purposes of the present advisory opinion. Before analysing it, however, it is necessary to refer briefly to resolutions 264 (1969) and 269 (1969), since these two resolutions have, together with resolution 276 (1970), a combined and a cumulative effect. Resolution 264 (1969), in paragraph 3 of its operative part, calls upon South Africa to withdraw its administration from Namibia immediately. Resolution 269 (1969), in view of South Africa's lack of compliance, after recalling the obligations of Members under Article 25 of the Charter, calls upon the Government of South Africa, in paragraph 5 of its operative part, "to withdraw its administration from the territory immediately and in any case before 4 October 1969". The preamble of resolution 276 (1970) reaffirms General Assembly resolution 2145 (XXI) and espouses it, by referring to the decision, not merely of the General Assembly, but of the United Nations "that the Mandate of South-West Africa was terminated". In the operative part, after condemning the non-compliance by South Africa with General Assembly and Security Council resolutions pertaining to Namibia, the Security Council declares, in paragraph 2, that "the continued presence of the South African authorities in Namibia is illegal" and that consequently all acts taken by the Government of South Africa "on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid". In paragraph 5 the Security Council "Calls upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution".

109. It emerges from the communications bringing the matter to the Security Council's attention, from the discussions held and particularly from the text of the resolutions themselves, that the Security Council, when it adopted these resolutions, was acting in the exercise of what it deemed to be its primary responsibility, the maintenance of peace and security, which, under the Charter, embraces situations which might

lead to a breach of the peace. (Art. 1, para. 1.) In the preamble of resolution 264 (1969) the Security Council was "*Mindful* of the grave consequences of South Africa's continued occupation of Namibia" and in paragraph 4 of that resolution it declared "that the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the United Nations Charter". In operative paragraph 3 of resolution 269 (1969) the Security Council decided "that the continued occupation of the territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations, . . ." In operative paragraph 3 of resolution 276 (1970) the Security Council declared further "that the defiant attitude of the Government of South Africa towards the Council's decisions undermines the authority of the United Nations".

110. As to the legal basis of the resolution, Article 24 of the Charter vests in the Security Council the necessary authority to take action such as that taken in the present case. The reference in paragraph 2 of this Article to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1. Reference may be made in this respect to the Secretary-General's Statement, presented to the Security Council on 10 January 1947, to the effect that "the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII . . . the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter."

111. As to the effect to be attributed to the declaration contained in paragraph 2 of resolution 276 (1970), the Court considers that the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end.

112. It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf. The question therefore arises as to the effect of this decision of the Security Council for States Members of the United Nations in accordance with Article 25 of the Charter.

113. It has been contended that Article 25 of the Charter applies only

to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had referred solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter. 114. It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.

115. Applying these tests, the Court recalls that in the preamble of resolution 269 (1969), the Security Council was "*Mindful* of its responsibility to take necessary action to secure strict compliance with the obligations entered into by States Members of the United Nations under the provisions of Article 25 of the Charter of the United Nations". The Court has therefore reached the conclusion that the decisions made by the Security Council in paragraphs 2 and 5 of resolutions 276 (1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269 (1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out.

116. In pronouncing upon the binding nature of the Security Council decisions in question, the Court would recall the following passage in its Advisory Opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*:

"The Charter has not been content to make the Organization created by it merely a centre 'for harmonizing the actions of nations in the attainment of these common ends' (Article 1, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization

by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council." (*I.C.J. Reports 1949*, p. 178.)

Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.

* * *

117. Having reached these conclusions, the Court will now address itself to the legal consequences arising for States from the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970). A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end. As this Court has held, referring to one of its decisions declaring a situation as contrary to a rule of international law: "This decision entails a legal consequence, namely that of putting an end to an illegal situation" (*I.C.J. Reports 1951*, p. 82).

118. South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the Territory of Namibia. By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.

119. The member States of the United Nations are, for the reasons given in paragraph 115 above, under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia, subject to paragraph 125 below.

120. The precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter. Thus it is for the Security Council to determine any further measures consequent upon the decisions already taken by it on the question of Namibia. In this context the Court notes that at the same meeting of the Security Council in which the request for advisory opinion was made, the Security Council also adopted resolution 283 (1970) which defined some of the steps to be taken. The Court has not been called upon to advise on the legal effects of that resolution.

121. The Court will in consequence confine itself to giving advice on those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with the declaration of illegality and invalidity made in paragraph 2 of resolution 276 (1970), because they may imply a recognition that South Africa's presence in Namibia is legal.

122. For the reasons given above, and subject to the observations contained in paragraph 125 below, member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.

123. Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.

124. The restraints which are implicit in the non-recognition of South Africa's presence in Namibia and the explicit provisions of paragraph 5 of resolution 276 (1970) impose upon member States the obligation to abstain from entering into economic and other forms of relationship

or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.

125. In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

126. As to non-member States, although not bound by Articles 24 and 25 of the Charter, they have been called upon in paragraphs 2 and 5 of resolution 276 (1970) to give assistance in the action which has been taken by the United Nations with regard to Namibia. In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof. The Mandate having been terminated by decision of the international organization in which the supervisory authority over its administration was vested, and South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with those decisions.

127. As to the general consequences resulting from the illegal presence of South Africa in Namibia, all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.

* * *

128. In its oral statement and in written communications to the Court, the Government of South Africa expressed the desire to supply the Court with further factual information concerning the purposes and objectives of South Africa's policy of separate development or *apartheid*, contending that to establish a breach of South Africa's substantive international obligations under the Mandate it would be necessary to prove that a particular exercise of South Africa's legislative or administrative powers was not directed in good faith towards the purpose of promoting to the utmost the well-being and progress of the inhabitants. It is claimed by the Government of South Africa that no act or omission on its part would constitute a violation of its international obligations unless it is

shown that such act or omission was actuated by a motive, or directed towards a purpose other than one to promote the interests of the inhabitants of the Territory.

129. The Government of South Africa having made this request, the Court finds that no factual evidence is needed for the purpose of determining whether the policy of *apartheid* as applied by South Africa in Namibia is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations. In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, constitute a violation of the purposes and principles of the Charter of the United Nations, the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.

130. It is undisputed, and is amply supported by documents annexed to South Africa's written statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the Territory. The application of this policy has required, as has been conceded by South Africa, restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.

131. Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.

* * *

132. The Government of South Africa also submitted a request that a plebiscite should be held in the Territory of Namibia under the joint supervision of the Court and the Government of South Africa (para. 16 above). This proposal was presented in connection with the request to submit additional factual evidence and as a means of bringing evidence before the Court. The Court having concluded that no further evidence

was required, that the Mandate was validly terminated and that in consequence South Africa's presence in Namibia is illegal and its acts on behalf of or concerning Namibia are illegal and invalid, it follows that it cannot entertain this proposal.

* * *

133. For these reasons,

THE COURT IS OF OPINION,

in reply to the question:

“What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?”

by 13 votes to 2,

(1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

by 11 votes to 4,

(2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

(3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-first day of June, one thousand nine hundred and seventy-one, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) ZAFRULLA KHAN,
President.

(Signed) S. AQUARONE,
Registrar.

President Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I am in entire agreement with the Opinion of the Court but would wish to add some observations on two or three aspects of the presentation made to the Court on behalf of South Africa.

It was contended that under the supervisory system as devised in the Covenant of the League and the different mandate agreements, the mandatory could, in the last resort, flout the wishes of the Council of the League by casting its vote in opposition to the directions which the Council might propose to give to the mandatory. The argument runs that this system was deliberately so devised, with open eyes, as to leave the Council powerless in face of the veto of the mandatory if the latter chose to exercise it. In support of this contention reliance was placed on paragraph 5 of Article 4 of the Covenant of the League by virtue of which any Member of the League not represented on the Council was to be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member. This entitled the mandatory to sit as a member at any meeting of the Council in which a matter affecting its interests as a mandatory came under consideration. Under paragraph 1 of Article 5 of the Covenant decisions of the Council required the agreement of all the Members of the League represented at the meeting. This is known as the unanimity rule and by virtue thereof it was claimed that a mandatory possessed a right of veto when attending a meeting of the Council in pursuance of paragraph 5 of Article 4 and consequently the last word on the manner and method of the administration of the mandate rested with the mandatory. This contention is untenable. Were it well founded it would reduce the whole system of mandates to mockery. As the Court, in its Judgment of 1966, observed:

“In practice, the unanimity rule was frequently not insisted upon, or its impact was mitigated by a process of give-and-take, and by various procedural devices to which both the Council and the mandatories lent themselves. So far as the Court's information goes, there never occurred any case in which a mandatory ‘vetoed’ what would otherwise have been a Council decision. Equally, however, much trouble was taken to avoid situations in which the mandatory would have been forced to acquiesce in the views of the rest of the Council short of casting an adverse vote. The occasional deliberate absence of the mandatory from a meeting, enabled decisions to be taken that the mandatory might have felt obliged to vote against if it had been present. This was part of the above-mentioned process for arriving at generally acceptable conclusions.”

(I.C.J. Reports 1966, pp. 44-45.)

The representative of South Africa, in answer to a question by a Member of the Court, confessed that there was not a single case on record in which the representative of a mandatory Power ever cast a negative vote in a meeting of the Council so as to block a decision of the Council. It is thus established that in practice the last word always rested with the Council of the League and not with the mandatory.

The Covenant of the League made ample provision to secure the effectiveness of the Covenant and conformity to its provisions in respect of the obligations entailed by membership of the League. A Member of the League which had violated any covenant of the League could be declared to be no longer a Member of the League by a vote of the Council concurred in by the representatives of all the other Members of the League represented thereon (para. 4, Art. 16, of the Covenant).

The representative of South Africa conceded that:

“... if a conflict between a mandatory and the Council occurred and if all the Members of the Council were of the opinion that the mandatory had violated a covenant of the League, it would have been legally possible for the Council to expel the mandatory from the League and thereafter decisions of the Council could no longer be thwarted by the particular mandatory—for instance, a decision to revoke the mandate. The mandatory would then no longer be a Member of the League and would then accordingly no longer be entitled to attend and vote in Council meetings.

... we agree that by expelling a mandatory the Council could have overcome the practical or mechanical difficulties created by the unanimity requirement.” (Hearing of 15 March 1971.)

It was no doubt the consciousness of this position which prompted the deliberate absence of a mandatory from a meeting of the Council of the League which enabled the Council to take decisions that the mandatory might have felt obliged to vote against if it had been present.

If a mandatory ceased to be a Member of the League and the Council felt that the presence of its representative in a meeting of the Council dealing with matters affecting the mandate would be helpful, it could still be invited to attend as happened in the case of Japan after it ceased to be a Member of the League. But it could not attend as of right under paragraph 5 of Article 4 of the Covenant.

In addition, if need arose the Covenant could be amended under Article 26 of the Covenant. In fact no such need arose but the authority was provided in the Covenant. It would thus be idle to contend that the mandates system was deliberately devised, with open eyes, so as to leave the Council of the League powerless against the veto of the mandatory if the latter chose to exercise it.

Those responsible for the Covenant were anxious and worked hard

to institute a system which would be effective in carrying out to the full the sacred trust of civilization. Had they deliberately devised a framework which might enable a mandatory so inclined to defy the system with impunity, they would have been guilty of defeating the declared purpose of the mandates system and this is not to be thought of; nor is it to be imagined that these wise statesmen, despite all the care that they took and the reasoning and persuasion that they brought into play, were finally persuaded into accepting as reality that which could so easily be turned into a fiction.

* * *

In my view the supervisory authority of the General Assembly of the United Nations in respect of the mandated territory, being derived from the Covenant of the League and the Mandate Agreement, is not restricted by any provision of the Charter of the United Nations. The extent of that authority must be determined by reference to the relevant provisions of the Covenant of the League and the Mandate Agreement. The General Assembly was entitled to exercise the same authority in respect of the administration of the Territory by the Mandatory as was possessed by the Council of the League and its decisions and determinations in that respect had the same force and effect as the decisions and determinations of the Council of the League. This was well illustrated in the case of General Assembly resolution 289 (IV), adopted on 21 November 1949 recommending that Libya shall become independent as soon as possible and in any case not later than 1 January 1952. A detailed procedure for the achievement of this objective was laid down, including the appointment by the General Assembly of a United Nations Commissioner in Libya and a Council to aid and advise him, etc. All the recommendations contained in this resolution constituted binding decisions; decisions which had been adopted in accordance with the provisions of the Charter but whose binding character was derived from Annex XI to the Treaty of Peace with Italy.

* * *

The representative of South Africa, during the course of his oral submission, refrained from using the expression “*apartheid*” but urged:

“... South Africa is in the position that its conduct would be unlawful if the differentiation which it admittedly practises should be directed at, and have the result of subordinating the interests of one or certain groups on a racial or ethnic basis to those of others... If that can be established in fact, then South Africa would be guilty of violation of its obligations in that respect, otherwise not.” (Hearing of 17 March 1971.)

The policy of *apartheid* was initiated by Prime Minister Malan and was then vigorously put into effect by his successors, Strijdom and Verwoerd. It has been continuously proclaimed that the purpose and object of the policy are the maintenance of White domination. Speaking to the South African House of Assembly, as late as 1963, Dr. Verwoerd said:

“Reduced to its simplest form the problem is nothing else than this: We want to keep South Africa White . . . Keeping it White can only mean one thing, namely, White domination, not leadership, not guidance, but control, supremacy. If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by White domination . . . we say that it can be achieved by separate development.” (*I.C.J. Pleadings, South West Africa*, Vol. IV, p. 264.)

South Africa's reply to this in its Rejoinder in the 1966 cases was in effect that these and other similar pronouncements were qualified by “the promise to provide separate homelands for the Bantu groups” wherein the Bantu would be free to develop his capacities to the same degree as the White could do in the rest of the country. But this promise itself was always subject to the qualification that the Bantu homelands would develop under the guardianship of the White. In this connection it was urged that in 1961 the “Prime Minister spoke of a greater degree of ultimate independence for Bantu homelands than he had mentioned a decade earlier”. This makes little difference in respect of the main purpose of the policy which continued to be the domination of the White.

It needs to be remembered, however, that the Court is not concerned in these proceedings with conditions in South Africa. The Court is concerned with the administration of South West Africa as carried on by the Mandatory in discharge of his obligations under the Mandate which prescribed that the well-being and development of people who were not yet able to stand by themselves under the strenuous conditions of the modern world constituted a sacred trust of civilization and that the best method of giving effect to this principle was that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience and their geographical position could best undertake this responsibility (Art. 22, paras. 1 and 2, of the Covenant of the League of Nations).

The administration was to be carried on “in the interests of the indigenous population” (para. 6, Art. 22). For the discharge of this obligation it is not enough that the administration should believe in good faith that the policy it proposes to follow is in the best interests of all sections of the population. The supervisory authority must be satisfied that it is in the

best interests of the indigenous population of the Territory. This follows from Article 6 of the Mandate Agreement for South West Africa, read with paragraph 6 of Article 22 of the Covenant.

The representative of South Africa, while admitting the right of the people of South West Africa to self-determination, urged in his oral statement that the exercise of that right must take into full account the limitations imposed, according to him, on such exercise by the tribal and cultural divisions in the Territory. He concluded that in the case of South West Africa self-determination “may well find itself practically restricted to some kind of autonomy and local self-government within a larger arrangement of co-operation” (hearing of 17 March 1971). This in effect means a denial of self-determination as envisaged in the Charter of the United Nations.

Whatever may have been the conditions in South Africa calling for special measures, those conditions did not exist in the case of South West Africa at the time when South Africa assumed the obligation of a mandatory in respect of the Territory, nor have they come into existence since. In South West Africa the small White element was not and is not indigenous to the Territory. There can be no excuse in the case of South West Africa for the application of the policy of *apartheid* so far as the interests of the White population are concerned. It is claimed, however, that the various indigenous groups of the population have reached different stages of development and that there are serious ethnic considerations which call for the application of the policy of separate development of each group. The following observations of the Director of the Institute of Race Relations, London, are apposite in this context:

“... White South African arguments are based on the different stages of development reached by various groups of people. It is undisputed fact that groups have developed at different paces in respect of the control of environment (although understanding of other aspects of life has not always grown at the same pace). But the aspect of South African thought which is widely questioned elsewhere is the assumption that an individual is permanently limited by the limitations of his group. His ties with it may be strong; indeed, when considering politics and national survival, the assumption that they will be strong is altogether reasonable. Again, as a matter of choice, people may prefer to mix socially with those of their own group, but to say that by law people of one group must mix with no others can really only proceed from a conviction not only that the other groups are inferior but that every member of each of the other groups is permanently and irremediably inferior. It is this that rankles. ‘Separate but equal’ is possible so long as it is a matter of choice by both parties; legally imposed by one, it must be regarded by the other as a humiliation, and far more so if it applies not only

to the group as a whole but to individuals. In fact, of course, what separate development has meant has been anything but equal.

These are some reasons why it will be hard to find natives of Africa who believe that to extend the policy of separate development to South West Africa even more completely than at present is in the interest of any but the White inhabitants." (Quoted in *I.C.J. Pleadings, South West Africa*, Vol. IV, p. 339.)

* * *

Towards the close of his oral presentation the representative of South Africa made a plea to the Court in the following terms:

"In our submission, the general requirement placed by the Charter on all United Nations activities is that they must further peace, friendly relations, and co-operation between nations, and especially between member States. South Africa, as a member State, is under a duty to contribute towards those ends, and she desires to do so, although she has no intention of abdicating what she regards as her responsibilities on the sub-continent of southern Africa.

If there are to be genuine efforts at achieving a peaceful solution, they will have to satisfy certain criteria. They will have to respect the will of the self-determining peoples of South West Africa. They will have to take into account the facts of geography, of economics, of budgetary requirements, of the ethnic conditions and of the state of development.

If this Court, even in an opinion on legal questions, could indicate the road towards a peaceful and constructive solution along these lines, then the Court would have made a great contribution, in our respectful submission, to the cause of international peace and security and, more, to the cause of friendly relations amongst not only the nations but amongst all men." (Hearing of 5 March 1971.)

The representative of the United States of America, in his oral presentation, observed that:

"... the question of holding a free and proper plebiscite under appropriate auspices and with conditions and arrangements which would ensure a fair and informed expression of the will of the people of Namibia deserves study. It is a matter which might be properly submitted to the competent political organs of the United Nations, which have consistently manifested their concern that the

Namibians achieve self-determination. The Court may wish to so indicate in its opinion to the Security Council." (Hearing of 9 March 1971.)

The Court having arrived at the conclusion that the Mandate has been terminated and that the presence of South Africa in South West Africa is illegal, I would, in response to the plea made by the representative of South Africa, suggest that South Africa should offer to withdraw its administration from South West Africa in consultation with the United Nations so that a process of withdrawal and substitution in its place of United Nations' control may be agreed upon and carried into effect with the minimum disturbance of present administrative arrangements. It should also be agreed upon that, after the expiry of a certain period but not later than a reasonable time-limit thereafter, a plebiscite may be held under the supervision of the United Nations, which should ensure the freedom and impartiality of the plebiscite, to ascertain the wishes of the inhabitants of the Territory with regard to their political future. If the result of the plebiscite should reveal a clear preponderance of views in support of a particular course and objective, that course should be adopted so that the desired objective may be achieved as early as possible.

South Africa's insistence upon giving effect to the will of the peoples of South West Africa proceeds presumably from the conviction that an overwhelming majority of the peoples of the Territory desire closer political integration with the Republic of South Africa. Should that prove in fact to be the case the United Nations, being wholly committed to the principle of self-determination of peoples, would be expected to readily give effect to the clearly expressed wishes of the peoples of the Territory. Should the result of the plebiscite disclose their preference for a different solution, South Africa should equally readily accept and respect such manifestation of the will of the peoples concerned and should co-operate with the United Nations in giving effect to it.

The Government of South Africa, being convinced that an overwhelming majority of the peoples of South West Africa truly desire incorporation with the Republic, would run little risk of a contrary decision through the adoption of the procedure here suggested. If some such procedure is adopted and the conclusion that may emerge therefrom, whatever it may prove to be, is put into effect, South Africa would have vindicated itself in the eyes of the world and in the estimation of the peoples of South West Africa, whose freely expressed wishes must be supreme. There would still remain the possibility, and, if South Africa's estimation of the situation is close enough to reality, the strong probability, that once the peoples of South West Africa have been put in a position to manage their own affairs without any outside influence or control and they have had greater experience of the difficulties and problems with which they would be confronted, they may freely decide, in the exercise of their sovereignty, to establish a closer political relationship with South Africa. The adoption

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of the course here suggested would indeed make a great contribution "to the cause of international peace and security and, more, to the cause of friendly relations amongst not only the nations but amongst all men".

Vice-President AMMOUN and Judges PADILLA NERVO, PETRÉN, ONYEAMA, DILLARD and DE CASTRO append separate opinions to the Opinion of the Court.

Judges Sir Gerald FITZMAURICE and Gros append dissenting opinions to the Opinion of the Court.

(Initialed) Z.K.

(Initialed) S.A.

**Accordance with International Law of the Unilateral
Declaration of Independence in Respect of Kosovo,
Advisory Opinion, 22 July 2010**

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ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO

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* *

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* *

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* *

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Declaration of independence was not issued by the Provisional Institutions of Self-Government — Declaration of independence did not violate the Constitutional Framework.

Adoption of the declaration of independence did not violate any applicable rule of international law.

ADVISORY OPINION

Present: President OWADA; Vice-President TOMKA; Judges KOROMA, AL-KHASAWNEH, BUERGENTHAL, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CAÑÇADO TRINDADE, YUSUF, GREENWOOD; Registrar COUVREUR.

On the accordance with international law of the unilateral declaration of independence in respect of Kosovo,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution 63/3 adopted by the General Assembly of the United Nations (hereinafter the General Assembly) on 8 October 2008. By a letter dated 9 October 2008 and received in the Registry by facsimile on 10 October 2008, the original of which was received in the Registry on 15 October 2008, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of the resolution were enclosed with the letter. The resolution reads as follows:

“*The General Assembly,*

Mindful of the purposes and principles of the United Nations,

Bearing in mind its functions and powers under the Charter of the United Nations,

Recalling that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia,

Aware that this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order,

Decides, in accordance with Article 96 of the Charter of the United Nations to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’”

2. By letters dated 10 October 2008, the Registrar, pursuant to Article 66, paragraph 1, of the Statute, gave notice of the request for an advisory opinion to all States entitled to appear before the Court.

3. By an Order dated 17 October 2008, in accordance with Article 66, paragraph 2, of the Statute, the Court decided that the United Nations and its Member States were likely to be able to furnish information on the question. By the same Order, the Court fixed, respectively, 17 April 2009 as the time-limit within which written statements might be submitted to it on the question, and 17 July 2009 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute.

The Court also decided that, taking account of the fact that the unilateral declaration of independence of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration were considered likely to be able to furnish information on the question. It therefore further decided to invite them to make written contributions to the Court within the same time-limits.

4. By letters dated 20 October 2008, the Registrar informed the United Nations and its Member States of the Court’s decisions and transmitted to them a copy of the Order. By letter of the same date, the Registrar informed the authors of the above-mentioned declaration of independence of the Court’s decisions, and transmitted to them a copy of the Order.

5. Pursuant to Article 65, paragraph 2, of the Statute, on 30 January 2009 the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question. The dossier was subsequently placed on the Court’s website.

6. Within the time-limit fixed by the Court for that purpose, written statements were filed, in order of their receipt, by: Czech Republic, France, Cyprus, China, Switzerland, Romania, Albania, Austria, Egypt, Germany, Slovakia, Russian Federation, Finland, Poland, Luxembourg, Libyan Arab Jamahiriyah, United Kingdom, United States of America, Serbia, Spain, Islamic Republic of Iran, Estonia, Norway, Netherlands, Slovenia, Latvia, Japan, Brazil, Ireland, Denmark, Argentina, Azerbaijan, Maldives, Sierra Leone and Bolivia. The authors of the unilateral declaration of independence filed a written contribution. On 21 April 2009, the Registrar communicated copies of the written statements and written contribution to all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence.

7. On 29 April 2009, the Court decided to accept the written statement filed by the Bolivarian Republic of Venezuela, submitted on 24 April 2009, after expiry of the relevant time-limit. On 15 May 2009, the Registrar communicated copies of this written statement to all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence.

8. By letters dated 8 June 2009, the Registrar informed the United Nations and its Member States that the Court had decided to hold hearings, opening on 1 December 2009, at which they could present oral statements and comments, regardless of whether or not they had submitted written statements and, as the case may be, written comments. The United Nations and its Member States were invited to inform the Registry, by 15 September 2009, if they intended to take part in the oral proceedings. The letters further indicated that the authors of the unilateral declaration of independence could present an oral contribution.

By letter of the same date, the Registrar informed the authors of the unilateral declaration of independence of the Court's decision to hold hearings, inviting them to indicate, within the same time-limit, whether they intended to take part in the oral proceedings.

9. Within the time-limit fixed by the Court for that purpose, written comments were filed, in order of their receipt, by: France, Norway, Cyprus, Serbia, Argentina, Germany, Netherlands, Albania, Slovenia, Switzerland, Bolivia, United Kingdom, United States of America and Spain. The authors of the unilateral declaration of independence submitted a written contribution regarding the written statements.

10. Upon receipt of the above-mentioned written comments and written contribution, the Registrar, on 24 July 2009, communicated copies thereof to all States having submitted written statements, as well as to the authors of the unilateral declaration of independence.

11. By letters dated 30 July 2009, the Registrar communicated to the United Nations, and to all of its Member States that had not participated in the written proceedings, copies of all written statements and written comments, as well as the written contributions of the authors of the unilateral declaration of independence.

12. By letters dated 29 September 2009, the Registry transmitted a detailed timetable of the hearings to those who, within the time-limit fixed for that purpose by the Court, had expressed their intention to take part in the aforementioned proceedings.

13. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and written comments submitted to the Court, as well as the written contributions of the authors of the unilateral declaration of independence, accessible to the public, with effect from the opening of the oral proceedings.

14. In the course of hearings held from 1 to 11 December 2009, the Court heard oral statements, in the following order, by:

For the Republic of Serbia:

H.E. Mr. Dušan T. Bataković, PhD in History, University of Paris-Sorbonne (Paris IV), Ambassador of the Republic of Serbia to France, Vice-Director of the Institute for Balkan Studies and Assistant Professor at the University of Belgrade, Head of Delegation,

Mr. Vladimir Djerić, S.J.D. (Michigan), Attorney at Law, Mikijelj, Janković & Bogdanović, Belgrade, Counsel and Advocate,

Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of International Law, University of Potsdam, Director of the Potsdam Center of Human Rights, Member of the Permanent Court of Arbitration, Counsel and Advocate,

Mr. Malcolm N. Shaw Q.C., Sir Robert Jennings Professor of International Law, University of Leicester, United Kingdom, Counsel and Advocate,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Associate Member of the Institut de droit international, Counsel and Advocate,

Mr. Saša Obradović, Inspector General in the Ministry of Foreign Affairs, Deputy Head of Delegation;

Mr. Skender Hyseni, Head of Delegation, Sir Michael Wood, K.C.M.G., member of the English Bar, Member of the International Law Commission, Counsel,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense, Counsel,

Mr. Sean D. Murphy, Patricia Roberts Harris Research Professor of Law, George Washington University, Counsel;

H.E. Mr. Gazmend Barbullushi, Ambassador Extraordinary and Plenipotentiary of the Republic of Albania to the Kingdom of the Netherlands, Legal Adviser,

Mr. Jochen A. Frowein, M.C.L., Director emeritus of the Max Planck Institute for International Law, Professor emeritus of the University of Heidelberg, Member of the Institute of International Law, Legal Adviser,

For the authors of the unilateral declaration of independence:

For the Republic of Albania:

- Mr. Terry D. Gill, Professor of Military Law at the University of Amsterdam and Associate Professor of Public International Law at Utrecht University, Legal Adviser;
- Ms Susanne Wasum-Rainer, Legal Adviser, Federal Foreign Office (Berlin);
- H.E. Mr. Abdullah A. Alshaghood, Ambassador of the Kingdom of Saudi Arabia to the Kingdom of the Netherlands, Head of Delegation;
- H.E. Madam Susana Ruiz Cerutti, Ambassador, Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship, Head of Delegation;
- H.E. Mr. Helmut Tichy, Ambassador, Deputy Legal Adviser, Federal Ministry of European and International Affairs;
- H.E. Mr. Agshin Mehdiyev, Ambassador and Permanent Representative of Azerbaijan to the United Nations;
- H.E. Madam Elena Gritsenko, Ambassador of the Republic of Belarus to the Kingdom of the Netherlands, Head of Delegation;
- H.E. Mr. Roberto Calzadilla Sarmiento, Ambassador of the Plurinational State of Bolivia to the Kingdom of the Netherlands;
- H.E. Mr. José Artur Denot Medeiros, Ambassador of the Federative Republic of Brazil to the Kingdom of the Netherlands;
- Mr. Zlatko Dimitroff, S.J.D., Director of the International Law Department, Ministry of Foreign Affairs, Head of Delegation;
- Mr. Thomas Barankitse, Legal Attaché, Counsel,
- Mr. Jean d'Aspremont, Associate Professor, University of Amsterdam, Chargé de cours invité, Catholic University of Louvain, Counsel;
- H.E. Madam Xue Hanqin, Ambassador to the Association of Southeast Asian Nations (ASEAN), Legal Counsel of the Ministry of Foreign Affairs, Member of the International Law Commission, Member of the Institut de droit international, Head of Delegation;
- For the Federal Republic of Germany:*
- For the Kingdom of Saudi Arabia:*
- For the Argentine Republic:*
- For the Republic of Austria:*
- For the Republic of Azerbaijan:*
- For the Republic of Belarus:*
- For the Plurinational State of Bolivia:*
- For the Federative Republic of Brazil:*
- For the Republic of Bulgaria:*
- For the Republic of Burundi:*
- For the People's Republic of China:*

- For the Republic of Cyprus:*
- H.E. Mr. James Droushiotis, Ambassador of the Republic of Cyprus to the Kingdom of the Netherlands,
- Mr. Vaughan Lowe Q.C., member of the English Bar, Chichele Professor of International Law, University of Oxford, Counsel and Advocate,
- Mr. Polyvios G. Polyviou, Counsel and Advocate;
- H.E. Madam Andreja Metelko-Zgombić, Ambassador, Chief Legal Adviser in the Ministry of Foreign Affairs and European Integration;
- H.E. Mr. Thomas Winkler, Ambassador, Under-Secretary for Legal Affairs, Ministry of Foreign Affairs, Head of Delegation;
- Ms Concepción Escobar Hernández, Legal Adviser, Head of the International Law Department, Ministry of Foreign Affairs and Co-operation, Head of Delegation and Advocate;
- Mr. Harold Hongju Koh, Legal Adviser, Department of State, Head of Delegation and Advocate;
- H.E. Mr. Kirill Gevorgian, Ambassador, Head of the Legal Department, Ministry of Foreign Affairs, Head of Delegation;
- Ms Päivi Kaukoranta, Director General, Legal Service, Ministry of Foreign Affairs,
- Mr. Martti Koskeniemi, Professor at the University of Helsinki;
- Ms Edwige Belliard, Director of Legal Affairs, Ministry of Foreign and European Affairs,
- Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense;
- H.R.H. Prince Zeid Raad Zeid Al Hussein, Ambassador of the Hashemite Kingdom of Jordan to the United States of America, Head of Delegation;
- Mr. Rolf Einar Fife, Director General, Legal Affairs Department, Ministry of Foreign Affairs, Head of Delegation;
- Ms Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign Affairs;
- For the Kingdom of Denmark:*
- For the Kingdom of Spain:*
- For the United States of America:*
- For the Russian Federation:*
- For the Republic of Finland:*
- For the French Republic:*
- For the Hashemite Kingdom of Jordan:*
- For the Kingdom of Norway:*
- For the Kingdom of the Netherlands:*

A. Jurisdiction

18. The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 October 2008. The power of the Court to give an advisory opinion is based upon Article 65, paragraph 1, of its Statute, which provides that:

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

19. In its application of this provision, the Court has indicated that:

“It is . . . a precondition of the Court’s competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ.” (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21.)

20. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ of the United Nations or a specialized agency having competence to make it. The General Assembly is authorized to request an advisory opinion by Article 96 of the Charter, which provides that:

“1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.”

21. While paragraph 1 of Article 96 confers on the General Assembly the competence to request an advisory opinion on “any legal question”, the Court has sometimes in the past given certain indications as to the relationship between the question which is the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 70; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 232-233, paras. 11-12; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 145, paras. 16-17).

22. The Court observes that Article 10 of the Charter provides that:

“The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.”

For Romania:
Mr. Bogdan Aurescu, Secretary of State, Ministry of Foreign Affairs,

Mr. Cosmin Dinescu, Director-General for Legal Affairs, Ministry of Foreign Affairs;

For the United Kingdom of Great Britain and Northern Ireland:
Mr. Daniel Bethlehem Q.C., Legal Adviser to the Foreign and Commonwealth Office, Representative of the United Kingdom of Great Britain and Northern Ireland, Counsel and Advocate,

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institut de droit international, Counsel and Advocate;

For the Bolivarian Republic of Venezuela:
Mr. Alejandro Fleming, Deputy Minister for Europe of the Ministry of the People’s Power for Foreign Affairs;

For the Socialist Republic of Viet Nam:
H.E. Madam Nguyen Thi Hoang Anh, Doctor of Law, Director-General, Department of International Law and Treaties, Ministry of Foreign Affairs.

15. Questions were put by Members of the Court to participants in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limit.

16. Judge Shi took part in the oral proceedings; he subsequently resigned from the Court with effect from 28 May 2010.

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I. JURISDICTION AND DISCRETION

17. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 144, para. 13).

Moreover, Article 11, paragraph 2, of the Charter has specifically provided the General Assembly with competence to discuss “any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations” and, subject again to the limitation in Article 12, to make recommendations with respect thereto.

23. Article 12, paragraph 1, of the Charter provides that:

“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

24. In the present proceedings, it was suggested that, since the Security Council was seized of the situation in Kosovo, the effect of Article 12, paragraph 1, was that the General Assembly’s request for an advisory opinion was outside its powers under the Charter and thus did not fall within the authorization conferred by Article 96, paragraph 1. As the Court has stated on an earlier occasion, however, “[a] request for an advisory opinion is not in itself a ‘recommendation’ by the General Assembly ‘with regard to [a] dispute or situation’” (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 148, para. 25). Accordingly, while Article 12 may limit the scope of the action which the General Assembly may take subsequent to its receipt of the Court’s opinion (a matter on which it is unnecessary for the Court to decide in the present context), it does not in itself limit the authorization to request an advisory opinion which is conferred upon the General Assembly by Article 96, paragraph 1. Whether the delimitation of the respective powers of the Security Council and the General Assembly — of which Article 12 is one aspect — should lead the Court, in the circumstances of the present case, to decline to exercise its jurisdiction to render an advisory opinion is another matter (which the Court will consider in paragraphs 29 to 48 below).

25. It is also for the Court to satisfy itself that the question on which it is requested to give its opinion is a “legal question” within the meaning of Article 96 of the Charter and Article 65 of the Statute. In the present case, the question put to the Court by the General Assembly asks whether the declaration of independence to which it refers is “in accordance with international law”. A question which expressly asks the Court whether or not a particular action is compatible with international law certainly appears to be a legal question; as the Court has remarked on a previous occasion, questions “framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15) and therefore appear to be questions of a legal character for the purposes of Article 96 of the Charter and Article 65 of the Statute.

26. Nevertheless, some of the participants in the present proceedings have suggested that the question posed by the General Assembly is not, in reality, a legal question. According to this submission, international law does not regulate the act of making a declaration of independence, which should be regarded as a political act; only domestic constitutional law governs the act of making such a declaration, while the Court’s jurisdiction to give an advisory opinion is confined to questions of international law. In the present case, however, the Court has not been asked to give an opinion on whether the declaration of independence is in accordance with any rule of domestic law but only whether it is in accordance with international law. The Court can respond to that question by reference to international law without the need to enquire into any system of domestic law.

27. Moreover, the Court has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have (*Conditions of Admission of a State in Membership of the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61, and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 13).

28. The Court therefore considers that it has jurisdiction to give an advisory opinion in response to the request made by the General Assembly.

B. Discretion

29. The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it:

“The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that ‘The Court may give an advisory opinion . . . (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met.’” (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44.)

The discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court’s judicial function and its nature as the principal judicial organ of the United Nations (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 29; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 175, para. 24; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 334, para. 22; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 156-157, paras. 44-45).

30. The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44). Accordingly, the consistent jurisprudence of the Court has determined that only “compelling reasons” should lead the Court to refuse its opinion in response to a request falling within its jurisdiction (*Judgments of the Administrative Tribunal of the ILO upon complaints made against the Unesco, I.C.J. Reports 1956*, p. 86; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44).

31. The Court must satisfy itself as to the propriety of the exercise of its judicial function in the present case. It has therefore given careful consideration as to whether, in the light of its previous jurisprudence, there are compelling reasons for it to refuse to respond to the request from the General Assembly.

32. One argument, advanced by a number of participants in the present proceedings, concerns the motives behind the request. Those participants drew attention to a statement made by the sole sponsor of the resolution by which the General Assembly requested the Court's opinion to the effect that

“the Court's advisory opinion would provide politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law.

.....

Supporting this draft resolution would also serve to reaffirm a fundamental principle: the right of any Member State of the United Nations to pose a simple, basic question on a matter it considers vitally important to the Court. To vote against it would be in effect a vote to deny the right of any country to seek — now or in the future — judicial recourse through the United Nations system.” (A/63/PV.22, p. 1.)

According to those participants, this statement demonstrated that the opinion of the Court was being sought not in order to assist the General Assembly but rather to serve the interests of one State and that the Court should, therefore, decline to respond.

33. The advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Article 96, paragraph 2, of the Charter, may obtain the Court's opinion in order to assist them in their activities. The Court's opinion is given not to States but to the organ which has requested it (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71). Nevertheless, precisely for that reason, the motives of individual States which sponsor, or vote in favour of, a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion whether or not to respond. As the Court put it in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*,

“once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution” (*I.C.J. Reports 1996 (I)*, p. 237, para. 16).

34. It was also suggested by some of those participating in the proceedings that resolution 63/3 gave no indication of the purpose for which the General Assembly needed the Court's opinion and that there was nothing to indicate that the opinion would have any useful legal effect. This argument cannot be accepted. The Court has consistently made clear that it is for the

organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions. In its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the Court rejected an argument that it should refuse to respond to the General Assembly's request on the ground that the General Assembly had not explained to the Court the purposes for which it sought an opinion, stating that

“it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.” (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

Similarly, in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court commented that “[t]he Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly” (*I.C.J. Reports 2004 (I)*, p. 163, para. 62).

35. Nor does the Court consider that it should refuse to respond to the General Assembly's request on the basis of suggestions, advanced by some of those participating in the proceedings, that its opinion might lead to adverse political consequences. Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot — in particular where there is no basis on which to make such an assessment — substitute its own view as to whether an opinion would be likely to have an adverse effect. As the Court stated in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, in response to a submission that a reply from the Court might adversely affect disarmament negotiations, faced with contrary positions on this issue “there are no evident criteria by which it can prefer one assessment to another” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 17; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 37, para. 73; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 159-160, paras. 51-54).

36. An important issue which the Court must consider is whether, in view of the respective roles of the Security Council and the General Assembly in relation to the situation in Kosovo, the Court, as the principal judicial organ of the United Nations, should decline to answer the question which has been put to it on the ground that the request for the Court's opinion has been made by the General Assembly rather than the Security Council.

37. The situation in Kosovo had been the subject of action by the Security Council, in the exercise of its responsibility for the maintenance of international peace and security, for more than ten years prior to the present request for an advisory opinion. The Council first took action specifically relating to the situation in Kosovo on 31 March 1998, when it adopted resolution 1160 (1998). That was followed by resolutions 1199 (1998), 1203 (1998) and 1239 (1999). On 10 June 1999, the Council adopted resolution 1244 (1999), which authorized the creation of an international military presence (subsequently known as “KFOR”) and an international civil presence (the United Nations Interim Administration Mission in Kosovo, “UNMIK”) and laid

down a framework for the administration of Kosovo. By resolution 1367 (2001), the Security Council decided to terminate the prohibitions on the sale or supply of arms established by paragraph 8 of resolution 1160 (1998). The Security Council has received periodic reports from the Secretary-General on the activities of UNMIK. The dossier submitted to the Court by the Secretary-General records that the Security Council met to consider the situation in Kosovo on 29 occasions between 2000 and the end of 2008. Although the declaration of independence which is the subject of the present request was discussed by the Security Council, the Council took no action in respect of it (Security Council, provisional verbatim record, 18 February 2008, 3 p.m. (S/VP.5839); Security Council, provisional verbatim record, 11 March 2008, 3 p.m. (S/VP.5850)).

38. The General Assembly has also adopted resolutions relating to the situation in Kosovo. Prior to the adoption by the Security Council of resolution 1244 (1999), the General Assembly adopted five resolutions on the situation of human rights in Kosovo (resolutions 49/204, 50/190, 51/111, 52/139 and 53/164). Following resolution 1244 (1999), the General Assembly adopted one further resolution on the situation of human rights in Kosovo (resolution 54/183 of 17 December 1999) and 15 resolutions concerning the financing of UNMIK (resolutions 53/241, 54/245A, 54/245B, 55/227A, 55/227B, 55/295, 57/326, 58/305, 59/286A, 59/286B, 60/275, 61/285, 62/262, 63/295 and 64/279). However, the broader situation in Kosovo was not part of the agenda of the General Assembly at the time of the declaration of independence and it was therefore necessary in September 2008 to create a new agenda item for the consideration of the proposal to request an opinion from the Court.

39. Against this background, it has been suggested that, given the respective powers of the Security Council and the General Assembly, if the Court's opinion were to be sought regarding whether the declaration of independence was in accordance with international law, the request should rather have been made by the Security Council and that this fact constitutes a compelling reason for the Court not to respond to the request from the General Assembly. That conclusion is said to follow both from the nature of the Security Council's involvement and the fact that, in order to answer the question posed, the Court will necessarily have to interpret and apply Security Council resolution 1244 (1999) in order to determine whether or not the declaration of independence is in accordance with international law.

40. While the request put to the Court concerns one aspect of a situation which the Security Council has characterized as a threat to international peace and security and which continues to feature on the agenda of the Council in that capacity, that does not mean that the General Assembly has no legitimate interest in the question. Articles 10 and 11 of the Charter, to which the Court has already referred, confer upon the General Assembly a very broad power to discuss matters within the scope of the activities of the United Nations, including questions relating to international peace and security. That power is not limited by the responsibility for the maintenance of international peace and security which is conferred upon the Security Council by Article 24, paragraph 1. As the Court has made clear in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paragraph 26, "Article 24 refers to a primary, but not necessarily exclusive, competence". The fact that the situation in Kosovo is before the Security Council and the Council has exercised its Chapter VII powers in respect of that situation does not preclude the General Assembly from discussing any aspect of that situation, including the declaration of independence. The limit which the Charter places upon the General Assembly to protect the role of the Security Council is contained in Article 12 and restricts the power of the General Assembly to make recommendations following a discussion, not its power to engage in such a discussion.

41. Moreover, Article 12 does not bar all action by the General Assembly in respect of threats to international peace and security which are before the Security Council. The Court considered this question in some detail in paragraphs 26 to 27 of its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court noted that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security and observed that it is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

42. The Court's examination of this subject in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was made in connection with an argument relating to whether or not the Court possessed the jurisdiction to give an advisory opinion, rather than whether it should exercise its discretion not to give an opinion. In the present case, the Court has already held that Article 12 of the Charter does not deprive it of the jurisdiction conferred by Article 96, paragraph 1 (paragraphs 23 to 24 above). It considers, however, that the analysis contained in the 2004 Advisory Opinion is also pertinent to the issue of discretion in the present case. That analysis demonstrates that the fact that a matter falls within the primary responsibility of the Security Council for situations which may affect the maintenance of international peace and security and that the Council has been exercising its powers in that respect does not preclude the General Assembly from discussing that situation or, within the limits set by Article 12, making recommendations with regard thereto. In addition, as the Court pointed out in its 2004 Advisory Opinion, General Assembly resolution 377A (V) ("Uniting for Peace") provides for the General Assembly to make recommendations for collective measures to restore international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression and the Security Council is unable to act because of lack of unanimity of the permanent members (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 150, para. 30). These considerations are of relevance to the question whether the delimitation of powers between the Security Council and the General Assembly constitutes a compelling reason for the Court to decline to respond to the General Assembly's request for an opinion in the present case.

43. It is true, of course, that the facts of the present case are quite different from those of the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The situation in the occupied Palestinian territory had been under active consideration by the General Assembly for several decades prior to its decision to request an opinion from the Court and the General Assembly had discussed the precise subject on which the Court's opinion was sought. In the present case, with regard to the situation in Kosovo, it was the Security Council which had been actively seized of the matter. In that context, it discussed the future status of Kosovo and the declaration of independence (see paragraph 37 above).

44. However, the purpose of the advisory jurisdiction is to enable organs of the United Nations and other authorized bodies to obtain opinions from the Court which will assist them in the future exercise of their functions. The Court cannot determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps. As the preceding paragraphs demonstrate, the General Assembly is entitled

1961) (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, pp. 175-177). The Court also notes that, in its Advisory Opinion on *Conditions of Admission of a State in the United Nations (Article 4 of the Charter)* (I.C.J. Reports 1947-1948, pp. 61-62), it responded to a request from the General Assembly even though that request referred to statements made in a meeting of the Security Council and it had been submitted that the Court should therefore exercise its discretion to decline to reply (*Conditions of Admission of a State in the United Nations (Article 4 of the Charter)*, *Pleadings, Oral Arguments, Documents*, p. 90). Where, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly.

48. Accordingly, the Court considers that there are no compelling reasons for it to decline to exercise its jurisdiction in respect of the present request.

II. SCOPE AND MEANING OF THE QUESTION

49. The Court will now turn to the scope and meaning of the question on which the General Assembly has requested that it give its opinion. The General Assembly has formulated that question in the following terms:

“Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”

50. The Court recalls that in some previous cases it has departed from the language of the question put to it where the question was not adequately formulated (see for example, in *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, Advisory Opinion, 1928, P.C.I.J., Series B, No. 16) or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the “legal questions really in issue” (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 89, para. 35). Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1982, p. 348, para. 46).

51. In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court’s opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. The Court notes that, in past requests for advisory opinions, the General Assembly and the Security Council, when they have wanted the Court’s opinion on the legal consequences of an action, have framed the question in such a way that this aspect is expressly stated (see, for example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (I), p. 136). Accordingly, the Court does not consider that it is

to discuss the declaration of independence and, within the limits considered in paragraph 42, above, to make recommendations in respect of that or other aspects of the situation in Kosovo without trespassing on the powers of the Security Council. That being the case, the fact that, hitherto, the declaration of independence has been discussed only in the Security Council and that the Council has been the organ which has taken action with regard to the situation in Kosovo does not constitute a compelling reason for the Court to refuse to respond to the request from the General Assembly.

45. Moreover, while it is the scope for future discussion and action which is the determining factor in answering this objection to the Court rendering an opinion, the Court also notes that the General Assembly has taken action with regard to the situation in Kosovo in the past. As stated in paragraph 38 above, between 1995 and 1999, the General Assembly adopted six resolutions addressing the human rights situation in Kosovo. The last of these, resolution 54/183, was adopted on 17 December 1999, some six months after the Security Council had adopted resolution 1244 (1999). While the focus of this resolution was on human rights and humanitarian issues, it also addressed (in para. 7) the General Assembly’s concern about a possible “cantonization” of Kosovo. In addition, since 1999 the General Assembly has each year approved, in accordance with Article 17, paragraph 1, of the Charter, the budget of UNMIK (see paragraph 38 above). The Court observes therefore that the General Assembly has exercised functions of its own in the situation in Kosovo.

46. Further, in the view of the Court, the fact that it will necessarily have to interpret and apply the provisions of Security Council resolution 1244 (1999) in the course of answering the question put by the General Assembly does not constitute a compelling reason not to respond to that question. While the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions. It has done so both in the exercise of its advisory jurisdiction (see for example, *Certain Expenses of the United Nations*, (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 175; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, pp. 51-54, paras. 107-116), and in the exercise of its contentious jurisdiction (see for example, *Questions of the 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. 15, paras. 39-41; *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, pp. 126-127, paras. 42-44).

47. There is, therefore, nothing incompatible with the integrity of the judicial function in the Court undertaking such a task. The question is, rather, whether it should decline to undertake that task unless it is the organ which has taken the decision that asks the Court to do so. In its Advisory Opinion on *Certain Expenses of the United Nations*, however, the Court responded to the question posed by the General Assembly, even though this necessarily required it to interpret a number of Security Council resolutions (namely, resolutions 143, 145 and 146 of 1960 and 161 and 169 of

55. While many of those participating in the present proceedings made reference to the opinion of the Supreme Court of Canada in *Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada* ([1998] 2 S.C.R. 217; 161 D.L.R. (4th) 385; 115 Int. Law Reps. 536), the Court observes that the question in the present case is markedly different from that posed to the Supreme Court of Canada.

The relevant question in that case was

“Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?”

56. The question put to the Supreme Court of Canada inquired whether there was a right to “effect secession”, and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked whether the declaration of independence was “in accordance with” international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act — such as a unilateral declaration of independence — not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.

III. FACTUAL BACKGROUND

57. The declaration of independence of 17 February 2008 must be considered within the factual context which led to its adoption. The Court therefore will briefly describe the relevant characteristics of the framework put in place by the Security Council to ensure the interim administration of Kosovo, namely, Security Council resolution 1244 (1999) and the regulations promulgated thereunder by the United Nations Mission in Kosovo. The Court will then proceed with a brief description of the developments relating to the so-called “final status process” in the years preceding the adoption of the declaration of independence, before turning to the events of 17 February 2008.

A. Security Council resolution 1244 (1999) and the relevant UNMIK regulations

58. Resolution 1244 (1999) was adopted by the Security Council, acting under Chapter VII of the United Nations Charter, on 10 June 1999. In this resolution, the Security Council, “determined to resolve the grave humanitarian situation” which it had identified (see the fourth

necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly. The Court accordingly sees no reason to reformulate the scope of the question.

52. There are, however, two aspects of the question which require comment. First, the question refers to “the unilateral declaration of independence by the *Provisional Institutions of Self-Government of Kosovo*” (General Assembly resolution 63/3 of 8 October 2008, single operative paragraph; emphasis added). In addition, the third preambular paragraph of the General Assembly resolution “[r]ecall[s] that on 17 February 2008 the *Provisional Institutions of Self-Government of Kosovo* declared independence from Serbia”. Whether it was indeed the *Provisional Institutions of Self-Government of Kosovo* which promulgated the declaration of independence was contested by a number of those participating in the present proceedings. The identity of the authors of the declaration of independence, as is demonstrated below (paragraphs 102 to 109), is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law. It would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly.

53. Nor does the Court consider that the General Assembly intended to restrict the Court’s freedom to determine this issue for itself. The Court notes that the agenda item under which what became resolution 63/3 was discussed did not refer to the identity of the authors of the declaration and was entitled simply “Request for an advisory opinion of the International Court of Justice on whether the declaration of independence of *Kosovo* is in accordance with international law” (General Assembly resolution 63/3 of 8 October 2008; emphasis added). The wording of this agenda item had been proposed by the Republic of Serbia, the sole sponsor of resolution 63/3, when it requested the inclusion of a supplementary item on the agenda of the 63rd session of the General Assembly (Letter of the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, 22 August 2008, A/63/195). That agenda item then became the title of the draft resolution and, in turn, of resolution 63/3. The common element in the agenda item and the title of the resolution itself is whether the declaration of independence is in accordance with international law. Moreover, there was no discussion of the identity of the authors of the declaration, or of the difference in wording between the title of the resolution and the question which it posed to the Court during the debate on the draft resolution (A/63/PV.22).

54. As the Court has stated in a different context:

“It is not to be assumed that the General Assembly would . . . seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion.” (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 157.)

This consideration is applicable in the present case. In assessing whether or not the declaration of independence is in accordance with international law, the Court must be free to examine the entire record and decide for itself whether that declaration was promulgated by the *Provisional Institutions of Self-Government* or some other entity.

preambular paragraph) and to put an end to the armed conflict in Kosovo, authorized the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide "an interim administration for Kosovo . . . which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions" (para. 10).

Paragraph 3 demanded "in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable". Pursuant to paragraph 5 of the resolution, the Security Council decided on the deployment in Kosovo, under the auspices of the United Nations, of international civil and security presences and welcomed the agreement of the Federal Republic of Yugoslavia to such presences. The powers and responsibilities of the security presence were further clarified in paragraphs 7 and 9. Paragraph 15 of resolution 1244 (1999) demanded that the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization. Immediately preceding the adoption of Security Council resolution 1244 (1999), various implementing steps had already been taken through a series of measures, including, *inter alia*, those stipulated in the Military Technical Agreement of 9 June 1999, whose Article 1.2 provided for the deployment of KFOR, permitting these to "operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission." The Military Technical Agreement also provided for the withdrawal of FRY ground and air forces, save for "an agreed number of Yugoslav and Serb military and police personnel" as foreseen in paragraph 4 of resolution 1244 (1999).

59. Paragraph 11 of the resolution described the principal responsibilities of the international civil presence in Kosovo as follows:

- "(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);
- (b) Performing basic civilian administrative functions where and as long as required;
- (c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
- (d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;
- (e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);
- (f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement . . ."

60. On 12 June 1999, the Secretary-General presented to the Security Council "a preliminary operational concept for the overall organization of the civil presence, which will be known as the United Nations Interim Administration Mission in Kosovo (UNMIK)", pursuant to paragraph 10 of resolution 1244 (1999), according to which UNMIK would be headed by a Special Representative of the Secretary-General, to be appointed by the Secretary-General in consultation with the Security Council (Report of the Secretary-General of 12 June 1999 (United Nations doc. S/1999/672, 12 June 1999)). The Report of the Secretary-General provided that there would be four Deputy Special Representatives working within UNMIK, each responsible for one of four major components (the so-called "four pillars") of the UNMIK régime (para. 5): (a) interim civil administration (with a lead role assigned to the United Nations); (b) humanitarian affairs (with a lead role assigned to the Office of the United Nations High Commissioner for Refugees (UNHCR)); (c) institution building (with a lead role assigned to the Organization for Security and Co-operation in Europe (OSCE)); and (d) reconstruction (with a lead role assigned to the European Union).

61. On 25 July 1999, the first Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, which provided in its Section 1.1 that "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General". Under Section 3 of UNMIK regulation 1999/1, the laws applicable in the territory of Kosovo prior to 24 March 1999 were to continue to apply, but only to the extent that these did not conflict with internationally recognized human rights standards and non-discrimination or the fulfilment of the mandate given to UNMIK under resolution 1244 (1999). Section 3 was repealed by UNMIK regulation 1999/25 promulgated by the Special Representative of the Secretary-General on 12 December 1999, with retroactive effect to 10 June 1999. Section 1.1 of UNMIK regulation 1999/24 of 12 December 1999 provides that "[t]he law applicable in Kosovo shall be: (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) The law in force in Kosovo on 22 March 1989". Section 4, entitled "Transitional Provision", reads as follows:

"All legal acts, including judicial decisions, and the legal effects of events which occurred, during the period from 10 June 1999 up to the date of the present regulation, pursuant to the laws in force during that period under section 3 of UNMIK Regulation No. 1999/1 of 25 July 1999, shall remain valid, insofar as they do not conflict with the standards referred to in section 1 of the present regulation or any UNMIK regulation in force at the time of such acts."

62. The powers and responsibilities thus laid out in Security Council resolution 1244 (1999) were set out in more detail in UNMIK regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government (hereinafter "Constitutional Framework"), which defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and the Provisional Institutions of Self-Government of Kosovo. With regard to the role entrusted to the Special Representative of the Secretary-General under Chapter 12 of the Constitutional Framework,

65. In November 2005, the Secretary-General appointed Mr. Martti Ahtisaari, former President of Finland, as his Special Envoy for the future status process for Kosovo. This appointment was endorsed by the Security Council (see Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, S/2005/709). Mr. Ahtisaari's Letter of Appointment included, as an annex to it, a document entitled "Terms of Reference" which stated that the Special Envoy "is expected to revert to the Secretary-General at all stages of the process". Furthermore, "[t]he pace and duration of the future status process will be determined by the Special Envoy on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground" (Terms of Reference, dated 10 November 2005, as an Appendix to the Letter of the Secretary-General to Mr. Martti Ahtisaari of 14 November 2005, United Nations dossier No. 198).

66. The Security Council did not comment on these Terms of Reference. Instead, the members of the Council attached to their approval of Mr. Ahtisaari's appointment the Guiding Principles of the Contact Group (an informal grouping of States formed in 1994 to address the situation in the Balkans and composed of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States). Members of the Security Council further indicated that the Guiding Principles were meant for the Secretary-General's (and therefore also for the Special Envoy's) "reference". These Principles stated, *inter alia*, that

"[t]he Contact Group . . . welcomes the intention of the Secretary-General to appoint a Special Envoy to lead this process"

A negotiated solution should be an international priority. Once the process has started, it cannot be blocked and must be brought to a conclusion. The Contact Group calls on the parties to engage in good faith and constructively, to refrain from unilateral steps and to reject any form of violence.

The Security Council will remain actively seized of the matter. The final decision on the status of Kosovo should be endorsed by the Security Council." (Guiding principles of the Contact Group for a settlement of the status of Kosovo, as annexed to the Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, S/2005/709.)

67. Between 20 February 2006 and 8 September 2006, several rounds of negotiations were held, at which delegations of Serbia and Kosovo addressed, in particular, the decentralization of Kosovo's governmental and administrative functions, cultural heritage and religious sites, economic issues, and community rights (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/361, S/2006/707 and S/2006/906). According to the reports of the Secretary-General, "the parties remain[ed] far apart on most issues" (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/707; S/2006/906).

"[t]he exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244 (1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework".

Moreover, pursuant to Chapter 2 (a), "[t]he Provisional Institutions of Self-Government and their officials shall . . . [e]xercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework". Similarly, according to the ninth preambular paragraph of the Constitutional Framework, "the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)". In his periodical report to the Security Council of 7 June 2001, the Secretary-General stated that the Constitutional Framework contained

"broad authority for my Special Representative to intervene and correct any actions of the provisional institutions of self-government that are inconsistent with Security Council resolution 1244 (1999), including the power to veto Assembly legislation, where necessary" (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2001/565, 7 June 2001).

63. Having described the framework put in place by the Security Council to ensure the interim administration of the territory of Kosovo, the Court now turns to the relevant events in the final status process which preceded the declaration of independence of 17 February 2008.

B. The relevant events in the final status process prior to 17 February 2008

64. In June 2005, the Secretary-General appointed Kai Eide, Permanent Representative of Norway to the North Atlantic Treaty Organization, as his Special Envoy to carry out a comprehensive review of Kosovo. In the wake of the Comprehensive Review report he submitted to the Secretary-General (attached to United Nations doc. S/2005/635 (7 October 2005)), there was consensus within the Security Council that the final status process should be commenced:

"The Security Council agrees with Ambassador Eide's overall assessment that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General's intention to start a political process to determine Kosovo's Future Status, as foreseen in Security Council resolution 1244 (1999)." (Statement by the President of the Security Council of 24 October 2005, S/PRST/2005/51.)

68. On 2 February 2007, the Special Envoy of the Secretary-General submitted a draft comprehensive proposal for the Kosovo status settlement to the parties and invited them to engage in a consultative process (recalled in the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/134, 9 March 2007). On 10 March 2007, a final round of negotiations was held in Vienna to discuss the settlement proposal. As reported by the Secretary-General, “the parties were unable to make any additional progress” at those negotiations (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/395, 29 June 2007, p. 1).

69. On 26 March 2007, the Secretary-General submitted the report of his Special Envoy to the Security Council. The Special Envoy stated that “after more than one year of direct talks, bilateral negotiations and expert consultations, it [had] become clear to [him] that the parties [were] not able to reach an agreement on Kosovo’s future status” (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo’s future status, S/2007/168, 26 March 2007). After emphasizing that his

“mandate explicitly provides that [he] determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground” (*ibid.*, para. 3),

the Special Envoy concluded:

“It is my firm view that the negotiations’ potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.

The time has come to resolve Kosovo’s status. Upon careful consideration of Kosovo’s recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.” (*Ibid.*, paras. 3 and 5.)

70. The Special Envoy’s conclusions were accompanied by his finalized Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add. 1, 26 March 2007), which, in his words, set forth “international supervisory structures, [and] provide[d] the foundations for a future independent Kosovo” (S/2007/168, 26 March 2007, para. 5). The Comprehensive Proposal called for the immediate convening of a Constitutional Commission to draft a Constitution for Kosovo (S/2007/168/Add. 1, 26 March 2007, Art. 10.1), established guidelines concerning the membership of that Commission (*ibid.*, Art. 10.2), set numerous requirements concerning principles and provisions to be contained in that Constitution (*ibid.*, Art. 1.3 and Ann.1), and required that the

Assembly of Kosovo approve the Constitution by a two-thirds vote within 120 days (*ibid.*, Art. 10.4). Moreover, it called for the expiry of the UNMIK mandate after a 120-day transition period, after which “all legislative and executive authority vested in UNMIK shall be transferred *en bloc* to the governing authorities of Kosovo, unless otherwise provided for in this Settlement” (*ibid.*, Art. 15.1). It mandated the holding of general and municipal elections no later than nine months from the entry into force of the Constitution (*ibid.*, Art. 11.1). The Court further notes that the Comprehensive Proposal for the Kosovo Status Settlement provided for the appointment of an International Civilian Representative (ICR), who would have the final authority in Kosovo regarding interpretation of the Settlement (*ibid.*, Art. 12). The Comprehensive Proposal also specified that the mandate of the ICR would be reviewed “no later than two years after the entry into force of [the] Settlement, with a view to gradually reducing the scope of the powers of the ICR and the frequency of intervention” (*ibid.*, Ann. IX, Art. 5.1) and that

“[t]he mandate of the ICR shall be terminated when the International Steering Group [a body composed of France, Germany, Italy, the Russian Federation, the United Kingdom, the United States, the European Union, the European Commission and NATO] determine[d] that Kosovo ha[d] implemented the terms of [the] Settlement” (*ibid.*, Art. 5.2).

71. The Secretary-General “fully support[ed] both the recommendation made by [his] Special Envoy in his report on Kosovo’s future status and the Comprehensive Proposal for the Kosovo Status Settlement” (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/168). The Security Council, for its part, decided to undertake a mission to Kosovo (see Report of the Security Council mission on the Kosovo issue, S/2007/256, 4 May 2007), but was not able to reach a decision regarding the final status of Kosovo. A draft resolution was circulated among the Council’s members (see draft resolution sponsored by Belgium, France, Germany, Italy, the United Kingdom and the United States, S/2007/437 Prov., 17 July 2007) but was withdrawn after some weeks when it had become clear that it would not be adopted by the Security Council.

72. Between 9 August and 3 December 2007, further negotiations on the future status of Kosovo were held under the auspices of a Troika comprising representatives of the European Union, the Russian Federation and the United States. On 4 December 2007, the Troika submitted its report to the Secretary-General, which came to the conclusion that, despite intensive negotiations, “the parties were unable to reach an agreement on Kosovo’s status” and “[n]either side was willing to yield on the basic question of sovereignty.” (Report of the European Union/United States/Russian Federation Troika on Kosovo, 4 December 2007, annexed to S/2007/723).

73. On 17 November 2007, elections were held for the Assembly of Kosovo, 30 municipal assemblies and their respective mayors (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo S/2007/768). The Assembly of Kosovo held its inaugural session on 4 and 9 January 2008 (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211).

C. The events of 17 February 2008 and thereafter

74. It is against this background that the declaration of independence was adopted on 17 February 2008. The Court observes that the original language of the declaration is Albanian. For the purposes of the present Opinion, when quoting from the text of the declaration, the Court has used the translations into English and French included in the dossier submitted on behalf of the Secretary-General.

In its relevant passages, the declaration of independence states that its authors were “[c]onvened in an extraordinary meeting on February 17, 2008, in Pristina, the capital of Kosovo” (first preambular paragraph); it “[r]ecall[ed] the years of internationally-sponsored negotiations between Belgrade and Pristina over the question of [Kosovo’s] future political status” and “[r]egret[ed] that no mutually-acceptable status outcome was possible” (tenth and eleventh preambular paragraphs). It further declared that the authors were “[d]etermined to see [Kosovo’s] status resolved in order to give [its] people clarity about their future, move beyond the conflicts of the past and realise the full democratic potential of [its] society” (thirteenth preambular paragraph).

75. In its operative part, the declaration of independence of 17 February 2008 states:

“1. We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.

2. We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.

5. We welcome the international community’s continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission.

9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK), ...

12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan... We declare publicly that all states are entitled to rely upon this declaration ...”

76. The declaration of independence was adopted at a meeting held on 17 February 2008 by 109 out of the 120 members of the Assembly of Kosovo, including the Prime Minister of Kosovo and by the President of Kosovo (who was not a member of the Assembly). The ten members of the Assembly representing the Kosovo Serb community and one member representing the Kosovo Gorani community decided not to attend this meeting. The declaration was written down on two sheets of papyrus and read out, voted upon and then signed by all representatives present. It was not transmitted to the Special Representative of the Secretary-General and was not published in the Official Gazette of the Provisional Institutions of Self-Government of Kosovo.

77. After the declaration of independence was issued, the Republic of Serbia informed the Secretary-General that it had adopted a decision stating that that declaration represented a forceful and unilateral secession of a part of the territory of Serbia, and did not produce legal effects either in Serbia or in the international legal order (S/PV.5839; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211). Further to a request from Serbia, an emergency public meeting of the Security Council took place on 18 February 2008, in which Mr. Boris Tadić, the President of the Republic of Serbia, participated and denounced the declaration of independence as an unlawful act which had been declared null and void by the National Assembly of Serbia (S/PV.5839).

IV. THE QUESTION WHETHER THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH INTERNATIONAL LAW

78. The Court now turns to the substance of the request submitted by the General Assembly. The Court recalls that it has been asked by the General Assembly to assess the accordance of the declaration of independence of 17 February 2008 with “international law” (resolution 63/3 of the General Assembly, 8 October 2008). The Court will first turn its attention to certain questions concerning the lawfulness of declarations of independence under general international law, against the background of which the question posed falls to be considered, and Security Council resolution 1244 (1999) is to be understood and applied. Once this general framework has been determined, the Court will turn to the legal relevance of Security Council resolution 1244 (1999), and determine whether the resolution creates special rules, and ensuing obligations, under international law applicable to the issues raised by the present request and having a bearing on the lawfulness of the declaration of independence of 17 February 2008.

A. General international law

79. During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State,

at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, paras. 52-53; *East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 171-172, para. 88). A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

80. Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity.

The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides 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.”

In General Assembly 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”, which reflects customary international law (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, pp. 101-103, paras. 191-193), the General Assembly reiterated “[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”. This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that “[t]he participating States will respect the territorial integrity of each of the participating States” (Art. IV). Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States.

81. Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, *inter alia*, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska.

The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*ius cogens*). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

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82. A number of participants in the present proceedings have claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of “remedial secession” in the face of the situation in Kosovo.

The Court has already noted (see paragraph 79 above) that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of “remedial secession” were actually present in Kosovo.

83. The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court’s opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of “remedial secession”, however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999).

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84. For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999.

B. Security Council resolution 1244 (1999) and the UNMIK Constitutional Framework created thereunder

85. Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law. The Court has had the occasion to interpret and apply such Security Council resolutions on a number of occasions and has consistently treated them as part of the framework of obligations under international law (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 16); *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. 15, paras. 39-41; *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*, pp. 126-127, paras. 42-44). Resolution 1244 (1999) was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations. The Court notes that none of the participants has questioned the fact that resolution 1244 (1999), which specifically deals with the situation in Kosovo, is part of the law relevant in the present situation.

86. The Court notes that there are a number of other Security Council resolutions adopted on the question of Kosovo, notably Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999); however, the Court sees no need to pronounce specifically on resolutions of the Security Council adopted prior to resolution 1244 (1999), which are, in any case, recalled in the second preambular paragraph of the latter.

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87. A certain number of participants have dealt with the question whether regulations adopted on behalf of UNMIK by the Special Representative of the Secretary-General, notably the Constitutional Framework (see paragraph 62 above), also form part of the applicable international law within the meaning of the General Assembly's request.

88. In particular, it has been argued before the Court that the Constitutional Framework is an act of an internal law rather than an international law character. According to that argument, the Constitutional Framework would not be part of the international law applicable in the present instance and the question of the compatibility of the declaration of independence therewith would thus fall outside the scope of the General Assembly's request.

The Court observes that UNMIK regulations, including regulation 2001/9, which promulgated the Constitutional Framework, are adopted by the Special Representative of the Secretary-General on the basis of the authority derived from Security Council resolution 1244 (1999), notably its paragraphs 6, 10, and 11, and thus ultimately from the United Nations Charter. The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.

89. At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law. Regulation 2001/9 opens with the statement that the Constitutional Framework was promulgated

“[f]or the purposes of developing meaningful self-government in Kosovo pending a final settlement, and establishing provisional institutions of self-government in the legislative, executive and judicial fields through the participation of the people of Kosovo in free and fair elections”.

The Constitutional Framework therefore took effect as part of the body of law adopted for the administration of Kosovo during the interim phase. The institutions which it created were empowered by the Constitutional Framework to take decisions which took effect within that body of law. In particular, the Assembly of Kosovo was empowered to adopt legislation which would have the force of law within that legal order, subject always to the overriding authority of the Special Representative of the Secretary-General.

90. The Court notes that both Security Council resolution 1244 (1999) and the Constitutional Framework entrust the Special Representative of the Secretary-General with considerable supervisory powers with regard to the Provisional Institutions of Self-Government established under the authority of the United Nations Interim Administration Mission in Kosovo. As noted above (see paragraph 58), Security Council resolution 1244 (1999) envisages “an interim administration for Kosovo . . . which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions” (para. 10). Resolution 1244 (1999) further states that “the main responsibilities of the international civil presence will include . . . [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections” (paragraph 11 (c)). Similarly, as described above (see paragraph 62), under the Constitutional Framework, the Provisional Institutions of Self-Government were to function in conjunction with and subject to the direction of the Special Representative of the Secretary-General in the implementation of Security Council resolution 1244 (1999).

91. The Court notes that Security Council resolution 1244 (1999) and the Constitutional Framework were still in force and applicable as at 17 February 2008. Paragraph 19 of Security Council resolution 1244 (1999) expressly provides that “the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise”. No decision amending resolution 1244 (1999) was taken by

the Security Council at its meeting held on 18 February 2008, when the declaration of independence was discussed for the first time, or at any subsequent meeting. The Presidential Statement of 26 November 2008 (S/PRST/2008/44) merely “welcom[ed] the cooperation between the UN and other international actors, *within* the framework of Security Council resolution 1244 (1999)” (emphasis added). In addition, pursuant to paragraph 21 of Security Council resolution 1244 (1999), the Security Council decided “to remain actively seized of the matter” and maintained the item “Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999) and 1244 (1999)” on its agenda (see, most recently, Report of the Security Council, 1 August 2008-31 July 2009, General Assembly, Official Records, 64th session, Supplement No. 2, pp. 39 ff. and 132 ff.). Furthermore, Chapter 14.3 of the Constitutional Framework sets forth that “[t]he SRSG... may effect amendments to this Constitutional Framework”. Minor amendments were effected by virtue of UNMIK regulations UNMIK/REG/2002/9 of 3 May 2002, UNMIK/REG/2007/29 of 4 October 2007, UNMIK/REG/2008/1 of 8 January 2008 and UNMIK/REG/2008/9 of 8 February 2008. Finally, neither Security Council resolution 1244 (1999) nor the Constitutional Framework contains a clause providing for its termination and neither has been repealed; they therefore constituted the international law applicable to the situation prevailing in Kosovo on 17 February 2008.

92. In addition, the Special Representative of the Secretary-General continues to exercise his functions in Kosovo. Moreover, the Secretary-General has continued to submit periodic reports to the Security Council, as required by paragraph 20 of Security Council resolution 1244 (1999) (see the most recent quarterly Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2010/169, 6 April 2010, as well as the preceding Reports S/2008/692 of 24 November 2008, S/2009/149 of 17 March 2009, S/2009/300 of 10 June 2009, S/2009/497 of 30 September 2009 and S/2010/5 of 5 January 2010).

93. From the foregoing, the Court concludes that Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion.

1. Interpretation of Security Council resolution 1244 (1999)

94. Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council

resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.

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95. The Court first notes that resolution 1244 (1999) must be read in conjunction with the general principles set out in annexes 1 and 2 thereto, since in the resolution itself, the Security Council: “1. *Decide[d]* that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2.” Those general principles sought to defuse the Kosovo crisis first by ensuring an end to the violence and repression in Kosovo and by the establishment of an interim administration. A longer-term solution was also envisaged, in that resolution 1244 (1999) was to initiate

“[a] political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA” (Security Council resolution 1244 (1999) of 10 June 1999, Ann. 1, sixth principle; *ibid.*, Ann. 2, para. 8).

Further, it bears recalling that the tenth preambular paragraph of resolution 1244 (1999) also recalled the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia.

96. Having earlier outlined the principal characteristics of Security Council resolution 1244 (1999) (see paragraphs 58 to 59), the Court next observes that three distinct features of that resolution are relevant for discerning its object and purpose.

97. First, resolution 1244 (1999) establishes an international civil and security presence in Kosovo with full civil and political authority and sole responsibility for the governance of Kosovo. As described above (see paragraph 60), on 12 June 1999, the Secretary-General presented to the Security Council his preliminary operational concept for the overall organization of the civil presence under UNMIK. On 25 July 1999, the Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, deemed to have entered into force as of 10 June 1999, the date of adoption of Security Council resolution 1244 (1999). Under this regulation, “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary”, was vested in UNMIK and exercised by the Special Representative. Viewed together, resolution 1244 (1999) and UNMIK regulation 1999/1 therefore had the effect of superseding the legal order in force at that time in the territory of Kosovo and setting up an international territorial administration. For this reason, the establishment of civil and security presences in Kosovo deployed on the basis of resolution 1244 (1999) must be understood as an exceptional measure relating to civil, political and security aspects and aimed at addressing the crisis existing in that territory in 1999.

98. Secondly, the solution embodied in resolution 1244 (1999), namely, the implementation of an interim international territorial administration, was designed for humanitarian purposes: to provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order in an area beset by crisis. This becomes apparent in the text of resolution 1244 (1999) itself which, in its second preambular paragraph, recalls Security Council resolution 1239, adopted on 14 May 1999, in which the Security Council had expressed "grave concern at the humanitarian crisis in and around Kosovo". The priorities which are identified in paragraph 11 of resolution 1244 (1999) were elaborated further in the so-called "four pillars" relating to the governance of Kosovo described in the Report of the Secretary-General of 12 June 1999 (paragraph 60 above). By placing an emphasis on these "four pillars", namely, interim civil administration, humanitarian affairs, institution building and reconstruction, and by assigning responsibility for these core components to different international organizations and agencies, resolution 1244 (1999) was clearly intended to bring about stabilization and reconstruction. The interim administration in Kosovo was designed to suspend temporarily Serbia's exercise of its authority flowing from its continuing sovereignty over the territory of Kosovo. The purpose of the legal régime established under resolution 1244 (1999) was to establish, organize and oversee the development of local institutions of self-government in Kosovo under the aegis of the interim international presence.

99. Thirdly, resolution 1244 (1999) clearly establishes an interim régime; it cannot be understood as putting in place a permanent institutional framework in the territory of Kosovo. This resolution mandated UNMIK merely to facilitate the desired negotiated solution for Kosovo's future status, without prejudging the outcome of the negotiating process.

100. The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.

2. The question whether the declaration of independence is in accordance with Security Council resolution 1244 (1999) and the measures adopted thereunder

101. The Court will now turn to the question whether Security Council resolution 1244 (1999), or the measures adopted thereunder, introduces a specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence of 17 February 2008. In order to answer this question, it is first necessary, as explained in paragraph 52 above, for the Court to determine precisely who issued that declaration.

(a) *The identity of the authors of the declaration of independence*

102. The Court needs to determine whether the declaration of independence of 17 February 2008 was an act of the "Assembly of Kosovo", one of the Provisional Institutions of Self-Government, established under Chapter 9 of the Constitutional Framework, or whether those who adopted the declaration were acting in a different capacity.

103. The Court notes that different views have been expressed regarding this question. On the one hand, it has been suggested in the proceedings before the Court that the meeting in which the declaration was adopted was a session of the Assembly of Kosovo, operating as a Provisional Institution of Self-Government within the limits of the Constitutional Framework. Other participants have observed that both the language of the document and the circumstances under which it was adopted clearly indicate that the declaration of 17 February 2008 was not the work of the Provisional Institutions of Self-Government and did not take effect within the legal framework created for the government of Kosovo during the interim phase.

104. The Court notes that, when opening the meeting of 17 February 2008 at which the declaration of independence was adopted, the President of the Assembly and the Prime Minister of Kosovo made reference to the Assembly of Kosovo and the Constitutional Framework. The Court considers, however, that the declaration of independence must be seen in its larger context, taking into account the events preceding its adoption, notably relating to the so-called "final status process" (see paragraphs 64 to 73). Security Council resolution 1244 (1999) was mostly concerned with setting up an interim framework of self-government for Kosovo (see paragraph 58 above). Although, at the time of the adoption of the resolution, it was expected that the final status of Kosovo would flow from, and be developed within, the framework set up by the resolution, the specific contours, let alone the outcome, of the final status process were left open by Security Council resolution 1244 (1999). Accordingly, its paragraph 11, especially in its subparagraphs (d), (e) and (f), deals with final status issues only in so far as it is made part of UNMIK's responsibilities to "[facilitat]e a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" and "[i]n a final stage, [to oversee] the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement".

105. The declaration of independence reflects the awareness of its authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached. The Preamble of the declaration refers to the "years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status" and expressly puts the declaration in the context of the failure of the final status negotiations, inasmuch as it states that "no mutually-acceptable status outcome was possible" (tenth and eleventh preambular paragraphs). Proceeding from there, the authors of the declaration of independence emphasize their determination to "resolve" the status of Kosovo and to give the people of Kosovo "clarity about their future" (thirteenth preambular paragraph). This language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo "as an independent and sovereign state" (para. 1). The declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.

106. This conclusion is reinforced by the fact that the authors of the declaration undertook to fulfil the international obligations of Kosovo, notably those created for Kosovo by UNMIK (declaration of independence, para. 9), and expressly and solemnly declared Kosovo to be bound vis-à-vis third States by the commitments made in the declaration (*ibid.*, para. 12). By contrast, under the régime of the Constitutional Framework, all matters relating to the management of the external relations of Kosovo were the exclusive prerogative of the Special Representative of the Secretary-General:

- “(m) concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999);
- (n) overseeing the fulfilment of commitments in international agreements entered into on behalf of UNMIK;
- (o) external relations, including with states and international organisations . . .”
(Chap. 8.1 of the Constitutional Framework, “Powers and Responsibilities Reserved to the SRSG”).

with the Special Representative of the Secretary-General only consulting and co-operating with the Provisional Institutions of Self-Government in these matters.

107. Certain features of the text of the declaration and the circumstances of its adoption also point to the same conclusion. Nowhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo. The words “Assembly of Kosovo” appear at the head of the declaration only in the English and French translations contained in the dossier submitted on behalf of the Secretary-General. The language used in the declaration differs from that employed in acts of the Assembly of Kosovo in that the first paragraph commences with the phrase “We, the democratically-elected leaders of our people . . .”, whereas acts of the Assembly of Kosovo employ the third person singular.

Moreover, the procedure employed in relation to the declaration differed from that employed by the Assembly of Kosovo for the adoption of legislation. In particular, the declaration was signed by all those present when it was adopted, including the President of Kosovo, who (as noted in paragraph 76 above) was not a member of the Assembly of Kosovo. In fact, the self-reference of the persons adopting the declaration of independence as “the democratically-elected leaders of our people” immediately precedes the actual declaration of independence within the text (“hereby declare Kosovo to be an independent and sovereign state”; para. 1). It is also noticeable that the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.

108. The reaction of the Special Representative of the Secretary-General to the declaration of independence is also of some significance. The Constitutional Framework gave the Special Representative power to oversee and, in certain circumstances, annul the acts of the Provisional Institutions of Self-Government. On previous occasions, in particular in the period between 2002 and 2005, when the Assembly of Kosovo took initiatives to promote the independence of Kosovo,

the Special Representative had qualified a number of acts as being incompatible with the Constitutional Framework on the grounds that they were deemed to be “beyond the scope of [the Assembly’s] competencies” (United Nations dossier No. 189, 7 February 2003) and therefore outside the powers of the Assembly of Kosovo.

The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible. As the practice shows, he would have been under a duty to take action with regard to acts of the Assembly of Kosovo which he considered to be *ultra vires*.

The Court accepts that the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, submitted to the Security Council on 28 March 2008, stated that “the Assembly of Kosovo held a session during which it adopted a ‘declaration of independence’, declaring Kosovo an independent and sovereign State” (United Nations doc. S/2008/211, para. 3). This was the normal periodic report on UNMIK activities, the purpose of which was to inform the Security Council about developments in Kosovo; it was not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted.

109. The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

(b) The question whether the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) or the measures adopted thereunder

110. Having established the identity of the authors of the declaration of independence, the Court turns to the question whether their act in promulgating the declaration was contrary to any prohibition contained in Security Council resolution 1244 (1999) or the Constitutional Framework adopted thereunder.

111. The Court recalls that this question has been a matter of controversy in the present proceedings. Some participants to the proceedings have contended that the declaration of independence of 17 February 2008 was a unilateral attempt to bring to an end the international presence established by Security Council resolution 1244 (1999), a result which it is said could only be effectuated by a decision of the Security Council itself. It has also been argued that a permanent settlement for Kosovo could only be achieved either by agreement of all parties involved (notably including the consent of the Republic of Serbia) or by a specific Security Council resolution endorsing a specific final status for Kosovo, as provided for in the Guiding Principles of the Contact Group. According to this view, the unilateral action on the part of the authors of the declaration of independence cannot be reconciled with Security Council resolution 1244 (1999) and thus constitutes a violation of that resolution.

112. Other participants have submitted to the Court that Security Council resolution 1244 (1999) did not prevent or exclude the possibility of Kosovo's independence. They argued that the resolution only regulates the interim administration of Kosovo, but not its final or permanent status. In particular, the argument was put forward that Security Council resolution 1244 (1999) does not create obligations under international law prohibiting the issuance of a declaration of independence or making it invalid, and does not make the authors of the declaration of independence its addressees. According to this position, if the Security Council had wanted to preclude a declaration of independence, it would have done so in clear and unequivocal terms in the text of the resolution, as it did in resolution 787 (1992) concerning the Republika Srpska. In addition, it was argued that the references, in the annexes of Security Council resolution 1244 (1999), to the Rambouillet accords and thus indirectly to the "will of the people" (see Chapter 8.3 of the Rambouillet accords) of Kosovo, support the view that Security Council resolution 1244 (1999) not only did not oppose the declaration of independence, but indeed contemplated it. Other participants contended that at least once the negotiating process had been exhausted, Security Council resolution 1244 (1999) was no longer an obstacle to a declaration of independence.

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113. The question whether resolution 1244 (1999) prohibits the authors of the declaration of 17 February 2008 from declaring independence from the Republic of Serbia can only be answered through a careful reading of this resolution (see paras. 94 *et seq.*).

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114. First, the Court observes that Security Council resolution 1244 (1999) was essentially designed to create an interim régime for Kosovo, with a view to channelling the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.

In this regard the Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution. For example, although the factual circumstances differed from the situation in Kosovo, only 19 days after the adoption of resolution 1244 (1999), the Security Council, in its resolution 1251 of 29 June 1999, reaffirmed its position that a "Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded" (para. 11). The Security Council thus set out the specific conditions relating to the permanent status of Cyprus.

By contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.

Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo.

115. Secondly, turning to the question of the addressees of Security Council resolution 1244 (1999), as described above (see paragraph 58), it sets out a general framework for the "deployment in Kosovo, under United Nations auspices, of international civil and security presences" (para. 5). It is mostly concerned with creating obligations and authorizations for United Nations Member States as well as for organs of the United Nations such as the Secretary-General and his Special Representative (see notably paras. 3, 5, 6, 7, 9, 10 and 11 of Security Council resolution 1244 (1999)). The only point at which resolution 1244 (1999) expressly mentions other actors relates to the Security Council's demand, on the one hand, "that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization" (para. 15) and, on the other hand, for the "full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia" (para. 14). There is no indication, in the text of Security Council resolution 1244 (1999), that the Security Council intended to impose, beyond that, a specific obligation to act or a prohibition from acting, addressed to such other actors.

116. The Court recalls in this regard that it has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and intergovernmental organizations. More specifically, a number of Security Council resolutions adopted on the subject of Kosovo prior to Security Council resolution 1244 (1999) contained demands addressed *eo nomine* to the Kosovo Albanian leadership. For example, resolution 1160 (1998) "[c]all[ed] upon the authorities in Belgrade and the leadership of the Kosovo Albanian community urgently to enter without preconditions into a meaningful dialogue on political status issues" (resolution 1160 (1998), para. 4; emphasis added). Resolution 1199 (1998) included four separate demands on the Kosovo Albanian leadership, i.e., improving the humanitarian situation, entering into a dialogue with the Federal Republic of Yugoslavia, pursuing their goals by peaceful means only, and co-operating fully with the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (resolution 1199 (1998), paras. 2, 3, 6 and 13). Resolution 1203 (1998) "[d]emand[ed] . . . that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998) and cooperate fully with the OSCE Verification Mission in Kosovo" (resolution 1203 (1998), para. 4). The same resolution also called upon the "Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo"; demanded that "the Kosovo Albanian leadership and all others concerned respect the freedom of movement of the OSCE Verification Mission and other international personnel"; "[i]nsist[ed] that the Kosovo Albanian leadership condemn all terrorist actions"; and demanded that the Kosovo Albanian leadership "cooperate with international efforts to improve the humanitarian situation and to avert the impending humanitarian catastrophe" (resolution 1203 (1998), paras. 5, 6, 10 and 11).

117. Such reference to the Kosovo Albanian leadership or other actors, notwithstanding the somewhat general reference to "all concerned" (para. 14), is missing from the text of Security Council resolution 1244 (1999). When interpreting Security Council resolutions, the Court must establish, on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations. The language used by the resolution may

120. The Court therefore turns to the question whether the declaration of independence of 17 February 2008 has violated the Constitutional Framework established under the auspices of UNMIK. Chapter 5 of the Constitutional Framework determines the powers of the Provisional Institutions of Self-Government of Kosovo. It was argued by a number of States which participated in the proceedings before the Court that the promulgation of a declaration of independence is an act outside the powers of the Provisional Institutions of Self-Government as set out in the Constitutional Framework.

121. The Court has already held, however (see paragraphs 102 to 109 above), that the declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework.

*

* *

V. GENERAL CONCLUSION

122. The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.

*

* *

123. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By nine votes to five,

Decides to comply with the request for an advisory opinion;

serve as an important indicator in this regard. The approach taken by the Court with regard to the binding effect of Security Council resolutions in general is, *mutatis mutandis*, also relevant here. In this context, the Court recalls its previous statement that:

“The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 114.)

118. Bearing this in mind, the Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard. The object and purpose of the resolution, as has been explained in detail (see paragraphs 96 to 100), is the establishment of an interim administration for Kosovo, without making any definitive determination on final status issues. The text of the resolution explains that the

“main responsibilities of the international civil presence will include ... [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government *pending a political settlement*” (para. 11 (c) of the resolution; emphasis added).

The phrase “political settlement”, often cited in the present proceedings, does not modify this conclusion. First, that reference is made within the context of enumerating the responsibilities of the international civil presence, i.e., the Special Representative of the Secretary-General in Kosovo and UNMIK, and not of other actors. Secondly, as the diverging views presented to the Court on this matter illustrate, the term “political settlement” is subject to various interpretations. The Court therefore concludes that this part of Security Council resolution 1244 (1999) cannot be construed to include a prohibition, addressed in particular to the authors of the declaration of 17 February 2008, against declaring independence.

119. The Court accordingly finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia. Hence, the declaration of independence did not violate Security Council resolution 1244 (1999).

*

IN FAVOUR: *President Owada*; *Judges Al-Khasawneh, Buergenthal, Simma, Abraham, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood*;

AGAINST: *Vice-President Tomka*; *Judges Koroma, Keith, Bennouna, Skotnikov*;

(3) By ten votes to four,

Is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

IN FAVOUR: *President Owada*; *Judges Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood*;

AGAINST: *Vice-President Tomka*; *Judges Koroma, Bennouna, Skotnikov*.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-second day of July, two thousand and ten, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President TOMKA appends a declaration to the Advisory Opinion of the Court; Judge KOROMA appends a dissenting opinion to the Advisory Opinion of the Court; Judge SIMMA appends a declaration to the Advisory Opinion of the Court; Judges KEITH and SEPÚLVEDA-AMOR append separate opinions to the Advisory Opinion of the Court; Judges BENNOUNA and SKOTNIKOV append dissenting opinions to the Advisory Opinion of the Court; Judges CANÇADO TRINDADE and YUSUF append separate opinions to the Advisory Opinion of the Court.

(Initialled) H. O.

(Initialled) Ph. C.

**East Timor (Portugal v. Australia),
Judgment, I.C.J. Reports 1995**

INTERNATIONAL COURT OF JUSTICE

YEAR 1995

30 June 1995

CASE CONCERNING EAST TIMOR

(PORTUGAL v. AUSTRALIA)

*Treaty of 1989 between Australia and Indonesia concerning the "Timor Gap".
Objection that there exists in reality no dispute between the Parties — Dis-
agreement between the Parties on the law and on the facts — Existence of a
legal dispute.*

*Objection that the Application would require the Court to determine the
rights and obligations of a third State in the absence of the consent of that State
— Case concerning Monetary Gold Removed from Rome in 1943 — Question
whether the Respondent's objective conduct is separable from the conduct of a
third State.*

*Right of peoples to self-determination as right erga omnes and essential prin-
ciple of contemporary international law — Difference between erga omnes char-
acter of a norm and rule of consent to jurisdiction.*

*Question whether resolutions of the General Assembly and of the Security
Council constitute "givens" on the content of which the Court would not have to
decide de novo.*

*For the two Parties, the Territory of East Timor remains a non-self-govern-
ing territory and its people has the right to self-determination.*

*Rights and obligations of a third State constituting the very subject-matter of
the decision requested — The Court cannot exercise the jurisdiction conferred
upon it by the declarations made by the Parties under Article 36, paragraph 2,
of its Statute to adjudicate on the dispute referred to it by the Application.*

JUDGMENT

*Present: President BEDJAOUI; Vice-President SCHWEBEL; Judges ODA, Sir
ROBERT JENNINGS, GUILLAUME, SHAHABUDDIN, AGUILAR-MAWDSLEY,
WEERAMANTRY, RANIEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA,
VERESHCHETIN; Judges ad hoc Sir Nimian STEPHEN, SKUBISZEWSKI;
Registrar VALENCIA-OSPINA.*

In the case concerning East Timor,
between

the Portuguese Republic,
represented by

H.E. Mr. António Cascais, Ambassador of the Portuguese Republic to the
Netherlands,

as Agent;

Mr. José Manuel Servulo Correia, Professor in the Faculty of Law of the
University of Lisbon and Member of the Portuguese Bar,
Mr. Miguel Galvão Teles, Member of the Portuguese Bar,

as Co-Agents, Counsel and Advocates;

Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II)
and Director of the Institut des hautes études internationales de Paris,
Mrs. Rosalyn Higgins, Q.C., Professor of International Law in the Univer-
sity of London,

as Counsel and Advocates;

Mr. Rui Quartin Santos, Minister Plenipotentiary, Ministry of Foreign
Affairs, Lisbon,

Mr. Francisco Ribeiro Telles, First Embassy Secretary, Ministry of Foreign
Affairs, Lisbon,

as Advisers;

Mr. Richard Meese, Advocate, Partner in Frere Cholmeley, Paris,

Mr. Paulo Canelas de Castro, Assistant in the Faculty of Law of the Uni-
versity of Coimbra,

Mrs. Luísa Duarte, Assistant in the Faculty of Law of the University of
Lisbon,

Mr. Paulo Otero, Assistant in the Faculty of Law of the University of Lisbon,

Mr. Iain Scobbie, Lecturer in Law in the Faculty of Law of the University of
Dundee, Scotland,

Miss Sasha Stepan, Squire, Sanders & Dempsey, Counsellors at Law,
Prague,

as Counsel;

Mr. Fernando Figueirinhas, First Secretary, Portuguese Embassy in the
Netherlands,

as Secretary,

and

the Commonwealth of Australia,

represented by

Mr. Gavan Griffith, Q.C., Solicitor-General of Australia,

as Agent and Counsel;

H.E. Mr. Michael Tate, Ambassador of Australia to the Netherlands, former
Minister of Justice,

Mr. Henry Burmester, Principal International Law Counsel, Office of Inter-
national Law, Attorney-General's Department,

as Co-Agents and Counsel;

Mr. Derek W. Bowett, Q.C., Whewell Professor emeritus, University of Cambridge,
 Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,
 Mr. Alain Pellet, Professor of International Law, University of Paris X-Nanterre and Institute of Political Studies, Paris,
 Mr. Christopher Staker, Counsel assisting the Solicitor-General of Australia, as Counsel;
 Mr. Christopher Lamb, Legal Adviser, Australian Department of Foreign Affairs and Trade,
 Ms Cate Steains, Second Secretary, Australian Embassy in the Netherlands,
 Mr. Jean-Marc Thouvenin, Head Lecturer, University of Maine and Institute of Political Studies, Paris,
 as Advisers,

THE COURT,

composed as above,
 after deliberation,

delivers the following Judgment:

1. On 22 February 1991, the Ambassador to the Netherlands of the Portuguese Republic (hereinafter referred to as "Portugal") filed in the Registry of the Court an Application instituting proceedings against the Commonwealth of Australia (hereinafter referred to as "Australia") concerning "certain activities of Australia with respect to East Timor". According to the Application Australia had, by its conduct, "failed to observe . . . the obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor] . . . and . . . the right of the people of East Timor to self-determination and the related rights". In consequence, according to the Application, Australia had "incurred international responsibility vis-à-vis both the people of East Timor and Portugal". As the basis for the jurisdiction of the Court, the Application refers to the declarations by which the two States have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute.

2. In accordance with Article 40, paragraph 2, of the Statute, the Application was communicated forthwith to the Australian Government by the Registrar; and, in accordance with paragraph 3 of the same Article, all the other States entitled to appear before the Court were notified by the Registrar of the Application.

3. By an Order dated 3 May 1991, the President of the Court fixed 18 November 1991 as the time-limit for filing the Memorial of Portugal and 1 June 1992 as the time-limit for filing the Counter-Memorial of Australia, and those pleadings were duly filed within the time-limits so fixed.

4. In its Counter-Memorial, Australia raised questions concerning the jurisdiction of the Court and the admissibility of the Application. In the course of a meeting held by the President of the Court on 1 June 1992 with the Agents of the Parties, pursuant to Article 31 of the Rules of Court, the Agents agreed that these questions were inextricably linked to the merits and that they should therefore be heard and determined within the framework of the merits.

5. By an Order dated 19 June 1992, the Court, taking into account the agreement of the Parties in this respect, authorized the filing of a Reply by Portugal and of a Rejoinder by Australia, and fixed 1 December 1992 and 1 June 1993 respectively as the time-limits for the filing of those pleadings. The Reply was duly filed within the time-limit so fixed. By an Order of 19 May 1993, the President of the Court, at the request of Australia, extended to 1 July 1993 the time-limit for the filing of the Rejoinder. This pleading was filed on 5 July 1993. Pursuant to Article 44, paragraph 3, of its Rules, having given the other Party an opportunity to state its views, the Court considered this filing as valid.

6. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; Portugal chose Mr. António de Arruda Ferrer-Correia and Australia Sir Ninian Martin Stephen. By a letter dated 30 June 1994, Mr. Ferrer-Correia informed the President of the Court that he was no longer able to sit, and, by a letter of 14 July 1994, the Agent of Portugal informed the Court that its Government had chosen Mr. Krzysztof Jan Skubiszewski to replace him.

7. In accordance with Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that the pleadings and annexed documents should be made accessible to the public from the date of the opening of the oral proceedings.

8. Between 30 January and 16 February 1995, public hearings were held in the course of which the Court heard oral arguments and replies by the following:

For Portugal:

H.E. Mr. António Cascais,
 Mr. José Manuel Servulo Correia,
 Mr. Miguel Galvão Teles,
 Mr. Pierre-Marie Dupuy,
 Mrs. Rosalyn Higgins, Q.C.

For Australia:

Mr. Gavan Griffith, Q.C.,
 H.E. Mr. Michael Tate,
 Mr. James Crawford,
 Mr. Alain Pellet,
 Mr. Henry Burmester,
 Mr. Derek W. Bowett, Q.C.,
 Mr. Christopher Staker.

9. During the oral proceedings, each of the Parties, referring to Article 56, paragraph 4, of the Rules of Court, presented documents not previously produced. Portugal objected to the presentation of one of these by Australia, on the ground that the document concerned was not "part of a publication readily available" within the meaning of that provision. Having ascertained Australia's views, the Court examined the question and informed the Parties that it had decided not to admit the document to the record in the case.

10. The Parties presented submissions in each of their written pleadings; in the course of the oral proceedings, the following final submissions were presented:

*

On behalf of Portugal,

at the hearing on 13 February 1995 (afternoon):

“Having regard to the facts and points of law set forth, Portugal has the honour to

— Ask the Court to dismiss the objections raised by Australia and to adjudge and declare that it has jurisdiction to deal with the Application of Portugal and that that Application is admissible, and

— Request that it *may please the Court*:

(1) To adjudge and declare that, first, the rights of the people of East Timor to self-determination, to territorial integrity and unity and to permanent sovereignty over its wealth and natural resources and, secondly, the duties, powers and rights of Portugal as the administering Power of the Territory of East Timor are opposable to Australia, which is under an obligation not to disregard them, but to respect them.

(2) To adjudge and declare that Australia, inasmuch as in the first place it has negotiated, concluded and initiated performance of the Agreement of 11 December 1989, has taken internal legislative measures for the application thereof, and is continuing to negotiate, with the State party to that Agreement, the delimitation of the continental shelf in the area of the Timor Gap; and inasmuch as it has furthermore excluded any negotiation with the administering Power with respect to the exploration and exploitation of the continental shelf in that same area; and, finally, inasmuch as it contemplates exploring and exploiting the subsoil of the sea in the Timor Gap on the basis of a plurilateral title to which Portugal is not a party (each of these facts sufficing on its own):

(a) has infringed and is infringing the right of the people of East Timor to self-determination, to territorial integrity and unity and its permanent sovereignty over its natural wealth and resources, and is in breach of the obligation not to disregard but to respect that right, that integrity and that sovereignty;

(b) has infringed and is infringing the powers of Portugal as the administering Power of the Territory of East Timor, is impeding the fulfilment of its duties to the people of East Timor and to the international community, is infringing the right of Portugal to fulfil its responsibilities and is in breach of the obligation not to disregard but to respect those powers and duties and that right;

(c) is contravening Security Council resolutions 384 and 389 and is in breach of the obligation to accept and carry out Security Council resolutions laid down by the Charter of the United Nations, is disregarding the binding character of the resolutions of United Nations organs that relate to East Timor and, more generally, is in breach of the obligation incumbent on Member States to co-operate in good faith with the United Nations;

(3) To adjudge and declare that, inasmuch as it has excluded and is excluding any negotiation with Portugal as the administering Power of the Territory of East Timor, with respect to the exploration and exploitation of the continental shelf in the area of the Timor Gap, Australia has failed and is failing in its duty to negotiate in order to harmonize the respective rights in the event of a conflict of rights or of claims over maritime areas.

(4) To adjudge and declare that, by the breaches indicated in paragraphs 2 and 3 of the present submissions, Australia has incurred international responsibility and has caused damage, for which it owes reparation to the people of East Timor and to Portugal, in such form and manner as may be indicated by the Court, given the nature of the obligations breached.

(5) To adjudge and declare that Australia is bound, in relation to the people of East Timor, to Portugal and to the international community, to cease from all breaches of the rights and international norms referred to in paragraphs 1, 2 and 3 of the present submissions and in particular, until such time as the people of East Timor shall have exercised its right to self-determination, under the conditions laid down by the United Nations:

(a) to refrain from any negotiation, signature or ratification of any agreement with a State other than the administering Power concerning the delimitation, and the exploration and exploitation, of the continental shelf, or the exercise of jurisdiction over that shelf, in the area of the Timor Gap;

(b) to refrain from any act relating to the exploration and exploitation of the continental shelf in the area of the Timor Gap or to the exercise of jurisdiction over that shelf, on the basis of any plurilateral title to which Portugal, as the administering Power of the Territory of East Timor, is not a party”;

On behalf of Australia,

at the hearing on 16 February 1995 (afternoon):

“The Government of Australia submits that, for all the reasons given by it in the written and oral pleadings, the Court should:

(a) adjudge and declare that the Court lacks jurisdiction to decide the Portuguese claims or that the Portuguese claims are inadmissible; or

(b) alternatively, adjudge and declare that the actions of Australia invoked by Portugal do not give rise to any breach by Australia of rights under international law asserted by Portugal.”

* * *

11. The Territory of East Timor corresponds to the eastern part of the island of Timor; it includes the island of Atauro, 25 kilometres to the north, the islet of Jaco to the east, and the enclave of Oé-Cusse in the western part of the island of Timor. Its capital is Dili, situated on its north coast. The south coast of East Timor lies opposite the north coast of Australia, the distance between them being approximately 430 kilometres.

In the sixteenth century, East Timor became a colony of Portugal; Portugal remained there until 1975. The western part of the island came under Dutch rule and later became part of independent Indonesia.

12. In resolution 1542 (XV) of 15 December 1960 the United Nations General Assembly recalled “differences of views . . . concerning the status of certain territories under the administrations of Portugal and Spain and described by these two States as ‘overseas provinces’ of the metropolitan

State concerned"; and it also stated that it considered that the territories under the administration of Portugal, which were listed therein (including "Timor and dependencies") were non-self-governing territories within the meaning of Chapter XI of the Charter. Portugal, in the wake of its "Car-nation Revolution", accepted this position in 1974.

13. Following internal disturbances in East Timor, on 27 August 1975 the Portuguese civil and military authorities withdrew from the mainland of East Timor to the island of Atauro. On 7 December 1975 the armed forces of Indonesia intervened in East Timor. On 8 December 1975 the Portuguese authorities departed from the island of Atauro, and thus left East Timor altogether. Since their departure, Indonesia has occupied the Territory, and the Parties acknowledge that the Territory has remained under the effective control of that State. Asserting that on 31 May 1976 the people of East Timor had requested Indonesia "to accept East Timor as an integral part of the Republic of Indonesia", on 17 July 1976 Indonesia enacted a law incorporating the Territory as part of its national territory.

14. Following the intervention of the armed forces of Indonesia in the Territory and the withdrawal of the Portuguese authorities, the question of East Timor became the subject of two resolutions of the Security Council and of eight resolutions of the General Assembly, namely, Security Council resolutions 384 (1975) of 22 December 1975 and 389 (1976) of 22 April 1976, and General Assembly resolutions 3485 (XXX) of 12 December 1975, 31/53 of 1 December 1976, 32/34 of 28 November 1977, 33/39 of 13 December 1978, 34/40 of 21 November 1979, 35/27 of 11 November 1980, 36/50 of 24 November 1981 and 37/30 of 23 November 1982.

15. Security Council resolution 384 (1975) of 22 December 1975 called upon "all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination"; called upon "the Government of Indonesia to withdraw without delay all its forces from the Territory"; and further called upon

"the Government of Portugal as administering Power to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination".

Security Council resolution 389 (1976) of 22 April 1976 adopted the same terms with regard to the right of the people of East Timor to self-determination; called upon "the Government of Indonesia to withdraw without further delay all its forces from the Territory"; and further called upon "all States and other parties concerned to co-operate fully with the United Nations to achieve a peaceful solution to the existing situation"

General Assembly resolution 3485 (XXX) of 12 December 1975 referred to Portugal "as the administering Power"; called upon it "to continue to make every effort to find a solution by peaceful means"; and "strongly deplore[d] the military intervention of the armed forces of Indonesia in

Portuguese Timor". In resolution 31/53 of 1 December 1976, and again in resolution 32/34 of 28 November 1977, the General Assembly rejected

"the claim that East Timor has been incorporated into Indonesia, inasmuch as the people of the Territory have not been able to exercise freely their right to self-determination and independence".

Security Council resolution 389 (1976) of 22 April 1976 and General Assembly resolutions 31/53 of 1 December 1976, 32/34 of 28 November 1977 and 33/39 of 13 December 1978 made no reference to Portugal as the administering Power. Portugal is so described, however, in Security Council resolution 384 (1975) of 22 December 1975 and in the other resolutions of the General Assembly. Also, those resolutions which did not specifically refer to Portugal as the administering Power recalled another resolution or other resolutions which so referred to it.

16. No further resolutions on the question of East Timor have been passed by the Security Council since 1976 or by the General Assembly since 1982. However, the Assembly has maintained the item on its agenda since 1982, while deciding at each session, on the recommendation of its General Committee, to defer consideration of it until the following session. East Timor also continues to be included in the list of non-self-governing territories within the meaning of Chapter XI of the Charter; and the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples remains seized of the question of East Timor. The Secretary-General of the United Nations is also engaged in a continuing effort, in consultation with all parties directly concerned, to achieve a comprehensive settlement of the problem.

17. The incorporation of East Timor as part of Indonesia was recognized by Australia *de facto* on 20 January 1978. On that date the Australian Minister for Foreign Affairs stated: "The Government has made clear publicly its opposition to the Indonesian intervention and has made this known to the Indonesian Government." He added: "[Indonesia's] control is effective and covers all major administrative centres of the territory." And further:

"This is a reality with which we must come to terms. Accordingly, the Government has decided that although it remains critical of the means by which integration was brought about it would be unrealistic to continue to refuse to recognize *de facto* that East Timor is part of Indonesia."

On 23 February 1978 the Minister said: "we recognize the fact that East Timor is part of Indonesia, but not the means by which this was brought about".

On 15 December 1978 the Australian Minister for Foreign Affairs declared that negotiations which were about to begin between Australia and Indonesia for the delimitation of the continental shelf between Australia and East Timor, "when they start, will signify *de jure* recognition by Australia of the Indonesian incorporation of East Timor"; he added: "The acceptance of this situation does not alter the opposition which the Government has consistently expressed regarding the manner of incorporation." The negotiations in question began in February 1979.

18. Prior to this, Australia and Indonesia had, in 1971-1972, established a delimitation of the continental shelf between their respective coasts; the delimitation so effected stopped short on either side of the continental shelf between the south coast of East Timor and the north coast of Australia. This undelimited part of the continental shelf was called the "Timor Gap".

The delimitation negotiations which began in February 1979 between Australia and Indonesia related to the Timor Gap; they did not come to fruition. Australia and Indonesia then turned to the possibility of establishing a provisional arrangement for the joint exploration and exploitation of the resources of an area of the continental shelf. A Treaty to this effect was eventually concluded between them on 11 December 1989, whereby a "Zone of Cooperation" was created "in an area between the Indonesian Province of East Timor and Northern Australia". Australia enacted legislation in 1990 with a view to implementing the Treaty; this law came into force in 1991.

* * *

19. In these proceedings Portugal maintains that Australia, in negotiating and concluding the 1989 Treaty, in initiating performance of the Treaty, in taking internal legislative measures for its application, and in continuing to negotiate with Indonesia, has acted unlawfully, in that it has infringed the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources, infringed the rights of Portugal as the administering Power, and contravened Security Council resolutions 384 and 389. Australia raised objections to the jurisdiction of the Court and to the admissibility of the Application. It took the position, however, that these objections were inextricably linked to the merits and should therefore be determined within the framework of the merits. The Court heard the Parties both on the objections and on the merits. While Australia concentrated its main arguments and submissions on the objections, it also submitted that Portugal's case on the merits should be dismissed, maintaining, in particular, that its actions did not in any way disregard the rights of Portugal.

* * *

20. According to one of the objections put forward by Australia, there exists in reality no dispute between itself and Portugal. In another objection, it argued that Portugal's Application would require the Court to rule on the rights and obligations of a State which is not a party to the proceedings, namely Indonesia. According to further objections of Australia, Portugal lacks standing to bring the case, the argument being that it does not have a sufficient interest of its own to institute the proceedings, notwithstanding the references to it in some of the resolutions of the Security Council and the General Assembly as the administering Power of East Timor, and that it cannot, furthermore, claim any right to represent the people of East Timor; its claims are remote from reality, and the judgment the Court is asked to give would be without useful effect; and finally, its claims concern matters which are essentially not legal in nature which should be resolved by negotiation within the framework of ongoing procedures before the political organs of the United Nations. Portugal requested the Court to dismiss all these objections.

* * *

21. The Court will now consider Australia's objection that there is in reality no dispute between itself and Portugal. Australia contends that the case as presented by Portugal is artificially limited to the question of the lawfulness of Australia's conduct, and that the true respondent is Indonesia, not Australia. Australia maintains that it is being sued in place of Indonesia. In this connection, it points out that Portugal and Australia have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute, but that Indonesia has not.

In support of the objection, Australia contends that it recognizes, and has always recognized, the right of the people of East Timor to self-determination, the status of East Timor as a non-self-governing territory, and the fact that Portugal has been named by the United Nations as the administering Power of East Timor; that the arguments of Portugal, as well as its submissions, demonstrate that Portugal does not challenge the capacity of Australia to conclude the 1989 Treaty and that it does not contest the validity of the Treaty; and that consequently there is in reality no dispute between itself and Portugal.

Portugal, for its part, maintains that its Application defines the real and only dispute submitted to the Court.

22. The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see *Mavromatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 27; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory*

Opinion, I.C.J. Reports 1988, p. 27, para. 35). In order to establish the existence of a dispute, "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328); and further, "Whether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

For the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the "real dispute" is between Portugal and Indonesia rather than Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.

On the record before the Court, it is clear that the Parties are in disagreement, both on the law and on the facts, on the question whether the conduct of Australia in negotiating, concluding and initiating performance of the 1989 Treaty was in breach of an obligation due by Australia to Portugal under international law.

Indeed, Portugal's Application limits the proceedings to these questions. There nonetheless exists a legal dispute between Portugal and Australia. This objection of Australia must therefore be dismissed.

* *

23. The Court will now consider Australia's principal objection, to the effect that Portugal's Application would require the Court to determine the rights and obligations of Indonesia. The declarations made by the Parties under Article 36, paragraph 2, of the Statute do not include any limitation which would exclude Portugal's claims from the jurisdiction thereby conferred upon the Court. Australia, however, contends that the jurisdiction so conferred would not enable the Court to act if, in order to do so, the Court were required to rule on the lawfulness of Indonesia's entry into and continuing presence in East Timor, on the validity of the 1989 Treaty between Australia and Indonesia, or on the rights and obligations of Indonesia under that Treaty, even if the Court did not have to determine its validity. Portugal agrees that if its Application required the Court to decide any of these questions, the Court could not entertain it. The Parties disagree, however, as to whether the Court is required to decide any of these questions in order to resolve the dispute referred to it.

24. Australia argues that the decision sought from the Court by Portugal would inevitably require the Court to rule on the lawfulness of the conduct of a third State, namely Indonesia, in the absence of that State's consent. In support of its argument, it cites the Judgment in the case concerning *Monetary Gold Removed from Rome in 1943*, in which the Court ruled that, in the absence of Albania's consent, it could not take any deci-

sion on the international responsibility of that State since "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision" (*I.C.J. Reports 1954*, p. 32).

25. In reply, Portugal contends, first, that its Application is concerned exclusively with the objective conduct of Australia, which consists in having negotiated, concluded and initiated performance of the 1989 Treaty with Indonesia, and that this question is perfectly separable from any question relating to the lawfulness of the conduct of Indonesia. According to Portugal, such conduct of Australia in itself constitutes a breach of its obligation to treat East Timor as a non-self-governing territory and Portugal as its administering Power; and that breach could be passed upon by the Court by itself and without passing upon the rights of Indonesia. The objective conduct of Australia, considered as such, constitutes the only violation of international law of which Portugal complains.

26. The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. This principle was reaffirmed in the Judgment given by the Court in the case concerning *Monetary Gold Removed from Rome in 1943* and confirmed in several of its subsequent decisions (see *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 25, para. 40; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 579, para. 49; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, pp. 114-116, paras. 54-56, and p. 112, para. 73; and *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 259-262, paras. 50-55).

27. The Court notes that Portugal's claim that, in entering into the 1989 Treaty with Indonesia, Australia violated the obligation to respect Portugal's status as administering Power and that of East Timor as a non-self-governing territory, is based on the assertion that Portugal alone, in its capacity as administering Power, had the power to enter into the Treaty on behalf of East Timor; that Australia disregarded this exclusive power, and, in so doing, violated its obligations to respect the status of Portugal and that of East Timor.

The Court also observes that Australia, for its part, rejects Portugal's claim to the exclusive power to conclude treaties on behalf of East Timor, and the very fact that it entered into the 1989 Treaty with Indonesia shows that it considered that Indonesia had that power. Australia in substance argues that even if Portugal had retained that power, on whatever basis, after withdrawing from East Timor, the possibility existed that the power could later pass to another State under general international law,

and that it did so pass to Indonesia; Australia affirms moreover that, if the power in question did pass to Indonesia, it was acting in conformity with international law in entering into the 1989 Treaty with that State, and could not have violated any of the obligations Portugal attributes to it. Thus, for Australia, the fundamental question in the present case is ultimately whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay with Portugal or with Indonesia.

28. The Court has carefully considered the argument advanced by Portugal which seeks to separate Australia's behaviour from that of Indonesia. However, in the view of the Court, Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.

29. However, Portugal puts forward an additional argument aiming to show that the principle formulated by the Court in the case concerning *Monetary Gold Removed from Rome in 1943* is not applicable in the present case. It maintains, in effect, that the rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner.

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, pp. 31-32, paras. 52-53; *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.

30. Portugal presents a final argument to challenge the applicability to the present case of the Court's jurisprudence in the case concerning *Monetary Gold Removed from Rome in 1943*. It argues that the principal matters on which its claims are based, namely the status of East Timor as a non-self-governing territory and its own capacity as the administering Power of the Territory, have already been decided by the General Assembly and the Security Council, acting within their proper spheres of competence; that in order to decide on Portugal's claims, the Court might well need to interpret those decisions but would not have to decide *de novo* on their content and must accordingly take them as "givens"; and that consequently the Court is not required in this case to pronounce on the question of the use of force by Indonesia in East Timor or upon the lawfulness of its presence in the Territory.

Australia objects that the United Nations resolutions regarding East Timor do not say what Portugal claims they say; that the last resolution of the Security Council on East Timor goes back to 1976 and the last resolution of the General Assembly to 1982, and that Portugal takes no account of the passage of time and the developments that have taken place since then; and that the Security Council resolutions are not resolutions which are binding under Chapter VII of the Charter or otherwise and, moreover, that they are not framed in mandatory terms.

31. The Court notes that the argument of Portugal under consideration rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far.

For the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination. Moreover, the General Assembly, which reserves to itself the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the Charter, has treated East Timor as such a territory. The competent subsidiary organs of the General Assembly have continued to treat East Timor as such to this day. Furthermore, the Security Council, in its resolutions 384 (1975) and 389 (1976) has expressly called for respect for "the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV)".

Nor is it at issue between the Parties that the General Assembly has expressly referred to Portugal as the "administering Power" of East Timor in a number of the resolutions it adopted on the subject of East Timor between 1975 and 1982, and that the Security Council has done so in its resolution 384 (1975). The Parties do not agree, however, on the

legal implications that flow from the reference to Portugal as the administering Power in those texts.

32. The Court finds that it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. The Court notes, furthermore, that several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory. Finally, the Court observes that, by a letter of 15 December 1989, the Permanent Representative of Portugal to the United Nations transmitted to the Secretary-General the text of a note of protest addressed by the Portuguese Embassy in Canberra to the Australian Department of Foreign Affairs and Trade on the occasion of the conclusion of the Treaty on 11 December 1989; that the letter of the Permanent Representative was circulated, at his request, as an official document of the forty-fifth session of the General Assembly, under the item entitled "Question of East Timor", and of the Security Council; and that no responsive action was taken either by the General Assembly or the Security Council.

Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as "givens" which constitute a sufficient basis for determining the dispute between the Parties.

33. It follows from this that the Court would necessarily have to rule upon the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention that Australia violated its obligation to respect Portugal's status as administering Power, East Timor's status as a non-self-governing territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources.

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34. The Court emphasizes that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case. Thus, in the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, it stated, *inter alia*, as follows:

"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 . . . 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 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." (*I.C.J. Reports 1992*, pp. 261-262, para. 55.)

However, in this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32).

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35. The Court concludes that it cannot, in this case, exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent. This conclusion applies to all the claims of Portugal, for all of them raise a common question: whether the power to make treaties concerning the continental shelf resources of East Timor belongs to Portugal or Indonesia, and, therefore, whether Indonesia's entry into and continued presence in the Territory are lawful. In these circumstances, the Court does not deem it necessary to examine the other arguments derived by Australia from the non-participation of Indonesia in the case, namely the Court's lack of jurisdiction to decide on the validity of the 1989 Treaty and the effects on Indonesia's rights under that treaty which would result from a judgment in favour of Portugal.

* *

36. Having dismissed the first of the two objections of Australia which it has examined, but upheld its second, the Court finds that it is not required to consider Australia's other objections and that it cannot rule on Portugal's claims on the merits, whatever the importance of the questions raised by those claims and of the rules of international law which they bring into play.

37. The Court recalls in any event that it has taken note in the present Judgment (paragraph 31) that, for the two Parties, the Territory of East

Timor remains a non-self-governing territory and its people has the right to self-determination.

* * *

38. For these reasons,

THE COURT,

By fourteen votes to two,

Finds that it cannot in the present case exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate upon the dispute referred to it by the Application of the Portuguese Republic.

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Sir Robert Jennings, Guillaume, Shahabuddeen, Aguilar-Mawdsley, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin; *Judge ad hoc* Sir Ninian Stephen;

AGAINST: *Judge* Weeramantry; *Judge ad hoc* Skubiszewski.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirtieth day of June, one thousand nine hundred and ninety-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 Portuguese Republic and the Government of the Commonwealth of Australia, respectively.

(*Signed*) Mohammed BEDJAOUI,
President.

(*Signed*) Eduardo VALENCIA-OSPINA,
Registrar.

Judges ODA, SHAHABUDDEN, RANJEVA and VERESHCHETIN append separate opinions to the Judgment of the Court.

Judge WEERAMANTRY and Judge *ad hoc* SKUBISZEWSKI append dissenting opinions to the Judgment of the Court.

(*Initialled*) M.B.
(*Initialled*) E.V.O.

**Legal Consequences of the Construction of a Wall in
the Occupied Palestinian Territory,
Advisory Opinion, I.C.J. Reports 2004**

INTERNATIONAL COURT OF JUSTICE

YEAR 2004

9 July 2004

2004
9 July
General List
No. 131

LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

Jurisdiction of the Court to give the advisory opinion requested.
Article 65, paragraph 1, of the Statute — Article 96, paragraph 1, of the Charter — Power of General Assembly to request advisory opinions — Activities of Assembly.

Events leading to the adoption of General Assembly resolution ES-10/14 requesting the advisory opinion.

Contention that General Assembly acted ultra vires under the Charter — Article 12, paragraph 1, and Article 24 of the Charter — United Nations practice concerning the interpretation of Article 12, paragraph 1, of Charter — General Assembly did not exceed its competence.

Request for opinion adopted by the Tenth Emergency Special Session of the General Assembly — Session convened pursuant to resolution 377 A (V) (“Uniting for Peace”) — Conditions set by that resolution — Regularity of procedure followed.

Alleged lack of clarity of the terms of the question — Purportedly abstract nature of the question — Political aspects of the question — Motives said to have inspired the request and opinion’s possible implications — “Legal” nature of question unaffected.

Court having jurisdiction to give advisory opinion requested.

* * *

Discretionary power of Court to decide whether it should give an opinion.
Article 65, paragraph 1, of Statute — Relevance of lack of consent of a State concerned — Question cannot be regarded only as a bilateral matter between Israel and Palestine but is directly of concern to the United Nations — Possible effects of opinion on a political, negotiated solution to the Israeli-Palestinian conflict — Question representing only one aspect of Israeli-Palestinian conflict — Sufficiency of information and evidence available to Court — Useful purpose

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of opinion — Nullus in commodum capere potest de sua injuria propria — Opinion to be given to the General Assembly, not to a specific State or entity.

No “compelling reason” for Court to use its discretionary power not to give an advisory opinion.

* *

“Legal consequences” of the construction of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem — Scope of question posed — Request for opinion limited to the legal consequences of the construction of those parts of the wall situated in Occupied Palestinian Territory — Use of the term “wall”.

Historical background.
Description of the wall.

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Applicable law.

United Nations Charter — General Assembly resolution 2625 (XXV) — Illegality of any territorial acquisition resulting from the threat or use of force — International humanitarian law — Regulations annexed to the Fourth Hague Convention of 1907 — Fourth Geneva Convention of 1949 — Applicability of Fourth Geneva Convention in the Occupied Palestinian Territory — Human rights law — International Covenant on Civil and Political Rights — International Covenant on Economic, Social and Cultural Rights — Convention on the Rights of the Child — Relationship between international humanitarian law and human rights law — Applicability of human rights instruments outside national territory — Applicability of those instruments in the Occupied Palestinian Territory.

* *

Settlements established by Israel in breach of international law in the Occupied Palestinian Territory — Construction of the wall and its associated regime create a “fait accompli” on the ground that could well become permanent — Risk of situation tantamount to de facto annexation — Construction of the wall severely impedes the exercise by the Palestinian people of its right to self-determination and is therefore a breach of Israel’s obligation to respect that right.

Applicable provisions of international humanitarian law and human rights instruments relevant to the present case — Destruction and requisition of properties — Restrictions on freedom of movement of inhabitants of the Occupied Palestinian Territory — Impediments to the exercise by those concerned of the right to work, to health, to education and to an adequate standard of living — Demographic changes in the Occupied Palestinian Territory — Provisions of international humanitarian law enabling account to be taken of military exigencies — Clauses in human rights instruments qualifying rights guaranteed or providing for derogation — Construction of the wall and its associated regime cannot be justified by military exigencies or by the requirements of national security or public order — Breach by Israel of various of its obligations under

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the applicable provisions of international humanitarian law and human rights instruments.

Self-defence — Article 51 of the Charter — Attacks against Israel not imputable to a foreign State — Threat invoked to justify the construction of the wall originating within a territory over which Israel exercises control — Article 51 not relevant in the present case.

State of necessity — Customary international law — Conditions — Construction of the wall not the only means to safeguard Israel's interests against the peril invoked.
Construction of the wall and its associated régime are contrary to international law.

* *

Legal consequences of the violation by Israel of its obligations.

Israel's international responsibility — Israel obliged to comply with the international obligations it has breached by the construction of the wall — Israel obliged to put an end to the violation of its international obligations — Obligation to cease forthwith the works of construction of the wall, to dismantle it forthwith and to repeal or render ineffective forthwith the legislative and regulatory acts relating to its construction, save where relevant for compliance by Israel with its obligation to make reparation for the damage caused — Israel obliged to make reparation for the damage caused to all natural or legal persons affected by construction of the wall.

Legal consequences for States other than Israel — Erga omnes character of certain obligations violated by Israel — Obligation for all States not to recognize the illegal situation resulting from construction of the wall and not to render aid or assistance in maintaining the situation created by such construction — Obligation for all States, while respecting the Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end — Obligation for all States parties to the Fourth Geneva Convention, while respecting the Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention — Need for the United Nations, and especially the General Assembly and the Security Council, to consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and its associated régime, taking due account of the Advisory Opinion.

* *

Construction of the wall must be placed in a more general context — Obligation of Israel and Palestine scrupulously to observe international humanitarian law — Implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973) — "Roadmap" — Need for efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, with peace and security for all in the region.

ADVISORY OPINION

Present: President SHI; Vice-President RANJEVA; Judges GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOLJIMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMIKA; Registrar COUVREUR.

On the legal consequences of the construction of a wall in the Occupied Palestinian Territory,

THE COURT,

composed as above,

gives the following *Advisory Opinion*:

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the "General Assembly") on 8 December 2003 at its Tenth Emergency Special Session. By a letter dated 8 December 2003 and received in the Registry by facsimile on 10 December 2003, the original of which reached the Registry subsequently, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of resolution ES-10/14 were enclosed with the letter. The resolution reads as follows:

"The General Assembly,

Reaffirming its resolution ES-10/13 of 21 October 2003,

Guided by the principles of the Charter of the United Nations,

Aware of the established principle of international law on the inadmissibility of the acquisition of territory by force,

Aware also that developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples is among the purposes and principles of the Charter of the United Nations,

Recalling relevant General Assembly resolutions, including resolution 181 (II) of 29 November 1947, which partitioned mandated Palestine into two States, one Arab and one Jewish,

Recalling also the resolutions of the tenth emergency special session of the General Assembly,

Recalling further relevant Security Council resolutions, including resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 267 (1969) of 3 July 1969, 298 (1971) of 25 September 1971, 446 (1979) of 22 March 1979, 452 (1979) of 20 July 1979, 465 (1980) of 1 March 1980, 476 (1980) of 30 June 1980, 478 (1980) of 20 August 1980, 904 (1994) of 18 March 1994, 1073 (1996) of 28 September 1996, 1397 (2002) of 12 March 2002 and 1515 (2003) of 19 November 2003,

Reaffirming the applicability of the Fourth Geneva Convention¹ as well as Additional Protocol I to the Geneva Conventions² to the Occupied Palestinian Territory, including East Jerusalem.

Recalling the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907³,

Welcoming the convening of the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, at Geneva on 15 July 1999,

Expressing its support for the declaration adopted by the reconvened Conference of High Contracting Parties at Geneva on 5 December 2001,

Recalling in particular relevant United Nations resolutions affirming that Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, are illegal and an obstacle to peace and to economic and social development as well as those demanding the complete cessation of settlement activities,

Recalling relevant United Nations resolutions affirming that actions taken by Israel, the occupying Power, to change the status and demographic composition of Occupied East Jerusalem have no legal validity and are null and void,

Noting the agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process,

Gravely concerned at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the de facto annexation of large areas of territory, and underlining the unanimous opposition by the international community to the construction of that wall,

Gravely concerned also at the even more devastating impact of the projected parts of the wall on the Palestinian civilian population and on the prospects for solving the Palestinian-Israeli conflict and establishing peace in the region.

Welcoming the report of 8 September 2003 of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967⁴, in particular the section regarding the wall.

¹ United Nations, *Treaty Series*, Vol. 75, No. 973.

² *Ibid.*, Vol. 1125, No. 17512.

³ See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

⁴ E/CN.4/2004/6.

Affirming the necessity of ending the conflict on the basis of the two-State solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949, in accordance with relevant Security Council and General Assembly resolutions,

Having received with appreciation the report of the Secretary-General, submitted in accordance with resolution ES-10/13⁵,

Bearing in mind that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences,

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

⁵ A/ES-10/248."

Also enclosed with the letter were the certified English and French texts of the report of the Secretary-General dated 24 November 2003, prepared pursuant to General Assembly resolution ES-10/13 (A/ES-10/248), to which resolution ES-10/14 makes reference.

2. By letters dated 10 December 2003, the Registrar notified the request for an advisory opinion to all States entitled to appear before the Court, in accordance with Article 66, paragraph 1, of the Statute.

3. By a letter dated 11 December 2003, the Government of Israel informed the Court of its position on the request for an advisory opinion and on the procedure to be followed.

4. By an Order of 19 December 2003, the Court decided that the United Nations and its Member States were likely, in accordance with Article 66, paragraph 2, of the Statute, to be able to furnish information on all aspects raised by the question submitted to the Court for an advisory opinion and fixed 30 January 2004 as the time-limit within which written statements might be submitted to it on the question in accordance with Article 66, paragraph 4, of the Statute. By the same Order, the Court further decided that, in the light of resolution ES-10/14 and the report of the Secretary-General transmitted with the request, and taking into account the fact that the General Assembly had granted Palestine a special status of observer and that the latter was co-sponsor of the draft resolution requesting the advisory opinion, Palestine might also submit a written statement on the question within the above time-limit.

5. By the aforesaid Order, the Court also decided, in accordance with

Article 105, paragraph 4, of the Rules of Court, to hold public hearings during which oral statements and comments might be presented to it by the United Nations and its Member States, regardless of whether or not they had submitted written statements, and fixed 23 February 2004 as the date for the opening of the said hearings. By the same Order, the Court decided that, for the reasons set out above (see paragraph 4), Palestine might also take part in the hearings. Lastly, it invited the United Nations and its Member States, as well as Palestine, to inform the Registry, by 13 February 2004 at the latest, if they were intending to take part in the above-mentioned hearings. By letters of 19 December 2004, the Registrar informed them of the Court's decisions and transmitted to them a copy of the Order.

6. Ruling on requests submitted subsequently by the League of Arab States and the Organization of the Islamic Conference, the Court decided, in accordance with Article 66 of its Statute, that those two international organizations were likely to be able to furnish information on the question submitted to the Court, and that consequently they might for that purpose submit written statements within the time-limit fixed by the Court in its Order of 19 December 2003 and take part in the hearings.

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

8. By a reasoned Order of 30 January 2004 regarding its composition in the case, the Court decided that the matters brought to its attention by the Government of Israel in a letter of 31 December 2003, and in a confidential letter of 15 January 2004 addressed to the President pursuant to Article 34, paragraph 2, of the Rules of Court, were not such as to preclude Judge Elaraby from sitting in the case.

9. Within the time-limit fixed by the Court for that purpose, written statements were filed by, in order of their receipt: Guinea, Saudi Arabia, League of Arab States, Egypt, Cameroon, Russian Federation, Australia, Palestine, United Nations, Jordan, Kuwait, Lebanon, Canada, Syria, Switzerland, Israel, Yemen, United States of America, Morocco, Indonesia, Organization of the Islamic Conference, France, Italy, Sudan, South Africa, Germany, Japan, Norway, United Kingdom, Pakistan, Czech Republic, Greece, Ireland on its own behalf, Ireland on behalf of the European Union, Cyprus, Brazil, Namibia, Malta, Malaysia, Netherlands, Cuba, Sweden, Spain, Belgium, Palau, Federated States of Micronesia, Marshall Islands, Senegal, Democratic People's Republic of Korea. Upon receipt of those statements, the Registrar transmitted copies thereof to the United Nations and its Member States, to Palestine, to the League of Arab States and to the Organization of the Islamic Conference.

10. Various communications were addressed to these latter by the Registry, concerning in particular the measures taken for the organization of the oral proceedings. By communications of 20 February 2004, the Registry transmitted a detailed timetable of the hearings to those of the latter who, within the time-limit fixed for that purpose by the Court, had expressed their intention of taking part in the aforementioned proceedings.

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

12. In the course of hearings held from 23 to 25 February 2004, the Court heard oral statements, in the following order, by:

for Palestine: H.E. Mr. Nasser Al-Kidwa, Ambassador, Permanent Observer of Palestine to the United Nations,

Ms Stephanie Koury, Member, Negotiations Support Unit, Counsel,

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institute of International Law, Counsel and Advocate,

Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law, Counsel and Advocate,

Mr. Vaughan Lowe, Chichele Professor of International Law, University of Oxford, Counsel and Advocate,

Mr. Jean Salmon, Professor Emeritus of International Law, Université libre de Bruxelles, Member of the Institute of International Law, Counsel and Advocate;

H.E. Mr. Aziz Pahad, Deputy Minister for Foreign Affairs, Head of Delegation,

Judge M. R. W. Madlanga, S.C.;

Mr. Ahmed Laraba, Professor of International Law;

H.E. Mr. Fawzi A. Shobokshi, Ambassador and Permanent Representative of the Kingdom of Saudi Arabia to the United Nations in New York, Head of Delegation;

H.E. Mr. Liaquat Ali Choudhury, Ambassador of the People's Republic of Bangladesh to the Kingdom of the Netherlands;

Mr. Jean-Marc Sorel, Professor at the University of Paris I (Panthéon-Sorbonne);

H.E. Mr. Abelardo Moreno Fernández, Deputy Minister for Foreign Affairs;

H.E. Mr. Mohammad Jusuf, Ambassador of the Republic of Indonesia to the Kingdom of the Netherlands, Head of Delegation;

H.R.H. Ambassador Zeid Ra'ad Zeid Al-Husseini, Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, New York, Head of Delegation,

Sir Arthur Watts, K.C.M.G., Q.C., Senior Legal

Adviser to the Government of the Hashemite Kingdom of Jordan;

for the Republic of Madagascar:

H.E. Mr. Alfred Rambeloson, Permanent Representative of Madagascar to the Office of the United Nations at Geneva and to the Specialized Agencies, Head of Delegation;

for Malaysia:

H.E. Datuk Seri Syed Hamid Albar, Foreign Minister of Malaysia, Head of Delegation;

for the Republic of Senegal:

H.E. Mr. Saliou Cissé, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands, Head of Delegation;

for the Republic of the Sudan:

H.E. Mr. Abuelgasim A. Idris, Ambassador of the Republic of the Sudan to the Kingdom of the Netherlands;

for the League of Arab States:

Mr. Michael Bothe, Professor of Law, Head of the Legal Team;

for the Organization of the Islamic Conference:

H.E. Mr. Abdelouahed Belkeziz, Secretary General of the Organization of the Islamic Conference, Ms Monique Chemillier-Gendreau, Professor of Public Law, University of Paris VII-Denis Diderot, as Counsel.

* * *

13. When seized of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10).

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14. The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 December 2003. The competence of the Court in this regard is based on Article 65, paragraph 1, of its Statute, according to which the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". The Court has already had occasion to indicate that:

"It is . . . a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ." (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21.)

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15. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it. In the present instance, the Court notes that the General Assembly, which seeks the advisory opinion, is authorized to do so by Article 96, paragraph 1, of the Charter, which provides: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

16. Although the above-mentioned provision states that the General Assembly may seek an advisory opinion "on any legal question", the Court has sometimes in the past given certain indications as to the relationship between the question of the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 70; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 232 and 233, paras. 11 and 12).

17. The Court will so proceed in the present case. The Court would observe that Article 10 of the Charter has conferred upon the General Assembly a competence relating to "any questions or any matters" within the scope of the Charter, and that Article 11, paragraph 2, has specifically provided it with competence on "questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . ." and to make recommendations under certain conditions fixed by those Articles. As will be explained below, the question of the construction of the wall in the Occupied Palestinian Territory was brought before the General Assembly by a number of Member States in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what the Assembly, in its resolution ES-10/2 of 25 April 1997, considered to constitute a threat to international peace and security.

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18. Before further examining the problems of jurisdiction that have been raised in the present proceedings, the Court considers it necessary to describe the events that led to the adoption of resolution ES-10/14, by which the General Assembly requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

19. The Tenth Emergency Special Session of the General Assembly, at which that resolution was adopted, was first convened following the rejection by the Security Council, on 7 March and 21 March 1997, as a result of negative votes by a permanent member, of two draft resolutions concerning certain Israeli settlements in the Occupied Palestinian Territory (see, respectively, S/1997/199 and S/SPV.3747, and S/1997/241 and S/SPV.3756). By a letter of 31 March 1997, the Chairman of the Arab Group then requested "that an emergency special session of the General Assembly be convened pursuant to resolution 377 A (V) entitled 'Uniting

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for Peace'” with a view to discussing “Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (letter dated 31 March 1997 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General, A/ES-10/1, 22 April 1997, Annex). The majority of Members of the United Nations having concurred in this request, the first meeting of the Tenth Emergency Special Session of the General Assembly took place on 24 April 1997 (see A/ES-10/1, 22 April 1997). Resolution ES-10/2 was adopted the following day; the General Assembly thereby expressed its conviction that:

“the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security”,

and condemned the “illegal Israeli actions” in occupied East Jerusalem and the rest of the Occupied Palestinian Territory, in particular the construction of settlements in that territory. The Tenth Emergency Special Session was then adjourned temporarily and has since been reconvened 11 times (on 15 July 1997, 13 November 1997, 17 March 1998, 5 February 1999, 18 October 2000, 20 December 2001, 7 May 2002, 5 August 2002, 19 September 2003, 20 October 2003 and 8 December 2003).

20. By a letter dated 9 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested an immediate meeting of the Security Council to consider the “grave and ongoing Israeli violations of international law, including international humanitarian law, and to take the necessary measures in this regard” (letter of 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations to the President of the Security Council, S/2003/973, 9 October 2003). This letter was accompanied by a draft resolution for consideration by the Council, which was deemed as illegal the construction by Israel of a wall in the Occupied Palestinian Territory departing from the Armistice Line of 1949. The Security Council held its 4841st and 4842nd meetings on 14 October 2003 to consider the item entitled “The situation in the Middle East, including the Palestine question”. It then had before it another draft resolution proposed on the same day by Guinea, Malaysia, Pakistan and the Syrian Arab Republic, which also condemned the construction of the wall. This latter draft resolution was put to a vote after an open debate and was not adopted owing to the negative vote of a permanent member of the Council (S/PV.4841 and S/PV.4842).

On 15 October 2003, the Chairman of the Arab Group, on behalf of

the States Members of the League of Arab States, requested the resumption of the Tenth Emergency Special Session of the General Assembly to consider the item of “Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory” (A/ES-10/242); this request was supported by the Non-Aligned Movement (A/ES-10/243) and the Organization of the Islamic Conference Group at the United Nations (A/ES-10/244). The Tenth Emergency Special Session resumed its work on 20 October 2003.

21. On 27 October 2003, the General Assembly adopted resolution ES-10/13, by which it demanded that

“Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law” (para. 1).

In paragraph 3, the Assembly requested the Secretary-General

“to report on compliance with the . . . resolution periodically, with the first report on compliance with paragraph 1 [of that resolution] to be submitted within one month . . .”.

The Tenth Emergency Special Session was temporarily adjourned and, on 24 November 2003, the report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (hereinafter the “report of the Secretary-General”) was issued (A/ES-10/248).

22. Meanwhile, on 19 November 2003, the Security Council adopted resolution 1515 (2003), by which it “*Endorse[d]* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict”. The Quartet consists of representatives of the United States of America, the European Union, the Russian Federation and the United Nations. That resolution

“*Call[ed]* on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security.”

Neither the “Roadmap” nor resolution 1515 (2003) contained any specific provision concerning the construction of the wall, which was not discussed by the Security Council in this context.

23. Nineteen days later, on 8 December 2003, the Tenth Emergency Special Session of the General Assembly again resumed its work, following a new request by the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, and pursuant to resolution ES-10/13 (letter dated 1 December 2003 to the President of the General Assembly from the Chargé d'affaires a.i. of the Permanent Mission

of Kuwait to the United Nations, A/ES-10/249, 2 December 2003). It was during the meeting convened on that day that resolution ES-10/14 requesting the present advisory opinion was adopted.

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24. Having thus recalled the sequence of events that led to the adoption of resolution ES-10/14, the Court will now turn to the questions of jurisdiction that have been raised in the present proceedings. First, Israel has alleged that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the Charter when it requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

25. The Court has already indicated that the subject of the present request for an advisory opinion falls within the competence of the General Assembly under the Charter (see paragraphs 15-17 above). However, Article 12, paragraph 1, of the Charter provides that:

“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

A request for an advisory opinion is not in itself a “recommendation” by the General Assembly “with regard to [a] dispute or situation”. It has however been argued in this case that the adoption by the General Assembly of resolution ES-10/14 was *ultra vires* as not in accordance with Article 12. The Court thus considers that it is appropriate for it to examine the significance of that Article, having regard to the relevant texts and the practice of the United Nations.

26. Under Article 24 of the Charter the Security Council has “primary responsibility for the maintenance of international peace and security”. In that regard it can impose on States “an explicit obligation of compliance if for example it issues an order or command . . . under Chapter VII” and can, to that end, “require enforcement by coercive action” (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, I.C.J. Reports 1962, p. 163). However, the Court would emphasize that Article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, *inter alia*, under Article 14 of the Charter, to “recommend measures for the peaceful adjustment” of various situations (*ibid.*).

“[T]he only limitation which Article 14 imposes on the General

Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.” (*I.C.J. Reports 1962*, p. 163.)

27. As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council’s agenda. Thus the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, *inter alia*, that the Council remained seized of the matter (*Official Records of the General Assembly, Fourth Session, Ad Hoc Political Committee, Summary Records of Meetings, 27 September-7 December 1949*, 56th Meeting, 3 December 1949, p. 339, para. 118). As for the Council, on a number of occasions it deleted items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question (*Official Records of the Security Council, First Year: Second Series, No. 21*, 79th Meeting, 4 November 1946, p. 498), in connection with incidents on the Greek border (*Official Records of the Security Council, Second Year, No. 89*, 202nd Meeting, 15 September 1947, pp. 2404-2405) and in regard to the island of Taiwan (Formosa) (*Official Records of the Security Council, Fifth Year, No. 48*, 506th Meeting, 29 September 1950, p. 5)). In the case of the Republic of Korea, the Council decided on 31 January 1951 to remove the relevant item from the list of matters of which it was seized in order to enable the Assembly to deliberate on the matter (*Official Records of the Security Council, Sixth Year, SPV.531*, 531st Meeting, 31 January 1951, pp. 11-12, para. 57).

However, this interpretation of Article 12 has evolved subsequently. Thus the General Assembly deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo (resolutions 1955 (XV) and 1600 (XVI)) and in 1963 in respect of the Portuguese colonies (resolution 1913 (XVIII)) while those cases still appeared on the Council’s agenda, without the Council having adopted any recent resolution concerning them. In response to a question posed by Peru during the twenty-third session of the General Assembly, the Legal Counsel of the United Nations confirmed that the Assembly interpreted the words “is exercising the functions” in Article 12 of the Charter as meaning “is exercising the functions at this moment” (General Assembly, Twenty-third Session, Third Committee, 1637th meeting, A/C.3/SR.1637, para. 9). Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and

Somalia). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

28. The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.

The Court is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

29. It has however been contended before the Court that the present request for an advisory opinion did not fulfil the essential conditions set by resolution 377 A (V), under which the Tenth Emergency Special Session was convened and has continued to act. In this regard, it has been said, first, that "The Security Council was never seized of a draft resolution proposing that the Council itself should request an advisory opinion from the Court on the matters now in contention", and, that specific issue having thus never been brought before the Council, the General Assembly could not rely on any inaction by the Council to make such a request. Secondly, it has been claimed that, in adopting resolution 1515 (2003), which endorsed the "Roadmap", before the adoption by the General Assembly of resolution ES-10/14, the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. The validity of the procedure followed by the Tenth Emergency Special Session, especially the Session's "rolling character" and the fact that its meeting was convened to deliberate on the request for the advisory opinion at the same time as the General Assembly was meeting in regular session, has also been questioned.

30. The Court would recall that resolution 377 A (V) states that:

"if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures"

The procedure provided for by that resolution is premised on two conditions, namely that the Council has failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members, and that the situa-

tion is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression. The Court must accordingly ascertain whether these conditions were fulfilled as regards the convening of the Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.

31. In the light of the sequence of events described in paragraphs 18 to 23 above, the Court observes that, at the time when the Tenth Emergency Special Session was convened in 1997, the Council had been unable to take a decision on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to negative votes of a permanent member; and that, as indicated in resolution ES-10/2 (see paragraph 19 above), there existed a threat to international peace and security.

The Court further notes that, on 20 October 2003, the Tenth Emergency Special Session of the General Assembly was reconvened on the same basis as in 1997 (see the statements by the representatives of Palestine and Israel, A/ES-10/PV.21, pp. 2 and 5), after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377 A (V). It does not appear to the Court that the situation in this regard changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the construction of the wall nor adopted any resolution in that connection. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. It follows that, during that period, the Tenth Emergency Special Session was duly reconvened and could properly be seized, under resolution 377 A (V), of the matter now before the Court.

32. The Court would also emphasize that, in the course of this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject-matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court's opinion. It is irrelevant in that regard that no proposal had been made to the Security Council to request such an opinion.

33. Turning now to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the "rolling" character of that Session, namely the fact of its having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. The Court observes in that regard that the Seventh Emergency Special Session of the General Assembly, having been convened on 22 July 1980, was subsequently reconvened four times (on 20 April 1982, 25 June 1982, 16 August 1982 and 24 September 1982), and that the validity of

resolutions or decisions of the Assembly adopted under such circumstances was never disputed. Nor has the validity of any previous resolutions adopted during the Tenth Emergency Special Session been challenged.

34. The Court also notes the contention by Israel that it was improper to reconvene the Tenth Emergency Special Session at a time when the regular session of the General Assembly was in progress. The Court considers that, while it may not have been originally contemplated that it would be appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule of the Organization has been identified which would be thereby violated, so as to render invalid the resolution adopting the present request for an advisory opinion.

35. Finally, the Tenth Emergency Special Session appears to have been convened in accordance with Rule 9 (b) of the Rules of Procedure of the General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules. As the Court stated in its Advisory Opinion of 21 June 1971 concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, a

“resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ’s rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted” (*I.C.J. Reports 1971*, p. 22, para. 20).

In view of the foregoing, the Court cannot see any reason why that presumption is to be rebutted in the present case.

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36. The Court now turns to a further issue related to jurisdiction in the present proceedings, namely the contention that the request for an advisory opinion by the General Assembly is not on a “legal question” within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has been contended in this regard that, for a question to constitute a “legal question” for the purposes of these two provisions, it must be reasonably specific, since otherwise it would not be amenable to a response by the Court. With regard to the request made in the present advisory proceedings, it has been argued that it is not possible to determine with reasonable certainty the legal meaning of the question asked of the Court for two reasons.

First, it has been argued that the question regarding the “legal consequences” of the construction of the wall only allows for two possible interpretations, each of which would lead to a course of action that is

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precluded for the Court. The question asked could first be interpreted as a request for the Court to find that the construction of the wall is illegal, and then to give its opinion on the legal consequences of that illegality. In this case, it has been contended, the Court should decline to respond to the question asked for a variety of reasons, some of which pertain to jurisdiction and others rather to the issue of propriety. As regards jurisdiction, it is said that, if the General Assembly had wished to obtain the view of the Court on the highly complex and sensitive question of the legality of the construction of the wall, it should have expressly sought an opinion to that effect (cf. *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 17). A second possible interpretation of the request, it is said, is that the Court should assume that the construction of the wall is illegal, and then give its opinion on the legal consequences of that assumed illegality. It has been contended that the Court should also decline to respond to the question on this hypothesis, since the request would then be based on a questionable assumption and since, in any event, it would be impossible to rule on the legal consequences of illegality without specifying the nature of that illegality.

Secondly, it has been contended that the question asked of the Court is not of a “legal” character because of its imprecision and abstract nature. In particular, it has been argued in this regard that the question fails to specify whether the Court is being asked to address legal consequences for “the General Assembly or some other organ of the United Nations”, “Member States of the United Nations”, “Israel”, “Palestine” or “some combination of the above, or some different entity”.

37. As regards the alleged lack of clarity of the terms of the General Assembly’s request and its effect on the “legal nature” of the question referred to the Court, the Court observes that this question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the “Fourth Geneva Convention”) and relevant Security Council and General Assembly resolutions. The question submitted by the General Assembly has thus, to use the Court’s phrase in its Advisory Opinion on *Western Sahara*, “been framed in terms of law and raise[s] problems of international law”; it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character (see *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

38. The Court would point out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncer-

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tainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.

In the past, both the Permanent Court and the present Court have observed in some cases that the wording of a request for an advisory opinion did not accurately state the question on which the Court's opinion was being sought (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, *Advisory Opinion*, 1928, *P.C.I.J., Series B, No. 16 (I)*, pp. 14-16), or did not correspond to the "true legal question" under consideration (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, *I.C.J. Reports 1980*, pp. 87-89, paras. 34-36). The Court noted in one case that "the question put to the Court is, on the face of it, at once infelicitously expressed and vague" (*Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion*, *I.C.J. Reports 1982*, p. 348, para. 46).

Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put (see the three Opinions cited above; see also *Jaworzina, Advisory Opinion*, 1923, *P.C.I.J., Series B, No. 8; Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion*, *I.C.J. Reports 1956*, p. 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, *I.C.J. Reports 1962*, pp. 157-162).

In the present instance, the Court will only have to do what it has often done in the past, namely "identify the existing principles and rules, interpret them and apply them . . . thus offering a reply to the question posed based on law" (*Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996 (I)*, p. 234, para. 13).

39. In the present instance, if the General Assembly requests the Court to state the "legal consequences" arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law. Thus, the Court is first called upon to determine whether such rules and principles have been and are still being breached by the construction of the wall along the planned route.

40. The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, the Court took the position that to contend that it should not deal with a question couched in abstract terms is "a mere affirmation devoid of any justification" and that "the Court may give an advisory opinion on any legal question, abstract or otherwise" (*I.C.J. Reports 1996 (I)*, p. 236, para. 15, referring to *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, *Advisory Opinion*, 1948, *I.C.J. Reports 1947-1948*, p. 61; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion*, *I.C.J. Reports 1954*, p. 51; and *Legal Con-*

sequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), *Advisory Opinion*, *I.C.J. Reports 1971*, p. 27, para. 40). In any event, the Court considers that the question posed to it in relation to the legal consequences of the construction of the wall is not an abstract one, and moreover that it would be for the Court to determine for whom any such consequences arise.

41. Furthermore, the Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the "political" character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects,

"as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute' (*Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*, *I.C.J. Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, *Advisory Opinion*, 1948, *I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion*, *I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, *I.C.J. Reports 1962*, p. 155)." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996 (I)*, p. 234, para. 13.)

In its Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court indeed emphasized that,

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

Moreover, the Court has affirmed in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that

"the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion" (*I.C.J. Reports 1996 (I)*, p. 234, para. 13).

The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.

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42. The Court accordingly has jurisdiction to give the advisory opinion requested by resolution ES-10/14 of the General Assembly.

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43. It has been contended in the present proceedings, however, that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly's request that would render the exercise of the Court's jurisdiction improper and inconsistent with the Court's judicial function.

44. The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that "The Court may give an advisory opinion . . ." (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 234-235, para. 14). The Court however is mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.) Given its responsibilities as the "principal judicial organ of the United Nations" (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only "compelling reasons" should lead the Court to refuse its opinion (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.)

The present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion. Its decision not to give the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* requested by the World Health Organization was based on the Court's lack of jurisdiction, and not on considerations of judicial propriety (see *I.C.J. Reports 1996 (I)*, p. 235, para. 14). Only on one occasion did the Court's predecessor, the Permanent Court of International Justice, take the view that it should

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not reply to a question put to it (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*), but this was due to

"the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 235-236, para. 14).

45. These considerations do not release the Court from the duty to satisfy itself, each time it is seized of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of "compelling reasons" as cited above. The Court will accordingly examine in detail and in the light of its jurisprudence each of the arguments presented to it in this regard.

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46. The first such argument is to the effect that the Court should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction. According to this view, the subject-matter of the question posed by the General Assembly "is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters". Israel has emphasized that it has never consented to the settlement of this wider dispute by the Court or by any other means of compulsory adjudication; on the contrary, it contends that the parties repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that recourse could be had to arbitration. It is accordingly contended that the Court should decline to give the present Opinion, on the basis *inter alia* of the precedent of the decision of the Permanent Court of International Justice on the *Status of Eastern Carelia*.

47. The Court observes that the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion. In an Advisory Opinion of 1950, the Court explained that:

"The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the

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United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organization, and, in principle, should not be refused." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also *Western Sahara, I.C.J. Reports 1975*, p. 24, para. 31.)

It followed from this that, in those proceedings, the Court did not refuse to respond to the request for an advisory opinion on the ground that, in the particular circumstances, it lacked jurisdiction. The Court did however examine the opposition of certain interested States to the request by the General Assembly in the context of issues of judicial propriety. Commenting on its 1950 decision, the Court explained in its Advisory Opinion on *Western Sahara* that it had "Thus . . . recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion." The Court continued:

"In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent." (*Western Sahara, I.C.J. Reports 1975*, p. 25, paras. 32-33.)

In applying that principle to the request concerning *Western Sahara*, the Court found that a legal controversy did indeed exist, but one which had arisen during the proceedings of the General Assembly and in relation to matters with which the Assembly was dealing. It had not arisen independently in bilateral relations (*ibid.*, p. 25, para. 34).

48. As regards the request for an advisory opinion now before it, the Court acknowledges that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel's construction of the wall, on which the Court has been asked to pronounce. However, as the Court has itself noted, "Differences of views . . . on legal issues have existed in practically every advisory proceeding" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 34).

49. Furthermore, the Court does not consider that the subject-matter

of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (see paragraphs 70 and 71 below). This responsibility has been described by the General Assembly as "a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.

50. The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

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51. The Court now turns to another argument raised in the present proceedings in support of the view that it should decline to exercise its jurisdiction. Some participants have argued that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it has been contended that such an opinion could undermine the scheme of the "Roadmap" (see paragraph 22 above), which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The requested opinion, it has been alleged, could complicate the negotiations envisaged in the "Roadmap", and the Court should therefore exercise its discretion and decline to reply to the question put.

This is a submission of a kind which the Court has already had to consider several times in the past. For instance, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated:

"It has . . . been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another." (*I.C.J. Reports 1996 (I)*, p. 237, para. 17; see also *Western Sahara, I.C.J. Reports 1975*, p. 37, para. 73.)

52. One participant in the present proceedings has indicated that the Court, if it were to give a response to the request, should in any event do so keeping in mind

"two key aspects of the peace process: the fundamental principle that permanent status issues must be resolved through negotiations; and the need during the interim period for the parties to fulfil their security responsibilities so that the peace process can succeed".

53. The Court is conscious that the "Roadmap", which was endorsed by the Security Council in resolution 1515 (2003) (see paragraph 22 above), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court's opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

54. It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict, which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked. The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

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55. Several participants in the proceedings have raised the further

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argument that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. In particular, Israel has contended, referring to the Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, that the Court could not give an opinion on issues which raise questions of fact that cannot be elucidated without hearing all parties to the conflict. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians. This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits. Israel has concluded that the Court, confronted with factual issues impossible to clarify in the present proceedings, should use its discretion and decline to comply with the request for an advisory opinion.

56. The Court observes that the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance. In its Opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (I.C.J. Reports 1950*, p. 72) and again in its Opinion on the *Western Sahara*, the Court made it clear that what is decisive in these circumstances is

"whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character" (*Western Sahara, I.C.J. Reports 1975*, pp. 28-29, para. 46).

Thus, for instance, in the proceedings concerning the *Status of Eastern Carelia*, the Permanent Court of International Justice decided to decline to give an Opinion *inter alia* because the question put "raised a question of fact which could not be elucidated without hearing both parties" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 72; see *Status of Eastern Carelia, P.C.I.J., Series B, No. 5*, p. 28). On the other hand, in the *Western Sahara* Opinion, the Court observed that it had been provided with very extensive documentary evidence of the relevant facts (*I.C.J. Reports 1975*, p. 29, para. 47).

57. In the present instance, the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of

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the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. The Secretary-General has further submitted to the Court a written statement updating his report, which supplemented the information contained therein. Moreover, numerous other participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel's Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes; many other documents issued by the Israeli Government on those matters are in the public domain.

58. The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.

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59. In their written statements, some participants have also put forward the argument that the Court should decline to give the requested opinion on the legal consequences of the construction of the wall because such opinion would lack any useful purpose. They have argued that the advisory opinions of the Court are to be seen as a means to enable an organ or agency in need of legal clarification for its future action to obtain that clarification. In the present instance, the argument continues, the General Assembly would not need an opinion of the Court because it has already declared the construction of the wall to be illegal and has already determined the legal consequences by demanding that Israel stop and reverse its construction, and further, because the General Assembly has never made it clear how it intended to use the opinion.

60. As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. In its Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court observed: "The object of this request for an Opinion is to guide the United Nations in respect of its own action." (*I.C.J. Reports 1951*, p. 19.) Likewise, in its Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South*

West Africa) notwithstanding Security Council Resolution 276 (1970), the Court noted: "The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions." (*I.C.J. Reports 1971*, p. 24, para. 32.) The Court found on another occasion that the advisory opinion it was to give would "furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara" (*Western Sahara, I.C.J. Reports 1975*, p. 37, para. 72).

61. With regard to the argument that the General Assembly has not made it clear what use it would make of an advisory opinion on the wall, the Court would recall, as equally relevant in the present proceedings, what it stated in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

"Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

62. It follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly — and the Security Council — may then draw conclusions from the Court's findings.

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63. Lastly, the Court will turn to another argument advanced with regard to the propriety of its giving an advisory opinion in the present proceedings. Israel has contended that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim *nullus in commodum capere potest de sua injuria propria*, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of "clean hands" provide a compelling reason that should lead the Court to refuse the General Assembly's request.

64. The Court does not consider this argument to be pertinent. As was emphasized earlier, it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity.

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65. In the light of the foregoing, the Court concludes not only that it has jurisdiction to give an opinion on the question put to it by the General Assembly (see paragraph 42 above), but also that there is no compelling reason for it to use its discretionary power not to give that opinion.

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66. The Court will now address the question put to it by the General Assembly in resolution ES-10/14. The Court recalls that the question is as follows:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

67. As explained in paragraph 82 below, the “wall” in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel (“fence”) or by the Secretary-General (“barrier”), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built “in the Occupied Palestinian Territory, including in and around East Jerusalem”. As also explained below (see paragraphs 79-84 below), some parts of the complex are being built, or are planned to be built, on the territory of Israel itself; the Court does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall.

68. The question put by the General Assembly concerns the legal consequences of the construction of the wall in the Occupied Palestinian Territory. However, in order to indicate those consequences to the General Assembly the Court must first determine whether or not the construction of that wall breaches international law (see paragraph 39 above). It will

therefore make this determination before dealing with the consequences of the construction.

69. To do so, the Court will first make a brief analysis of the status of the territory concerned, and will then describe the works already constructed or in course of construction in that territory. It will then indicate the applicable law before seeking to establish whether that law has been breached.

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70. Palestine was part of the Ottoman Empire. At the end of the First World War, a class “A” Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of Article 22 of the Covenant, which provided that:

“Certain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”

The Court recalls that in its Advisory Opinion on the *International Status of South West Africa*, speaking of mandates in general, it observed that “The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilization.” (*I.C.J. Reports 1950*, p. 132.) The Court also held in this regard that “two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] ‘a sacred trust of civilization’” (*ibid.*, p. 131).

The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928.

71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which “*Recommends* to the United Kingdom . . . and to all other Members of the United Nations the adoption and implementation . . . of the Plan of Partition” of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May

1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.

72. By resolution 62 (1948) of 16 November 1948, the Security Council decided that "an armistice shall be established in all sectors of Palestine" and called upon the parties directly involved in the conflict to seek agreement to this end. In conformity with this decision, general armistice agreements were concluded in 1949 between Israel and the neighbouring States through mediation by the United Nations. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the "Green Line" owing to the colour used for it on maps; hereinafter the "Green Line"). Article III, paragraph 2, provided that "No element of the . . . military or para-military forces of either Party . . . shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines . . ." It was agreed in Article VI, paragraph 8, that these provisions would not be "interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties". It was also stated that "the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto". The Demarcation Line was subject to such rectification as might be agreed upon by the parties.

73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).

74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war and called for the "Withdrawal of Israel armed forces from territories occupied in the recent conflict", and "Termination of all claims or states of belligerency".

75. From 1967 onwards, Israel took a number of measures in these territories aimed at changing the status of the City of Jerusalem. The Security Council, after recalling on a number of occasions "the principle that acquisition of territory by military conquest is inadmissible", condemned those measures and, by resolution 298 (1971) of 25 September 1971, confirmed in the clearest possible terms that:

"all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status".

Later, following the adoption by Israel on 30 July 1980 of the Basic Law making Jerusalem the "complete and united" capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, stated that the enactment of that Law constituted a violation of international law and that "all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . are null and void". It further decided "not to recognize the 'basic law' and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem".

76. Subsequently, a peace treaty was signed on 26 October 1994 between Israel and Jordan. That treaty fixed the boundary between the two States "with reference to the boundary definition under the Mandate as is shown in Annex I (a) . . . without prejudice to the status of any territories that came under Israeli military government control in 1967" (Article 3, paragraphs 1 and 2). Annex I provided the corresponding maps and added that, with regard to the "territory that came under Israeli military government control in 1967", the line indicated "is the administrative boundary" with Jordan.

77. Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.

78. The Court would observe that, under customary international law as reflected (see paragraph 89 below) in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter "the Hague Regulations of 1907"), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.

79. It is essentially in these territories that Israel has constructed or plans to construct the works described in the report of the Secretary-General. The Court will now describe those works, basing itself on that report. For developments subsequent to the publication of that report, the Court will refer to complementary information contained in the Written Statement of the United Nations, which was intended by the Secretary-General to supplement his report (hereinafter "Written Statement of the Secretary-General").

80. The report of the Secretary-General states that "The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank . . ." (para. 4). According to that report, a plan of this type was approved for the first time by the Israeli Cabinet in July 2001. Then, on 14 April 2002, the Cabinet adopted a decision for the construction of works, forming what Israel describes as a "security fence", 80 kilometres in length, in three areas of the West Bank.

The project was taken a stage further when, on 23 June 2002, the Israeli Cabinet approved the first phase of the construction of a "continuous fence" in the West Bank (including East Jerusalem). On 14 August 2002, it adopted the line of that "fence" for the work in Phase A, with a view to the construction of a complex 123 kilometres long in the northern West Bank, running from the Salem checkpoint (north of Jenin) to the settlement at Elkana. Phase B of the work was approved in December 2002. It entailed a stretch of some 40 kilometres running east from the Salem checkpoint towards Beth Shean along the northern part of the Green Line as far as the Jordan Valley. Furthermore, on 1 October 2003, the Israeli Cabinet approved a full route, which, according to the report of the Secretary-General, "will form one continuous line stretching 720 kilometres along the West Bank". A map showing completed and planned sections was posted on the Israeli Ministry of Defence website on 23 October 2003. According to the particulars provided on that map, a continuous section (Phase C) encompassing a number of large settlements will link the north-western end of the "security fence" built around Jerusalem with the southern point of Phase A construction at Elkana. According to the same map, the "security fence" will run for 115 kilometres from the Har Gilo settlement near Jerusalem to the Carmel settlement south-east of Hebron (Phase D). According to Ministry of Defence documents, work in this sector is due for completion in 2005. Lastly, there are references in the case file to Israel's planned construction of a "security fence" following the Jordan Valley along the mountain range to the west.

81. According to the Written Statement of the Secretary-General, the first part of these works (Phase A), which ultimately extends for a distance of 150 kilometres, was declared completed on 31 July 2003. It is reported that approximately 56,000 Palestinians would be encompassed in enclaves. During this phase, two sections totalling 19.5 kilometres

were built around Jerusalem. In November 2003 construction of a new section was begun along the Green Line to the west of the Nazlat Issa-Baqa al-Sharqiya enclave, which in January 2004 was close to completion at the time when the Secretary-General submitted his Written Statement.

According to the Written Statement of the Secretary-General, the works carried out under Phase B were still in progress in January 2004. Thus an initial section of this stretch, which runs near or on the Green Line to the village of al-Muilla, was almost complete in January 2004. Two additional sections diverge at this point. Construction started in early January 2004 on one section that runs due east as far as the Jordanian border. Construction of the second section, which is planned to run from the Green Line to the village of Taysir, has barely begun. The United Nations has, however, been informed that this second section might not be built.

The Written Statement of the Secretary-General further states that Phase C of the work, which runs from the terminus of Phase A, near the Elkana settlement, to the village of Nu'man, south-east of Jerusalem, began in December 2003. This section is divided into three stages. In Stage C1, between *inter alia* the villages of Rantis and Budrus, approximately 4 kilometres out of a planned total of 40 kilometres have been constructed. Stage C2, which will surround the so-called "Ariel Salient" by cutting 22 kilometres into the West Bank, will incorporate 52,000 Israeli settlers. Stage C3 is to involve the construction of two "depth barriers"; one of these is to run north-south, roughly parallel with the section of Stage C1 currently under construction between Rantis and Budrus, whilst the other runs east-west along a ridge said to be part of the route of Highway 45, a motorway under construction. If construction of the two barriers were completed, two enclaves would be formed, encompassing 72,000 Palestinians in 24 communities.

Further construction also started in late November 2003 along the south-eastern part of the municipal boundary of Jerusalem, following a route that, according to the Written Statement of the Secretary-General, cuts off the suburban village of El-Ezariya from Jerusalem and splits the neighbouring Abu Dis in two.

As at 25 January 2004, according to the Written Statement of the Secretary-General, some 190 kilometres of construction had been completed, covering Phase A and the greater part of Phase B. Further construction in Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun.

The Israeli Government has explained that the routes and timetable as described above are subject to modification. In February 2004, for example, an 8-kilometre section near the town of Baqa al-Sharqiya was

demolished, and the planned length of the wall appears to have been slightly reduced.

82. According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:

- (1) a fence with electronic sensors;
- (2) a ditch (up to 4 metres deep);
- (3) a two-lane asphalt patrol road;
- (4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;
- (5) a stack of six coils of barbed wire marking the perimeter of the complex.

The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. "Depth barriers" may be added to these works.

The approximately 180 kilometres of the complex completed or under construction as of the time when the Secretary-General submitted his report included some 8.5 kilometres of concrete wall. These are generally found where Palestinian population centres are close to or abut Israel (such as near Qalqiliya and Tulkarm or in parts of Jerusalem).

83. According to the report of the Secretary-General, in its northernmost part, the wall as completed or under construction barely deviates from the Green Line. It nevertheless lies within occupied territories for most of its course. The works deviate more than 7.5 kilometres from the Green Line in certain places to encompass settlements, while encircling Palestinian population areas. A stretch of 1 to 2 kilometres west of Tulkarm appears to run on the Israeli side of the Green Line. Elsewhere, on the other hand, the planned route would deviate eastward by up to 22 kilometres. In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.

84. On the basis of that route, approximately 975 square kilometres (or 16.6 per cent of the West Bank) would, according to the report of the Secretary-General, lie between the Green Line and the wall. This area is stated to be home to 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities, described as enclaves in the report. As a result of the planned route, nearly 320,000 Israeli settlers (of whom 178,000 in East Jerusalem) would be living in the area between the Green Line and the wall.

85. Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative régime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the

part of the West Bank lying between the Green Line and the wall as a "Closed Area". Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

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86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

87. The Court first recalls that, pursuant to Article 2, paragraph 4, of the United Nations Charter:

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

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" (hereinafter "resolution 2625 (XXV)"), in which it emphasized that "No territorial acquisition resulting from the threat or use of force shall be recognized as legal." As the Court stated in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law (see *I.C.J. Reports 1986*, pp. 98-101, paras. 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

88. The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant

to which "Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination." Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

The Court would recall that in 1971 it emphasized that current developments in "international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]". The Court went on to state that "These developments leave little doubt that the ultimate objective of the sacred trust" referred to in Article 22, paragraph 1, of the Covenant of the League of Nations "was the self-determination . . . of the peoples concerned" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 31, paras. 52-53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid.*; see also *Western Sahara*, *Advisory Opinion*, I.C.J. Reports 1975, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal v. Australia)*, *Judgment*, I.C.J. Reports 1995, p. 102, para. 29).

89. As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared "to revise the general laws and customs of war" existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the "rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war" (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (*Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, I.C.J. Reports 1996 (I), p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.

The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns "Military authority over the territory of the hostile State", is particularly pertinent in the present case.

90. Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the other participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory. In particular, in paragraph 3 of Annex I to the report of the Secretary-General, entitled "Summary Legal Position of the Government of Israel", it is stated that Israel does not agree that the Fourth Geneva Convention "is applicable to the occupied Palestinian Territory", citing "the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt" and inferring that it is "not a territory of a High Contracting Party as required by the Convention".

91. The Court would recall that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention. Jordan has also been a party thereto since 29 May 1951. Neither of the two States has made any reservation that would be pertinent to the present proceedings.

Furthermore, Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. Switzerland, as depositary State, considered that unilateral undertaking valid. It concluded, however, that it "[was] not — as a depositary — in a position to decide whether" "the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the 'State of Palestine' to accede" *inter alia* to the Fourth Geneva Convention "can be considered as an instrument of accession".

92. Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common Article 2 of the four Conventions of 12 August 1949:

"In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

93. After the occupation of the West Bank in 1967, the Israeli authorities issued an order No. 3 stating in its Article 35 that:

"the Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of

Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail.”

Subsequently, the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel's position as briefly recalled in paragraph 90 above, that Convention is not applicable *de jure* within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that Jordan was admittedly a party to the Fourth Geneva Convention in 1967, and that an armed conflict broke out at that time between Israel and Jordan, but it goes on to observe that the territories occupied by Israel subsequent to that conflict had not previously fallen under Jordanian sovereignty. It infers from this that that Convention is not applicable *de jure* in those territories. According however to the great majority of other participants in the proceedings, the Fourth Geneva Convention is applicable to those territories pursuant to Article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967.

94. The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 32 provides that:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly obscure or unreasonable.” (See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23; see, similarly, *Kasikili/Sedudu Island (Botswana/Namibia)*, *Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *Judgment, I.C.J. Reports 2002*, p. 645, para. 37.)

95. The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satis-

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fied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.

That interpretation is confirmed by the Convention's *travaux préparatoires*. The Conference of Government Experts convened by the International Committee of the Red Cross (hereinafter, “ICRC”) in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict “whether [it] is or is not recognized as a state of war by the parties” and “in cases of occupation of territories in the absence of any state of war” (*Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 14-26 April 1947*, p. 8). The drafters of the second paragraph of Article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter's scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.

96. The Court would moreover note that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1999. They issued a statement in which they “reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem”. Subsequently, on 5 December 2001, the High Contracting Parties, referring in particular to Article 1 of the Fourth Geneva Convention of 1949, once again reaffirmed the “applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem”. They further reminded the Contracting Parties participating in the Conference, the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations.

97. Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be “recognized and respected at all times” by the parties pursuant

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to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that “the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem”.

98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. Thus on 10 December 2001 and 9 December 2003, in resolutions 56/60 and 58/97, it reaffirmed

“that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967”.

99. The Security Council, for its part, had already on 14 June 1967 taken the view in resolution 237 (1967) that “all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War . . . should be complied with by the parties involved in the conflict”. Subsequently, on 15 September 1969, the Security Council, in resolution 271 (1969), called upon “Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation”.

Ten years later, the Security Council examined “the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967”. In resolution 446 (1979) of 22 March 1979, the Security Council considered that those settlements had “no legal validity” and affirmed “*once more* that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem”. It called “*once more upon* Israel, as the occupying Power, to abide scrupulously” by that Convention.

On 20 December 1990, the Security Council, in resolution 681 (1990), urged “the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention . . . to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention”. It further called upon “the high contracting parties to the said Fourth Geneva Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof”.

Lastly, in resolutions 799 (1992) of 18 December 1992 and 904 (1994) of 18 March 1994, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories.

100. The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

“The military operations of the [Israeli Defence Forces] in Rafah,

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to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 . . . and the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949.”

101. In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

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102. The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

“4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.”

Of the other participants in the proceedings, those who addressed this issue contend that, on the contrary, both Covenants are applicable within the Occupied Palestinian Territory.

103. On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.

104. In order to determine whether these texts are applicable in the Occupied Palestinian Territory, the Court will first address the issue of the relationship between international humanitarian law and human rights law and then that of the applicability of human rights instruments outside national territory.

105. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil

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and Political Rights. In those proceedings certain States had argued that “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict” (*J.C.J. Reports 1996 (I)*, p. 239, para. 24).

The Court rejected this argument, stating that:

“the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” (*Ibid.*, p. 240, para. 25.)

106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.

108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This provision can be interpreted as covering only individuals who are both present within a State’s territory and subject to that State’s jurisdiction. It can also be construed as covering both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero v. Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee’s interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, para. 4 (1955)*).

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question “whether individuals resident in the occupied territories were indeed subject to Israel’s jurisdiction” for purposes of the application of the Covenant (CCPR/C/SR.1675, para. 21). Israel took the position that “the Covenant and similar instruments did not apply directly to the current situation in the occupied territories” (*ibid.*, para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel’s attitude and pointed “to the long-standing presence of Israel in [the occupied] territories, Israel’s

ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein" (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel's consistent position, to the effect that "the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza . . .", the Committee reached the following conclusion:

"in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law" (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which "at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge".

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1998, Israel provided "statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories". The Committee noted that, according to Israel, "the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant" (E/C.12/1/Add.27, para. 8). The Committee expressed its concern in this regard, to which Israel replied in a further report of 19 October 2001 that it has "consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction" (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is "based on the well-established distinction between human rights and humanitarian law under international law". It added: "the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights" (E/1990/6/Add.32, para. 5). In view of these observations, the Committee reiterated

its concern about Israel's position and reaffirmed "its view that the State party's obligations under the Covenant apply to all territories and populations under its effective control" (E/C.12/1/Add.90, paras. 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel's view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .". That Convention is therefore applicable within the Occupied Palestinian Territory.

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114. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.

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115. In this regard, Annex II to the report of the Secretary-General, entitled "Summary Legal Position of the Palestine Liberation Organization", states that "The construction of the Barrier is an attempt to annex the territory contrary to international law" and that "The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination." This view was echoed in certain of the written statements submitted to the Court and in the views expressed at the hearings. *Inter alia*, it was contended that:

"The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force."

In this connection, it was in particular emphasized that "[t]he route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli

settlements" illegally established on the Occupied Palestinian Territory. It was further contended that the wall aimed at "reducing and parcelling out the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination".

116. For its part, Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure (see report of the Secretary-General, para. 29). It did so *inter alia* through its Permanent Representative to the United Nations at the Security Council meeting of 14 October 2003, emphasizing that "[the fence] does not annex territories to the State of Israel", and that Israel is "ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement" (S/PV.4841, p. 10). Israel's Permanent Representative restated this view before the General Assembly on 20 October and 8 December 2003. On this latter occasion, he added:

"As soon as the terror ends, the fence will no longer be necessary. The fence is not a border and has no political significance. It does not change the legal status of the territory in any way." (A/ES-10/PV.23, p. 6.)

117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of "the inadmissibility of the acquisition of territory by war" (see paragraphs 74 and 87 above). Thus in resolution 242 (1967) of 22 November 1967, the Security Council, after recalling this rule, affirmed that:

"the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force".

It is on this same basis that the Council has several times condemned the measures taken by Israel to change the status of Jerusalem (see paragraph 75 above).

118. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a "Palestinian people" is no

longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized "the right of the State of Israel to exist in peace and security" and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, "the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people". The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its "legitimate rights" (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003).

119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the "Closed Area" (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.

The Security Council has thus taken the view that such policy and practices "have no legal validity". It has also called upon "Israel, as the occupying Power, to abide scrupulously" by the Fourth Geneva Convention and:

"to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem

and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories” (resolution 446 (1979) of 22 March 1979).

The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980. Indeed, in the latter case it described “Israel’s policy and practices of settling parts of its population and new immigrants in [the occupied] territories” as a “flagrant violation” of the Fourth Geneva Convention.

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

121. Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

122. The Court recalls moreover that, according to the report of the Secretary-General, the planned route would incorporate in the area between the Green Line and the wall more than 16 per cent of the territory of the West Bank. Around 80 per cent of the settlers living in the Occupied Palestinian Territory, that is 320,000 individuals, would reside in that area, as well as 237,000 Palestinians. Moreover, as a result of the construction of the wall, around 160,000 other Palestinians would reside in almost completely encircled communities (see paragraphs 84, 85 and 119 above).

In other terms, the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council (see paragraphs 75 and 120 above). There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, as will be further explained in paragraph 133 below, to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right.

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123. The construction of the wall also raises a number of issues in rela-

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tion to the relevant provisions of international humanitarian law and of human rights instruments.

124. With regard to the Hague Regulations of 1907, the Court would recall that these deal, in Section II, with hostilities and in particular with “means of injuring the enemy, sieges, and bombardments”. Section III deals with military authority in occupied territories. Only Section III is currently applicable in the West Bank and Article 23 (*g*) of the Regulations, in Section II, is thus not pertinent.

Section III of the Hague Regulations includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to “take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country”. Article 46 adds that private property must be “respected” and that it cannot “be confiscated”. Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.

125. A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. It thus states in Article 6:

“The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.”

Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.

126. These provisions include Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention. According to Article 47:

“Protected persons who are in occupied territory shall not be

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deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”

Article 49 reads as follows:

“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

According to Article 52:

“No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power’s intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.”

Article 53 provides that:

“Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

Lastly, according to Article 59:

“If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.”

127. The International Covenant on Civil and Political Rights also contains several relevant provisions. Before further examining these, the Court will observe that Article 4 of the Covenant allows for derogation to be made, under various conditions, to certain provisions of that instrument. Israel made use of its right of derogation under this Article by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991:

“Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant.

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of

the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."

The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

128. Among these mention must be made of Article 17, paragraph 1 of which reads as follows: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

Mention must also be made of Article 12, paragraph 1, which provides: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

129. In addition to the general guarantees of freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. The status of the Christian Holy Places in the Ottoman Empire dates far back in time, the latest provisions relating thereto having been incorporated into Article 62 of the Treaty of Berlin of 13 July 1878. The Mandate for Palestine given to the British Government on 24 July 1922 included an Article 13, under which:

"All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory . . ."

Article 13 further stated: "nothing in this mandate shall be construed as conferring . . . authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed".

In the aftermath of the Second World War, the General Assembly, in adopting resolution 181 (II) on the future government of Palestine, devoted an entire chapter of the Plan of Partition to the Holy Places, religious buildings and sites. Article 2 of this Chapter provided, in so far as the Holy Places were concerned:

"the liberty of access, visit and transit shall be guaranteed, in conformity with existing rights, to all residents and citizens [of the Arab

State, of the Jewish State] and of the City of Jerusalem, as well as to aliens, without distinction as to nationality, subject to requirements of national security, public order and decorum".

Subsequently, in the aftermath of the armed conflict of 1948, the 1949 General Armistice Agreement between Jordan and Israel provided in Article VIII for the establishment of a special committee for "the formulation of agreed plans and arrangements for such matters as either Party may submit to it" for the purpose of enlarging the scope of the Agreement and of effecting improvement in its application. Such matters, on which an agreement of principle had already been concluded, included "free access to the Holy Places".

This commitment concerned mainly the Holy Places located to the east of the Green Line. However, some Holy Places were located west of that Line. This was the case of the Room of the Last Supper and the Tomb of David, on Mount Zion. In signing the General Armistice Agreement, Israel thus undertook, as did Jordan, to guarantee freedom of access to the Holy Places. The Court considers that this undertaking by Israel has remained valid for the Holy Places which came under its control in 1967. This undertaking has further been confirmed by Article 9, paragraph 1, of the 1994 Peace Treaty between Israel and Jordan, by virtue of which, in more general terms, "Each party will provide freedom of access to places of religious and historical significance."

130. As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (Arts. 6 and 7); protection and assistance accorded to the family and to children and young persons (Art. 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right "to be free from hunger" (Art. 11); the right to health (Art. 12); the right to education (Arts. 13 and 14).

131. Lastly, the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in Articles 16, 24, 27 and 28.

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132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of

Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqiliya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. For example, according to the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, "Qalqiliya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m." (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A and entitled "Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine", E/CN.4/2004/6, 8 September 2003, para. 9.)

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories

"an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank's most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus groves and hothouses upon which tens of thousands of Palestinians rely for their survival" (Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/58/311, 22 August 2003, para. 26).

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region" and adds that "Many fruit and olive trees had been destroyed in the course of building the barrier" (E/CN.4/2004/6, 8 September 2003, para. 9). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall "cuts off Palestinians from their agricultural lands, wells and means of subsistence" (Report by the Special Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, "The Right to Food", Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31 October 2003, para. 49). In a recent survey conducted by the World Food Programme, it is stated that the situation has aggra-

vated food insecurity in the region, which reportedly numbers 25,000 new beneficiaries of food aid (report of the Secretary-General, para. 25).

It has further led to increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water. This is also attested by a number of different information sources. Thus the report of the Secretary-General states generally that "According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks." (Report of the Secretary-General, para. 23.) The Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Palestinians between the Wall and Green Line will effectively be cut off from their land and workplaces, schools, health clinics and other social services." (E/CN.4/2004/6, 8 September 2003, para. 9.) In relation specifically to water resources, the Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights observes that "By constructing the fence Israel will also effectively annex most of the western aquifer system (which provides 51 per cent of the West Bank's water resources)." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) Similarly, in regard to access to health services, it has been stated that, as a result of the enclosure of Qalqiliya, a United Nations hospital in that town has recorded a 40 per cent decrease in its caseload (report of the Secretary-General, para. 24).

At Qalqiliya, according to reports furnished to the United Nations, some 600 shops or businesses have shut down, and 6,000 to 8,000 people have already left the region (E/CN.4/2004/6, 8 September 2003, para. 10; E/CN.4/2004/10/Add.2, 31 October 2003, para. 51). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights has also observed that "With the fence/wall cutting communities off from their land and water without other means of subsistence, many of the Palestinians living in these areas will be forced to leave." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) In this respect also the construction of the wall would effectively deprive a significant number of Palestinians of the "freedom to choose [their] residence". In addition, however, in the view of the Court, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned in paragraph 120 above, is tending to alter the demographic composition of the Occupied Palestinian Territory.

134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception

of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.

135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances.

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2 of that Article provides for an exception in those cases in which "the security of the population or imperative military reasons so demand". This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception "where such destruction is rendered absolutely necessary by military operations".

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument.

The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in Article 17 of the Interna-

tional Covenant on Civil and Political Rights. On the other hand, Article 12, paragraph 3, of that instrument provides that restrictions on liberty of movement as guaranteed under that Article

"shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".

As for the International Covenant on Economic, Social and Cultural Rights, Article 4 thereof contains a general provision as follows:

"The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they "must conform to the principle of proportionality" and "must be the least intrusive instrument amongst those which might achieve the desired result" (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14). On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel's construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be "solely for the purpose of promoting the general welfare in a democratic society".

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various

of its obligations under the applicable international humanitarian law and human rights instruments.

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138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)”. More specifically, Israel’s Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that “the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter”; the Security Council resolutions referred to, he continued, “have clearly recognized the right of States to use force in self-defence against terrorist attacks”, and therefore surely recognize the right to use non-forcible measures to that end (A/ES-10/PV.21, p. 6).

139. Under the terms of Article 51 of the Charter of the United Nations:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

140. The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see para-

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graphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, “the state of necessity is a ground recognized by customary international law” that “can only be accepted on an exceptional basis”; it “can only be invoked under certain strictly defined conditions which must be cumulatively satisfied”, and the State concerned is not the sole judge of whether those conditions have been met” (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be “the only way for the State to safeguard an essential interest against a grave and imminent peril” (Article 25 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts; see also former Article 33 of the Draft Articles on the International Responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

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143. The Court having concluded that, by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it (see paragraphs 114-137 above), it must now, in order to reply to the question posed by the General Assembly, examine the consequences of those violations.

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144. In their written and oral observations, many participants in the proceedings before the Court contended that Israel's action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations; in its Written Statement, Israel, for its part, presented no arguments regarding the possible legal consequences of the construction of the wall.

145. As regards the legal consequences for Israel, it was contended that Israel has, first, a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory, and to give appropriate assurances and guarantees of non-repetition.

It was argued that, secondly, Israel is under a legal obligation to make reparation for the damage arising from its unlawful conduct. It was submitted that such reparation should first of all take the form of restitution, namely demolition of those portions of the wall constructed in the Occupied Palestinian Territory and annulment of the legal acts associated with its construction and the restoration of property requisitioned or expropriated for that purpose; reparation should also include appropriate compensation for individuals whose homes or agricultural holdings have been destroyed.

It was further contended that Israel is under a continuing duty to comply with all of the international obligations violated by it as a result of the construction of the wall in the Occupied Palestinian Territory and of the associated régime. It was also argued that, under the terms of the Fourth Geneva Convention, Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall.

146. As regards the legal consequences for States other than Israel, it was contended before the Court that all States are under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to co-operate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefor.

Certain participants in the proceedings further contended that the States parties to the Fourth Geneva Convention are obliged to take measures to ensure compliance with the Convention and that, inasmuch as the construction and maintenance of the wall in the Occupied Palestinian Territory constitutes grave breaches of that Convention, the States parties to that Convention are under an obligation to prosecute or extradite the authors of such breaches. It was further observed that

“the United Nations Security Council should consider flagrant and systematic violation of international law norm[s] and principles by

Israel, particularly . . . international humanitarian law, and take all necessary measures to put an end [to] these violations”,

and that the Security Council and the General Assembly must take due account of the advisory opinion to be given by the Court.

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147. Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel's international obligations, it follows that the responsibility of that State is engaged under international law.

148. The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.

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149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above).

150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 149; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 44, para. 95; *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82).

151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court's finding (see paragraph 143 above) that Israel's violations of

its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.

152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:

“The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.” (*Factory at Chorzów, Merris, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47.*)

153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.

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154. The Court will now consider the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States.

155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature “the concern of all States” and, “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection” (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33*). The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed (paragraph 88 above) that in the *East Timor* case, it described as “irreproachable” the assertion that “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character” (*I.C.J. Reports 1995, p. 102, para. 29*). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

“Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . .”

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* it stated that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ . . . that they are “to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law” (*I.C.J. Reports 1996 (I), p. 257, para. 79*). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” It follows from that provision that every State party to that Convention, whether or

not it a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

* * *

161. The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.

162. The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic

situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The "Roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

* * *

163. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By fourteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Eiaraby, Owada, Simma, Tomka;*

AGAINST: *Judge Buergenthal;*

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

A. By fourteen votes to one,

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Eiaraby, Owada, Simma, Tomka;*

AGAINST: *Judge Buergenthal;*

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith

all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

IN FAVOUR: *President Shi*; *Vice-President Ranjeva*; *Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka*;
AGAINST: *Judge Buergenthal*;

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

IN FAVOUR: *President Shi*; *Vice-President Ranjeva*; *Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka*;
AGAINST: *Judge Buergenthal*;

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

IN FAVOUR: *President Shi*; *Vice-President Ranjeva*; *Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka*;
AGAINST: *Judges Kooijmans, Buergenthal*;

E. By fourteen votes to one,

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

IN FAVOUR: *President Shi*; *Vice-President Ranjeva*; *Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka*;
AGAINST: *Judge Buergenthal*.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this ninth day of July, two thousand and

four, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) *SHI Jiuyong*,
President.

(Signed) *Philippe COUVREUR*,
Registrar.

Judges *KOROMA, HIGGINS, KOOIJMANS* and *AL-KHASAWNEH* append separate opinions to the Advisory Opinion of the Court; Judge *BUERGENTHAL* appends a declaration to the Advisory Opinion of the Court; Judges *ELARABY* and *OWADA* append separate opinions to the Advisory Opinion of the Court.

(Initialed) *J.Y.S.*
(Initialed) *Ph.C.*

**Legal Consequences of the Construction of a Wall in
the Occupied Palestinian Territory,
Separate Opinion of Judge Higgins,
Advisory Opinion, I.C.J. Reports 2004**

SEPARATE OPINION OF JUDGE HIGGINS

Issues relevant for discretion not addressed by the Court — Elements lacking for a balanced Opinion — Violations of Articles 46 and 52 of the Hague Regulations and Articles 49 and 53 of the Fourth Geneva Convention — Disagreement with passages in the Opinion on self-determination, self-defence and the erga omnes principle — limitations of the factual materials relied on.

1. I agree with the Opinion of the Court as regards its jurisdiction in the present case and believe that paragraphs 14-42 correctly answer the various contrary arguments that have been raised on this point.

2. The question of discretion and propriety is very much harder. Although ultimately I have voted in favour of the decision to give the Opinion, I do think matters are not as straightforward as the Court suggests. It is apparent (not least from the wording of the request to the Court) that an attempt has been made by those seeking the Opinion to assimilate the Opinion on the wall to that obtained from the Court regarding Namibia (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*), *Advisory Opinion, I.C.J. Reports 1971*, p. 12). I believe this to be incorrect for several reasons. First and foremost, there was already, at the time of the request for an opinion in 1971 on the legal consequences of certain acts, a series of Court Opinions on South West Africa which made clear what were South Africa's legal obligations (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23). Further, all the legal obligations as mandatory Power lay with South West Africa. There were no legal obligations, still less unfulfilled obligations, which in 1971 lay also upon South-West Africa People's Organization (SWAPO), as the representative of the Namibian people.

3. In the present case, it is the General Assembly, and not the Court, which has made any prior pronouncements in respect of legality. Further, in contrast to how matters stood as regards Namibia in 1971, the larger intractable problem (of which the wall may be seen as an element) cannot be regarded as one in which one party alone has been already classified

by a court as the legal wrongdoer; where it is for it alone to act to restore a situation of legality; and where from the perspective of legal obligation there is nothing remaining for the other "party" to do. That is evident from the long history of the matter, and is attested to by Security Council resolutions 242 (1967) and 1515 (2003) alike.

4. In support of the misconceived analogy — which serves both to assist so far as legal issues of discretion are concerned, as well as wider purposes — counsel have informed the Court that "The problem . . . is a problem between one State — Israel — and the United Nations." (See for example, CR 2004/3, p. 62, para. 31.) Of course, assimilation to the *Namibia* case, and a denial of any dispute save as between Israel and the United Nations, would also avoid the necessity to meet the criteria enunciated by the Court when considering whether it should give an opinion where a dispute exists between two States. But, as will be elaborated below, this cannot be avoided.

5. Moreover, in the *Namibia* Opinion the Assembly sought legal advice on the consequences of its own necessary decisions on the matter in hand. The General Assembly was the organ in which now the power to terminate a League of Nations mandate was located. The Mandate was duly terminated. But Assembly resolutions are in most cases only recommendations. The Security Council, which in certain circumstances can pass binding resolutions under Chapter VII of the Charter, was not the organ with responsibility over mandates. This conundrum was at the heart of the opinion sought of the Court. Here, too, there is no real analogy with the present case.

6. We are thus in different legal terrain — in the familiar terrain where there is a dispute between parties, which fact does not of itself mean that the Court should not exercise its competence, provided certain conditions are met.

7. Since 1948 Israel has been in dispute, first with its Arab neighbours (and other Arab States) and, in more recent years, with the Palestinian Authority. Both Israel's written observations on this aspect (7.4-7.7) and the report of the Secretary-General, with its reference to the "Summary Legal Position" of "each side", attest to this reality. The Court has regarded the special status of Palestine, though not yet an independent State, as allowing it to be invited to participate in these proceedings. There is thus a dispute between two international actors, and the advisory opinion request bears upon one element of it.

8. That of itself does not suggest that the Court should decline to exercise jurisdiction on grounds of propriety. It is but a starting point for the Court's examination of the issue of discretion. A series of advisory opinion cases have explained how the *Status of Eastern Carelia, Advisory Opinion, 1923 (P.C.I.J., Series B, No. 5)* principle should properly be read. Through the *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion (I.C.J. Reports 1962, p. 151)*; the *Legal Consequences for States of the Continued Presence of*

South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), *Advisory Opinion (I.C.J. Reports 1971, p. 12)*; and, most clearly, the *Western Sahara, Advisory Opinion (I.C.J. Reports 1975, p. 12)*, the *ratio decidendi* of *Status of Eastern Carelia* has been explained. Of these the *Western Sahara* case provides by far the most pertinent guidance, as it involved a dispute between international actors, in which the Court had not itself already given several advisory opinions (cf. the *Namibia* Opinion, which was given against the background of three earlier ones on issues of legality).

9. The Court did not in the *Western Sahara* case suggest that the consistent principle to the settlement of disputes in advisory opinions had now lost all relevance for all who are United Nations Members. It was saying no more than the particular factors underlying the *ratio decidendi* of *Status of Eastern Carelia* were not present. But other factors had to be considered to see if propriety is met in giving an advisory opinion when the legal interests of a United Nations Member are the subject of that advice.

10. Indeed, in the *Western Sahara* case the Court, after citing the oft-quoted dictum from *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, that an opinion given to a United Nations organ "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*I.C.J. Reports 1950, p. 71*), went on to affirm that nonetheless:

"lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion.

In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character." (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 25, paras. 32-33*.)

11. What then are the conditions that in the *Western Sahara* case were found to make it appropriate for the Court to give an opinion even where a dispute involving a United Nations Member existed? One such was that a United Nations Member:

"could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers" (*ibid.*, p. 24, para. 30).

Although the Assembly is not exercising either the powers of a mandate supervisory body (as in *Namibia*) or a body decolonizing a non-self-governing territory (as in *Western Sahara*), the Court correctly recounts at paragraphs 48-50 the long-standing special institutional interest of the United Nations in the dispute, of which the building of the wall now represents an element.

12. There remains, however, a further condition to be fulfilled, which the Court enunciated in the *Western Sahara* case. It states that it was satisfied that:

"The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory." (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975, pp. 26-27, para. 39*.)

In the present case it is the reverse circumstance that obtains. The request is not in order to secure advice on the Assembly's decolonization duties, but later, on the basis of our Opinion, to exercise powers over the dispute or controversy. Many participants in the oral phase of this case frankly emphasized this objective.

13. The Court has not dealt with this point at all in that part of its Opinion on propriety. Indeed, it is strikingly silent on the matter, avoiding mention of the lines cited above and any response as to their application to the present case. To that extent, this Opinion by its very silence essentially revises, rather than applies, the existing case law.

14. There is a further aspect that has been of concern to me so far as the issue of propriety is concerned. The law, history and politics of the Israel-Palestine dispute is immensely complex. It is inherently awkward for a court of law to be asked to pronounce upon one element within a multifaceted dispute, the other elements being excluded from its view. Context is usually important in legal determinations. So far as the request of the Assembly envisages an opinion on humanitarian law, however, the obligations thereby imposed are (save for their own qualifying provisions) absolute. That is the bedrock of humanitarian law, and those engaged in conflict have always known that it is the price of our hopes for the future that they must, whatever the provocation, fight "with one hand behind their back" and act in accordance with international law. While that factor diminishes relevance of context so far as the obligations of humanitarian law are concerned, it remains true, nonetheless, that

context is important for other aspects of international law that the Court chooses to address. Yet the formulation of the question precludes consideration of that context.

15. Addressing the reality that “the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict”, the Court states that it “is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give” (para. 54).

16. In fact, it never does so. There is nothing in the remainder of the Opinion that can be said to cover this point. Further, I find the “history” as recounted by the Court in paragraphs 71-76 neither balanced nor satisfactory.

17. What should a court do when asked to deliver an opinion on one element in a larger problem? Clearly, it should not purport to “answer” these larger legal issues. The Court, wisely and correctly, avoids what we may term “permanent status” issues, as well as pronouncing on the rights and wrongs in myriad past controversies in the Israel-Palestine problem. What a court faced with this quandary must do is to provide a balanced opinion, made so by recalling the obligations incumbent upon all concerned.

18. I regret that I do not think this has been achieved in the present Opinion. It is true that in paragraph 162 the Court recalls that “[i]llegal actions and unilateral decisions have been taken on all sides” and that it emphasizes that “both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law”. But in my view much, much more was required to avoid the huge imbalance that necessarily flows from being invited to look at only “part of a greater whole”, and then to take that circumstance “carefully into account”. The call upon both parties to act in accordance with international humanitarian law should have been placed within the *dispositif*. The failure to do so stands in marked contrast with the path that the Court chose to follow in operative clause F of the *dispositif* of the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (I.C.J. Reports 1996 (I), p. 266)*. Further, the Court should have spelled out what is required of both parties in this “greater whole”. This is not difficult — from Security Council resolution 242 (1967) through to Security Council resolution 1515 (2003), the key underlying requirements have remained the same — that Israel is entitled to exist, to be recognized, and to security, and that the Palestinian people are entitled to their territory, to exercise self-determination, and to have their own State. Security Council resolution 1515 (2003) envisages that these long-standing obligations are to be secured, both generally and as to their detail, by negotiation. The perceptible tragedy is that neither side will act to achieve these ends prior to the other so doing. The Court, having decided that it was appropriate to exercise its jurisdiction, should have used the latitude available to it in an advisory opinion case, and reminded both parties not only of their substantive obligations

under international law, but also of the procedural obligation to move forward simultaneously. Further, I believe that, in order to achieve a balanced opinion, this latter element should also have appeared in the *dispositif* itself.

19. I think the Court should also have taken the opportunity to say, in the clearest terms, what regrettably today apparently needs constant reaffirmation even among international lawyers, namely, that the protection of civilians remains an intransgressible obligation of humanitarian law, not only for the occupier but equally for those seeking to liberate themselves from occupation.

20. My vote in favour of subparagraph (2) of the *dispositif* has thus been made with considerable hesitation. I have voted affirmatively in the end because I agree with almost all of what the Court has written in paragraphs 44-64. My regrets are rather about what it has chosen not to write.

* * *

21. The way subparagraph (3) (A) of the *dispositif* is formulated does not separate out the various grounds that the Court relied on in reaching its conclusions. I have voted in favour of this subparagraph because I agree that the wall, being built in occupied territory, and its associated régime, entail certain violations of humanitarian law. But I do not agree with several of the other stepping stones used by the Court in reaching this generalized finding, nor with its handling of the source materials.

22. The question put by the General Assembly asks the Court to respond by “considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions” (General Assembly resolution ES-10/14). It might have been anticipated that once the Court finds the Fourth Geneva Convention applicable humanitarian law would be at the heart of this Opinion.

23. The General Assembly has in resolution ES-10/13 determined that the wall contravenes humanitarian law, without specifying which provisions and why. Palestine has informed the Court that it regards Articles 33, 53, 55 and 64 of the Fourth Geneva Convention and Article 52 of the Hague Regulations as violated. Other participants invoked Articles 23 (*g*), 46, 50 and 52 of the Hague Regulations, and Articles 27, 47, 50, 55, 56 and 59 of the Fourth Convention. For the Special Rapporteur, the wall constitutes a violation of Articles 23 (*g*) and 46 of the Fourth Geneva Convention and Articles 47, 49, 50, 53 and 55 of the Fourth Geneva Convention. It might have been expected that an advisory opinion would have contained a detailed analysis, by reference to the texts, the

voluminous academic literature and the facts at the Court's disposal, as to which of these propositions is correct. Such an approach would have followed the tradition of using advisory opinions as an opportunity to elaborate and develop international law.

24. It would also, as a matter of balance, have shown not only which provisions Israel has violated, but also which it has not. But the Court, once it has decided which of these provisions are in fact applicable, thereafter refers only to those which Israel has violated. Further, the structure of the Opinion, in which humanitarian law and human rights law are not dealt with separately, makes it in my view extremely difficult to see what exactly has been decided by the Court. Notwithstanding the very general language of subparagraph (3) (A) of the *dispositif*, it should not escape attention that the Court has in the event found violations only of Article 49 of the Fourth Geneva Convention (para. 120), and of Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention (para. 132). I agree with these findings.

25. After its somewhat light treatment of international humanitarian law, the Court turns to human rights law. I agree with the Court's finding about the continued relevance of human rights law in the occupied territories. I also concur in the findings made at paragraph 134 as regards Article 12 of the International Covenant on Civil and Political Rights.

26. At the same time, it has to be noted that there are established treaty bodies whose function it is to examine in detail the conduct of States parties to each of the Covenants. Indeed, the Court's response as regards the International Covenant on Civil and Political Rights notes both the pertinent jurisprudence of the Human Rights Committee and also the concluding observations of the Committee on Israel's duties in the occupied territories.

27. So far as the International Covenant on Economic, Social and Cultural Rights is concerned, the situation is even stranger, given the programmatic requirements for the fulfilment of this category of rights. The Court has been able to do no more than observe, in a single phrase, that the wall and its associated régime

“impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights . . .” (para. 134).

For both Covenants, one may wonder about the appropriateness of asking for advisory opinions from the Court on compliance by States parties with such obligations, which are monitored, in much greater detail, by a treaty body established for that purpose. It could hardly be an answer that the General Assembly is not setting any more general precedent, because while many, many States are not in compliance with their obligations under the two Covenants, the Court is being asked to look only at the conduct of Israel in this regard.

28. The Court has also relied, for the general determination in subparagraph (3) (A) of the *dispositif*, on a finding that Israel is in violation of the law on self-determination. It follows observations on the legally problematic route of the wall and associated demographic risks with the statement: “That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.” (Para. 122.) This appears to me to be a non sequitur.

29. There is a substantial body of doctrine and practice on “self-determination beyond colonialism”. The United Nations Declaration on Friendly Relations, 1970 (General Assembly resolution 2625 (XXV)) speaks also of self-determination being applicable in circumstances where peoples are subject to “alien subjugation, domination, and exploitation”. The General Assembly has passed many resolutions referring to the latter circumstance, having Afghanistan and the Occupied Arab Territories in mind (for example, General Assembly resolution 3236 (XXIX) of 1974 (Palestine); General Assembly resolution 2144 (XXV) of 1987 (Afghanistan)). The Committee on Human Rights has consistently supported this post-colonial view of self-determination.

30. The Court has for the very first time, without any particular legal analysis, implicitly also adopted this second perspective. I approve of the principle invoked, but am puzzled as to its application in the present case. Self-determination is the right of “All peoples . . . freely [to] determine their political status and freely pursue their economic, social and cultural development” (Art. 1 (1), International Covenant on Civil and Political Rights and also International Covenant on Economic, Social and Cultural Rights). As this Opinion observes (para. 118), it is now accepted that the Palestinian people are a “peoples” for purposes of self-determination. But it seems to me quite detached from reality for the Court to find that it is the wall that presents a “serious impediment” to the exercise of this right. The real impediment is the apparent inability and/or unwillingness of both Israel and Palestine to move in parallel to secure the necessary conditions — that is, at one and the same time, for Israel to withdraw from Arab occupied territory and for Palestine to provide the conditions to allow Israel to feel secure in so doing. The simple point is underscored by the fact that if the wall had never been built, the Palestinians would still not yet have exercised their right to self-determination. It seems to me both unrealistic and unbalanced for the Court to find that the wall (rather than “the larger problem”, which is beyond the question put to the Court for an opinion) is a serious obstacle to self-determination.

31. Nor is this finding any more persuasive when looked at from a territorial perspective. As the Court states in paragraph 121, the wall does not at the present time constitute, *per se*, a *de facto* annexation.

“Peoples” necessarily exercise their right to self-determination within their own territory. Whatever may be the detail of any finally negotiated boundary, there can be no doubt, as is said in paragraph 78 of the Opinion, that Israel is in occupation of Palestinian territory. That territory is no more, or less, under occupation because a wall has been built that runs through it. And to bring to an end that circumstance, it is necessary that both sides, simultaneously, accept their responsibilities under international law.

32. After the Court deals with the applicable law, and then applies it, it looks at possible qualifications, exceptions and defences to potential violations.

33. I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.” There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State. That qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment, I.C.J. Reports 1986, p. 14)*. It there held that military action by irregulars could constitute an armed attack if these were sent by or on behalf of the State and if the activity “because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces” (*ibid.*, p. 103, para. 195). While accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere (R. Higgins, *Problems and Process: International Law and How We Use It*, pp. 250-251).

34. I also find unpersuasive the Court’s contention that, as the uses of force emanate from occupied territory, it is not an armed attack “by one State against another”. I fail to understand the Court’s view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory — a territory which it has found not to have been annexed and is certainly “other than” Israel. Further, Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an un-evenhanded sort. The question is surely where responsibility lies for the sending of groups and persons who act against Israeli civilians and the cumulative severity of such action.

35. In the event, however, these reservations have not caused me to vote against subparagraph (3) (A) of the *dispositif*, for two reasons. First, I remain unconvinced that non-forcible measures (such as the building of

a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood. Second, even if it were an act of self-defence, properly so called, it would need to be justified as necessary and proportionate. While the wall does seem to have resulted in a diminution on attacks on Israeli civilians, the necessity and proportionality for the particular route selected, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained.

36. The latter part of the *dispositif* deals with the legal consequences of the findings made by the Court.

37. I have voted in favour of subparagraph (3) (D) of the *dispositif* but, unlike the Court, I do not think that the specified consequence of the identified violations of international law have anything to do with the concept of *erga omnes* (cf. paras. 154-159 of this Opinion). The Court’s celebrated dictum in *Barcelona Traction, Light and Power Company, Limited, Second Phase (Judgment, I.C.J. Reports 1970, p. 32, para. 33)* is frequently invoked for more than it can bear. Regrettably, this is now done also in this Opinion, at paragraph 155. That dictum was directed to a very specific issue of jurisdictional *locus standi*. As the International Law Commission has correctly put it in the Commentaries to the draft Articles on the Responsibility of States for Internationally Wrongful Acts (A/56/10 at p. 278), there are certain rights in which, by reason of their importance “all states have a legal interest in their protection”. It has nothing to do with imposing substantive obligations on third parties to a case.

38. That an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of “*erga omnes*”. It follows from a finding of an unlawful situation by the Security Council, in accordance with Articles 24 and 25 of the Charter entails “decisions [that] are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 53, para. 115*). The obligation upon United Nations Members not to recognize South Africa’s illegal presence in Namibia, and not to lend support or assistance, relied in no way whatever on “*erga omnes*”. Rather, the Court emphasized that “A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence.” (*Ibid.*, para. 117.) The Court had already found in a contentious case that its determination of an illegal act “entails a legal consequence, namely that of putting an end to an illegal situation” (*Haya de la Torre, Judgment, I.C.J. Reports 1951, p. 82*). Although in the present case it is the Court, rather than a United Nations organ acting under Articles 24 and 25, that has found the illegality; and although it is found in the context of an advisory opinion rather than in a contentious case, the Court’s position as the principal

judicial organ of the United Nations suggests that the legal consequence for a finding that an act or situation is illegal is the same. The obligation upon United Nations Members of non-recognition and non-assistance does not rest on the notion of *erga omnes*.

39. Finally, the invocation (para. 157) of “the *erga omnes*” nature of violations of humanitarian law seems equally irrelevant. These intransgressible principles are generally binding because they are customary international law, no more and no less. And the first Article to the Fourth Geneva Convention, under which “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances” while apparently viewed by the Court as something to do with “the *erga omnes* principle”, is simply a provision in an almost universally ratified multilateral Convention. The Final Record of the diplomatic conference of Geneva of 1949 offers no useful explanation of that provision; the commentary thereto interprets the phrase “ensure respect” as going beyond legislative and other action within a State’s own territory. It observes that

“in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.” (*The Geneva Conventions of 12 August 1949: Commentary, IV Geneva Convention relative to the protection of civilian persons in time of war*, Pictet, ed., p. 16.)

It will be noted that the Court has, in subparagraph (3) (D) of the *dispositif*, carefully indicated that any such action should be in conformity with the Charter and international law.

40. In conclusion, I would add that, although there has indeed been much information provided to the Court in this case, that provided directly by Israel has only been very partial. The Court has based itself largely on the Secretary-General’s report from 14 April 2002 to 20 November 2003 and on the later Written Statement of the United Nations (see para. 79). It is not clear whether it has availed itself of other data in the public domain. Useful information is in fact contained in such documents as the Third Report of the current Special Rapporteur and Israel’s Reply thereto (E/CN.4/2004/6/Add.1), as well as in “The Impact of Israel’s Separation Barrier on Affected West Bank Communities: An Update to the Humanitarian and Emergency Policy Group (HEPG), Construction

of the Barrier, Access, and Its Humanitarian Impact, March 2004”. In any event, the Court’s findings of law are notably general in character, saying remarkably little as concerns the application of specific provisions of the Hague Rules or the Fourth Geneva Convention along particular sections of the route of the wall. I have nonetheless voted in favour of subparagraph (3) (A) of the *dispositif* because there is undoubtedly a significant negative impact upon portions of the population of the West Bank that cannot be excused on the grounds of military necessity allowed by those Conventions; and nor has Israel explained to the United Nations or to this Court why its legitimate security needs can be met only by the route selected.

(Signed) Rosalyn HIGGINS.

**Legal Consequences of the Construction of a Wall in
the Occupied Palestinian Territory,
Separate Opinion of Judge Kooijmans,
Advisory Opinion, I.C.J. Reports 2004**

SEPARATE OPINION OF JUDGE KOOIJMANS

Reasons for negative vote on operative subparagraph (3) (D) — Background and context of request for advisory opinion — Need for balanced treatment — Jurisdictional issues — Article 12, paragraph 2, of the Charter and General Assembly resolution 377 A (V) — Question of judicial propriety — Purpose of request — Merits — Self-determination — Proportionality — Self-defence — Legal consequences — Obligations for other States — Article 41 of the International Law Commission Articles on State Responsibility — Duty of non-recognition — Duty of abstention — Duty to ensure respect for humanitarian law — Common Article 1 of the Geneva Conventions.

I. INTRODUCTORY REMARKS

1. I have voted in favour of all paragraphs of the operative part of the Advisory Opinion with one exception, viz. subparagraph (3) (D) dealing with the legal consequences for States.

I had a number of reasons for casting that negative vote which I will only briefly indicate at this stage, since I will come back to them when commenting on the various parts of the Opinion.

My motives can be summarized as follows.

First, the request as formulated by the General Assembly did not make it necessary for the Court to determine the obligations for States which ensue from the Court's findings. In this respect an analogy with the structure of the Opinion in the *Namibia* case is not appropriate. In that case the question about the legal consequences for States was at the heart of the request and logically so since it was premised on a decision of the Security Council. That resolution, and in particular its operative paragraph 5 which was addressed to "all States", was considered by the Court to be "essential for the purposes of the present advisory opinion" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 51, para. 108).

A similar situation does not exist in the present case, where the Court's view is not asked on the legal consequences of a decision taken by a political organ of the United Nations but of an act committed by a Member State. That does not prevent the Court from considering the issue of consequences for third States once that act has been found to be illegal but then the Court's conclusion is wholly dependent upon its reasoning and not upon the necessary logic of the request.

It is, however, this reasoning that in my view is not persuasive (see paras. 39-49, below) and this was my second motive for casting a negative vote.

And, third, I find the Court's conclusions as laid down in subparagraph (3) (D) of the *dispositif* rather weak; apart from the Court's finding that States are under an obligation "not to render aid or assistance in maintaining the situation created by [the] construction [of the wall]" (a finding I subscribe to) I find it difficult to envisage what States are expected to do or not to do in actual practice. In my opinion a judicial body's findings should have a direct bearing on the addressee's behaviour; neither the first nor the last part of operative subparagraph (3) (D) meets this requirement.

2. Although I am in general agreement with the Court's Opinion, on some issues I have reservations with regard to its reasoning. I will, in giving my comments, follow the logical order of the Opinion:

- (a) jurisdictional issues;
- (b) the question of judicial propriety;
- (c) the merits;
- (d) the legal consequences.

Before doing so I wish, however, to make some remarks about the background and context of the request.

II. BACKGROUND AND CONTEXT OF THE REQUEST FOR THE ADVISORY OPINION

3. In paragraph 54 of the Opinion the Court observes (in the context of judicial propriety) that it is aware that the question of the wall is part of a greater whole but that that cannot be a reason for it to decline to reply to the question asked. It adds that this wider context will be carefully taken into account. I fully share the Court's view as laid down in that paragraph including the Court's observation that it can nevertheless only examine other issues to the extent that is necessary for the consideration of the question put to it.

4. In my opinion the Court could and should have given more explicit attention to the general context of the request in its Opinion. The situation in and around Palestine has been for a number of decades not only a virtually continuous threat to international peace and security but also a human tragedy which in many respects is mind-boggling. How can a society like the Palestinian one get used to and live with a situation where the victims of violence are often innocent men, women and children? How can a society like the Israeli society get used to and live with a situation where attacks against a political opponent are targeted at innocent civilians, men, women and children, in an indiscriminate way?

5. The construction of the wall is explained by Israel as a necessary protection against the latter category of acts which are generally considered to be international crimes. Deliberate and indiscriminate attacks against civilians with the intention to kill are the core element of terrorism which has been unconditionally condemned by the international community regardless of the motives which have inspired them.

Every State, including Israel, has the right and even the duty (as the Court says in paragraph 141) to respond to such acts in order to protect the life of its citizens, albeit the choice of means in doing so is limited by the norms and rules of international law. In the present case, Israel has not respected those limits, and the Court convincingly demonstrates that these norms and rules of international law have not been respected by it. I find no fault with this conclusion nor with the finding that the construction of the wall along the chosen route has greatly added to the suffering of the Palestinians living in the Occupied Territory.

6. In paragraph 122 the Court finds that the construction of the wall, along with measures taken earlier, severely impedes the exercise by the Palestinian people of its right to self-determination, and therefore constitutes a breach of Israel's obligation to respect that right. I have doubts whether the last part of that finding is correct (see paragraph 32, below), but it is beyond doubt that the mere existence of a structure that separates the Palestinians from each other makes the realization of their right to self-determination far more difficult, even if it has to be admitted that the realization of this right is more dependent upon political agreement than on the situation *in loco*.

But it is also true that the terrorist acts themselves have caused "great harm to the legitimate aspirations of the Palestinian people for a better future", as was stated in the Middle East Quartet Statement of 16 July 2002. And the Statement continues: "Terrorists must not be allowed to kill the hope of an entire region, and a united international community, for genuine peace and security for both Palestinians and Israelis." (Written Statement of Israel, Annex 10.)

7. The fact that the Court has limited itself to report merely on a number of the historical facts which have led to the present human tragedy may be correct from the viewpoint of what is really needed to answer the request of the General Assembly: the result, however, is that the historical résumé, as presented in paragraphs 70 to 78, is rather two-dimensional. I will illustrate this by giving one example which is hardly relevant for the case itself.

8. Before giving its historical résumé, the Court says that it will first make a brief analysis of the status of the territory and it starts by mentioning the establishment of the Mandate after the First World War. Nothing is said, however, about the status of the West Bank between the conclusion of the General Armistice Agreement in 1949 and the occupation by Israel in 1967, in spite of the fact that it is a generally known fact

that it was placed by Jordan under its sovereignty but that this claim to sovereignty, which was relinquished only in 1988, was recognized by three States only.

9. I fail to understand the reason for this omission of an objective historical fact since in my view the fact that Jordan claimed sovereignty over the West Bank only strengthens the argument in favour of the applicability of the Fourth Geneva Convention right from the moment of its occupation by Israel in June 1967.

If it is correct that the Government of Israel claims that the Fourth Geneva Convention is not applicable *de jure* in the West Bank since that territory had not previously to the 1967 war been under Jordanian sovereignty, that argument already fails since a territory, which by one of the parties to an armed conflict is claimed as its own and is under its control, is — once occupied by the other party — by definition occupied territory of a *High Contracting Party* in the sense of the Fourth Geneva Convention (emphasis added). And both Israel and Jordan were parties to the Convention.

That this at the time also was recognized by the Israeli authorities is borne out by the Order issued after the occupation and referred to in paragraph 93 of the Opinion.

10. The strange result of the Court's reticence about the status of the West Bank between 1949 and 1967 is that it is only by implication that the reader is able to understand that it was under Jordanian control (paragraphs 73 and 129 refer to the demarcation line between Israel and Jordan (the Green Line)) without ever being explicitly informed that the West Bank had been placed under Jordanian authority. This is all the more puzzling as the Court would in no way have been compelled to comment on the legality or legitimacy of that authority if it had made mention of it.

11. In a letter of 29 January from the Deputy Director General and Legal Adviser of the Israeli Ministry of Foreign Affairs to the Registrar of the Court it is stated that "Israel trusts and expects that the Court will look beyond the request to the wider issues relevant to this matter" (Written Statement of Israel, covering letter). In this respect it was said that resolution ES-10/14 is "absolutely silent" on the terrorist attacks against Israeli citizens and thus "reflects the gravest prejudice and imbalance with the requesting organ". Israel, therefore, requested the Court not to render the opinion.

12. I am of the view that the Court, in deciding whether it is appropriate to respond to a request for an advisory opinion, can involve itself with the political debate which has preceded the request only to the extent necessary to understand the question put. It is no exception that such debate is heated but, as the Court said in the case of the *Legality of the Threat or Use of Nuclear Weapons*

“once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution” (*I.C.J. Reports 1996 (I)*, p. 237, para. 16).

The Court, however, does not function in a void. It is the principal judicial organ of the United Nations and has to carry out its function and responsibility within the wider political context. It cannot be expected to present a legal opinion on the request of a political organ without taking full account of the context in which the request was made.

13. Although the Court certainly has taken into account the arguments put forward by Israel and has dealt with them in a considerate manner, I am of the view that the present Opinion could have reflected in a more satisfactory way the interests at stake for all those living in the region. The rather oblique references to terrorist acts which can be found at several places in the Opinion are in my view not sufficient for this purpose. An advisory opinion is brought to the attention of a political organ of the United Nations and is destined to have an effect on a political process. It should therefore throughout its reasoning and up till the operative part reflect the legitimate interests and responsibilities of *all* those involved and not merely refer to them in a concluding paragraph (para. 162).

III. JURISDICTIONAL ISSUES

14. I fully share the view of the Court that the adoption of resolution ES-10/14 was not *ultra vires* since it did not contravene the provision of Article 12, paragraph 1, of the Charter; nor did it fail to fulfil the essential conditions set by the Uniting for Peace resolution (resolution 377 A (V)) for the convening of an Emergency Special Session.

15. I doubt, however, whether it is possible to describe the practice of the political organs of the United Nations with respect to the interpretation of Article 12, paragraph 1, of the Charter without taking into account the effect of the Uniting for Peace resolution on this interpretation. In the Opinion, the Court deals with resolution 377 A (V) as a separate item and merely in relation to its procedural requirements. In my opinion this resolution also had a more substantive effect, namely with regard to the interpretation of the relationship between the competences of the Security Council and the General Assembly respectively, in the field of international peace and security and has certainly expedited

the development of the interpretation of the condition, contained in Article 12, paragraph 1, namely that the Assembly shall not make a recommendation with regard to a dispute or situation *while* the Security Council is exercising its functions in respect of such dispute or situation (emphasis added).

16. This effect is also recognized in doctrine. “The adoption of the ‘Uniting for Peace’ resolution . . . could not fail to have an effect on the weight to be given to the restriction in Article 12, paragraph 1.” (Philippe Manin, in J.-P. Cot, *La Charte des Nations Unies*, 2nd ed., 1981, p. 298 [*translation by the Registry*]; see also E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004, p. 46.) In actual practice the adoption of the Uniting for Peace resolution has contributed to the interpretation that, if a veto cast by a permanent member prevents the Security Council from taking a decision, the latter is no longer considered to be exercising its functions within the meaning of Article 12, paragraph 1. And the fact that a veto had been cast when the Security Council voted on a resolution dealing with the construction of the wall is determinative for the conclusion that the Security Council was no longer exercising its functions under the Charter with respect to the construction of the wall. In the present case, therefore, the conclusion that resolution ES-10/14 did not contravene Article 12, paragraph 1, of the Charter cannot be dissociated from the effect resolution 377 A (V) has had on the interpretation of that provision.

17. That such practice is accepted by both Assembly and Security Council also with regard to the procedural requirements of resolution 377 A (V) is borne out by the fact that none of the Council’s members considered that the reconvening of the Assembly in Emergency Special Session on 20 October 2003 was unconstitutional and that the adoption of the resolution demanding that Israel stop and reverse the construction of the wall was therefore *ultra vires*. In this respect it is telling that this resolution (resolution ES-10/13) was tabled as a compromise by the Presidency of the European Union, among whose members were two permanent and two non-permanent members of the Security Council, less than a week after a draft resolution on the same subject had been vetoed in the Council.

18. Let me add that I agree with the Court that there has developed a practice enabling the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. I doubt, however, whether a resolution of the character of resolution ES-10/13 (which beyond any doubt is a recommendation in the sense of Article 12, paragraph 1) could have been lawfully adopted by the Assembly, whether in a regular session or in an Emergency Special Session, if the Security Council had been considering the specific issue of the construction of the wall without yet having taken a decision.

IV. THE QUESTION OF JUDICIAL PROPRIETY

19. I must confess that I have felt considerable hesitation as to whether it would be judicially proper to comply with the request of the Assembly.

20. This hesitation had first of all to do with the question whether the Court would not be unduly politicized by giving the requested advisory opinion, thereby undermining its ability to contribute to global security and to respect for the rule of law. It must be admitted that such an opinion, whatever its content, will inevitably become part of an already heated political debate. The question is in particular pertinent as three members of the Quartet (the United States, the Russian Federation and the European Union) abstained on resolution ES-10/14 and do not seem too eager to see the Court complying with the request out of fear that the opinion may interfere with the political peace process. Such fears cannot be taken lightly since the situation concerned is a continuous danger for international peace and security and a source of immense human suffering.

21. While recognizing that the risk of a possible politicization is real, I nevertheless concluded that this risk would not be neutralized by a refusal to give an opinion. The risk should have been a consideration for the General Assembly when it envisaged making the request. Once the decision to do so had been taken, the Court was made an actor on the political stage regardless of whether it would or would not give an opinion. A refusal would just as much have politicized the Court as the rendering of an opinion. Only by limiting itself strictly to its judicial function is the Court able to minimize the risk that its credibility in upholding the respect for the rule of law is affected.

22. My hesitation was also related to the question of the object of the Assembly's request. What was the Assembly's purpose in making the request? Resolution ES-10/14 seems to give some further information in this respect in its last preambular paragraph which reads as follows:

“*Bearing in mind* that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences . . .”

Evidently the Assembly finds it necessary to take speedy action to bring to an end these detrimental implications and consequences and for this purpose it needs the views of the Court.

But the question remains: Views on what? And why the views of a judicial body on an act which has already been determined not to be in conformity with international law and the perpetrator of which has already been called upon to terminate and reverse its wrongful conduct (resolution ES-10/13)?

23. The present request recalls the dilemma as seen by Judge Petřín in the *Namibia* case. He felt that the purpose of the request for an advisory opinion was in that case “above all to obtain from the Court a reply such that States would find themselves under obligation to bring to bear on South Africa pressure . . .”. He called this a reversal of the natural distribution of roles as between the principal judicial organ and the political organ of the United Nations since, instead of asking the Court its opinion on a legal question in order to deduce the political consequences following from it, the opposite was done (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 128).

24. In the present Opinion the Court responds to the argument that the Assembly has not made clear what use it would make of an advisory opinion on the wall, with a reference to the *Nuclear Weapons* case where it said that

“it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.” (Para. 61.)

And the Court continues that it “cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly” (para. 62).

25. I do not consider this answer fully satisfactory. There is quite a difference between substituting the Court's assessment of the usefulness of the opinion for that of the organ requesting it and analysing from a judicial viewpoint what the purpose of the request is. The latter is a simple necessity in order to find out what the Court as a judicial body is in a position to say. And from that point of view the request is phrased in a way which can be called odd, to put it mildly. And in actual fact the Court makes this analysis when in paragraph 39 of the Opinion it says that the use of the terms “legal consequences” arising from the construction of the wall “necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law”. I agree with that statement but not because the word “necessarily” is related to the terms of the request but because it is related to the judicial responsibility of the Court. To quote the words of Judge Dillard in the *Namibia* case:

“when these [political] organs do see fit to ask for an advisory opinion, they must expect the Court to act in strict accordance with its judicial function. This function *precludes* it from accepting, without any enquiry whatever, a legal conclusion which itself conditions the nature and scope of the legal consequences flowing from it. It would be otherwise if the resolutions requesting an opinion were legally neutral . . .” (*I.C.J. Reports 1971*, p. 151; emphasis added.)

26. In the present case the request is far from being “legally neutral”. In order not to be precluded, from the viewpoint of judicial propriety, from rendering the opinion, the Court therefore is duty bound to reconsider the content of the request in order to uphold its judicial dignity. The Court has done so but in my view it should have done so *proprio motu* and not by assuming what the Assembly “necessarily” must have assumed, something it evidently did not.

27. Let me add that in other respects I share the views the Court has expressed with regard to the issue of judicial propriety. In particular the Court’s finding that the subject-matter of the General Assembly cannot be regarded as being “only a bilateral matter between Israel and Palestine” (para. 49) is in my view worded in a felicitous way since, in regard to the issue of the existence of a bilateral dispute, it avoids the dilemma of “either/or”. A situation which is of legitimate concern to the organized international community and a bilateral dispute with regard to that same situation may exist simultaneously. The existence of the latter cannot deprive the organs of the organized community of the competence which has been assigned to them by the constitutive instruments. In the present case the involvement of the United Nations in the question of Palestine is a long-standing one and, as the Court says, the subject-matter of the request is of acute concern to the United Nations (para. 50). By giving an opinion the Court therefore in no way circumvents the principle of consent to the judicial settlement of a bilateral dispute which exists simultaneously. The bilateral dispute cannot be dissociated from the subject-matter of the request, but only in very particular circumstances which cannot be spelled out in general can its existence be seen as an argument for the Court to decline to reply to the request. In this respect, I find the quotation from the *Western Sahara* Opinion in paragraph 47 of the Opinion, which contains pure circular reasoning, less than helpful.

28. If the request has been legitimately made in view of the United Nations long-standing involvement with the question of Palestine, Israel’s argument that the Court does not have at its disposal the necessary evidentiary material, as this is to an important degree in the hands of Israel as a party to the dispute, does not hold water. The Court has to respect Israel’s choice not to address the merits, but it is the Court’s own responsibility to assess whether the available information is sufficient to enable it to give the requested opinion. And, although it is a matter for sincere regret that Israel has decided not to address the merits, the Court is right when it concludes that the available material allows it to give the opinion.

V. MERITS

29. I share the Court’s view that the 1907 Hague Regulations, the Fourth Geneva Convention of 1949, the 1966 Covenants on Civil and

Political Rights and on Economic, Social and Cultural Rights and the 1989 Convention on the Rights of the Child are applicable to the Occupied Palestinian Territory and that Israel by constructing the wall and establishing the associated régime has breached its obligation under certain provisions of each of these conventions.

I find no fault with the Court’s reasoning in this respect although I regret that the summary of the Court’s findings in paragraph 137 does not contain a list of treaty provisions which have been breached.

30. The Court has refrained from taking a position with regard to territorial rights and the question of permanent status. It has taken note of statements, made by Israeli authorities on various occasions, that the “fence” is a temporary measure, that it is not a border and that it does not change the legal status of the territory. I welcome these assurances which may be seen as the recognition of legal commitments on the side of Israel but share the Court’s concern that the construction of the wall creates a fait accompli. It is therefore all the more important to expedite the political process which has to settle all territorial and permanent status issues.

31. *Self-determination* — In my view, it would have been better if the Court had also left issues of self-determination to this political process. I fully recognize that the right of self-determination is one of the basic principles of modern international law and that the realization of this right for the people of Palestine is one of the most burning issues for the solution of the Israeli-Palestinian conflict. The overriding aim of the political process, as it is embodied *inter alia* in the Roadmap, is “the emergence of an independent, democratic and viable Palestinian State living side by side in peace and security with Israel and its other neighbours” (dossier of the Secretary-General, No. 70). This goal is subscribed to by both Israel and Palestine; both are, therefore, in good faith bound to desist from acts which may jeopardize this common interest.

32. The right of self-determination of the Palestinian people is therefore imbedded in a much wider context than the construction of the wall and has to find its realization in this wider context. I readily agree with the Court that the wall and its associated régime impede the exercise by the Palestinian people of its right to self-determination but only for the reason that the wall establishes a physical separation of the people entitled to enjoy this right. But not every impediment to the exercise of a right is by definition a breach of that right or of the obligation to respect it, as the Court seems to conclude in paragraph 122. As was said by the Quartet in its statement of 16 July 2002, the terrorist attacks (and the failure of the Palestinian Authority to prevent them) cause also great harm to the legitimate aspirations of the Palestinian people and thus

seriously impede the realization of the right of self-determination. Is that also a breach of that right? And if so, by whom? In my view the Court could not have concluded that Israel had committed a breach of its obligation to respect the Palestinians' right to self-determination without further legal analysis.

33. In this respect I do not find the references to earlier statements of the Court in paragraph 88 of the Opinion very enlightening. In the *Namibia* case the Court referred in specific terms to the relations between the inhabitants of a mandate and the mandatory as reflected in the constitutive instruments of the mandate system. In the *East Timor* case the Court called the rights of peoples to self-determination in a colonial situation a right *erga omnes*, therefore a right opposable to all. But it said nothing about the way in which this "right" must be translated into obligations for States which are not the colonial Power. And I repeat the question: Is every impediment to the exercise of the right to self-determination a breach of an obligation to respect it? Is it so only when it is serious? Would the discontinuance of the impeding act restore the right or merely bring the breach to an end?

34. *Proportionality* — The Court finds that the conditions set out in the qualifying clauses in the applicable humanitarian law and human rights conventions have not been met and that the measures taken by Israel cannot be justified by military exigencies or by requirements of national security or public order (paras. 135-137). I agree with that finding but in my opinion the construction of the wall should also have been put to the proportionality test, in particular since the concepts of military necessity and proportionality have always been intimately linked in international humanitarian law. And in my view it is of decisive importance that, even if the construction of the wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test. The route chosen for the construction of the wall and the ensuing disturbing consequences for the inhabitants of the Occupied Palestinian Territory are manifestly disproportionate to interests which Israel seeks to protect, as seems to be recognized also in recent decisions of the Israeli Supreme Court.

35. *Self-defence* — Israel based the construction of the wall on its inherent right of self-defence as contained in Article 51 of the Charter. In this respect it relied on Security Council resolutions 1368 (2001) and 1373 (2001), adopted after the terrorist attacks of 11 September 2001 against targets located in the United States.

The Court starts its response to this argument by stating that

Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State (para. 139). Although this statement is undoubtedly correct, as a reply to Israel's argument it is, with all due respect, beside the point. Resolutions 1368 (2001) and 1373 (2001) recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 (2001) without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence.

36. The argument which in my view is decisive for the dismissal of Israel's claim that it is merely exercising its right of self-defence can be found in the second part of paragraph 139. The right of self-defence as contained in the Charter is a rule of international law and thus relates to international phenomena. Resolutions 1368 (2001) and 1373 (2001) refer to acts of *international* terrorism as constituting a threat to *international* peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from that contemplated by resolutions 1368 (2001) and 1373 (2001) and that consequently Article 51 of the Charter cannot be invoked by Israel.

VI. LEGAL CONSEQUENCES

37. I have voted in favour of subparagraph (3) (B), (C) and (E) of the operative part. I agree with the Court's finding with regard to the consequences of the breaches by Israel of its obligations under international law for Israel itself and for the United Nations (paras. 149-153 and 160). Since I have voted, however, against operative subparagraph (3) (D), the remainder of my opinion will explain the reasons for my dissent in a more detailed way than I did in my introductory remarks.

38. The General Assembly requests the Court to specify what are the

legal consequences arising from the construction of the wall. If the object of the request is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions (para. 50) it is only logical that a specific paragraph of the *dispositif* is addressed to the General Assembly. That the paragraph is also addressed to the Security Council is logical as well in view of the shared or parallel responsibilities of the two organs.

Since the Court has found that the construction of the wall and the associated régime constitute breaches of Israel's obligations under international law, it is also logical that the Court spells out what are the legal consequences for Israel.

39. Although the Court beyond any doubt is entitled to do so, the request itself does not necessitate (not even by implication) the determination of the legal consequences for other States, even if a great number of participants urged the Court to do so (para. 146). In this respect the situation is completely different from that in the *Namibia* case where the question was exclusively focused on the legal consequences for States, and logically so since the subject-matter of the request was a decision by the Security Council.

In the present case there must therefore be a special reason for determining the legal consequences for other States since the clear analogy in wording with the request in the *Namibia* case is insufficient.

40. That reason as indicated in paragraphs 155 to 158 of the Opinion is that the obligations violated by Israel include certain obligations *erga omnes*. I must admit that I have considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States. The nearest I can come to such an explanation is the text of Article 41 of the International Law Commission's Articles on State Responsibility. That Article reads:

"1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. [Article 40 deals with serious breaches of obligations arising under a peremptory norm of general international law.]

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."

Paragraph 3 of Article 41 is a saving clause and of no relevance for the present case.

41. I will not deal with the tricky question whether obligations *erga omnes* can be equated with obligations arising under a peremptory norm of general international law. In this respect I refer to the useful commentary of the ILC under the heading of Chapter III of its Articles. For argument's sake I start from the assumption that the consequences of the violation of such obligations are identical.

42. Paragraph 1 of Article 41 explicitly refers to a duty to co-operate. As paragraph 3 of the commentary states, "What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches." And paragraph 2 refers to "[c]ooperation . . . in the framework of a competent international organization, in particular the United Nations". Article 41, paragraph 1, therefore does not refer to individual obligations of third States as a result of a serious breach. What is said there is encompassed in the Court's finding in operative subparagraph (3) (E) and not in subparagraph (3) (D).

43. Article 41, paragraph 2, however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach just as operative subparagraph (3) (D) does. In its commentary the ILC refers to unlawful situations which — virtually without exception — take the form of a legal claim, usually to territory. It gives as examples "an attempted acquisition of sovereignty over territory through denial of the right of self-determination", the annexation of Manchuria by Japan and of Kuwait by Iraq, South Africa's claim to Namibia, the Unilateral Declaration of Independence in Rhodesia and the creation of Bantustans in South Africa. In other words, all examples mentioned refer to situations arising from formal or quasi-formal promulgations intended to have an *erga omnes* effect. I have no problem with accepting a duty of non-recognition in such cases.

44. I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part of operative subparagraph (3) (D) supposed to do in order to comply with this obligation? That question is even more cogent considering that 144 States unequivocally have condemned the construction of the wall as unlawful (resolution ES-10/13), whereas those States which abstained or voted against (with the exception of Israel) did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to an obligation without real substance.

45. That argument does not apply to the second obligation mentioned in Article 41, paragraph 2, namely the obligation not to render aid or assistance in maintaining the situation created by the serious breach. I therefore fully support that part of operative subparagraph (3) (D). Moreover, I would have been in favour of adding in the reasoning or even in the operative part a sentence reminding States of the importance of rendering humanitarian assistance to the victims of the construction of the wall. (The Court included a similar sentence, be it with a different scope, in its Opinion in the *Namibia* case, *I.C.J. Reports 1971*, p. 56, para. 125.)

46. Finally, I have difficulty in accepting the Court's finding that the States parties to the Fourth Geneva Convention are under an obligation

to ensure compliance by Israel with humanitarian law as embodied in that Convention (paragraph 159, operative subparagraph (3) (D), last part).

In this respect the Court bases itself on common Article 1 of the Geneva Convention which reads: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." (Emphasis added.)

47. The Court does not say on what ground it concludes that this Article imposes obligations on third States not party to a conflict. The *travaux préparatoires* do not support that conclusion. According to Professor Kalshoven, who investigated thoroughly the genesis and further development of common Article 1, it was mainly intended to ensure respect of the conventions by the population as a whole and as such was closely linked to common Article 3 dealing with internal conflicts (F. Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", in *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 3-61). His conclusion from the *travaux préparatoires* is:

"I have not found in the records of the Diplomatic Conference even the slightest awareness on the part of government delegates that one might ever wish to read into the phrase 'to ensure respect' any undertaking by a contracting State other than an obligation to ensure respect for the Conventions by its people 'in all circumstances.'" (*Ibid.*, p. 28.)

48. Now it is true that already from an early moment the International Committee of the Red Cross in its (non-authoritative) commentaries on the 1949 Convention has taken the position that common Article 1 contains an obligation for all States parties to ensure respect by other States parties. It is equally true that the Diplomatic Conference which adopted the 1977 Additional Protocols incorporated common Article 1 in the First Protocol. But at no moment did the Conference deal with its presumed implications for third States.

49. Hardly less helpful is the Court's reference to common Article 1 in the *Nicaragua* case. The Court, without interpreting its terms, observed that "such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression". The Court continued that "The United States [was] thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua" to act in violation of common Article 3 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, *Judgment*, I.C.J. Reports 1986, p. 114, para. 220).

But this duty of abstention is completely different from a positive duty to ensure compliance with the law.

50. Although I certainly am not in favour of a restricted interpretation

of common Article 1, such as may have been envisaged in 1949, I simply do not know whether the scope given by the Court to this Article in the present Opinion is correct as a statement of positive law. Since the Court does not give any argument in its reasoning, I do not feel able to support its finding. Moreover, I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic démarches.

51. For all these reasons I felt compelled to vote against operative subparagraph (3) (D).

(Signed) Pieter H. KOOLJIMANS.

**Legal Consequences of the Construction of a Wall in
the Occupied Palestinian Territory,
Separate Opinion of Judge Elaraby,
Advisory Opinion, I.C.J. Reports 2004**

SEPARATE OPINION OF JUDGE ELARABY

The nature and scope of United Nations responsibility — The international legal status of the Occupied Palestinian Territory — Historical survey — The law of belligerent occupation, including current situation of prolonged occupation, principle of military necessity, breaches of international humanitarian law and the erga omnes right to self-determination of the Palestinian people.

I would like to express, at the outset, my complete and unqualified support for the findings and conclusions of the Court. I consider it necessary, however, to exercise my entitlement under Article 57 of the Statute, to append this separate opinion to elaborate on some of the historical and legal aspects contained in the Advisory Opinion.

I feel obliged, with considerable reluctance, to start by referring to paragraph 8 of the Advisory Opinion. In my view, as Judge Lachs wrote in his separate opinion in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Judgment*, “A judge — as needs no emphasis — is bound to be impartial, objective, detached, disinterested and unbiased.” (*I.C.J. Reports 1986*, p. 158.) Throughout the consideration of this Advisory Opinion, I exerted every effort to be guided by this wise maxim which has a wider scope than the solemn declaration every judge makes in conformity with Article 20 of the Statute of the International Court of Justice.

In this separate opinion, I will address three interrelated points:

- (i) the nature and scope of the United Nations responsibility;
- (ii) the international legal status of the Occupied Palestinian Territory;
- (iii) the law of belligerent occupation.

I. THE NATURE AND SCOPE OF THE UNITED NATIONS RESPONSIBILITY

1. The first point to be emphasized is the need to spell out the nature and the wide-ranging scope of the United Nations historical and legal responsibility towards Palestine. Indeed, the Court has referred to this special responsibility when it held that:

“The responsibility of the United Nations in this matter also has

its origin in the Mandate and the Partition Resolution concerning Palestine . . . this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.” (Advisory Opinion, para. 49.)

What I consider relevant to emphasize is that this special responsibility was discharged for five decades without proper regard for the rule of law. The question of Palestine has dominated the work of the United Nations since its inception, yet no organ has ever requested the International Court of Justice to clarify the complex legal aspects of the matters under its purview. Decisions with far-reaching consequences were taken on the basis of political expediency, without due regard for the legal requirements. Even when decisions were adopted, the will to follow through to implementation soon evaporated. Competent United Nations organs, including the General Assembly and the Security Council, have adopted streams of resolutions that remain wholly or partially unfulfilled. The United Nations special responsibility has its origin in General Assembly resolution 118 (II) of 29 November 1947 (hereafter, the Partition Resolution).

Proposals to seek advisory opinions prior to the adoption of the Partition Resolution were considered on many occasions in the competent subsidiary bodies but no request was ever adopted. This fact by itself confers considerable importance on the request for an advisory opinion embodied in General Assembly resolution ES-10/14 (A/ES-10/L.16), adopted on 8 December 2003, at the 23rd meeting of the resumed Tenth Emergency Special Session. The request is indeed a landmark in the United Nations consideration of the question of Palestine. The historical record of some previous attempts to seek the views of the International Court of Justice deserves to be recalled, albeit briefly.

The report of the Sub-Committee 2 in 1947 to the *Ad Hoc* Committee on the Palestinian Question recognized the necessity to clarify the legal issues. In paragraph 38, it was stated:

“The Sub-Committee examined in detail the legal issues raised by the delegations of Syria and Egypt, and its considered views are recorded in this report. There is, however, no doubt that it would be advantageous and more satisfactory from all points of view if an advisory opinion on these difficult and complex legal and constitutional issues were obtained from the highest international judicial tribunal.” (Document A/AC.14/32 and Add.1, 11 November 1947, para. 38.)

The “difficult and complex legal and constitutional issues” revolved around:

“whether the General Assembly is competent to recommend either of the solutions proposed by the majority and by the minority respectively of the Special Committee, and whether it lies within the power of any Member or group of Members of the United Nations to implement any of the proposed solutions without the consent of the people of Palestine” (document A/AC.14/32 and Add.1, 11 November 1947, para. 37).

Several such proposals were considered. None was adopted. The Subcommittee in its report, some two weeks before the vote on the Partition Resolution, recognized that:

“A refusal to submit this question for the opinion of the International Court of Justice would amount to a confession that the General Assembly is determined to make recommendations in a certain direction, not because those recommendations are in accord with the principles of international justice and fairness, but because the majority of the representatives desire to settle the problem in a certain manner, irrespective of what the merits of the question or the legal obligations of the parties might be. Such an attitude will not serve to enhance the prestige of the United Nations. . . .” (*Ibid.*, para. 40.)

The clear and well-reasoned arguments calling for clarification and elucidation of the legal issues fell on deaf ears. The rush to vote proceeded without clarifying the legal aspects. In this context, it is relevant to recall that the Partition Resolution fully endorsed referral of “any dispute relating to the application or interpretation”¹ of its provisions to the International Court of Justice. The referral “shall be . . . at the request of either party”². Needless to say, this avenue was also never followed.

Thus, the request by the General Assembly for an advisory opinion, as contained in resolution 10/14, represents the first time ever that the International Court of Justice has been consulted by a United Nations organ with respect to any aspect regarding Palestine. The Advisory Opinion has great historical significance as a landmark which will definitely add to its legal value.

¹ No. 181 (II), resolution adopted on the report of the *Ad Hoc* Committee on the Palestinian Question (29 November 1947), Chap. 4, para. 2.

² *Ibid.*

II. THE INTERNATIONAL LEGAL STATUS OF THE OCCUPIED PALESTINIAN TERRITORY

2.1. The international legal status of the Palestinian Territory (paras. 70-71 of the Advisory Opinion), in my view, merits more comprehensive treatment. An historical survey is relevant to the question posed by the General Assembly, for it serves as the background to understanding the legal status of the Palestinian Territory on the one hand and underlines the special and continuing responsibility of the General Assembly on the other. This may appear as academic, without relevance to the present events. The present is however determined by the accumulation of past events and no reasonable and fair concern for the future can possibly disregard a firm grasp of past events. In particular, when on more than one occasion the rule of law was consistently side-stepped.

The point of departure, or one can say in legal jargon, the critical date, is the League of Nations Mandate which was entrusted to Great Britain. As stated in the Preamble of the Mandate for Palestine, the United Kingdom undertook “to exercise it on behalf of the League of Nations”.³ The Mandate must be considered in the light of the Covenant of the League of Nations. One of the primary responsibilities of the Mandatory Power was to assist the peoples of the territory to achieve full self-government and independence at the earliest possible date. Article 22, paragraph 1, of the Covenant stipulated that the “well-being and development of such peoples form a sacred trust of civilisation”. The only limitation imposed by the League’s Covenant upon the sovereignty and full independence of the people of Palestine was the temporary tutelage entrusted to the Mandatory Power. Palestine fell within the scope of Class A Mandates under Article 22, paragraph 4, of the Covenant, which provided that:

“Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”

The conventional wisdom and the general expectation were such that when the stage of rendering administrative advice and assistance had been concluded and the Mandate had come to an end, Palestine would be independent as of that date, since its provisional independence as a nation was already legally acknowledged by the Covenant. Moreover, the Covenant clearly differentiated between the communities which formerly belonged to the Turkish Empire, and other territories. Regarding the latter, the Mandatory Power was held responsible for the complete

³ Preamble, CMD No. 1785 (1923), reprinted in report of the United Nations Special Committee on Palestine (UNSCOP report).

administration of the territory and was not confined to administrative advice and assistance⁴. These distinct arrangements can be interpreted as further recognition by the Covenant of the special status of the former Turkish territories which included Palestine.

In point of fact, the report submitted by Sub-Committee 2 to the *Ad Hoc* Committee on the Palestinian Question in 1947 shed more light on the status of Palestine. The report gave the conclusion that

“the people of Palestine are ripe for self-government and that it has been agreed on all hands that they should be made independent at the earliest possible date. It also follows, from what has been said above, that the General Assembly is not competent to recommend, still less to enforce, any solution other than the recognition of the independence of Palestine.” (A/AC.14/32, and Add.1, 11 November 1947, para. 18.)

The Sub-Committee further submitted the following views:

“It will be recalled that the object of the establishment of Class A Mandates, such as that for Palestine, under Article 22 of the Covenant, was to provide for a temporary tutelage under the Mandatory Power, and one of the primary responsibilities of the Mandatory was to assist the peoples of the mandated territories to achieve full self-government and independence at the earliest opportunity. It is generally agreed that that stage has now been reached in Palestine, and not only the United Nations Special Committee on Palestine but the Mandatory Power itself agree that the Mandate should be terminated and the independence of Palestine recognized.” (*Ibid.*, para. 15.)

2.2. The Court has considered the legal nature of mandated territories in both 1950 (*International Status of South West Africa, Advisory Opinion*) and 1971 (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*), and laid down both the conceptual philosophy and the legal parameters for defining the legal status of former mandated territories. The dicta of the Court emphasized the special responsibility of the international community. It is to be noted that, in the setting up of the mandates system, the Court held that

“two principles were considered to be of paramount importance: the principle of *non-annexation* and the principle that the well-being and development of such peoples form ‘a sacred trust of civilization’” (*I.C.J. Reports 1950*, p. 131; emphasis added).

⁴ Covenant of the League of Nations, Art. 22.

The two fundamental principles enunciated by the Court in 1950 apply to all former mandated territories which have not gained independence. They remain valid today for the Occupied Palestinian Territory. The territory cannot be subject to annexation by force and the future of the Palestinian people, as “a sacred trust of civilization”, is the direct responsibility and concern of the United Nations.

2.3. It should be borne in mind that General Assembly resolution 181 (II) of 29 November 1947, which partitioned the territory of mandated Palestine, called for, *inter alia*, the following steps to be undertaken:

- (i) the termination of the Mandate not later than 1 August 1948;
- (ii) the establishment of two independent States, one Arab and one Jewish;
- (iii) the period between the adoption of the Partition Resolution and “the establishment of the independence of the Arab and Jewish States shall be a transitional period”.

On 14 May 1948, the independence of the Jewish State was declared. The Israeli declaration was “by virtue of [Israel’s] natural and historic right” and based “on the strength of the resolution of the United Nations General Assembly”⁵. The independence of the Palestinian Arab State has not yet materialized.

That there “shall be a transitional period” pending the establishment of the two States is a determination by the General Assembly within its sphere of competence and should be binding on all Member States as having legal force and legal consequences⁶. This conclusion finds support in the jurisprudence of the Court.

The Court has held in the *Namibia* case that when the General Assembly declared the Mandate to be terminated,

“‘South Africa has no other right to administer the Territory’. This is not a finding on facts, but the formulation of a legal situation. For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 50, para. 105.)

⁵ *Laws of the State of Israel*, Vol. 1, p. 3.

⁶ Moreover, Judge Weeramantry, in his dissenting opinion in the *East Timor* case, considered that “a resolution containing a decision within its proper sphere of competence may well be *productive of legal consequences*” (*East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 186; emphasis added).

The Court, moreover, has previously held, in the *Certain Expenses* case, that the decisions of the General Assembly on “important questions” under Article 18, “have dispositive force and effect” (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, I.C.J. Reports 1962, p. 163).

The legal force and effect of a General Assembly resolution adopted by the General Assembly “within the framework of its competence” is therefore well established in the Court’s jurisprudence. On that basis, it is submitted that two conclusions appear imperative:

- (a) the United Nations is under an obligation to pursue the establishment of an independent Palestine, a fact which necessitates that the General Assembly’s special legal responsibility not lapse until the achievement of this objective;
- (b) the transitional period referred to in the Partition Resolution serves as a legal nexus with the Mandate. The notion of a transitional period carrying the responsibilities emanating from the Mandate to the present is a political reality, not a legal fiction, and finds support in the dicta of the Court, in particular, that former mandated territories are the “sacred trust of civilization” and “cannot be annexed”. The stream of General Assembly and Security Council resolutions on various aspects of the question of Palestine provides cogent proof that this notion of a transitional period is generally, albeit implicitly, accepted.

2.4. The legal status of the Occupied Palestinian Territories cannot be fully appreciated without an examination of *Israel’s contractual undertakings* to respect the territorial integrity of the territory, and to withdraw from the occupied territories. The withdrawal and the territorial integrity injunctions are based on Security Council resolution 242 (1967) which is universally considered as the basis for a just, viable and comprehensive settlement. Resolution 242 (1967) is a multidimensional resolution which addresses various aspects of the Arab-Israeli dispute. I will focus only on the territorial dimension of resolution 242 (1967): the resolution contained two basic principles which defined the scope and the status of the territories occupied in 1967 and confirmed that occupied territories have to be “de-occupied”: resolution 242 (1967) emphasized the inadmissibility of acquisition of territory by war, thus prohibiting the annexation of the territories occupied in the 1967 conquest. It called for the withdrawal of Israeli armed forces from the territories occupied in the conflict. On 22 October 1973, the Security Council adopted resolution 338 (1973) which reiterated the necessity to implement resolution 242 (1967) “in all of its parts” (S/RES/338 of 22 October 1973, para. 2).

Following resolution 242 (1967), several undertakings to end the Israeli military occupation, while reserving the territorial integrity of the West Bank and Gaza, were made by Israel:

- (a) The Camp David Accords of 17 September 1978, in which Israel agreed that the basis for a peaceful settlement of the conflict with its neighbours is United Nations Security Council resolution 242 (1967) in all its parts.
- (b) The Oslo Accord, signed in Washington, D.C. on 13 September 1993, which was a bilateral agreement between Israel and Palestine. Article IV of the Oslo Accord provides that “the two sides view the West Bank and the Gaza Strip as a single territorial unit whose integrity will be preserved during the interim period”.
- (c) The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed in Washington, D.C. on 28 September 1995, reiterated the commitment to respect the integrity and status of the Territory during the interim period. In addition, Article XXXI (7) provided that “[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations”.

Thus Israel undertook to carry out the following obligations:

- (i) to withdraw in conformity with resolution 242 (1967);
- (ii) to respect the territorial integrity of the West Bank and the Gaza Strip; and
- (iii) to refrain from taking any step that would change the status of the West Bank and Gaza.

These undertakings were contractual and are legally binding on Israel.

2.5. Yet, notwithstanding the general prohibition against annexing occupied territories, the dicta of the Court on the legal nature of former mandatory territories, and in clear contravention of binding bilateral undertakings, on 14 April 2004, the Prime Minister of Israel addressed a letter to the President of the United States. Attached to the letter is a Disengagement Plan which one has to interpret as authoritatively reflecting Israel’s intention to annex Palestinian territories. The Disengagement Plan provides that

“it is clear that in the West Bank, there are areas which will be part of the State of Israel, including cities, towns and villages, security areas and installations, and other places of special interest to Israel”.

The clear undertakings to withdraw and to respect the integrity and status of the West Bank and Gaza legally debar Israel from infringing upon or altering the international legal status of the Palestinian territory. The construction of the wall, with its chosen route and associated régime, has to be read in the light of the Disengagement Plan. It is safe to assume that the construction was conceived with a view to annexing Palestinian territories, “cities, towns and villages” in the West Bank which “will be part of the State of Israel”. The letter of the Prime Minister of Israel was

dated 14 April 2004, over two months before the delivery of the Advisory Opinion.

The Court reached the correct conclusion regarding the characterization of the wall when it held that:

“the construction of the wall and its associated régime create a ‘fait accompli’ on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation” (Advisory Opinion, para. 121).

It is submitted that this finding should have been reflected in the *dispositif* with an affirmation that the Occupied Palestinian Territory cannot be annexed. It would also have been appropriate, in my view, to refer to the implications of the letter of the Prime Minister of Israel and its attachments and to underline that what it purports to declare is a breach of Israel’s obligations and contrary to international law.

III. THE LAW OF BELLIGERENT OCCUPATION

The Court was requested by the General Assembly to urgently render an advisory opinion on “the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory” (A/RES/ES-10/14-A/ES-10/L.16). The focus of the request evolves around the law of belligerent occupation. As already stated, I do concur with the reasoning and conclusions in the Advisory Opinion. I feel constrained, however, to emphasize and elaborate on some points:

- (a) the prolonged occupation;
- (b) the scope and limitations of the principle of military necessity;
- (c) the grave breaches of international humanitarian law; and
- (d) the right to self-determination.

3.1. The prohibition of the use of force, as enshrined in Article 2, paragraph 4, of the Charter, is no doubt the most important principle that emerged in the twentieth century. It is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted. The Court recalls in paragraph 87, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (resolution 2625 (XXV)), which provides an agreed interpretation of Article 2 (4). The Declaration “emphasized that ‘No territorial acquisition resulting from the threat or use of force shall be recognized as legal’” (Advisory Opinion, para. 87). The general principle that an illegal act cannot produce legal rights — *ex injuria jus non oritur* — is well recognized in international law.

The Israeli occupation has lasted for almost four decades. Occupation, regardless of its duration, gives rise to a myriad of human, legal and political problems. In dealing with prolonged belligerent occupation, international law seeks to “perform a holding operation pending the termination of the conflict”⁷. No one underestimates the inherent difficulties that arise during situations of prolonged occupation. A prolonged occupation strains and stretches the applicable rules, however, the law of belligerent occupation must be fully respected regardless of the duration of the occupation.

Professor Christopher Greenwood provided a correct legal analysis which I share. He wrote:

“Nevertheless, there is no indication that international law permits an occupying power to disregard provisions of the Regulations or the Convention merely because it has been in occupation for a long period, not least because there is no body of law which might plausibly take their place and no indication that the international community is willing to trust the occupant with *carte blanche*.”⁸

Both Israelis and Palestinians are subjected to untold sufferings. Both Israelis and Palestinians have a right to live in peace and security. Security Council resolution 242 (1967) affirmed the right “of every State in the area . . . to live in peace within secure and recognized boundaries free from threats or acts of force” (S/RES/242 (1967), para. 1 (ii)). These are solemn reciprocal rights which give rise to solemn legal obligations. The right to ensure and enjoy security applies to the Palestinians as well as to the Israelis. Security cannot be attained by one party at the expense of the other. By the same token of corresponding rights and obligations, the two sides have a reciprocal obligation to scrupulously respect and comply with the rules of international humanitarian law by respecting the rights, dignity and property of the civilians. Both sides are under a legal obligation to measure their actions by the identical yardstick of international humanitarian law which provides protection for the civilian population.

The Court has very clearly held, in the *Legality of the Threat or Use of Nuclear Weapons* case, that

“The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must con-

⁷ C. Greenwood, “The Administration of Occupied Territory in International Law”, *International Law and the Administration of Occupied Territories*, E. Playfair, ed., 1992, pp. 262-263.

⁸ *Ibid.*

sequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.” (*Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 257, para. 78.)

The fact that occupation is met by armed resistance cannot be used as a pretext to disregard fundamental human rights in the occupied territory. Throughout the annals of history, occupation has always been met with armed resistance. Violence breeds violence. This vicious circle weighs heavily on every action and every reaction by the occupier and the occupied alike.

The dilemma was pertinently captured by Professors Richard Falk and Burns Weston when they wrote

“the occupier is confronted by threats to its security that arise . . . primarily, and especially in the most recent period, from a pronounced and sustained failure to restrict the character and terminate its occupation so as to restore the sovereign rights of the inhabitants. Israeli occupation, by its substantial violation of Palestinian rights, has itself operated as an inflaming agent that threatens the security of its administration of the territory, inducing reliance on more and more brutal practices to restore stability which in turn provokes the Palestinians even more. In effect, the illegality of the Israeli occupation regime itself set off an escalatory spiral of resistance and repression, and under these conditions all considerations of morality and reason establish a right of resistance inherent in the population. This right of resistance is an implicit legal corollary of the fundamental legal rights associated with the primacy of sovereign identity and assuring the humane protection of the inhabitants.”⁹

I wholeheartedly subscribe to the view expressed by Professors Falk and Weston, that the breaches by both sides of the fundamental rules of humanitarian law reside in “the illegality of the Israeli occupation regime itself”. Occupation, as an illegal and temporary situation, is at the heart of the whole problem. The only viable prescription to end the grave violations of international humanitarian law is to end occupation.

The Security Council has more than once called for ending the occu-

⁹ Falk and Weston, “The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza”, *International Law and the Administration of Occupied Territories*, E. Playfair, ed., 1992, Chap. 3, pp. 146-147.

pation. On 30 June 1980, the Security Council reaffirmed “the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem” (S/RES/476 (1980)). Notwithstanding this clarion call, the Palestinians are still languishing under a heavy-handed, prolonged occupation.

3.2. The Court, in paragraph 135, rejected the contention that the principle of military necessity can be invoked to justify the construction of the wall. The Court held that:

“However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.” (Advisory Opinion, para. 135.)

I fully share this finding. Military necessities and military exigencies could arguably be advanced as justification for building the wall had Israel proven that it could perceive no other alternative for safeguarding its security. This, as the Court notes, Israel failed to demonstrate. A distinction must be drawn between building the wall as a security measure, as Israel contends, and accepting that the principle of military necessity could be invoked to justify the unwarranted destruction and demolition that accompanied the construction process. Military necessity, if applicable, extends to the former and not the latter. The magnitude of the damage and injury inflicted upon the civilian inhabitants in the course of building the wall and its associated régime is clearly prohibited under international humanitarian law. The destruction of homes, the demolition of the infrastructure, and the despoilment of land, orchards and olive groves that has accompanied the construction of the wall cannot be justified under any pretext whatsoever. Over 100,000 civilian non-combatants have been rendered homeless and hapless.

It is a fact that the law of belligerent occupation contains clauses which confer on the occupying Power a limited leeway for military necessities and security. As in every exception to a general rule, it has to be interpreted in a strict manner with a view to preserving the basic humanitarian considerations. The Secretary-General reported to the General Assembly on 24 November 2003 that he recognizes “Israel’s right and duty to protect its people against terrorist attacks. However, that duty should not be carried out in a way that is in contradiction to international law . . .” (A/ES-10/248, para. 30.)

The jurisprudence of the Court has been consistent. In the 1949 *Corfu Channel* case, the Court referred to the core and fabric of the rules of humanitarian law as “elementary considerations of humanity, even more exacting in peace than in war” (*Corfu Channel, Merits, Judgment, 1949, I.C.J. Reports 1949*, p. 22). In the case concerning *Legality of the Threat or Use of Nuclear Weapons*, the Court held that

“these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law” (*I.C.J. Reports 1996 (I)*, p. 257, para. 79).

In the final analysis, I have reached the same conclusion as Professor Michael Schmitt, that

“Military necessity operates within this paradigm to prohibit acts that are not militarily necessary; it is a principle of limitation, not authorization. In its legal sense, military necessity justifies nothing.”¹⁰

The Court reached the same conclusion. The Court held that

“In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.” (Advisory Opinion, para. 140.)

3.3. It is relevant to recall, moreover, that the reading of the reports by the two Special Rapporteurs, John Dugard and Jean Ziegler, leaves no doubt that as an occupying Power, Israel has committed grave breaches. The pattern and the magnitude of the violations committed against the non-combatant civilian population in the ancillary measures associated with constructing the wall, are, in my view, “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” (Fourth Geneva Convention, Art. 147). In the area of extending protection to civilians, the rules of international humanitarian law have progressively developed since the conclusion of the Geneva Conventions and Additional Protocols. It is submitted that the Court should have contributed to the development of the rules of *ius in bello* by characterizing the destruction committed in the course of building the wall as grave breaches.

3.4. The Court underlined the paramount importance of the right to self-determination in our contemporary world and held in paragraph 88: “The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 102, para. 29).” Moreover, the Court notes that the route chosen for the wall and the measures taken “severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right” (Advisory Opinion, para. 122). This legally authoritative dictum, which has my full support, was confined to the reasoning.

¹⁰ M. N. Schmitt, “Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict” (1998), 19 *Michigan Journal of International Law*, p. 1080.

The legal consequences that flow for all States from measures which severely impede the exercise by the Palestinians of an *erga omnes* right, should, in my view, have been included in the *dispositif*.

CONCLUSION

I now approach my final comment. It is a reflection on the future. The Court, in paragraph 162, observes that in its view

“this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973)” (Advisory Opinion, para. 162).

This finding by the Court reflects a lofty objective that has eluded the international community for a very long time. Since 22 November 1967, all efforts have been aimed at ensuring the implementation of Security Council resolution 242 (1967) which was adopted unanimously. In the course of its 37-year lifespan, Security Council resolution 242 (1967) has been both praised and vilified. Yet detractors and supporters alike agree that the balance in its provisions represent the only acceptable basis for establishing a viable and just peace. The Security Council, in the aftermath of the 1973 armed conflict, adopted resolution 338 (1973), which called upon the parties concerned “to start immediately after the ceasefire the implementation of Security Council resolution 242 (1967) in all of its parts” (emphasis added). The obligations emanating from these resolutions are obligations of result of paramount importance. They are syn-lagmatic obligations in which the obligation of each party constitutes the *raison d’être* of the obligation of the other. It is legally wrong and politically unsound to transform this obligation of result into a mere obligation of means, confining it to a negotiating process. Any attempt to tamper with such solemn obligation would not contribute to an outcome based on a solid foundation of law and justice.

The establishment of “a just and lasting peace”, as called for in Security Council resolution 242 (1967), necessitates the full implementation of the corresponding obligations by the two parties. The Advisory Opinion should herald a new era as the first concrete manifestation of a meaningful administration of justice related to Palestine. It is hoped that it will provide the impetus to steer and direct the long-dormant quest for a just peace.

(Signed) Nabil ELARABY.

**Frontier Dispute (Burkina Faso *v.* Republic of Mali),
Judgment, I.C.J. Reports 1986**

INTERNATIONAL COURT OF JUSTICE

YEAR 1986

22 December 1986

1986
22 December
General List
No. 69

CASE CONCERNING THE FRONTIER DISPUTE (BURKINA FASO/REPUBLIC OF MALI)

Frontier dispute — Frontiers inherited from the colonial period — Applicable law — Principle of uti possidetis juris — Nature and scope of the principle — Critical date — Place of colonial law (French droit d'outre-mer) — Role of equity infra legem — Form of equity which would constitute a method of interpretation of the law.

Conduct of a Party — Argument from acquiescence — Unilateral act of one government — Intention to become bound — Interpretation of the act in the light of all the factual circumstances and of the possibility of becoming bound by other means — Acceptance of the application to the dispute of certain principles and rules — Rules expressly recognized by the contesting States.

Interests of a third State — Frontier ending in a tripoint — Judicial competence and exercise of the judicial function — Distinction between the determination of a land boundary and the identification of the rules applicable to the delimitation of the continental shelf — Duty of the Chamber to rule upon the whole of the petition. Titles and evidence — Difficulties relating to evidence — Legislative and regulatory texts — Value of the texts as evidence independently of their validity in the internal legal order — Cartographic materials — Maps as extrinsic evidence — Possibility of a map being one of the elements constituting the expression of the State's intentions — Value of maps as evidence — Technical reliability — Neutrality of their sources — Problems raised in this case by the cartographic materials (incompatibility, deficiencies) — The "colonial effectivités" as evidence of the effective exercise of territorial jurisdiction — Correspondence among the colonial administrators.

Equitable application of a rule of law — Local agreement not approved by the competent authorities on the international plane — Circumstances in which the agreement was reached.

JUDGMENT

Present: Judge BEDJAOUI, President of the Chamber; Judges LACHS, RUDA; Judges ad hoc LUCHAIRE, ABI-SAAB; Registrar TORRES BERNARDEZ.

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In the case concerning the frontier dispute,
between

Burkina Faso,
represented by

H.E. Mr. Ernest Ouedraogo, Minister for Territorial Administration and Security,

as Agent,

H.E. Mr. Emmanuel Salembere, Ambassador,
as Co-Agent,

H.E. Mr. Eduardo Jiménez de Aréchaga, formerly Professor of International Law at the University of Montevideo,
as Adviser,

Mr. Jean-Pierre Cot, professeur de droit international et de sociologie politique à l'Université de Paris I,

Mr. Alain Pellet, professeur à l'Université de Paris-Nord et à l'Institut d'études politiques de Paris,

as Counsel and Advocates,

Mr. Souleymane Diallo, Counsellor at the Embassy of Burkina Faso in Paris,

as Counsel,

Mr. Jean Gateaud, ingénieur général géographe (retired),
as Expert,

Mr. Alain Pipart, assistant à l'Université de Paris-Nord, avocat à la cour d'appel de Paris,

Mr. Stephen Marquardt, graduate in Law of the University of Bonn,
as Advisers,

Mr. Jean-Matthieu Cot,

Mrs. Angélique Bouda,

Mrs. Miriam Dauba,

Mrs. Martine Soulier-Moroni,

and

the Republic of Mali,

represented by

H.E. Lieutenant-Colonel Abdourahmane Maiga, Minister for Territorial Administration and Basic Development,

as Agent,

H.E. Mr. Diango Cissoko, Minister of Justice, Keeper of the Seals,
as Special Adviser,

H.E. Mr. Yaya Diarra, Ambassador, Minister for Foreign Affairs and International Co-operation,
as Co-Agent,

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Mr. René-Jean Dupuy, professeur au Collège de France,
 Mr. Pierre-Marie Dupuy, professeur à l'Université de droit, d'économie et de sciences sociales de Paris,
 Mr. Raymond Ranjeva, de l'Académie malgache, président de l'établissement d'enseignement supérieur de droit, d'économie, de gestion et de sociologie de l'Université de Madagascar,
 Mr. Jean Salmon, professeur à l'Université libre de Bruxelles,
 as Counsel,

Mr. Diadié Traoré, National Director of Cartography and Topography,
 as Scientific and Technical Adviser,
 Mr. Sinaly Coulibaly, Legal Adviser at the Ministry of Foreign Affairs and International Co-operation,

as Legal Adviser,
 Mr. Aguibou Diarra, Head of the Frontier Section of the Ministry of Territorial Administration and Basic Development,

Mr. Mamadou Kone, Head of the Legal Department in the Government Secretariat,

Mr. N'Tji Laïco Traoré, Chargé d'affaires a.i., Embassy of Mali in Brussels,

Mr. Mahamadou Maiga, Administrative Officer (retired),
 Mr. Daba Diawara, formerly Head of the Constitutional Division of the Supreme Court

as Advisers,

Mr. Paul Delmond, Chief Administrative Officer for Overseas Affairs (retired),

Mr. Drissa Sangare, Ministry of Territorial Administration and Basic Development,

Mr. Amadou Billy Soussoko, Ministry of Territorial Administration and Basic Development,

Mr. Aliou Toure, National Office of Cartography and Topography,
 Mr. Oumar Kansa Ongoïba, Administrative Officer ; Cabinet attaché, Ministry of Territorial Administration and Basic Development,

Mrs. Maciré Yattassaye, Journalist attached to the Ministry of Territorial Administration and Basic Development,
 as Experts,

THE CHAMBER OF THE INTERNATIONAL COURT OF JUSTICE formed to deal with the case above-mentioned,

composed as above,
 after deliberation,

delivers the following Judgment :

1. By a joint letter dated 14 October 1983, filed in the Registry of the Court on 20 October 1983, the Minister for Foreign Affairs and International Co-operation of the Republic of Mali and the Minister for Foreign Affairs of the Republic

of Upper Volta transmitted to the Registrar a Special Agreement which was dated 16 September 1983 and had entered into force the same day, by which Upper Volta and Mali had agreed to submit to a chamber of the Court, to be constituted pursuant to Article 26, paragraph 2, of the Statute of the Court, a dispute relating to the delimitation of part of their common frontier.

2. The text of the Special Agreement of 16 September 1983 is as follows :

"The Government of the Republic of the Upper Volta and the Government of the Republic of Mali,

Desiring to achieve as rapidly as possible a settlement of the frontier dispute between them, based in particular on respect for the principle of the intangibility of frontiers inherited from colonization, and to effect the definitive delimitation and demarcation of their common frontier,

Referring to the Agreement concluded between them with a view to the settlement of the frontier dispute between them,

Have agreed as follows :

Article I

Subject of the Dispute

1. The question put before the Chamber of the International Court of Justice formed in accordance with Article II below is as follows :

'What is the line of the frontier between the Republic of the Upper Volta and the Republic of Mali in the disputed area as defined below?'

2. The disputed area consists of a band of territory extending from the sector Koro (Mali) Djiibo (Upper Volta) up to and including the region of the Béli.

Article II

Formation of a Chamber of the International Court of Justice

The Parties submit the question put in Article I to a chamber of the International Court of Justice (hereinafter called 'the Chamber') formed pursuant to Article 26, paragraph 2, of the Statute of the International Court of Justice (hereinafter called 'the Court') and to the provisions of the present Special Agreement.

Article III

Procedure

1. The Parties agree that their pleadings and their oral argument shall be presented in the French language.

2. Without prejudice to any question as to the burden of proof, the Parties request the Chamber to authorize the following procedure for the pleadings :

(a) a Memorial filed by each Party not later than six months after the adoption by the Court of the Order constituting the Chamber ;

- (b) a Counter-Memorial filed by each Party not later than six months after exchange of the Memorials ;
- (c) any other pleading which the Chamber may find to be necessary.
3. The pleadings submitted to the Registrar shall not be transmitted to the other Party until the Registrar has received the corresponding pleading from the other Party.

Article IV

Judgment of the Chamber

1. The Parties accept the Judgment of the Chamber given pursuant to the Special Agreement as final and binding upon them.
2. Within one year after that Judgment the Parties shall effect the demarcation of the frontier.
3. The Parties request the Chamber to nominate, in its Judgment, three experts to assist them in the demarcation operation.

Article V

Entry into Force, Publication and Notification

1. The present Special Agreement shall come into force on the date of its signature.
2. It shall be registered with the Secretariat of the United Nations pursuant to Article 102 of the United Nations Charter by the more diligent Party.
3. In accordance with Article 40 of the Statute of the Court, the present Special Agreement shall be notified to the Registrar of the Court by a joint letter from the Parties.
4. If such notification is not effected in accordance with the preceding paragraph within one month from the entry into force of the present Special Agreement, it shall be notified to the Registrar of the Court by the more diligent Party."
3. Pursuant to Article 40, paragraph 3, of the Statute of the Court, and to Article 42 of the Rules of Court, copies of the notification and Special Agreement were transmitted to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.
4. By a letter dated 29 August 1984, filed with the Registry on 4 September 1984, the Agent of Burkina Faso (formerly the Upper Volta) informed the Court of the change of name of his country, in force from 4 August 1984.
5. By the same letter, the Agent of Burkina Faso notified to the Court the choice by his Government of Mr. François Luchaire, Professor at the University of Paris I, to sit as judge *ad hoc* ; and by a letter of 18 March 1985, the Co-Agent of Mali notified his Government's choice of Mr. Georges Abi-Saab, Professor at the Graduate Institute of International Studies, Geneva, to sit as judge *ad hoc*.
6. The Parties, duly consulted by the President on 14 March 1985 concerning the composition of the Chamber, expressed their wish for the formation of a Chamber of five Members, two of whom would be judges *ad hoc* chosen by them

pursuant to Article 31 of the Statute of the Court, and confirmed their wish that the Court should proceed immediately to the constitution of the Chamber.

7. By an Order dated 3 April 1985 the Court, having noted the choice of a judge *ad hoc* by each of the Parties, decided to accede to the request of the Governments of Burkina Faso and the Republic of Mali for the constitution of a special Chamber of five judges to deal with the case, and declared that Judges Lachs, Ruda and Bedjaoui had been elected to form, with the above-named judges *ad hoc*, such a Chamber, and that it was duly constituted with that composition.

8. By an Order made on 12 April 1985, pursuant to Article 92 of the Rules of Court, the President of the Court, referring to Article III, paragraph 2, of the Special Agreement, fixed 3 October 1985 as the time-limit for the filing of a Memorial by each Party. The Memorials in question were duly filed within the time-limit so fixed. By an Order dated 3 October 1985, the President of the Chamber, referring to Article III, paragraph 2, of the Special Agreement, fixed 2 April 1986 as the time-limit for the filing of a Counter-Memorial by each Party, reserving the subsequent procedure for further decision.

9. Before the expiry of the time-limit for the filing of the Counter-Memorials, the Parties submitted to the Chamber parallel requests for the indication of provisional measures. The Chamber held a public sitting on 9 January 1986 for the purpose of hearing the oral observations of the Parties and, on 10 January 1986, made an Order whereby it indicated certain provisional measures ; called upon the Agents of the Parties to notify the Registrar without delay of any agreement concluded between their Governments within the scope of point 1 D of the same Order ; and decided that, pending its final judgment, and without prejudice to the application of Article 76 of the Rules, the Chamber would remain seized of the questions covered by that Order.

10. In a letter dated 24 January 1986, and pursuant to point 2 of the above-mentioned Order indicating provisional measures, the Co-Agent of the Republic of Mali transmitted to the Registrar the final communiqué, issued on 18 January 1986, of the first extraordinary conference of Heads of State and Government of the member countries of ANAD (*Accord de non-agression et d'assistance en matière de défense*). That communiqué reported that the Heads of State of Burkina Faso and the Republic of Mali had agreed "to withdraw all their armed forces from either side of the disputed area and to effect their return to their respective territories".

11. On 2 April 1986, within the time-limit fixed for that purpose, the Parties filed their Counter-Memorials. On the same day, they stated that they did not wish to present any further written pleadings. Since the Chamber did not consider that any further written pleadings were necessary, the case was ready for hearing.

12. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Chamber, having ascertained the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public with effect from the opening of the oral proceedings.

13. After the closure of the written proceedings both Parties produced further documents under Article 56 of the Rules. The Parties having been duly consulted pursuant to Articles 31 and 58, paragraph 2, of the Rules of Court, public sittings were held on 16-21 June and 24-26 June 1986, at which the Chamber was addressed by the following :

For Burkina Faso :

H.E. Mr. Ernest Ouédraogo,
Mr. Souleymane Diallo,
H.E. Mr. Emmanuel Salembere,
Mr. Alain Pellet,
Mr. Jean-Pierre Cot,
Mr. Jean Gateaud.

For the Republic of Mali : H.E. Lieutenant-Colonel Abdourahmane Maiga,

Mr. Jean Salmon,
Mr. Raymond Ranjeva,
Mr. Pierre-Marie Dupuy,
Mr. Diadié Traoré,
Mr. Paul Delmond.

14. At the hearing held on the morning of 26 June 1986 Burkina Faso, which had already completed its last round of oral argument, requested the Chamber to enable it to comment briefly upon the statement made the same day by a member of the Malian delegation. The Chamber decided to accede to that request and to authorize the Republic of Mali to comment in turn upon the observations to be made at that hearing by Burkina Faso, either orally, before the closure of the oral proceedings, or in writing within the ensuing 48 hours. The Republic of Mali conveyed to the Registry, within the prescribed time-limit, a written reply to the observations of the other Party, to which that reply was immediately communicated.

*

15. During the proceedings, the following Submissions were presented by the Parties :

On behalf of Burkina Faso,

in the Memorial and Counter-Memorial and at the hearing of 24 June 1986 (afternoon) :

"1. Burkina Faso respectfully requests the Chamber of the International Court of Justice, formed in accordance with the Special Agreement of 16 September 1983, to adjudge and declare that the course of the frontier between Burkina Faso and the Republic of Mali is constituted by the following line :

1. West of the point with the geographical co-ordinates :

longitude 0° 40' 47" W
latitude 15° 00' 03" N

the line is as shown on the 1:200,000 scale map of the French Institut géographique national (1960 edition), the villages of Dioulouna, Oukoulou, Agoulourou and Koubo being located in Burkinabe territory.

2. East of the point with the geographical co-ordinates :

longitude 0° 40' 47" W
latitude 15° 00' 03" N

the line corresponds to the information given in letter 191 CM2 of

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19 February 1935, and on the 1:500,000 scale map, 1925 edition, as far as the northern point of the pool of In Abao.

3. From the northern point of the pool of In Abao, the line follows the course shown on the 1:500,000 scale map, 1925 edition, leaving the region of the Béli to Burkina Faso, as far as the tripoint with the frontier of Niger, which is formed by the heights of N'Gourma, situated to the north of the Kabia ford.

II. Burkina Faso respectfully requests the Chamber to appoint three experts to assist the Parties for the purpose of the demarcation operation, which is to be completed within one year of the delivery of the judgment."

On behalf of the Republic of Mali,

in the Memorial and Counter-Memorial :

"The Government of the Republic of Mali submits as follows :

May it please the Chamber

To state that the frontier line between the Republic of Mali and Burkina Faso in the disputed area runs through the following points :

- Lofou,
- the mosque-shaped enclosure situated 2 kilometres to the north of Diguél,
- a point situated 3 kilometres to the south of Kouinia,
- the Selba baobab,
- the Tondigaria,
- Fourfaré Tiauga,
- Fourfaré Wandé,
- Garrol,
- Gountouré Kiri,
- a point to the east of the pool of Kétiouaire, having the following geographical co-ordinates :

longitude 0° 44' 47" W
latitude 14° 56' 52" N

- the pool of Raf Naman,

and from that point follows the marigot passing, in particular, through the pool of Fadar-Fadar, the pool of In Abao, the pool of Tin Akoff and the pool of In Tangoum, terminating at the Kabia ford";

at the hearing of 26 June 1986 (afternoon) :

"The Government of the Republic of Mali submits as follows :

May it please the Chamber

1. To state that the frontier line between the Republic of Mali and Burkina Faso in the disputed area runs through the following points :

- Lofou,
- the mosque-shaped enclosure situated 2 kilometres to the north of Diguél,
- a point situated 3 kilometres to the south of Kouinia,

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- the Selba baobab,
 - the Tondigaria,
 - Fourfaré Tiaiga,
 - Fourfaré Wandé,
 - Gariol,
 - Gountouré Kiri,
 - a point to the east of the pool of Kétiouaire, having the following geographical co-ordinates :
 - longitude 0° 44' 47" W
 - latitude 14° 56' 52" N
 - the pool of Raf Namat,
- and from that point follows the marigot passing, in particular, through the pool of Fadar-Fadar, the pool of In Abao, the pool of Tin Akoff and the pool of In Tangoum, terminating at the Kabia ford.
2. To refrain from determining the tripoint between the Republic of Mali, Burkina Faso and Niger.
 3. To nominate, in its Judgment, three experts to assist the Parties in the demarcation operation (Art. IV, para. 3, of the Special Agreement of 16 September 1983)."

* * *

16. The task entrusted to the Chamber in this case by the Special Agreement concluded between the two Parties on 16 September 1983 is that of indicating the line of the frontier between Burkina Faso and the Republic of Mali (hereinafter called "Mali") in the disputed area, as defined in that Special Agreement. The two States have a common frontier of 1,380 kilometres according to Burkina Faso and 1,297 kilometres according to Mali, of which almost 900 kilometres according to Burkina Faso and almost 1,022 kilometres according to Mali have been successfully delimited by agreement between the Parties. The disputed area is defined by the Special Agreement as "a band of territory extending from the sector Koro (Mali) Djibo (Upper Volta) up to and including the region of the Béli". The Béli is the largest of the temporary watercourses in the region. It originates in the eastern slopes of the Hombori mountains and flows to the south-east before joining the Niger river outside the disputed area. In the dry season it consists of a chain of 11 pools. In their submissions to the Chamber, each of the Parties indicated the frontier line which it considered well-founded in law (these lines and the topography of the region are shown on sketch-map No. 1¹); according to either contention, the disputed frontier runs in an approximately west-east direction between Mali to the north and Burkina Faso to the south. The end-point of the frontier to the east, the position of which has not been determined, is also a point on the frontier between Niger and the two disputant States and is, accord-

¹ A copy of this sketch-map will be found in a pocket at the end of this fascicle or inside the back cover of the volume of *I.C.J. Reports 1986*. [Note by the Registry.]

ingly, a tripoint. By the Niamey Protocol of 23 June 1964 between Upper Volta and Niger, those two States agreed that, for the purpose of delimiting their common frontier, they would have recourse to certain documents which were mentioned in the Protocol and treated as basic documents. However, the two States have not as yet carried out any delimitation operations. As for the frontier between Mali and Niger, it was decided at a recent meeting between representatives of those two States that bilateral negotiations would be set in train with a view to determining it, but no agreement has at present been concluded on the subject. In the present case, Mali maintains, for reasons to be considered below, that the Chamber must refrain from taking any decision on the position of the above-mentioned tripoint. Burkina Faso, on the other hand, maintains that such a decision is necessary as an integral part of the task entrusted to the Chamber.

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17. The Parties have argued at length over how the present dispute is to be classified in terms of a distinction sometimes made by legal writers between "frontier disputes" or "delimitation disputes", and "disputes as to attribution of territory". According to this distinction, the former refer to delimitation operations affecting what has been described as "a portion of land which is not geographically autonomous" whereas the object of the latter is the attribution of sovereignty over the whole of a geographical entity. Both Parties seem ultimately to have accepted that the present dispute belongs rather to the category of delimitation disputes, even though they fail to agree on the conclusions to be drawn from this. In fact, however, in the great majority of cases, including this one, the distinction outlined above is not so much a difference in kind but rather a difference of degree as to the way the operation in question is carried out. The effect of any delimitation, no matter how small the disputed area crossed by the line, is an apportionment of the areas of land lying on either side of the line. In the present case, it may be noted that the Special Agreement, in Article I, refers not merely to a line to be drawn, but to a disputed "area", which it defines as consisting of a "band" of territory encompassing the "region" of the Béli. Moreover, the effect of any judicial decision rendered either in a dispute as to attribution of territory or in a delimitation dispute, is necessarily to establish a frontier. It is not without interest that certain recent codifying conventions have used formulae such as a treaty which "establishes a boundary" or a "boundary established by a treaty" to cover both delimitation treaties and treaties ceding or attributing territory (cf. Vienna Convention on the Law of Treaties, Art. 62; Vienna Convention on Succession of States in respect of Treaties, Art. 11). In both cases, a clarification is made of a given legal situation with declaratory effect from the date of the legal title upheld by the court. This clarification is itself a new element; it was because the parties wished to see that element intro-

duced that they went to court at all. If there had been no dispute or uncertainty, they would not have wished to do so. Hence it is not so much the nature and qualification of the present dispute as the Statute of the Court and the terms of the Special Agreement which must determine the nature and extent of the Chamber's task and functions in this case.

18. The Chamber also feels obliged to dispel a misunderstanding which might arise from this distinction between "delimitation disputes" and "disputes as to attribution of territory". One of the effects of this distinction is to contrast "legal titles" and "effectivités". In this context, the term "legal title" appears to denote documentary evidence alone. It is hardly necessary to recall that this is not the only accepted meaning of the word "title". Indeed, the Parties have used this word in different senses. In fact, the concept of title may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right. The Chamber will rule at the appropriate juncture on the relevance of the evidence produced by the Parties for the purpose of establishing their respective rights in this case. It will now turn to the question of the rules applicable to the case; in so doing, it will, *inter alia*, ascertain the source of the rights claimed by the Parties.

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19. The characteristic feature of the legal context of the frontier determination to be undertaken by the Chamber is that both States involved derive their existence from the process of decolonization which has been unfolding in Africa during the past 30 years. Their territories, and that of Niger, were formerly part of the French colonies which were grouped together under the name of French West Africa (AOF). Considering only the situation which prevailed immediately before the accession to independence of the two States, and disregarding previous administrative changes, it can be said that Burkina Faso corresponds to the colony of Upper Volta, and the Republic of Mali to the colony of Sudan (formerly French Sudan). It is to be supposed that the Parties drew inspiration from the principle expressly stated in the well-known resolution (AGH/Res. 16 (I)), adopted at the first session of the Conference of African Heads of State and Government, meeting in Cairo in 1964, whereby the Conference solemnly declared that all member States of the Organization of African Unity "solemnly . . . pledge themselves to respect the frontiers existing on their achievement of national independence", inasmuch as, in the preamble to their Special Agreement, they stated that the settlement of the dispute by the Chamber must be "based in particular on respect for the principle of the intangibility of frontiers inherited from colonization". It is clear from this text, and from the pleadings and oral arguments of the

Parties, that they are in agreement as regards both the applicable law and the starting-point for the legal reasoning which is to lead to the determination of the frontier between their territories in the disputed area.

20. Since the two Parties have, as noted above, expressly requested the Chamber to resolve their dispute on the basis, in particular, of the "principle of the intangibility of frontiers inherited from colonization", the Chamber cannot disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers. Although there is no need, for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes to emphasize its general scope, in view of its exceptional importance for the African continent and for the two Parties. In this connection it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.

21. It was for this reason that, as soon as the phenomenon of decolonization characteristic of the situation in Spanish America in the 19th century subsequently appeared in Africa in the 20th century, the principle of *uti possidetis*, in the sense described above, fell to be applied. The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.

22. The elements of *uti possidetis* were latent in the many declarations made by African leaders in the dawn of independence. These declarations confirmed the maintenance of the territorial status quo at the time of independence, and stated the principle of respect both for the frontiers deriving from international agreements, and for those resulting from mere internal administrative divisions. The Charter of the Organization of African Unity did not ignore the principle of *uti possidetis*, but made only indirect reference to it in Article 3, according to which member States solemnly affirm the principle of respect for the sovereignty and territorial integrity of every State. However, at their first summit conference after the creation of the Organization of African Unity, the African Heads of State, in their Resolution mentioned above (AGH/Res. 16 (I)), adopted in Cairo

in July 1964, deliberately defined and stressed the principle of *uti possidetis juris* contained only in an implicit sense in the Charter of their organization.

23. There are several different aspects to this principle, in its well-known application in Spanish America. The first aspect, emphasized by the Latin genitive *juris*, is found in the pre-eminence accorded to legal title over effective possession as a basis of sovereignty. Its purpose, at the time of the achievement of independence by the former Spanish colonies of America, was to scotch any designs which non-American colonizing powers might have on regions which had been assigned by the former metropolitan State to one division or another, but which were still uninhabited or unexplored. However, there is more to the principle of *uti possidetis* than this particular aspect. The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term. This is true both of the States which took shape in the regions of South America which were dependent on the Spanish Crown, and of the States Parties to the present case, which took shape within the vast territories of French West Africa. *Uti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs.

24. The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another, or indeed a colonial territory from the territory of an independent State, or one which was under protectorate, but had retained its international personality. There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*. Hence the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself, are evidently declaratory rather than constitutive: they recognize and confirm an existing principle, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent.

25. However, it may be wondered how the time-hallowed principle has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and

the emergence of new States have been accompanied by a certain questioning of traditional international law. At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.

26. Thus the principle of *uti possidetis* has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms implied. Indeed it was by deliberate choice that African States selected, among all the classic principles, that of *uti possidetis*. This remains an undeniable fact. In the light of the foregoing remarks, it is clear that the applicability of *uti possidetis* in the present case cannot be challenged merely because in 1960, the year when Mali and Burkina Faso achieved independence, the Organization of African Unity which was to proclaim this principle did not yet exist, and the above-mentioned resolution calling for respect for the pre-existing frontiers dates only from 1964.

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27. In their pleadings and oral arguments, the two Parties have advanced conflicting views on the question whether equity can be invoked in the present case. They both agree that no use should be made of the Chamber's power, under Article 38 of the Statute, to decide the case *ex aequo et bono* if they had agreed to this. However, Mali urges that account should be taken of "that form of equity which is inseparable from the application of international law", which it sees as equivalent to equity *infra legem*. Although it did not object to this concept being resorted to, Burkina Faso considered that it was far from clear what the practical implications would be in this case. It emphasized that in the field of territorial boundary delimitation there is no equivalent to the concept of "equitable principles" so frequently referred to by the law applicable in the delimitation of maritime areas. Mali did not question this statement; it explained that what it had in mind was simply the equity which is a normal part of the due application of law.

28. It is clear that the Chamber cannot decide *ex aequo et bono* in this case. Since the Parties have not entrusted it with the task of carrying out an adjustment of their respective interests, it must also dismiss any possibility of resorting to equity *contra legem*. Nor will the Chamber apply equity *praeter legem*. On the other hand, it will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of

the law in force, and is one of its attributes. As the Court has observed : "It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law." (*Fisheries Jurisdiction, I.C.J. Reports 1974*, p. 33, para. 78 ; p. 202, para. 69.) How in practice the Chamber will approach recourse to this kind of equity in the present case will emerge from its application throughout this Judgment of the principles and rules which it finds to be applicable.

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29. The determination of a frontier line between two States is obviously a matter of international law, but the Parties both recognize also that the question has here to be appraised in the light of French colonial law, "*droit d'outre-mer*". Since the territories of the two States had been part of French West Africa, the former boundary between them became an international frontier only at the moment when they became independent. The line which the Chamber is required to determine as being that which existed in 1959-1960, was at that time merely the administrative boundary dividing two former French colonies, called *territoires d'outre-mer* from 1946 ; as such it had to be defined not according to international law, but according to the French legislation which was applicable to such *territoires*.

30. One clarification is, however, necessary as concerns the application of French *droit d'outre-mer*. By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery of State succession. International law — and consequently the principle of *uti possidetis* — applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State *as it is*, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title ; it stops the clock, but does not put back the hands. Hence international law does not effect any renvoi to the law established by the colonizing State, nor indeed to any legal rule unilaterally established by any State whatever ; French law — especially legislation enacted by France for its colonies and *territoires d'outre-mer* — may play a role not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the "colonial heritage", i.e., the "photograph of the territory" at the critical date.

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31. With a view to a proper understanding of what follows, it should be

recalled that from the beginning of the century up to the entry into force of the French Constitution of 27 October 1946, the territorial administration of French West Africa was centralized. It was headed by a governor-general, and was divided into colonies ; the power to create or abolish these belonged to the executive in Paris. At the head of each colony was a lieutenant-governor. The colonies were themselves made up of basic units called *cercles* which were administered by *commandants de cercle* ; the creation and abolition of the *cercles* were the sole prerogative of the governor-general who decided their overall extent. Each *cercle* in turn was composed of *subdivisions*, administered by *chefs de subdivision*. Finally, the *subdivisions* comprised *cantons*, which grouped together a number of villages. The creation and abolition of *subdivisions* and *cantons* within any particular *cercle* came within the jurisdiction of the lieutenant-governor of the colony of which the *cercle* formed part.

32. For the purpose of determining in broad terms what for each of the two Parties was the colonial heritage to which the *uti possidetis* was to apply, the origins of the French colonies concerned will be briefly retraced. For this purpose, however, it is unnecessary to go further back in the history of the colonies of French West Africa than 1919. At that time, the present territories of Mali and Burkina Faso both formed part of the colony of Upper Senegal and Niger. By virtue of a decree of the President of the French Republic dated 1 March 1919, the *cercles* of Gaoua, Bobo-Dioulasso, Dédougou, Ouagadougou, Dori and Fada N'Gourma, which had until then been part of Upper Senegal and Niger, were established as a separate colony with the name of Upper Volta. By a decree of 4 December 1920, the remaining territories, comprising what was left of Upper Senegal and Niger, were given the name of French Sudan, and by a decree of 13 October 1922 the Civil Territory of the Niger became an independent colony. The colony of French Sudan (or Sudan) continued to exist as such, or as a *territoire d'outre-mer*, until 1959 when it became the Sudanese Republic, and then achieved independence, as the Federation of Mali, on 20 June 1960. On the other hand, the decree of 1 March 1919 which had created Upper Volta was rescinded by a decree of 5 September 1932, and the *cercles* which had comprised Upper Volta were incorporated, in whole or in part, into Niger and into French Sudan or the Ivory Coast. The Chamber refers to paragraph 73 below and to sketch-map No. 2, which shows the distribution of the *cercles* in the disputed frontier region. Upper Volta was reconstituted in 1947 by the law 47-1707 of 4 September 1947, which rescinded outright the decree of 5 September 1932 that had abolished the colony of Upper Volta, and stated that the boundaries of "the re-established territory of Upper Volta" were to be "those of the former colony of Upper Volta on 5 September 1932". It was this reconstituted Upper Volta which subsequently obtained independence on 5 August 1960, and took the name of Burkina Faso in 1984.

33. For both Parties, the problem is to ascertain what is the frontier which was inherited from the French administration, that is, the frontier which existed at the moment of independence. However, their views diverge somewhat as to the exact date to be chosen for that purpose. In the opinion of Burkina Faso, the date to be taken into consideration is that of the accession of each Party to independence : 20 June 1960 for Mali and 5 August 1960 for Burkina Faso. In Mali's opinion, it is necessary to go back to the "last date on which the French colonial authorities participated in the exercise of jurisdiction for administrative organization", a date which, for the reasons explained in its Memorial, Mali fixes at 30 January 1959 for the Sudanese Republic and 28 February 1959 for Upper Volta. The Parties have however, while holding to their respective contentions as to the legal grounds which warrant the choice of these dates, ultimately admitted that the point has no practical implications for the case. They are requesting the Chamber to ascertain what, in the disputed area, was the frontier between the *territoires d'outre-mer* of Sudan and of Upper Volta as it existed in 1959-1960. Although it was said on a number of occasions, during the colonial period, that there was no frontier which was fully determined by direct or delegated legislation, the two Parties both agree that when they became independent there was a definite frontier. Both of them also accept that no modification of the frontier took place between January 1959 and August 1960, or has taken place since.

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34. The Parties have expounded at length the origins of the frontier dispute which is presently before the Chamber. Since however the line of the frontier has to be defined as it existed in the years 1959-1960, and the Parties agree that no legal validity attaches to any subsequent acts of administration which may have been performed by either of them on the territory of the other, a review of the frontier incidents and the efforts made to bring the dispute to an end would hardly be pertinent. Nevertheless, one Burkinabe argument warrants particular attention. This argument is based on the conduct of the Malian Government during the negotiations which led to agreements being concluded for the delimitation of the 900 or 1,022 kilometres of frontier which are no longer in dispute, and on that Government's attitude towards the work of a Mediation Commission of the Organization of African Unity which sat in 1975. According to Burkina Faso, Mali accepted as binding the solution to the dispute outlined by that Commission. Since this argument from acquiescence would, if correct, make it unnecessary to endeavour to establish the frontier inherited from the colonial period, it should be dealt with at the outset as a preliminary question.

35. Very soon after achieving independence, the Parties set up bilateral

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negotiating machinery with a view to resolving their frontier problems. Thus, as early as 29 November 1961, they gave institutional shape to the regular meetings already held during the colonial period between the heads of the frontier districts, by establishing a "mixed commission composed of the *chefs de circonscription*". Subsequently, on 25 February 1964, they instituted a "joint commission" comprising for each State a government delegate, a geographer, a topographer and the *commandants* of the frontier *cercles*, its task being to make proposals by 15 June 1964 "for the delimitation of the frontier on the basis of the preparatory work of the *chefs de circonscription*". This commission was replaced by a "standing joint commission" created on 8 May 1968, which comprised the Ministers of the Interior together with representatives of various ministries of both countries. The task entrusted to this latter body was a much broader one : general co-operation between the two countries. Finally, in the same year, a conference of Ministers of the Interior of both Parties created a "mixed technical commission", comprising for each State a government representative, a topographer, a geographer and the *chefs de circonscription* concerned. The task of this commission was "to survey and identify the frontier in accordance with the pre-independence documents held by the Governments of Mali and Upper Volta". The Parties have produced a number of records and documents emanating from these bodies.

36. Following an armed conflict between the two countries which broke out on 14 December 1974, appeals were made for conciliation, notably by the head of State of Somalia, then President of the Organization of African Unity, and by the President of Senegal. On 26 December 1974, the Presidents of Upper Volta, Mali and Togo met at Lomé and decided to set up a Mediation Commission composed of Togo, Niger, Guinea and Senegal. One of the tasks of the Commission as stated in the Lomé communiqué was that of "seeking a solution to the frontier dispute on the basis of existing legal documents". The Mediation Commission met on 6 and 7 January 1975 and set up a Military Sub-Commission and a Legal Sub-Commission ; the latter's role included "drawing up an initial draft proposal for submission to the Commission, comprising . . . an outline solution . . .". On 11 April 1975, the head of State of Mali granted an interview to the France-Press agency, during which he stated that :

"Mali extends over 1,240,000 square kilometres, and we cannot justify fighting for a scrap of territory 150 kilometres long. Even if the Organization of African Unity Commission decides objectively that the frontier line passes through Bamako, my Government will comply with the decision."

37. The Legal Sub-Commission presented its report to the Mediation Commission on 14 June 1975, suggesting "that the Parties should accept the following . . .". Paragraph A refers to the implementation of the prin-

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ciple of the intangibility of colonial frontiers, and to the use for that purpose of texts and maps. In paragraph B, the Sub-Commission presents specific proposals for the frontier line. On 17 and 18 June 1975, the Mediation Commission met at Lomé. With the participation of the Presidents of Upper Volta and Mali, the Commission adopted a final communiqué stating that :

“Upper Volta and Mali undertake to bring their dispute to an end on the basis of the recommendations of the Mediation Commission.

The two Parties agree to the establishment by the Chairman of the Mediation Commission of a neutral technical committee . . . the task of this committee being to determine the location of the villages of Dionouga, Diolouna, Oukoulou and Koubo, to reconnoitre the frontier and to make proposals for its materialization to the Commission.”

On 10 July 1975, the heads of State of both Parties met again at Conakry, at the invitation of the President of the Republic of Guinea. In a joint declaration published on this occasion, the Parties

“welcome the efforts made and the results achieved by the Mediation Commission of the Organization of African Unity, and affirm their common intention to do their utmost to transcend [*dépasser*] these results, especially by facilitating the delimitation of the frontier between the two States in order to place the final seal on their reconciliation”.

The neutral technical committee which had been spoken of at the meeting of 17 and 18 June 1975 was in fact set up by the chairman of the Mediation Commission, but was unable to fulfil its function. To enable the committee to accomplish it, the proposal had been made that a systematic survey should be made of the frontier zone on the basis of aerial photographs, a task to be performed by the French Institut géographique national. Mali refused to grant the necessary authorizations for overflights of its territory, and despite further contacts between the Parties, this was how matters remained until the conclusion of the Special Agreement by which the case was brought before the Court.

38. The two Parties agree, in the first place, that the Mediation Commission of the Organization of African Unity was not a jurisdictional body, and lacked the power to take legally binding decisions ; in the second place, that the Commission never actually completed its work, since it took no steps formally to take note of the reports of its subcommissions, and submitted no definitive overall solution for consideration by the Parties in the context of its mediating functions. However, Burkina Faso argues that there was acquiescence by Mali in the solutions outlined in this context, on two distinct grounds. On the basis of the facts described above it argues, firstly, that the final communiqué of the Lomé summit conference of

27 December 1974, setting up the Mediation Commission, has to be treated as a genuine international agreement binding upon the States parties. Further, while admitting that the Mediation Commission was not empowered to render binding decisions, Burkina Faso alleges that the Reports of the Legal Sub-Commission, endorsed by the summit meeting of Heads of State or Government held at Lomé on 17 and 18 June 1975, became binding for Mali because Mali had proclaimed itself already bound by the report which might have been made by the Mediation Commission, by virtue of the declaration made by the President of Mali on 11 April 1975. The effect of the Lomé final communiqué of 18 June 1975, which according to Burkina Faso emanated from the enlarged Mediation Commission and is also an international agreement which the Parties are bound to observe, was to reinforce Mali's obligations in the matter. Mali challenges this interpretation of the statement of its President of 11 April 1975 ; it observes, in the first place, that the Commission would have to have had a power of decision, which was not legally the case, and in the second place, that the comment by Mali's head of State was merely “a witticism of the kind regularly uttered at press-conferences”, which implied “no more than that Mali is anxious to consider the Commission's recommendations with goodwill and in good faith”. Mali also challenges Burkina Faso's interpretation of the final communiqué of 18 June 1975. In Mali's view, the Mediation Commission did not, strictly speaking, make any recommendation, and the heads of State did not accept any predetermined line ; on the contrary, in entrusting a neutral technical committee with the task of determining the position of certain villages, reconnoitring the frontier, and making proposals to the Commission for its materialization, they instructed that committee to produce new proposals, and thus, in Mali's opinion, surely indicates that the proposals of the subcommissions were not final ones.

39. The statement of Mali's Head of State on 11 April 1975 was not made during negotiations or talks between the two Parties ; at most, it took the form of a unilateral act by the Government of Mali. Such declarations “concerning legal or factual situations” may indeed “have the effect of creating legal obligations” for the State on whose behalf they are made, as the Court observed in the *Nuclear Tests* cases (*I.C.J. Reports 1974*, pp. 267, 472). But the Court also made clear in those cases that it is only “when it is the intention of the State making the declaration that it should become bound according to its terms” that “that intention confers on the declaration the character of a legal undertaking” (*ibid.*). Thus it all depends on the intention of the State in question, and the Court emphasized that it is for the Court to “form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation” (*ibid.*, pp. 269, 474). In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court examined a communication transmitted by the Junta of National Reconstruction of Nicaragua to the Organization of American

States, in which the Junta listed its objectives ; but the Court was unable to find anything in that communication "from which it can be inferred that any legal undertaking was intended to exist" (*I.C.J. Reports 1986*, p. 132, para. 261). The Chamber considers that it has a duty to show even greater caution when it is a question of a unilateral declaration not directed to any particular recipient.

40. In order to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred. For example, in the *Nuclear Tests* cases, the Court took the view that since the applicant States were not the only ones concerned at the possible continuance of atmospheric testing by the French Government, that Government's unilateral declarations had "conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests" (*I.C.J. Reports 1974*, p. 269, para. 51 ; p. 474, para. 53). In the particular circumstances of those cases, the French Government could not express an intention to be bound otherwise than by unilateral declarations. It is difficult to see how it could have accepted the terms of a negotiated solution with each of the applicants without thereby jeopardizing its contention that its conduct was lawful. The circumstances of the present case are radically different. Here, there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method : a formal agreement on the basis of reciprocity. Since no agreement of this kind was concluded between the Parties, the Chamber finds that there are no grounds to interpret the declaration made by Mali's head of State on 11 April 1975 as a unilateral act with legal implications in regard to the present case.

41. The second argument advanced by Burkina Faso to establish acquiescence by Mali concerns the principles of delimitation approved by the Legal Sub-Commission of the Organization of African Unity Mediation Commission. In its report, the Sub-Commission did not refer solely to the principle of the intangibility of colonial frontiers ; it also defined, for the purpose of applying it, the appropriate method of appraising the respective weight of the evidence produced – specifically, the texts on the one hand and the maps on the other –, and of contrasting or reconciling these where necessary. Burkina Faso considers that the principles adopted by the Sub-Commission in this matter were the same as those which it contends should be applied to the delimitation of the whole of its frontier with Mali. It also claims that Mali agreed to these principles being taken into consideration for the purpose of delimiting the greater part of the common frontier. It concludes therefore that Mali may not reject their application to the determination of the frontier in the disputed area, in view of the principle that a State cannot disclaim in a particular instance rules and principles to which it has acquiesced in comparable circum-

stances, when their operation becomes disadvantageous to itself. This latter principle, according to Burkina Faso, must be combined with that of the unity of the frontier line. It thus argues that the delimitation of the frontier in the disputed area has to be approached as a whole ; it takes the view that unless there are compelling reasons to the contrary, the principles of delimitation and the evidence already recognized by the Parties as relevant for the purpose of drawing their common frontier over approximately 1,000 kilometres, do not cease to be relevant in delimiting the remaining 300 kilometres. Mali however states that it could not accept the report of the Legal Sub-Commission, on its merits, as an instrument potentially offering a reasonable solution, even on a compromise basis, and claims that it never did accept it. Referring to the principles imputed by Burkina Faso to the Sub-Commission, Mali rejects the position of the other Party particularly on the questions of the importance of the maps and conduct evincing effectivity.

42. It must be recalled in this connection that the Chamber, whose judgment "shall be considered as rendered by the Court" (Statute, Art. 27), is bound to settle the present dispute "in accordance with international law" (Art. 38). Accordingly, it is on the basis of international law that the Chamber will have to fix the frontier line, weighing for that purpose the legal force of the respective evidence submitted by the Parties for its appraisal. It is therefore of little significance whether Mali adopted a particular approach, either in the course of negotiations on frontier questions, or with respect to the conclusions of the Legal Sub-Commission of the Organization of African Unity Mediation Commission, and whether that approach may or may not be construed to reflect a specific position, or indeed to signify acquiescence, towards the principles and rules, including those which determine the respective weight of the various kinds of evidence applicable to the dispute. If these principles and rules are applicable as elements of law in the present case, they remain so whatever Mali's attitude. If the reverse is true, the Chamber could only take account of them if the two Parties had requested it to do so, or had given such principles and rules a special place in the Special Agreement, as "rules expressly recognized by the contesting States" (Art. 38, para. 1 (a), of the Statute).

"While the Court is . . . bound to have regard to all the legal sources specified in Article 38, paragraph 1, of the Statute . . . it is also bound, in accordance with paragraph 1 (a), of that Article, to apply the provisions of the Special Agreement." (*I.C.J. Reports 1982*, p. 37, para. 23.)

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43. The reason why the argument from the notion of acquiescence, as set out above, has been dealt with by the Chamber at an initial stage of its Judgment is that it is in the nature of a preliminary question. If the

Chamber had upheld the contention that the report of the Legal Sub-Commission of the Mediation Commission had become binding, it would only have had to endorse it. Both the Parties have however resorted in other connections to arguments bearing upon acquiescence, estoppel or the conduct of the Parties. Mali has referred to “the inconsistency shown by Upper Volta and thereafter by Burkina Faso” towards a regulation (Order 2728 AP of 27 November 1935) on which, as will be seen later, Mali rests its claims in regard to the western part of the disputed area. For its part, Burkina Faso argues in connection with a projected definition of the boundary between the colonies of French Sudan and Niger in 1935, said to have been accepted by the Governor of Sudan as a description of the existing boundary, that “what was accepted by French Sudan is therefore binding upon Mali by virtue of State succession”. However, the Chamber considers that these questions should be reserved and examined, if necessary, when the Chamber turns to its examination of the texts in question.

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44. Before turning to the various kinds of evidence invoked by the Parties to support their claims in regard to the line of the frontier, the Chamber must dispose of a further preliminary question, namely : what are its powers in the matter of fixing the tripoint which forms the end-point of the frontier between the Parties. In its Memorial, Mali observes that the tripoint Niger/Mali/Burkina Faso cannot be determined by the two Parties without Niger’s agreement, nor can it be determined by the Chamber, which may not affect the rights of a third State not a party to the proceedings. According to Mali, the eastern extremity of the frontier in the disputed area must be determined in such a way as not to infringe these rights, and this could only be done if the delimitation were to terminate at a given point which is not the end-point. Burkina Faso, on the other hand, considers that the Chamber must perform the whole of the task entrusted to it by the Special Agreement, and must for that purpose decide the position of the tripoint. In its view, if the Chamber discharges its task in this manner, it would not infringe the rights of Niger, since the sole object of its decision would be to determine the line of the frontier between the Parties. Burkina Faso believes that although the meeting-point between that frontier and the frontier of Niger is a tripoint, the determination of that point will be a consequence and not the object of the Chamber’s judgment. Mali rejects the argument that the Special Agreement requires the Chamber to determine the tripoint, pointing out that the text refers to a “disputed area” consisting of “a band of territory extending from the sector Koro (Mali) Djibo (Upper Volta) up to and including the region of the Béli”. According to Mali, the text is silent as to the actual point where the Chamber’s line is to begin or end ; and the Chamber cannot determine the tripoint without simultaneously deciding the question of Niger’s rights in its relation to each of the Parties. Burkina Faso replies by, *inter alia*,

drawing the Chamber’s attention to the preamble to the Special Agreement, according to which the Parties are seeking “the definitive delimitation and demarcation of their common frontier”. While holding to its formal submission, which mentions the “tripoint”, Burkina Faso nevertheless concedes that it might be preferable for the judgment to refer to “the eastern extremity of the common frontier” between the Parties, rather than to the tripoint.

45. In the Chamber’s opinion, it should first be recalled that there is a distinction between the question of the jurisdiction conferred upon it by the Special Agreement concluded between the Parties, and the question whether “the adjudication sought by the Applicant is one which the Court’s judicial function permits it to give”, a question considered by the Court in the case concerning the *Northern Cameroons*, among others (*I.C.J. Reports 1963*, p. 31). As it also stated in that case, “even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction” (*ibid.*, p. 29). But in the absence of “considerations which would lead it to decline to give judgment” (*I.C.J. Reports 1974*, p. 271, para. 58), the Court is bound to fulfil the functions assigned to it by its Statute. Moreover, the Court has recently confirmed the principle that it “must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent” (*Continental Shelf (Libya Arab Jamahiriya/Malta)*, *I.C.J. Reports 1985*, p. 23). In the present case, the Chamber finds it to be clear from the wording of the Special Agreement – including its preamble – that the common intention of the Parties was that the Chamber should indicate the frontier line between their respective territories throughout the whole of the “disputed area”, and that this area was for them the whole of the frontier not yet delimited by joint agreement.

46. The Chamber also considers that its jurisdiction is not restricted simply because the end-point of the frontier lies on the frontier of a third State not a party to the proceedings. The rights of the neighbouring State, Niger, are in any event safeguarded by the operation of Article 59 of the Statute of the Court, which provides that “The decision of the Court has no binding force except between the parties and in respect of that particular case”. The Parties could at any time have concluded an agreement for the delimitation of their frontier, according to whatever perception they might have had of it, and an agreement of this kind, although legally binding upon them by virtue of the principle *pacta sunt servanda*, would not be opposable to Niger. A judicial decision, which “is simply an alternative to the direct and friendly settlement” of the dispute between the Parties (*P.C.J.J., Series A, No. 22*, p. 13), merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by a court under the mandate which they have given it. In both instances, the solution only has legal and binding effect as between the States which have accepted it, either directly or as a consequence of having accepted the

court's jurisdiction to decide the case. Accordingly, on the supposition that the Chamber's judgment specifies a point which it finds to be the easternmost point of the frontier, there would be nothing to prevent Niger from claiming rights, vis-à-vis either of the Parties, to territories lying west of the point identified by the Chamber.

47. Admittedly, in the case of the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the Court confined its decision to a certain geographical area because, as it explained,

"the Court has not been endowed with jurisdiction to determine what principles and rules govern delimitations with third States, or whether the claims of the Parties outside that area prevail over the claims of those third States in the region" (*I.C.J. Reports 1985*, p. 26, para. 21).

But the process by which a court determines the line of a land boundary between two States can be clearly distinguished from the process by which it identifies the principles and rules applicable to the delimitation of the continental shelf. The legal considerations which have to be taken into account in determining the location of the land boundary between parties are in no way dependent on the position of the boundary between the territory of either of those parties and the territory of a third State, even where, as in the present case, the rights in question for all three States derive from one and the same predecessor State. On the other hand, in continental shelf delimitations, an agreement between the parties which is perfectly valid and binding on the treaty level may, when the relations between the parties and a third State are taken into consideration, prove to be contrary to the rules of international law governing the continental shelf (see *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 20, para. 14 ; pp. 27-28, paras. 35-36). It follows that a court dealing with a request for the delimitation of a continental shelf must decline, even if so authorized by the disputant parties, to rule upon rights relating to areas in which third States have such claims as may contradict the legal considerations – especially in regard to equitable principles – which would have formed the basis of its decision.

48. At most, the Chamber should consider whether, in this case, considerations related to the need to safeguard the interests of the third State concerned require it to refrain from exercising its jurisdiction to determine the whole course of the line. In this regard, the Chamber is not unmindful of the fact that Niger and Burkina Faso agreed by the Niamey Protocol of 23 June 1964, to "treat as basic documents for the determination of the frontier" between them a general Order issued by the Governor-General of French West Africa on 31 August 1927, an erratum to that Order dated 5 October 1927 and a 1:200,000 scale map of the Institut géographique national from the year 1960, these being the same documents as those invoked by Burkina Faso in support of its contention regarding the location of the end-point of the frontier with Mali. Pointing to this fact, Burkina Faso infers that if this point were fixed according to the infor-

mation contained in these documents, there would be no infringement of Niger's rights. The Chamber cannot share this view. From the mere fact that the same documents are used as the starting-point for the Chamber's reasoning and for the negotiations between Burkina Faso and Niger, it cannot be inferred that the practical conclusions reached in both operations, regarding the location of the end-point of the frontier between Burkina Faso and Mali, would necessarily be the same. It is clear that the interpretation given by the Chamber, for the purposes of this case, of the 1927 Order and its erratum will not be opposable to Niger, which has not participated in the proceedings and consequently has been unable to state its views. Mali further claims, for reasons to be examined later, that the Order of 1927 was invalidated by a factual error and is therefore inapplicable. This argument, the correctness or otherwise of which has to be decided by the Chamber, does not at first sight appear to have been put forward in the context of the Niamey Protocol ; but this is again a matter outside the jurisdiction of the Chamber, which has not been called upon by the parties to that Protocol to interpret it.

49. The fact is, as the Parties seem to have realized towards the end of the proceedings, that the question has been wrongly defined. The Chamber is in fact required, not to fix a tripoint, which would necessitate the consent of all the States concerned, but to ascertain, in the light of the evidence which the Parties have made available to it, how far the frontier which they inherited from the colonial power extends. Certainly such a finding implies, as a logical corollary, both that the territory of a third State lies beyond the end-point, and that the Parties have exclusive sovereign rights up to that point. However, this is no more than a twofold presumption which underlies any boundary situation. This presumption remains in principle irrefutable in the judicial context of a given case, in the sense that neither of the disputant parties, having contended that it possesses a common frontier with the other as far as a specific point, can change its position to rely on the alleged existence of sovereignty pertaining to a third State ; but this presumption does not thereby create a ground of opposability outside that context and against the third State. Indeed, this is the whole point of the above-quoted Article 59 of the Statute. It is true that in a given case it may be clear from the record that the legal interests of a third State "would not only be affected by a decision, but would form the very subject-matter of the decision" (*Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 32) so that the Court has to use its power "to refuse to exercise its jurisdiction" (*I.C.J. Reports 1984*, p. 431, para. 88). However, this is not the case here.

50. The Chamber therefore concludes that it has a duty to decide the whole of the *petitum* entrusted to it ; that is, to indicate the line of the frontier between the Parties over the entire length of the disputed area. In so doing, it will define the location of the end-point of the frontier in the east, the point where this frontier ceases to divide the territories of Burkina

Faso and Mali ; but, as explained above, this will not amount to a decision by the Chamber that this is a tripoint which affects Niger. In accordance with Article 59 of the Statute, this Judgment will also not be opposable to Niger as regards the course of that country's frontiers.

* * *

51. Among the evidence cited by the Parties in the present case, the basic document is the French law 47-1707 of 4 September 1947 "for the re-establishment of the territory of Upper Volta". The decision to abolish the colony of Upper Volta had been made in the form of a decree. The reason why a law was necessary to reverse that decision was because, under Article 86 of the Constitution of the French Republic of 1946, only the French Parliament could then determine the extent, and accordingly the boundaries, of a *territoire d'outre-mer*. As noted above, the 1947 law provided (Art. 2) that the boundaries of the territory were to be "those of the former colony of Upper Volta on 5 September 1932"; Article 3 also provided that "the territorial boundaries defined in Article 2 may be modified following consultation with the local assemblies concerned". As far as the disputed area is concerned, no modifications were made under this provision, so that the boundaries of Upper Volta in that area at the time of its accession to independence in 1960 remained those which had existed on 5 September 1932. However, neither the legislative and regulatory texts, nor the relevant administrative documents, contain any complete description of the course of the boundary between French Sudan and Upper Volta during the two periods when these colonies co-existed, i.e., between 1919 and 1932, and between 1947 and 1960. The principal texts of this kind which the Parties have produced to the Chamber are limited in scope, and the legal significance or the interpretation of most of these are matters of dispute between the Parties.

52. Apart from the above-mentioned law of 4 September 1947, the most important documents in question are the following (in chronological order) :

- the decree of 1 March 1919, already mentioned, which created the colony of Upper Volta ;
- an Order issued by the Governor-General of French West Africa on 31 December 1922 "for the reorganization of the region of Timbuktu" (French Sudan). This Order provided that

"The *cercle* of Gao . . . is delimited . . . To the west by a line beginning at Saleah on the Niger . . . and passing through En Amaka, Tinamassarori, the pools of Oussodia Mersi and In Abao, and, from that point, the northern boundary of Upper Volta."

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The Parties both conclude from this text that the boundary which existed between Sudan and Upper Volta in 1932 ran past the pool of In Abao, but disagree on the question whether the line intersected the pool or was merely tangential to it ;

– a general Order issued by the Governor-General *ad interim* of French West Africa on 31 August 1927 "fixing the boundaries of the colonies of Upper Volta and Niger", modified by an "erratum" of 5 October 1927, published in the *Journal officiel* of French West Africa on 15 October 1927. Admittedly this Order, as its text makes clear, dealt with the frontier between Upper Volta and Niger, and not the frontier between Upper Volta and French Sudan. But the two Parties recognize that this text, unless shown to be invalidated by error as Mali claims, is relevant for the purposes of the present case, since the starting-point of the frontier line between Upper Volta and Niger was also the end-point of the frontier between Upper Volta and French Sudan and of the frontier between French Sudan and Niger, that is, the tripoint mentioned above ;

- the decree of 5 September 1932, already mentioned, for the abolition of the colony of Upper Volta ;
- an exchange of letters which took place in 1935 between the Governor-General of French West Africa and the Lieutenant-Governors of French Sudan and Niger (letter 191 CM2 of 19 February 1935 from the Governor-General to the Lieutenant-Governors ; a reply by the Lieutenant-Governor of French Sudan dated 3 June 1935). It may be noted in passing that letter 191 CM2 is the only available text which mentions a point defined in terms of co-ordinates of latitude and longitude : the point 1° 24' 15" W, 14° 43' 45" N. For the sake of easier reference in the passages to follow, this point will be called "point P" ;
- an Order (2728 AP) "for the delimitation of the *cercles* of Bafoulabé, Bamako and Mopti (French Sudan)", issued on 27 November 1935 by the Governor-General *ad interim* of French West Africa. On that date, it will be remembered, Upper Volta no longer existed, since the territories which formerly comprised it had been distributed among French Sudan, Niger and the Ivory Coast. The *cercle* of Mopti, which was Sudanese at that time and is now Malian, bordered upon the *cercle* of Ouahigouya, which was also a Sudanese unit at the time, but subsequently became Voltan again (from 1947 onwards) and is now part of Burkina Faso. Most of the boundary between these two *cercles* was again to form the boundary between the *territoires d'outre-mer* of Upper Volta and Sudan. According to Article 1 of the Order of 27 November 1935, the *cercle* of Mopti was bounded on the east by "a line running markedly northeast, leaving to the *cercle* of Mopti the villages of Yoro, Dioulouna, Oukoulou, Agoulourou, Koubo . . ." A similar form of words is used in an Order of 2 August 1945 for the reorganization of the *cercle* of Mopti ; it is not known whether this Order was ever published. The Parties do not agree upon the legal effects to be attributed to this provision. They are at odds as to whether the line indicated in the text, in "leaving" the villages in question to the *cercle* of

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Mopti, actually gave to that *cercle* villages which previously belonged to another *cercle*, or whether the definition of this line rather implied that these villages already belonged to the *cercle* of Mopti.

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53. Apart from the regulative or administrative texts referred to above, the Parties have produced an abundant and varied collection of cartographic materials, consisting of a series of maps and sketch-maps differing as to date, origin, technical standard and level of accuracy. They have also, both in their written pleadings and in their oral arguments, discussed in considerable detail the theoretical question of the probative force of the maps. During the proceedings the question of the legal force to be attributed to these various elements, and the respective priority to be assigned to them, was debated at length. Both Parties agree that the title which is accorded pre-eminence in the colonial system is the legislative and regulative title. Mali takes the view that the reliability of "other evidence", including the maps and the conduct of administrative authorities, has to be gauged against a particular set of criteria. For its part, Burkina Faso accepts the primacy of instruments over maps, but considers that the title may be either textual or cartographical.

54. At the present stage of its reasoning the Chamber can confine itself to the statement of a principle. Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits; it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.

55. The actual weight to be attributed to maps as evidence depends on a range of considerations. Some of these relate to the technical reliability of the maps. This has considerably increased, owing particularly to the progress achieved by aerial and satellite photography since the 1950s. But the only result is a more faithful rendering of nature by the map, and an increasingly accurate match between the two. Information derived from human intervention, such as the names of places and of geographical features (the toponymy) and the depiction of frontiers and other political

boundaries, does not thereby become more reliable. Of course, the reliability of the toponymic information has also increased, although to a lesser degree, owing to verification on the ground; but in the opinion of cartographers, errors are still common in the representation of frontiers, especially when these are shown in border areas to which access is difficult.

56. Other considerations which determine the weight of maps as evidence relate to the neutrality of their sources towards the dispute in question and the parties to that dispute. Since relatively distant times, judicial decisions have treated maps with a considerable degree of caution: less so in more recent decisions, at least as regards the technical reliability of maps. But even where the guarantees described above are present, maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps. In consequence, except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title. The only value they possess is as evidence of an auxiliary or confirmatory kind, and this also means that they cannot be given the character of a rebuttable or *juris tantum* presumption such as to effect a reversal of the onus of proof.

* * *

57. The Chamber now turns to the maps produced in this case. Not a single map available to the Chamber can reliably be said to reflect the intentions of the colonial administration expressed in the relevant texts concerning the disputed frontier. The law of 4 September 1947 "for the re-establishment of the territory of Upper Volta" made no reference to any map; all it contained was a reference in general terms to the boundaries "of the former colony . . . on 5 September 1932". Neither of the two Parties has been able to identify the map, if there was one, which was used by the French lawmakers in 1947 in order to obtain a clearer picture of those boundaries. As regards Order 2336 of 1927 and its erratum, Mali has produced a map bearing the inscription "New frontier of Upper Volta and Niger (according to the erratum of 5 October 1927 to the Order dated 31 August 1927)"; however, the document offers no information as to which official body compiled it or which administrative authority approved the line shown on it. A map was annexed to letter 191 CM2 from the Governor-General of French West Africa dated 19 February 1935, but this map has not been found. Finally, Order 2728 AP of 27 November 1935 defined the boundaries of the *cercle* of Mopti "as transcribed on the maps annexed" thereto, but here again the Parties have been unable to find the maps in question, and one of them doubts whether they ever existed. Thus

the Chamber is confronted with an unusual situation which does not ease its burden. It has no map available to it which can provide a direct official illustration of the words contained in the four texts already mentioned, which are essential to the case, even though their authors had intended two of these texts to be accompanied by such maps.

58. The cartographic documentation has assumed unaccustomed proportions in this case, to the point of creating a dual paradox. On the one hand, the Chamber is faced with a considerable body of maps, sketches and drawings for a region which is nevertheless described as being partly unknown ; and, on the other hand, no indisputable frontier line is discernible from this abundance of cartographic materials. To this must be added the somewhat curious fact that, as just explained, whenever there is some question of a map annexed to a regulation or enclosed with an administrative document which the Chamber has to interpret, that is the very map, of all those which the Parties have managed to assemble, which is found to be missing. These circumstances call for special vigilance from the outset when examining the file of maps.

59. Of all the maps produced, two appear to be of special overall significance for the purposes of the case. The Parties have devoted much attention to these, and Burkina Faso has referred expressly to them in its submissions. These are the 1:500,000 scale map of the colonies of French West Africa, 1925 edition, compiled by the Geographical Service of French West Africa at Dakar and printed in Paris by Blondel la Rougery (reconnaissance map ; compilation of the Hombori D. 30 and Ansongo D. 31 sheets) ; and the 1:200,000 scale map of West Africa, issued by the French Institut géographique national, which was originally published between 1958 and 1960 (Ansongo, In Tillit, Dori, Tera and Djibo sheets).

60. For Burkina Faso the first of these two maps, described hereafter as the "Blondel la Rougery map", is of special importance because, until 1960, it remained the largest-scale map published by the Geographical Service of the Governorship General of French West Africa. Relying on an administrative circular, 93 CM2 of 4 February 1930, Burkina Faso claims that the territorial authorities had to refer to this map in order to fix or to modify the administrative boundaries and that the colonial officials considered themselves bound by it. The text of circular 93 CM2 of 4 February 1930 has not been filed, and the only information about it which is available to the Chamber is contained in a letter of 11 July 1935, addressed by the Geographical Service of French West Africa to the Director of Political and Administrative Affairs in the office of the Governor-General of French West Africa. With reference to a draft text defining district boundaries, the Geographical Service stated :

"It would be appropriate to seek further information and to request the Lieutenant-Governor of the Sudan to comply with the instruc-

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tions in general circular No. 93 CM2 of 4 February 1930 which stipulates that "the order must be confined to general indications, specifying by means of a special clause that the boundary is as drawn on the map ... (scale and title of the sheet) annexed to this order".

The map used must be the largest-scale map in existence published by the Geographical Service of the Governorship General (cf. same circular)."

The Chamber cannot interpret this text as meaning that the administrators had a duty to refer to the published "largest-scale map in existence" when informing themselves of the positions of administrative boundaries ; in its view the text simply required this map to be used as a cartographic base whenever it was necessary to portray existing boundaries on a map of any kind. Moreover, Burkina Faso itself explained subsequently that if the administrators considered themselves bound by a map of the Geographical Service of French West Africa in regard to the boundaries shown on it, this was because they had themselves modified the map and, as a result of the exchange of administrative correspondence about it, that map had become an administrative document. It follows, in the Chamber's opinion, that even for Burkina Faso the administrative boundaries shown on the Blondel la Rougery map as compiled by the Geographical Service do not in themselves possess any particular authority.

61. As for the IGN map of 1958-1960, the Chamber observes that it depicts a frontier line of which one segment, represented by a continuous series of crosses in the original edition, is represented in subsequent editions by a broken series of crosses. In general this map has enjoyed the approval of both Parties in its depiction of the topography. On the other hand, as regards toponyms, Burkina Faso expresses reservations as to the designation of mount N'Gouma on this map. Mali does not accept the frontier line shown on this map by a row of small crosses. In other respects, the map is described by Mali as "a model of reliability from the stand-points of topography and toponymy" and, for Burkina Faso, the IGN maps offer guarantees of both technical precision and official authority, since they were compiled by an impartial official body directly connected with the administrative authorities of the period. Among the documents submitted to the Chamber is a note dated 27 January 1975, compiled by the IGN, on the subject of the positioning of the frontiers on the maps. According to that note, the 1:200,000 maps of the Mali/Upper Volta frontier had been surveyed before the two States became independent. The note gives the following explanation of how the frontiers were recorded on those maps :

"Then, with the help of the texts, the cartographers tried to locate the frontier in relation to the map base. Unfortunately, the inaccuracy of the texts made it impossible to draw a sufficiently reliable bound-

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dary in certain areas. Some names quoted in the texts could not be found, others referred to villages which had disappeared or been moved, or again the actual nature of the terrain (course of rivers, position of mountains) appeared different from that described in the former itinerary surveys.

The actual frontier was, therefore, recorded in the light of information supplied by the heads of the frontier districts and according to information gathered on the spot from the village chiefs and local people.”

62. From this text the conclusion may be drawn that the map compiled in 1958-1960 by the IGN – a body neutral towards the Parties to the present dispute –, although it does not possess the status of a legal title, is a visual portrayal both of the available texts and of information obtained on the ground. This in itself is not sufficient to permit the Chamber to infer that the frontier line depicted in the form of small crosses, whether in a continuous or a broken series, in the successive editions of the IGN map, corresponds entirely with the boundary inherited from the colonial administration. It has to consider how far the evidence offered by this or any map corroborates the other evidence produced. The Chamber cannot uphold the information given by the map where it is contradicted by other trustworthy information concerning the intentions of the colonial power. However, having regard to the date on which the surveys were made and the neutrality of the source, the Chamber considers that where all other evidence is lacking, or is not sufficient to show an exact line, the probative value of the IGN map becomes decisive.

63. Apart from the texts and maps listed above, the Parties have invoked in support of their respective contentions the “colonial *effectivités*”, in other words, the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period. For Burkina Faso, the *effectivités* can support an existing title, whether written or cartographical, but when their probative value has to be assessed they must be systematically compared with the title in question; in no circumstances can they be substituted for the title. For its part, Mali admits that in principle the *effectivités* cannot be brought into operation where they are contrary to the text of a treaty, but argues that in a situation where there is no boundary described in conventional or legislative form, it is necessary to ascertain the boundary by other methods, and an investigation of the *effectivités* then becomes essential. The role played in this case by such *effectivités* is complex, and the Chamber will have to weigh carefully the legal force of these in each particular instance. It must however state forthwith, in general terms, what legal relationship exists between such acts and the titles on which the implementation of the principle of *uti possidetis* is grounded. For this purpose, a distinction must be drawn among several eventualities. Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis*

juris, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice.

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64. At this stage of its reasoning, the Chamber must emphasize that the present case is a decidedly unusual one as concerns the facts which have to be proven and the evidence which has been, or might have been, produced for this purpose. The Chamber has to ascertain where the frontier lay in 1932 in a region of Africa little known at the time and largely inhabited by nomads, in which transport and communications were very sketchy. In order to identify this the Chamber has to refer to the legislative and regulative texts, not all of which were even published; to the maps and sketch-maps compiled at the time, maps which are sometimes of doubtful accuracy and reliability and which contradict one another; and to administrative documents which, having been drawn up for the purposes of a system of government which ceased to exist nearly 30 years ago, have had to be obtained from various collections of archives. Although the Parties have provided it with a case file as complete as possible, the Chamber cannot however be certain of deciding the case on the basis of full knowledge of the facts. The case file shows inconsistencies and shortcomings. Some of these are already known; the Parties have informed the Chamber that they were unable to locate certain specific documents such as, for example, the cartographic documents mentioned in paragraph 57 above. But even if those documents had been located, the Chamber cannot preclude the possibility that the large body of archives from the French West Africa administration, now dispersed among several countries, may contain further documents of considerable relevance.

65. In these circumstances, it is clear that the Chamber cannot resolve the problem by means of any of the powers in the matter of evidence under Articles 48, 49 and 50 of the Statute of the Court. Nor can the solution be looked for in a systematic application of the rule concerning the burden of proof. For example, in respect of certain villages of which it is necessary to determine the administrative situation between 1927 and 1935, Mali claims that it is for Burkina Faso to demonstrate the Voltan character of the villages during that period. While it is true that “ultimately . . . it is the litigant seeking to establish a fact who bears the burden of proving it” (*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984*, p. 437, para. 101), it is also for Mali to establish the facts underlying its

claims, that is, to demonstrate that the villages were Sudanese at that time. The Special Agreement of 20 October 1983 by which the case was brought before the Court deals with the question of the burden of proof only in order to make it clear that it is not prejudged by the written procedure there provided for (Art. 3, para. 2). In any event, however, in a case such as this, the rejection of any particular argument on the ground that the factual allegations on which it is based have not been proved is not sufficient to warrant upholding the contrary argument. The Chamber has to indicate the line of the frontier on the basis of the documents and other evidence presented to it by the disputant Parties. Its task is further complicated by the doubts it has expressed above regarding the sufficiency of this evidence.

* * *

66. In its Memorial, Burkina Faso divided the disputed frontier into two sectors : the western part, described as the sector of the "four villages", and the eastern sector, extending from the point with the co-ordinates 1° 24' 15" W and 14° 43' 45" N as far as the heights of N'Gouma. In its submissions however, throughout the proceedings, it divided the line it proposed into two sectors in relation to a different point (geographical co-ordinates 0° 40' 47" W and 15° 00' 03" N) ; the Chamber will consider later what significance is to be attached to this point. For Mali, the disputed region can also be divided into two sectors : one extending from the village of Yoro to the pool of Kétiouaire, for which, according to Mali, a fairly precise delimitation exists, and the other from the pool of Kétiouaire to the heights of N'Gouma and the Kabia ford. In its Counter-Memorial, Burkina Faso preferred to adopt a division of the frontier into three sectors : the first from Dionouga to the point with the co-ordinates 1° 24' 15" W and 14° 43' 45" N (the region of the four villages), the second from the former point to mount Tabakarach (the Soum region), and the third from mount Tabakarach to the tripoint. This was also the division adopted by counsel for Burkina Faso during the oral proceedings. However, these various methods for dividing the frontier rely on considerations which are closely linked with the submissions of the Party in question relating to the titles or evidence to be taken into consideration in order to determine the line of the frontier in each sector. The Chamber therefore cannot adopt any such method of division at the outset without running the risk of prejudging its decision on the opposing contentions on the merits. It is therefore appropriate for the Chamber to deal first with the legislative and regulative titles and the administrative documents invoked by the Parties, and to consider what weight to attach to each of these, in order subsequently to be able to make use of them, where appropriate, in order to indicate the course of the line in the sector to which they are deemed to relate.

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67. After the decree of 1 March 1919 which created the colony of Upper Volta but did not specify its boundaries, the first of these texts in chronological order is the Order of 31 December 1922 for the reorganization of the Timbuktu region. The Parties agree in recognizing that this text is both valid and relevant ; the Chamber can therefore postpone the question of its interpretation to the stage of its examination of the course of the line.

68. Next comes an Order dated 31 August 1927, issued by the Governor-General *ad interim* of French West Africa, according to which

"the boundaries of the colonies of Niger and Upper Volta are henceforward determined as follows :

(1) Boundaries between the *cercle* of Tillabéry and Upper Volta ; This boundary is determined to the North by the existing boundary with Sudan (*cercle* of Gao) as far as the height of N'Gourma, and to the West by a line passing through the Kabia ford, mount Darouskoy, mount Balébangou, to the west of the ruins of the village of Tokébangou, mount Doumafondé, and then heading south-east, leaving to the east the ruins of Tong-Tong . . ."

On 5 October 1927 an erratum to that Order was adopted, which replaced the above-quoted text with the following text :

"The boundaries of the colonies of Niger and Upper Volta are determined as follows :

A line starting at the heights of N'Gouma, passing through the Kabia ford (astronomic point), mount Arounskoye, mount Balébangou to the west of the ruins of the village of Tokébangou, mount Doumafendé and the astronomic marker of Tong-Tong ; this line then heads south-east . . ."

There also exists a 1:1,000,000 map, already mentioned, entitled "French West Africa : New frontier of Upper Volta and Niger (according to the erratum of 5 October 1927 to the Order dated 31 August 1927)". Mali has laid this map before the Chamber, but observes that it contains no information as to what official body compiled it or which administrative authority approved the line shown on it. Here again, the two Parties agree that the Order and its erratum were duly adopted by the administrative authority with jurisdiction in the matter, and that these texts are relevant to the present case. However, they advance conflicting interpretations of these texts. The Chamber could in principle reserve this question for the stage of its reasoning when it turns to the course of the line in the light of the texts and the other evidence provided by the Parties. But Mali, arguing from what it considers to be the correct interpretation of the texts in relation to the geographical situation in the area, claims that the Order and

the erratum are invalidated by a factual error, so that Burkina Faso may not properly rely upon it. For this reason, the Chamber will deal at this point with the interpretation of the Order.

69. The two Parties have advanced various explanations of the fact that the colonial administration found it necessary to issue an erratum to the 1927 Order, and have submitted to the Chamber documents of the nature of *travaux préparatoires*. It should be noted at the outset that if the Chamber's task were to interpret and apply the Order as amended on 5 October 1927 as a regulative text, for the purpose of establishing the boundaries of Upper Volta in 1932, it would have to examine its scope and appraise the relevance of the initial text of 31 August 1927, and of any *travaux préparatoires*, in the light of the particular rules of the legal system from which the Order derives its force as a regulation, i.e., French colonial law. But the Chamber recalls that the 1927 Order does not directly concern the boundary between Sudan and Upper Volta, but only the boundary between Upper Volta and Niger, and that for the purposes of this case, the Chamber is consulting the Order solely as evidence which may shed some light on the intentions of the colonial power concerning the course of the boundary between French Sudan and Upper Volta. In addition, from a more general perspective, the Chamber has already had occasion to emphasize (paragraph 30) that if colonial law has any role to play in this case it does so not in its own right, by way of a *renvoi* from international law to colonial law, but solely as evidence of the situation which existed at the time when the two States Parties achieved independence. The Chamber is therefore free to examine in this light the two successive versions of the 1927 Order, while nonetheless attributing greater weight to the text as modified by the erratum as a reflection of the definitive intentions of the colonial authorities, and to take the *travaux préparatoires* into consideration if this proves to be necessary.

70. It is clear from the actual wording of the text of the amended Order that the starting-point of the boundary between Niger and Upper Volta, which was also the end-point of the boundary between French Sudan and Upper Volta, was considered by the authors of this text to be the "heights of N'Gouma", which were situated in the region of the "Kabia ford". The location of this ford is not in doubt, nor is it a matter of disagreement between the Parties. This does not apply to the "heights of N'Gouma". It should be noted that a neutral technical committee, comprising three cartographers appointed by the Legal Sub-Commission of the Organization of African Unity Mediation Commission, went to the spot in May 1975 with a mission "to determine the true position of mounts N'Gouma". This committee reported having found, first, a collection of rocky spurs rising to the north of the Kabia ford and, secondly, an elevation or hill situated to the southeast of the ford. These two topographical features correspond respectively to the two possible locations of a "mount N'Gouma" according to the various maps produced by the Parties. For Burkina Faso the "heights of N'Gouma" are situated to the north of the Kabia ford,

and according to Mali "mount N'Gouma" lies to the south-east of the ford; each Party has produced arguments to demonstrate why no credence should be given to whatever cartographic or other material contradicts its claim. The 1975 technical committee of cartographers reached its own conclusion on the matter, and this will be examined later (paragraph 170 below).

71. Mali argues that when the Governor-General adopted the 1927 Order and its erratum he believed he was selecting a particular point but was in fact in error on the very subject-matter of his decision, which within the compass of that error, but only so far, would invalidate the legal act in question, based as it was on wrong and inaccurate grounds of fact. Here Mali postulates that when the 1927 Order and erratum were drawn up it may well have been the 1:500,000 1925 map (Ansongo sheet) which provided the cartographic support. But this map, according to Mali, misplaces mount N'Gouma by locating it to the north of the Kabia ford; the correct position of N'Gouma, to the south-east of the ford, is that shown on the 1:200,000 map published by the IGN in 1960. In sum, Mali would exclude the 1927 Order, corrected by its erratum, as a source for locating the "heights of N'Gouma" and, consequently, the end-point of the frontier, on the ground that the text is invalidated by a factual error. This error is said to reside in the use of a position for the heights of N'Gouma which is factually inaccurate. After analysing the rules of the law of contract and French administrative law on the question, Mali concludes that, by the lights of French internal law as a whole, the Order of 1927 cannot be treated as a valid and relevant title because it contains an error in regard to the subject-matter of the decision. As for international law, Mali argues that the change of status of the territorial boundaries of French Sudan and Upper Volta, whereby they have become the international frontiers of Mali and Burkina Faso, precludes any automatic confirmation on the international plane of an act void in internal law.

72. At the present stage of its Judgment, the Chamber has only to consider whether it may or must take account of the Order of 1927, or should lay it aside as null and void. To show the invalidity of the Order, it would be necessary to establish, through evidence or arguments not themselves dependent on the validity or invalidity of the Order and erratum, and taking the matter further than the mere observation of a discrepancy between maps, that in 1927 the words "the heights of N'Gouma" denoted elevations other than those envisaged by the Governor-General at the moment of drafting the Order or the erratum. But it would thereby also be shown that the end-point of the line was located at a different spot from the one stated in the Order, and the validity or invalidity of the Order in French administrative law would then become academic. At all events, this question does not enter into the problem with which the Chamber has to deal. In the present proceedings, it is solely the evidentiary value of the Order and erratum which counts. If the Order was flawed by a factual error, this could have had some implications for the legal validity of part of the boundary between Upper Volta and Niger. The significance of the

Order as evidence of the location of the end-point of the boundary between French Sudan and Upper Volta is a separate question. Any finding on the validity of the Order may well depend on what is found as regards the position of the "heights of N'Gouma", but the converse cannot be true. Even Mali, which contends that the Order is wanting in legal validity, uses it as evidence in support of its contention regarding the true position of the end-point of the line. Consequently, it is not necessary for the Chamber further to construe the 1927 Order with the aim of determining its legal validity; it will suffice, at a later stage in this Judgment, to examine the value of the Order, of the erratum and of the *travaux préparatoires*, as evidence of the position of the end-point of the boundary between French Sudan and Upper Volta.

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73. In chronological order, the next regulative text that has to be mentioned is the decree of 5 September 1932, one of whose effects was the outright abrogation of the decree of 1 March 1919 which had created the colony of Upper Volta, and hence the abolition of that colony. The new decree, which came into force on 1 January 1933, also provided as follows:

"Art. 2 — The cercles of Fada and Dori (except the *canton* of Aribinda) are annexed to the colony of Niger.

The cercle of Ouahigouya, the *canton* of Aribinda within the cercle of Dori and that part of the cercle of Dedougou located on the left bank of the Black Volta are annexed to the colony of French Sudan . . ." (See sketch-map No. 2 below.)

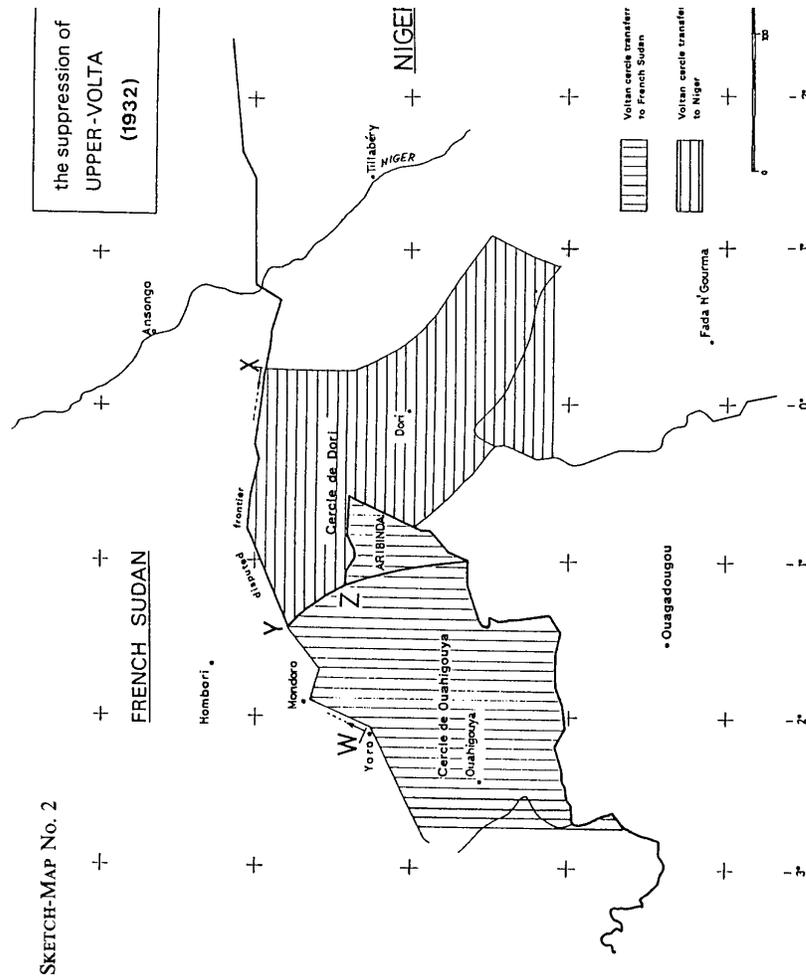
By an Order of the Governor-General of French West Africa dated 17 November 1932, the territories of the colony of Upper Volta which had been annexed to French Sudan by the above-mentioned decree were reorganized as follows:

"1. The cercle of Ouahigouya, at present forming part of Upper Volta, and the *canton* of Aribinda, detached from the cercle of Dori, are to form a single unit under the name of cercle of Ouahigouya, with its chief town at Ouahigouya . . ."

This Order also came into force on 1 January 1933. It was in this administrative setting that an exchange of letters took place between the Governor-General of French West Africa and the Lieutenant-Governors of Niger and French Sudan, and this correspondence is relied upon by Burkina Faso.

74. To appreciate the significance attached by Burkina Faso to this exchange of letters, which occurred in 1935, it must be viewed against the background of the period. As a result of the decree of 5 September 1932, Upper Volta had ceased to exist as from 1 January 1933, and the cercles

SKETCH-MAP No. 2



which had comprised it had been annexed, in the region in question, either to French Sudan or to Niger. Wherever Voltan territories bordering on French Sudan had become part of Niger, the former boundary between French Sudan and Upper Volta continued to divide two separate colonies, Sudan and Niger; wherever Voltan territories had been annexed to French Sudan, the former boundary between the two colonies was transformed into a boundary between two *cercles* within French Sudan. From the passages quoted it is clear that the dismemberment of Upper Volta was carried out on the basis of the *cercles* and *cantons* such as they existed in 1932. Hence the Chamber believes it may conclude that the boundaries between French Sudan and Upper Volta in 1932 and those between Niger and French Sudan in 1935 matched, though only in the areas referred to in the former of the hypotheses contemplated above. As the attached sketch-map No. 2 shows, the 1935 boundary between French Sudan and Niger was identical with the former boundary between French Sudan and Upper Volta from its eastern extremity, which before 1932 had been the tripoint (marked X on the sketch) between the colonies of French Sudan, Niger and Upper Volta, to another tripoint (marked Y), where the boundary between the Voltan *cercles* of Dori and Ouahigouya had encountered, before 1932, that between French Sudan and Upper Volta. As already explained, as a result of the decree of 5 September 1932 the *cercle* of Dori, minus the *canton* of Aribinda, which was annexed to French Sudan, was allotted to Niger. The Chamber must therefore take into account any evidence as to where the boundary then lay between French Sudan and Niger, but only as regards the line between these two points. To the south (from point Y to point Z), what in 1935 was the boundary between French Sudan and Niger was transformed in 1947, owing to the reincorporation of the *canton* of Aribinda and the Niger *cercle* of Dori into the restored colony of Upper Volta, into a mere administrative boundary within that colony between two *cantons* of the *cercle* of Dori. To the west, between point Y and point W, what had been in 1935 merely an administrative boundary between two Sudanese *cercles* (Mopti — including Bandiagara — and Ouahigouya) became once more the frontier between French Sudan and Upper Volta.

75. In letter 191 CM2 of 19 February 1935, addressed simultaneously to the Lieutenant-Governors of Niger and French Sudan, the Governor-General of French West Africa stated as follows :

“The boundary between your colony and that of Niger [Sudan] has only *de facto* value at present, being based on texts which do not include a geographical description of this boundary. I feel it is necessary, in order to ensure satisfactory regulation of the various administrative issues pertaining to the frontier region between Sudan and Niger, and its exact portrayal on the map, to fix the boundary in question by means of a text. To enable me to send the Department the

necessary regulatory proposals, I would be glad if you would send me your opinion, as a matter of urgency, concerning the following draft [*projet*] :

‘From a point located on the Algerian frontier . . . the heights of Gorontondi, mounts Tin Garan, Ngouma, Trontikato, via the northern peak of mount Ouagou, the northern point of the pool of In Abao, and the summits of mounts Tin Eoult and Tabakarach, and then bends southwest as far as the point of latitude 14° 43' 45" and longitude 1° 24' 15" (west of Greenwich). . . .’

The final paragraph of the letter specified that there was a map annexed “showing the location of the various points mentioned, as derived from the most recent geographical work” ; this map has not been traced.

76. In his reply of 3 June 1935 the Lieutenant-Governor of French Sudan, after noting that the Governor-General’s proposals affected four Sudanese *cercles* (only one of which, the *cercle* of Mopti, requires consideration in the present proceedings), expressed the following view :

“There does not seem to be any need to alter the projected boundary described in letter 191 CM2 referred to above, except with regard to the following : (1) the part relating to the *cercle* of Mopti, in which the administrator is proposing that the pool of Kébanaire situated almost on the boundary of the *cercles* of Mopti, Gourma-Rharous and Dori (the latter forming part of the colony of Niger) should be included in the geographical description of the boundary, which would accordingly be amended as follows (letter No. 191 CM2, page 2, lines 4 and 5 from the end) : ‘the summits of mounts Tin Eoult and Tabakarech and the pool of Kébanaire . . .’

It will be noted that, according to the various copies of these letters produced by the Parties the Governor-General mentioned mount “Tabakarach” (or even “Tabanarach”) whereas the Lieutenant-Governor’s reply spelled the name as “Tabakarech”. From this letter it also emerges that the administrator of the *cercle* of Gao had proposed having a survey made between Labézanga and Anderamboukane, a region not relevant to the present dispute. For administrative reasons, this survey was not undertaken. The Governor-General’s draft remained in abeyance.

77. The Parties cannot agree on the interpretation of this exchange of letters. According to Burkina Faso, these letters

“although they do not possess the formal authority of an administrative act in due form, nevertheless constitute an authentic expression by the competent authority of the period . . . of his conviction as to the course of the boundary line”

that is, the line of a boundary which existed at the time. Mali’s opinion differs : the Governor-General’s letter is merely a preparatory document

for a draft administrative decision on delimitation between French Sudan and Niger, and is consequently without legal effect. Mali also denies that the letter has any evidentiary value as a description of the frontier in the region concerned and argues that to attribute such a value to the letter would be impossible to reconcile with the actual text of the letter, the reaction of the heads of administrative districts and the fact that nothing ever came of the draft delimitation it adumbrated, so that no legal act ever took shape.

78. If it had demonstrably been the Governor-General's intention to define a boundary where none existed, or to modify the existing boundary in the light of the requirements of colonial administration, Mali's objection that the proposal considered was never transformed into a regulative instrument, and therefore has no legal force, would obviously be cogent. Everything therefore depends on whether, as Burkina Faso claims, letter 191 CM2 did no more than describe an existing boundary. Mali does not argue that there was no boundary between French Sudan and Niger, but considers that the Governor-General's letter has to be interpreted as reflecting an intention to define the legal boundary *de novo*, that is, to treat the existing situation as irrelevant and focus on the definition of a new situation.

79. Before considering the intentions of the Governor-General as regards the boundary in this region, the Chamber must note Burkina Faso's contention that the absence of protest by the Lieutenant-Governor of French Sudan against the boundary line described in letter 191 CM2 did and does amount to an acceptance of that line, and that what French Sudan accepted is binding on Mali by virtue of State succession. Burkina Faso also maintains that acceptance of the course of the line by French Sudan would override any error which the Governor-General might have made concerning the position of the administrative boundary. It so contends without, however, abandoning its submission that letter 191 CM2 amounts to a description of the actual boundary in 1935, a submission supplemented by the argument from acquiescence. The Chamber will first consider that argument and next seek to determine what interpretation is warranted of letter 191 CM2, having regard to the circumstances prevailing in 1935. According to whether the letter is found to have been innovative or merely descriptive in scope, it will then become clear, either that the argument advanced by Burkina Faso on the basis of a supposed acquiescence by Mali merits examination as a major contention, or that it is merely adjunctive to its case.

80. In the Chamber's view, the argument from the supposed acceptance by the Lieutenant-Governor of French Sudan of the line indicated in the Governor-General's letter is untenable, for the following reasons. The writers of the letters were not of equal standing, nor did they possess the same territorial competence: the Lieutenant-Governor in question was replying to a communication from his superior. That being so, it is difficult

to see how the idea of acquiescence, which presupposes freedom of will, can arise. In addition, it must be borne in mind that the argument is based on the assumption that the description contained in letter 191 CM2 did not correspond to the existing boundary, if there was one, between the colonies of French Sudan and Niger. Now, the Chamber's investigations relate to the boundaries of Upper Volta on the eve of its independence, boundaries which were assigned to it as a result of the 1947 law. Thus the question is whether, in 1947, the restored Upper Volta would have inherited any new boundary arising in 1935 after acceptance by the authorities of French Sudan of letter 191 CM2. The answer to that question is negative. On the one hand, the 1947 law reconstituted Upper Volta within its 1932 boundaries, and if one of them, after conversion into a boundary between French Sudan and Niger, had undergone alteration in 1935, that modification would have become ineffective on that law's entry into force. On the other, it must not be overlooked that the Governor-General of French West Africa never issued any order to give effect to his 1935 proposal. Whatever its value as evidence, or as mere information regarding the views or intentions of the Governor-General, the 1935 exchange of letters could not in colonial administrative law, the only law applicable in the matter at the time, have resulted in the institution of an intra-colonial boundary which could have been inherited by Upper Volta.

81. The Chamber now comes to the problem of the interpretation and significance of the 1935 exchange of letters. Mali stresses that letter 191 CM2 begins with the words "the boundary . . . has only *de facto* value [*valeur de fait*] at present" and infers that this letter actually records the absence of any legal boundary between the two colonies. Yet it explains that, on its own interpretation of the letter, a boundary did in fact exist between French Sudan and Niger, that this boundary derived from texts which existed at the time, though it is no longer known what texts these were, and that if the Governor-General felt the need to propose a definition, that was because the cartographic representation of the boundary was not satisfactory. Setting aside for the moment the question of the meaning to be ascribed to the term "*valeur de fait*", it is the Chamber's view that, if a boundary of at least such value existed in 1935, there is no reason to suppose that the same boundary did not exist in 1932, the critical date for the implementation of the provision in the 1947 law which fixed the boundaries of Upper Volta. It would then be this *de facto* boundary that defined the heritage bequeathed in 1960 by colonization, which it is now the Chamber's business to discern. From that standpoint, it matters little that the Governor-General of French West Africa was unable to bring to fruition his plan "to fix the boundary in question by means of a text". What is important in these proceedings is to ascertain where that boundary lay, taking account of all available indications, including letter 191 CM2.

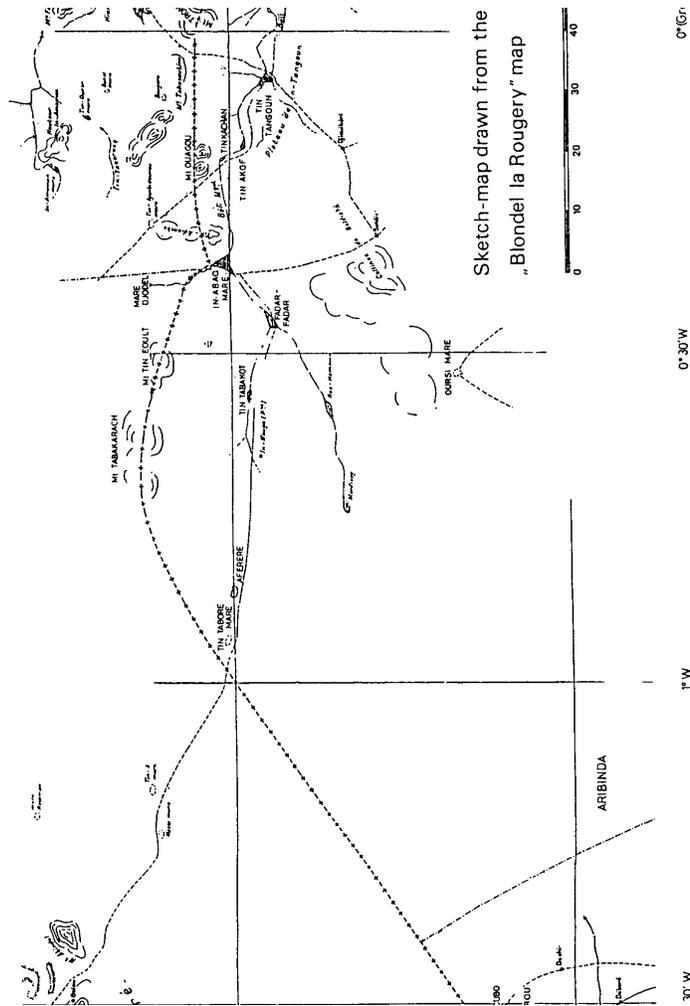
82. To Mali, it is clear that the text of letter 191 CM2 was a verbal interpretation of the line drawn on the 1925 1:500,000 scale map, that is, the Blondel la Rougery map mentioned in paragraph 59 above, an excerpt

from which is annexed to this Judgment (sketch-map No. 3 below). With-out at this stage expanding the correlations of detail between the wording of the letter and the place-names appearing near the line on the map, the Chamber believes that the author of the letter, most probably, had this map in front of him. Mali has also emphasized the deficiencies of this map, and maintained that no probative or descriptive value can be attributed to measures taken on the basis of information "which is either erroneous or fanciful". For the moment, however, the Chamber is considering only the question whether, as claimed, letter 191 CM2 was of an amending or declaratory nature. What must first be ascertained is what the intentions of the Governor-General may have been in that respect; and the concordance between the text of the letter and the administrative line presented by the 1925 map lends greater weight to the idea that the letter was intended to give a description of an existing boundary. This is because, if the objective were to modify an existing boundary having "*de facto* value", the Governor-General must then have known of this boundary, and been aware that it did not match the boundary shown on the Blondel la Rougery map, deliberately substituting the boundary on the map for the existing boundary. It is difficult to reconcile this interpretation of the facts with the text of letter 191 CM2. Whether, on the one hand, the map in question accurately represented the topography, or instead led the Governor-General into error, and what, on the other hand, would be the legal consequences of such error, are questions that will be dealt with later.

83. A further argument presented by Mali relies on the fact that the letter itself describes the indications it gives as of the Governor-General's "*projet*". According to Mali, the very idea of a *projet* seems to preclude retroactive measures, since a *projet* implies preparatory work and a draft description of the contemplated action or objective. The Chamber acknowledges that this correctly defines the purpose of a *projet*. But it points out that the letter in question contained a draft text which might subsequently have taken the form of an order – a legislative text intended for adoption – and that such a *projet* might well have endorsed and defined a boundary which already existed, even if only with a "*valeur de fait*", without thereby forfeiting the prospective character of a *projet*. Mali also observes that there is nothing to show that the authority with jurisdiction to fix a colonial boundary undertook that the proposed line would be a "*definitively de facto* line [*ligne de fait d'une manière définitive*]" : the Governor-General could not be bound by the opinions of heads of colonies or other organs failing express provision otherwise in law. The Chamber concedes that the Governor-General could well have changed his mind and issued an order defining the boundary between French Sudan and Niger in some other way. But for the Chamber it does not follow that the fact described in the letter ought not to be taken account of in law.

84. Mali also perceives, in the reactions of the *chefs de circonscription* to letter 191 CM2, an indication to the effect that the letter merely contained a proposal unrelated to the existing situation. The Lieutenant Governor-

SKETCH-MAP No. 3



General of the Sudan, in a letter-telegram dated 11 March 1935, had transmitted copies of the Governor-General's letter and of the annexed sketch-map to the Sudan *cercle* heads concerned, requesting their opinions on the draft text. The Governor-General based his reply of 3 June 1935 to the Governor-General's letter on the replies of the *cercle* commanders of Mopti and Gao to that letter-telegram. In the opinion of Mali, "it was the forward-looking character of the planned operation which explained this wide-ranging consultation"; "it was a tactic to avoid dealing with a problem or a difficulty which was burning everyone's fingers".

85. The Chamber does not share this view: it considers that a valuable indication of the nature of the process carried out by the Governor-General and by the Lieutenant-Governors of Sudan and Niger is found in the replies he had from them. The Lieutenant-Governor of Sudan consulted the *commandants de cercle* concerned, and conveyed their comments in his reply to the Governor-General of 3 June 1935. In the view of the Chamber, it is clear from these comments that the *commandants de cercle* started from the idea that the text submitted to them was intended to define the existing boundary, and that their superior's attention should be drawn to any aspects of the proposed definition which seemed either to depart from the existing boundary, or to resolve a factual situation which was unclear (the Labézanga/Anderamboukane boundary), or to omit some detail which might help to clarify the definition (pool of Kébanaira). In view of this consideration, and of all the other factors mentioned by the Parties during the proceedings, the Chamber reaches the conclusion that the definition of this portion of the boundary between Sudan and Niger in that part of it which is relevant in the present case, contained in the letter 191 CM2 from the Governor-General of French West Africa dated 19 February 1935, corresponded, in the mind both of the Governor-General and of all the administrators who were consulted, to the *de facto* situation. It still has to be ascertained whether the flaws or errors which Mali ascribes to the Blondel la Rougery map were such, given the close connections between this map and letter 191 CM2, as to render inoperative the Governor-General's intention of defining the existing situation by means of a text. The Chamber will deal with this question when it comes to apply the letter for the purpose of defining the line of the frontier in the disputed area.

86. One final observation is, however, necessary. The aforementioned description of the boundary in letter 191 CM2 (paragraph 75 above) concerned only that segment of the boundary which relates to the frontier in dispute in the present case. But the text of this letter continues as follows:

"from there [point P] it [the boundary] rejoins the Gorobol at the point of latitude 14° 27' 30" and longitude 1° 14' 45" (west of Greenwich);

it follows this marigot as far as a point situated approximately 3 kilometres to the west of Tin Abalak"

This refers to the eastern boundary of the *cercle* of Ouahigouya, which takes account of the annexation to that *cercle* of the *canton* of Aribinda, in consequence of the Decree of 5 September 1932. Accordingly, this boundary no longer corresponds to the one shown on the Blondel la Rougery map, which dates from 1925. The *Croquis de l'Afrique française* on the scale 1:1,000,000, ND 30 sheet, shows an eastern boundary for the *cercle* of Ouahigouya, in its 1926 edition, which is identical to the one reproduced on the Blondel la Rougery map. But its 1946 edition depicts a boundary which corresponds to the above-quoted description in letter 191 CM2. No regulative text had been issued in the meantime on the basis of letter 191 CM2. The Chamber therefore takes the view that the alteration made to the sketch-map between 1926 and 1946 is evidence of the declaratory purport of letter 191 CM2.

* * *

87. On 27 November 1935, the Governor-General *ad interim* of French West Africa issued an Order (No. 2728 AP) "for the delimitation of the *cercles* of Bafoulabé, Bamako and Mopti (French Sudan)". The *cercle* of Mopti, an administrative unit which was then part of French Sudan and is now part of Mali, bordered the *cercle* of Ouahigouya, which had been transferred by the Decree of 5 September 1932 to the colony of French Sudan, and into which the *canton* of Aribinda had been incorporated by an Order of 17 November 1932 (paragraph 73 above). According to the opening phrase of Article 1 of the Order of 27 November 1935, "the boundaries of the *cercles* of Bafoulabé, Bamako and Mopti are defined as follows and as drawn on the maps annexed to this Order". It will be recalled that the maps here referred to have never been traced, so that the Chamber can only refer to the actual text of the Order. Article 1, paragraph 3, of the Order describes the eastern boundary of the Sudanese *cercle* of Mopti as follows:

"From this latter point a meridian line intersecting the parallel 13° 30', and then a line running markedly north-east, leaving to the *cercle* of Mopti the villages of Yoro, Dioulouna, Oukoulou, Agoulourou, Koubo, passing to the south of the pool of Toussougou and culminating at a point located to the east of the pool of Kétiouaire."

88. The relevance of the Order 2728 AP will be apparent if the circumstances in which this Order was issued are again recalled (see paragraph 74 above). As a result of the Decree of 5 September 1932 Upper Volta had ceased to exist, and the *cercles* which had comprised it had, in the region in question, been transferred either to French Sudan or to Niger. Wherever Voltian territories bordering upon French Sudan had become part of Niger, the former boundary between French Sudan and Upper Volta continued

to divide two separate colonies, French Sudan and Niger ; wherever Vol-tan territories had been annexed to French Sudan, the former boundary between these two colonies was transformed into a boundary between two *cercles* which were now Sudanese. The consequence of Order 2728 AP was to define the administrative boundary which divided the *cercle* of Mopti on the one hand, from the *cercle* of Ouahigouya, and on the other from the *cercle* of Dori. As already stated, in 1935 the *cercles* of Mopti and Ouahigouya belonged to French Sudan, but before 1932 the *cercle* of Ouahigouya had belonged to the colony of Upper Volta, so that the law of 4 September 1947 restored it to Upper Volta. The *cercle* of Dori, which in 1935 belonged to Niger, had also belonged to Upper Volta before 1932, and so underwent a similar transfer in 1947.

89. In Mali's view, Order 2728 AP, by so defining the boundary, merely confirmed the situation which had existed in 1932, whereas for Burkina Faso, the boundary so defined involved a modification of the pre-existing situation. However, both Parties agree that there was no modification of this boundary between 1932 and 1935, the year in which Order 2728 AP was issued. Therefore, in so far as the Order proves the position of the boundary between the *cercles* of Mopti and Ouahigouya before the Order was adopted in 1935, it also proves the boundaries between French Sudan and Upper Volta in 1932, the boundaries which were confirmed by the Law of 4 September 1947 when the colony was re-established. Burkina Faso has argued that Order 2728 AP is no longer a valid legal title since it was impliedly abrogated by the Law of 4 September 1947, but solely because of the modifying effect which that Party ascribes to the Order. This abrogation does not therefore debar the Chamber from enquiring into the effects of the Order ; on the contrary, it has first to establish whether the Order was declaratory or of a modifying nature, so as to be able subsequently to determine whether the Law of 1947 did in fact abrogate it.

90. The Chamber will begin by considering whether there are any indications to be derived by analysing the actual text of Order 2728 AP and the administrative context in which it was issued, concerning the scope which the Governor-General *ad interim* of French West Africa intended it to have. The preamble to the Order refers to a number of texts, both prior to and subsequent to the Decree of 5 September 1932 for the abolition of the colony of Upper Volta, but makes no mention of that particular decree. Among these texts are Order 2790 of 5 December 1925, modified by Order 1111 AP of 30 April 1928, for the abolition of the *cercle* of Hombori and (*inter alia*) the transfer of the *cantons* of Mondoro, Boni, Sarnière and Hombori to the *cercle* of Bandiagara (*subdivision* of Douentza) and Order 2862 AP, dated 15 December 1934, for the abolition of the *cercle* of Bandiagara and the transfer of its territory to the *cercle* of Mopti. The first of these Orders is the regulation which created the boundary which, in 1932, when the colony of Upper Volta was abolished, divided it from

Bandiagara (French Sudan). From the second Order it is clear, in the first place, that this boundary, which was now the boundary of the *cercle* of Mopti, remained unchanged (Art. 1) and, in the second place, that a subsequent Order was to define the overall boundaries of this enlarged *cercle*.

91. Having listed the texts prior to its adoption which were deemed relevant to its purpose, Order 2728 AP continues, in the introductory paragraph of Article 1, with the provision that "the boundaries of the *cercles* of . . . Mopti are defined as follows . . ." This form of words undoubtedly echoes that used in Article 2 of the above-mentioned Order 2862 AP : it therefore seems clear, in the absence of any other text which would have to be taken into account in this respect, that Order 2728 AP was in fact the Order contemplated by Order 2862 AP. Consequently, there is at least a presumption that neither the aim nor the result of Order 2728 AP was to modify the boundaries which existed in 1935 between the Sudanese *cercles* of Mopti and Ouahigouya, boundaries which divided the colonies of French Sudan and Upper Volta before the abolition of the latter pursuant to the Decree of 5 September 1932. Indeed, it seems hardly likely that an intention would have been formed to go beyond the text adopted the previous year. This presumption is borne out by the fact that the title of the Order reads "Order for the delimitation of the *cercles* of Bafoulabé, Bamako and Mopti (French Sudan)" and not "Order for a territorial modification in the *cercle* of . . ." like, for example, an Order of 17 November 1932 mentioned in the preamble to Order 2728 AP. But so far the Chamber has merely stated that a presumption exists ; it must now enquire, therefore, whether the content of Order 2728 AP – especially the indication of the villages bordering upon the boundary between the *cercles* of Mopti and Ouahigouya – operates to reverse or to confirm this presumption. For this purpose, it is necessary to examine the documentary and cartographic information from which these villages can be located, as well as the various administrative communications which were contemporaneous with the preparation of the Order.

92. The first part of the frontier which the Chamber is required to define, the part for which the scope of Order 2728 AP has to be ascertained, has throughout the proceedings, been called "the sector of the four villages". The words "four villages" do not however seem always to have had the same meaning for the two Parties to the case. The text in question refers to five villages, the first of which (Yoro) is indisputably situated in Malian territory and is not in issue. The four others are Dioulouna, Oukoulou, Agoulourou and Koubo. At its meetings of 7 and 8 October 1971, the Standing Joint Commission established by the Parties (see paragraph 35 above) requested a mixed technical commission to ascertain, for the purpose of delimiting the frontier, the exact position of the villages bearing these names. During the proceedings before the Chamber it became clear that, in the opinion of both Parties, Dioulouna can be identified with the village of Dionouga. For the purposes of this Judgment the words "four villages" will be used to denote the villages mentioned in Order 2728 AP,

that is, Dioulouna/Dionouga, Oukoulou, Agoulourou and Koubo. The Chamber reserves the question whether all these villages exist today, whether they have changed their names since 1935, or even whether they all existed then. It also notes that Mali has sometimes referred to the "four villages" of Dionouga, Kounia, Selba and Douna, that its Memorial also mentions Orotounga or Orotoungo and the Burkinabe village of Diguel, and that during the hearing, its counsel stated that for Mali the "four villages" are those of Dioulouna, Agoulourou, Koubo and Douna. Without seeking to establish at this stage whether such of these other villages as were not mentioned in Order 2728 AP are relevant for the purpose of these proceedings, the Chamber emphasizes that they are not included in the term the "four villages" as employed in this Judgment.

93. According to Burkina Faso, the fact that the 1935 Order modified the administrative situation of the villages can be inferred from the obvious discrepancy between the provisions of the Order and the official maps of the period, from the *travaux préparatoires* of the Order and from the attitude of the administration after 1947. As far as the maps are concerned, Burkina Faso claims that on all the maps available to it which are sufficiently detailed to show the position of the four villages, all the villages without exception are shown to the south of the relevant administrative boundary, and accordingly on territory which is now Burkinabe. As observed above (paragraph 59), Burkina Faso attaches special significance to the Blondel la Rougery map on the scale 1:500,000, which clearly leaves the villages of Oukoulou, Agoulourou and Koubo to Upper Volta. Burkina Faso also observes that the original edition of the IGN 1:200,000 map (also mentioned in paragraph 59 above), represents the whole of the western sector of the disputed frontier, that of the "four villages", as a broken line of crosses. The Chamber has however already indicated that it cannot accept Burkina Faso's argument that the maps compiled by the Geographical Service of the office of the Governor-General of French West Africa are to some extent administrative acts, and are sources of legal title in French administrative and colonial law.

94. Mali draws the Chamber's attention to the fact that Burkina Faso is in this connection relying only on general maps, and has not filed any detailed sketch-map compiled by Voltan administrators. Mali has presented to the Chamber a map of the Gourma dating from 1901-1902 or 1909-1910, on which the village of Dioulouna is shown to the north of the boundary. It has also presented a sketch-map of the *canton* of Mondoro, compiled in 1923 by a colonial administrator and signed by the *commandant* of the region, annexed to a list of the villages comprising that *canon*. This sketch-map indicates the location of Dioulouna as well as of Douna and Orotoungo, villages which are not apparently in dispute. Two other sketch-maps, dating respectively from 1948 and 1953, were projected during the oral proceedings.

95. The Chamber has already stated (paragraph 65 above) why it cannot uphold Mali's argument that the burden of proof in this respect is on Burkina Faso, in the sense that it would be for Burkina Faso to demonstrate the Voltan character of the villages between 1927 and 1935. It takes as a starting-point of its reasoning the fact, attested by Order 2728 AP, that in 1935 the administrative authorities were aware of the existence, close to the boundary between the *cercles* of Mopti and Ouahigouya, of four villages bearing the names of Dioulouna, Oukoulou, Agoulourou and Koubo. At this stage the Chamber must remain solely within the context of 1932 (the reference date in the 1947 law for the purpose of defining the boundaries of Upper Volta) and 1935; it is not required to consider whether the villages in question still exist today, or whether they still bear the same names. Similarly, in order to ascertain the intentions of the Governor-General in 1935, it has to consider only such maps and documents as existed at the time. As far as the maps are concerned, the location of the villages follows from the information provided by the following maps, which are broadly consistent:

- A map, untitled and undated (according to Mali it dates from 1900-1902 or 1909-1910), representing the Gourma and bearing the reference 12 D/6, and a sketch-map annexed to a 1923 census of villages belonging to the *canton* of Mondoro, on which Dioulouna is given, but not the other villages mentioned in Order 2728 AP. These other villages, in view of their position on the maps mentioned below, apparently should not appear on the aforementioned maps and sketch-maps since they lay outside the administrative region covered by the maps and the sketch.
- A map of central Niger on the scale 1:1,000,000, compiled by Lieutenant Desplagnes in 1905, on which each of the five villages referred to in the Order is shown: Yoro, Dioulouna (spelt "Dioukouna"), Oukoulou, Agoulourou, and Koubo.
- A map of west Africa on the scale 1:2,000,000, sheet No. 2: Timbuktu, published by the Geographical Service for the colonies in 1922, which shows Yoro, Dioukouna, Oukoulou (spelt "Okolou") and Koubo, but not Agoulourou. However, a later edition of this map (1932) mentions only Yoro and Koubo.
- The map of the colonies of French West Africa on the scale 1:500,000 (the Blondel la Rougery map of 1925) which shows Yoro, Oukoulou, Agoulourou and Koubo, but not Dioulouna.
- The *Atlas des cercles de l'Afrique occidentale française* fascicle IV, map No. 59, *cercle* of Ouahigouya (Geographical Service of French West Africa, 1926), which also shows Yoro, Oukoulou, Agoulourou and Koubo, but not Dioulouna.
- A sketch-map of French Africa on the scale 1:1,000,000 (sheet ND-30, Ouagadougou) compiled in 1926, which shows Yoro, Oukoulou and Koubo, but not Dioulouna or Agoulourou.

96. As for the administrative unit or units to which the villages are

supposed to belong, all the maps, except Lieutenant Desplagnes' 1905 map, include a line indicating an administrative boundary, but this does not follow an identical course on every map. In that respect :

- Yoro, where shown, is always situated to the north-west (the Sudanese/Malian side) of the line.
- Dioulouna/Djoukouna, where shown, is always on the Sudanese/Malian side of the line ; however, the line shown on the Blondel la Rougery map and on the *Atlas des cercles* (1926) runs to the north of what, according to the other maps, is the position of Dioulouna.
- Agoulourou, Oukoulou and Koubo, where shown, are always on the Voltan/Burkinabe side of the line.

97. The documentary evidence submitted by Mali to the Chamber includes extracts from an official publication of the office of the Governor-General of French West Africa dating from 1927, entitled *Répertoire général des localités de l'Afrique occidentale française* (fascicles IV and VIII). This publication shows that in 1927 the Governor-General's office had recorded the following localities : in French Sudan, a village named Dioulouna in the *canton* of Mondoro, *cercle* of Bandiagara, and a village named Koubo in the *canton* of Hombori, also in the *cercle* of Bandiagara. The extracts from the *Répertoire* submitted to the Chamber are not sufficient to establish whether the same names appear on the list of Voltan places, or whether the names of Oukoulou and Agoulourou appear on either the Sudanese or the Voltan lists. However, the Chamber believes it is warranted in concluding from the silence of both Parties on this matter that this is not the case. By an Order 2862 AP of 15 December 1934, the Sudanese *cercle* of Bandiagara was abolished, and its territory was annexed to the *cercle* of Mopti. The Order also provides that "the overall boundaries of the *cercle* of . . . Mopti will be defined later by a General Order". It follows from this, assuming the village named Koubo in Order 2728 AP to be identical with the village named Koubo in the *Répertoire*, that these two villages (Dioulouna and Koubo) would have been part of the *cercle* of Mopti both before and after the adoption of Order 2728 AP.

98. If it were contended, on the basis of the maps, especially the Blondel la Rougery map of 1925, that Agoulourou and Oukoulou at least did not belong to the *cercle* of Mopti before Order 2728 AP of 1935, the conclusion would be inescapable that the colonial authorities were using the single phrase "leaving to the *cercle* of Mopti the villages of Yoro, Dioulouna, Oukoulou, Agoulourou, Koubo . . ." to refer simultaneously to a village (Yoro) which indubitably did belong to the *cercle* of Mopti, a village (Dioulouna) as to which the maps and the administrative documents do not agree, and three villages which according to the maps did not belong to the *cercle* of Mopti. On careful consideration, the Chamber thinks it very unlikely that, if that had been the situation, the Governor-General would have been so imprecise. As regards the maps, the Chamber has already

indicated (paragraph 55) that they may be of considerable probative value in so far as they reflect physical facts — e.g., the existence and position of a village —, but are of limited weight where they show a purely abstract line, an administrative boundary which fails to match the other evidence produced. The Chamber recognizes that it is hardly possible to arrive in this case at a solution capable of reconciling all the factors involved, and concludes that this material does not reverse the presumption, already mentioned, that Order 2728 AP was declaratory in nature.

99. As for the *travaux préparatoires* of Order 2728 AP, Burkina Faso has relied on a note dated 5 December 1934 bearing a marginal reference "Territorial modification in the Sudan", in which the Director of Political and Administrative Affairs of the Governorship of French West Africa wrote as follows to the military *chef de cabinet* (Geographical Service) :

"I have the honour to advise you that I have no objection in principle to the counter-proposals contained in your aforementioned note concerning the modifications to be made to the *cercles* of Bafoulabé, Bamako and Mopti consequent upon the respective annexation of the *cercles* of Satadougou, Baninko and Bandiagara."

Emphasizing the use of the word "modifications" in that note, Burkina Faso considers that it confirms that Order 2728 AP was of a modifying character. In the light of what was obviously the context of the document, i.e., the abolition of the *cercle* of Bandiagara and its attachment to the *cercle* of Mopti as a result of Order 2862 AP of 15 December 1934 (paragraph 90 above), the Chamber does not consider it possible to take the word "modifications" here to mean anything other than the effects of the proposed reorganization. This conclusion is borne out by another document from that period filed by Mali : an "Extract from the draft Order abolishing the *cercles* of Satadougou, Baninko and Bandiagara, which are converted into *subdivisions* annexed to the *cercles* of Bafoulabé, Bamako and Mopti respectively". This text is undated, but from the fact that it refers to a "draft Order" dealing with the same subject as the Order of 15 December 1934 it is clear that it is prior to that date. The text does not serve to elucidate the effects of Order 2728 AP, since the description it gives of the eastern boundary of the *cercle* of Mopti matches that of the former *cercle* of Bandiagara, as it was before the annexation to it of a part of the *cercle* of Hombori, in consequence of the Order of 5 December 1925, subsequently modified by the Order of 30 April 1928.

100. Turning to the *travaux préparatoires* which preceded the Governor-General's adoption of Order 2728 AP, it is necessary to examine among the documents submitted particularly those which were annexed by Mali to its

Counter-Memorial. According to these documents, on 2 January 1935 the Governor of French Sudan transmitted to the administrator of the reorganized *cercle* of Mopti a "geographical outline" of the boundaries of that *cercle* produced by the Governor-General at Dakar, asking the administrator whether he had any objection to it. It appears that the administrator of Mopti, in reply to this communication, sent the Governor of Sudan a letter-telegram of 26 February 1935, no copy of which has been filed, transmitting to him maps showing the boundaries of the *subdivisions* of the *cercle* of Mopti. The Governor replied to this letter-telegram on 20 March 1935 asking the administrator to supply "general indications for determining the boundaries in question (chief geographical features encountered along the course of the boundaries : mountain, watercourse, pools, etc.)", and to mark these on the map. The case file includes further a document dated 25 May 1935 entitled "Delimitation of the *subdivisions* of the *cercle* of Mopti" and bearing the signature of the administrator of that *cercle*. It will be noted that according to this text the "southern" boundary of the *subdivision* of Douentza, after reaching the village of Yoro, "then heads northeast as far as the pool of Toussougou", and that the "eastern" boundary starts "from the pool of Toussougou", following an "undulating line running northwest". These two boundaries appear to correspond, respectively, to the boundaries "to the east" and "to the north" of the *cercle* of Mopti as described in Order 2728 AP. By a letter of 3 June 1935, which was not produced in the proceedings, the Governor of French Sudan apparently transmitted to the Governor-General of French West Africa a description of the boundaries of the *cercle* of Mopti. It is reasonable to suppose that this description was based on the document prepared by the administrator of the *cercle* of Mopti, dated 25 May 1935. On 15 June 1935, this description was submitted by the Director of Political Affairs to the Geographical Service "for consideration and technical advice".

101. It must be borne in mind that during this period the administrators were also studying the proposals made by the Governor-General in his letter 191 CM2 of 19 February 1935, concerning the boundary between the colonies of French Sudan and Niger. On 11 March 1935 the Governor of French Sudan asked the administrator of the *cercle* of Mopti, among other things, for his opinion of the draft text set out in letter 191 CM2 from the Governor-General. By a letter-telegram dated 19 March 1935 the administrator replied as follows :

"Honour inform you no amendment found necessary to draft text relating to Sudan-Niger frontier.

The pool of 'Kébanaire' situated almost on the boundary of the *cercles* of Mopti-Gourma-Rharous and Dori might be mentioned . . . as follows : 'the summits of mounts Tin Eoult and Tabakarach and the pool of Kébanaire, etc. . . .'

102. In reply to the communication from the Director of Political Affairs dated 15 June 1935, a note was addressed to him by the Geographical Service of French West Africa on 11 July 1935. This note, entitled

"Boundaries of the *cercles* of Mopti, Bamako and Bafoulabé", contains the following remarks on the boundaries of the *cercle* of Mopti as contemplated by the Director of Political Affairs :

"But as regards the text concerning the *cercle* of Mopti, the description of the southern boundary (from ' . . . heading southeast, towards . . .' to the end) and that of the eastern boundary do not seem to correspond to the current state of affairs. Moreover, I have found it impossible to follow this description on the official maps of the Geographical Service, since the points referred to in the text are not shown (pool of Ouairé, village of Dioulouna, pool of Toussougou, well of Agouf, pools of Fossa and Dourgana)."

The document annexed to the communication of 15 June 1935, and which is referred to in the observations by the Geographical Service, is not among the case-file supplied by the Parties. The Chamber clearly has no means of knowing how far this draft corresponded with the text which was ultimately adopted. It may be noted in this connection that the words "heading south-east" quoted by the Geographical Service are not found in the definition of the Mopti *cercle* boundaries contained in Order 2728 AP. Nor does that Order mention the pool of "Ouairé", but it is apparent from the document dated 25 May 1935 entitled "Delimitation of the *subdivisions* of the *cercle* of Mopti", that this pool lay to the north-west of Yoro, and had only been referred to for the purpose of defining a *subdivision* boundary. Moreover, although the pool of Kéiouaire does not appear on any of the maps which have been obtained by the Parties, the Geographical Service expresses no reservations about it ; it may be concluded that, if the draft which was commented upon included a mention of this pool, the Geographical Service must have known where it was.

103. On 5 August 1935, the Governor of French Sudan informed the administrator of the *cercle* of Mopti of the difficulties experienced by the Geographical Service, and asked him to draw the outline of the boundaries of his *cercle* on the "largest-scale map in existence" published by that service "(Mopti and Hombori sheet, scale 1:500,000)", i.e., the Blondel la Rougery map. The *cercle* administrator replied on 9 August 1935 requesting a copy of this map. On 20 September 1935 the *cercle* administrator returned to the Governor of French Sudan the copy which had been supplied to him by the Geographical Service, having "drawn on it in blue pencil the *subdivision* boundaries of the *cercle* which are mentioned in the attached draft Order". At the same time, the administrator pointed out that "These lines are very approximate since these maps, compiled more than 15 years ago, contain gaps and many inaccuracies". The Governor of the Sudan communicated this warning to the Governor-General simultaneously with the description of the southern and eastern boundaries of the *cercle* of Mopti and the maps, which have not been traced. The Geographical Service then produced, on 18 October 1935, a description of the topographical boundaries of the *cercle* of Mopti, corresponding to the

description in Order 2728 AP, stating that "The *subdivision* boundaries [of this *cercle*] must be fixed by local Order".

104. Burkina Faso believes it can be inferred from the wording of the above-mentioned note of 11 July 1935, especially from the phrase observing that certain descriptions "do not seem to correspond to the current state of affairs", that the draft of Order 2728 AP did in fact imply a modification of the boundaries of the *cercle* of Mopti as previously fixed. The Chamber finds it cannot endorse this view. Rather, in view of the complete text of this draft, it considers that the "state of affairs" to which the Geographical Service was referring was the one which appeared on the maps and not the one which existed on the ground. It is obvious that the Geographical Service would not have been able to ascertain, for example, whether the statement that the boundary ran "south of the pool of Tougou" actually corresponded with the situation on the ground, since the Service did not know the position of this pool. The Chamber has already found that the maps available in 1935 do not agree with other administrative documents. Accordingly, the fact that the Geographical Service found that the draft submitted to it did not correspond, for the points indicated, to the maps it had available, may mean that this draft made changes to the existing official maps; it does not warrant a finding that the legally-established boundaries were likewise altered.

105. The Chamber believes it must be concluded that the *travaux préparatoires* of Order 2728 AP, taken as a whole, tend to confirm the presumption that the Order did not have either the object or the effect of modifying the boundaries of the *cercle* of Mopti as they existed before its adoption.

* * *

106. Having thus established how far the various regulative or administrative texts relied on by the Parties are applicable in determining the frontier line, the Chamber now comes to the question of how these can be implemented. In this respect the Chamber's task is chiefly to identify the topographical elements used as reference points in these documents, and to locate them on the maps and on the ground in relation to the modern place-names. But when doing so, the Chamber must return to the question of the methods of division of the line used by the Parties for the purpose of their arguments. Since the Chamber has reached the conclusion that letter 191 CM2 from the Governor-General of French West Africa dated 19 February 1935 was a description of the boundary existing at the time between French Sudan and Niger, it might seem to follow that one point on the frontier, point P, is now identified (the point with the geographical co-ordinates 1° 24' 15" W and 14° 43' 45" N) and that Burkina Faso's proposed division into two sectors can therefore be adopted, the one sector lying to the west of that point and the other to the east, as far as the end of

the frontier between Burkina Faso and Mali. But before pronouncing on this, the Chamber must consider the relationship between the information provided by the various written texts which it has to apply.

107. The Order of 31 December 1922 "for the reorganization of the region of Timbuktu" and the letter 191 CM2 from the Governor-General of French West Africa dated 19 February 1935 bear each other out, in that both refer to the pool of In Abao (1922 Order) or Inabao (1935 letter) as one of the reference points of the boundary between Sudan and the neighbouring colony, from 1922 onwards Upper Volta, and from 1935 on Niger. Similarly, the letter 191 CM2 of 1935 agrees with the Order of 31 August 1927 "fixing the boundaries of the colonies of Upper Volta and Niger", which implied that the end-point of the frontier between Upper Volta and French Sudan was situated at the "heights of N'Gouma". The boundary contemplated in the 1935 letter, a boundary which no longer ended at N'Gouma because of the transfer of certain Voltan *cercles* to Niger, nevertheless continued to run through (*inter alia*) "mounts Tin Garan, N'Gouma, Trontikato . . .".

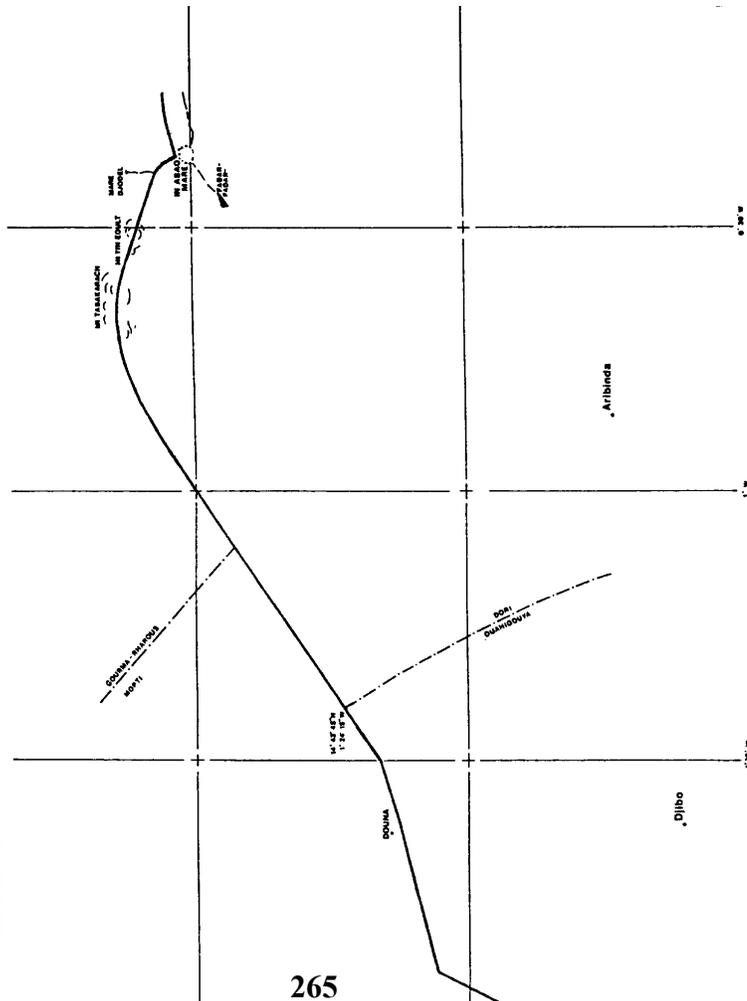
108. Even more significant, but also more complex, is the relationship between the line described in Order 2728 AP of 27 November 1935 and that given in the draft description in letter 191 CM2 of 19 February of the same year. Order 2728 AP defines the eastern and northern boundaries of the *cercle* of Mopti by reference to topographical elements. It gives no indication which administrative entity was separated from that *cercle* by each boundary. The Chamber notes that, in the region relevant to the present case, the so-called "eastern" boundary followed a southwest-northeast direction, and divided the *cercle* of Mopti from two *cercles* lying successively to the southeast of the line: the Sudanese *cercle* of Ouahigouya and the Niger *cercle* of Dori. The so-called "northern" boundary divided the *cercle* of Mopti from the Sudanese *cercle* of Gourma-Rharous. The point "located to the east of the pool of Kétouaire" mentioned in the Order is therefore the tripoint where the *cercles* of Mopti, Gourma-Rharous and Dori met. However, the "eastern" boundary also ran through another tripoint, that is, the meeting-point between that boundary and the boundary between the *cercles* of Ouahigouya (Sudan) and Dori (Niger). The purpose of letter 191 CM2 of 19 February 1935 was to define the boundary between the colonies of French Sudan and Niger: between the two tripoints, Mopti/Ouahigouya/Dori and Mopti/Gourma-Rharous/Dori (see sketch-map No. 4, below) that boundary was identical with the line which Order 2728 AP was intended to define. The geographical co-ordinates given in the letter by way of definition of the end-point of the Sudan-Niger boundary are therefore those of the tripoint Mopti/Ouahigouya/Dori.

109. With regard to this latter point, it should first be noted that it corresponds to the northwestern extremity of the *cercle* of Dori as shown in

the maps of the *Atlas des cercles* (fascicle IV, maps 53 and 59) of 1926, as well as in the Blondel la Rougery map of 1925, maps drawn up before the abolition of Upper Volta and the transfer of the *canton* of Aribinda from the Chamber of Dori to the *cercle* of Ouahigouya. The maps made available to the Chamber do not show the boundaries of that *canton*. However, from the successive editions of 1926 and 1933 of the sketch-map of French Africa on the scale 1:1,000,000 (ND 30 sheet : Ouagadougou, maps filed by Burkina Faso), it is plain that the modification of the boundaries of the *cercle* of Dori which resulted from the transfer of the *canton* of Aribinda did not result in modifying the location of the tripoint Mopti/Ouahigouya/Dori. In the second place, it may seem surprising that at the time when Order 2728 AP was compiled, in November 1935, the Geographical Service did not see fit to propose to the Governor-General that point P should be mentioned in the definition of the boundary of the *cercle* of Mopti ; that was the point used in the letter 191 CM2 of February 1935 to define the western end-point of a boundary the extension of which was identical with that of the boundary which was to be defined by Order 2728 AP, at least in so far as both boundaries connected the two tripoints mentioned above. This is the more curious in that the administrator of the *cercle* of Mopti, after receiving a copy of letter 191 CM2, had informed the Lieutenant-Governor of the Sudan, by a letter-telegram of 19 March 1935, that he found "no amendment . . . necessary to draft text relating to Sudan-Niger frontier" except for the suggested addition of a reference to the pool of Kébanaire. The administrator of the *cercle* of Mopti had therefore accepted that point P mentioned in the letter was indeed on the boundary of his *cercle*.

110. It might be thought that the reference in letter 191 CM2 of 1935 to a point defined by co-ordinates of latitude and longitude would have simplified the Chamber's task, since it would thus have a firm and reliable key point for the purpose of determining the course of the line. That is however not so. From the documents of the period it seems clear that the reason for giving a precise definition of point P was not that it corresponded to a typical topographical feature the co-ordinates of which should be calculated, nor for the purpose of later fixing an astronomic marker at that point. The point to which the co-ordinates refer was the meeting-point of three *cercle* boundaries, which were themselves defined in topographical terms, and there is little doubt that it was on the basis of the data supplied by one or more maps that the author of letter 191 CM2 gave a definition of this point in figures. Paradoxically, it follows that it is the point so defined which is the least authoritative in the present case. When the boundaries described in the letter 191 CM2 or in Order 2728 AP are defined in terms of topographical features, as passing through a certain hill or pool, then once these have been identified on the ground the Chamber must necessarily ensure that the line it has to draw passes through them. But it must be borne in mind that the basic maps available in 1935, according to the IGN itself, were most inaccurately drawn, so that "the position of certain details may be misplaced by several kilometres" (Note

SKETCH-MAP No. 4



dated 27 January 1975 on the positioning of frontiers). If the definition of a boundary refers both to details like these and to a calculated point with co-ordinates derived from such a map, there is only one way to observe the consistency among boundaries sought by the colonial administrators : where the topography and the co-ordinates fail to agree, the topography must be preferred. In the present instance, if it were to prove to be the case, on the basis of reference-points shown on maps and in other geographical sources which are more reliable, in 1986, than those compiled with the technical data available in 1935, that the geographical co-ordinates mentioned in letter 191 CM2 are imprecise or inaccurate, then for the Chamber to give a correct interpretation of the letter it would have to correct them, or even disregard them.

111. To establish the relationship between Order 2728 AP and letter 191 CM2, particular account must be taken of the attitude of the Mopti *cercle* administrator. He must doubtless have had maps available to him, but he did not possess the Blondel la Rougery map (the Hombori sheet of the 1:500,000 series), as is shown by his communication to the Governor of French Sudan on 9 August 1935. Now on 19 March 1935 this administrator himself approved, for the boundary of his *cercle*, the draft description set out in letter 191 CM2, that description being simply the verbal equivalent of the line shown on the Blondel la Rougery map. If, having regard to the documentary or cartographic information in his possession, the Mopti administrator made no objection to that description, it may be assumed that, as regards the portion of the line which was at the same time a boundary of the *cercle* of Mopti, the description contained in the letter corresponded to the administrative situation. It should also be noted that the Mopti administrator returned to the Lieutenant-Governor of French Sudan the Hombori and Mopti sheets of the 1:500,000 map, after drawing on them in blue pencil the boundaries as he knew them to be ; and it was on the basis of these sheets, and not from a clean copy of the Hombori sheet, that the Geographical Service prepared the definition of the *cercle* boundaries to be set out in Order 2728 AP. This confirms the Chamber's conclusion that it cannot accept the argument that the depiction on the 1:500,000 Hombori sheet of the villages of Koubo, Agoulourou and Oukoulou south of the boundary shown on it proves that Order 2728 AP had the effect of transferring them from the *cercle* of Ouahigouya to the *cercle* of Mopti.

* * *

112. Now that the Chamber turns to the essential part of its task, it encounters a practical problem : the Parties have not clearly indicated to it the end-point of the frontier already established between them by common

agreement, that is to say, the western end of the disputed area. In its submissions, Mali requested the Chamber to decide that the frontier line in the disputed area runs through a series of defined points, the first of which is "Lofou". According to a map also presented by Mali, entitled "Disputed area - crossing points on the frontier", Lofou is to be found 29 kilometres to the south of Diounouga, to the west - the Malian side - of the "frontier line shown on the 1:200,000 scale map" of the IGN. Burkina Faso has not challenged the accuracy of this. One of Mali's counsel explained during the oral proceedings that Lofou was not apparently a disputed point. This also appeared from the Counter-Memorial of Burkina Faso, where it is stated that Lofou is a "Malian village cultivated by Burkinabes". On the map mentioned above submitted to the Chamber by Mali, there is a line in red ink, which corresponds to its submissions. This line begins at Lofou and follows the "frontier line" of the IGN map as far as a point apparently with the following geographical co-ordinates : 1° 59' 01" W and 14° 24' 40" N. As for Burkina Faso, it did not in its submissions identify the starting-point of the line to be drawn by the Chamber ; it merely submitted to the Chamber a map (comprising an extract from a compilation of five sheets from the IGN 1:200,000 map) indicating both the frontier line which it asks the Chamber to endorse, and what it alleges to be the successive claims of Mali. On that map, the respective lines proposed by the two Parties intersect at a point lying on the "frontier line" mentioned above, but approximately 18 kilometres to the north of Lofou. Burkina Faso also states that, for the purpose of the delimitation already made by agreement, the Parties based themselves on the line on the IGN 1:200,000 scale map.

113. The Chamber considers that it can justifiably conclude that the Parties both accept the frontier line of the IGN map south of the point with the geographical co-ordinates 1° 59' 01" W and 14° 24' 40" N ; it finds therefore that it is from that point that they are requesting the Chamber to indicate the line of their common frontier in an easterly direction.

* * *

114. The regulative texts intended to fix the district boundaries - Order 2728 AP being one of these - generally do so merely by referring to the villages comprising a *canton* or allocated to a certain *cercle*, without further geographical clarification. This therefore calls for a consideration of the meaning to be ascribed to the word "village". The problem arises particularly because the inhabitants of the villages in the region frequently cultivate land at a distance from the village itself, sometimes separated from it by areas comprising uncultivated or arid land, and they take up residence in "farming hamlets" which form dependencies of the main village. This system further complicates the Chamber's task of drawing a

line which, as the boundary of certain villages, constitutes the former administrative boundary of a colony, and consequently the present frontier between the territories of the Parties. The Chamber has to decide whether, in the light of the delimitation it is asked to effect, the farming hamlets form part of the villages on which they depend. Moreover, in a region where it is common for villages, in the course of time, to change their locations or names, or even disappear, it is no easy matter to decide what was the position of farming hamlets in 1932, should this be necessary for the delimitation which the Chamber has to effect.

115. Mali has emphasized that it is claiming those villages which were formerly administratively Sudanese to their legal extent ; that it is not claiming land cultivated by Malians, but land which administratively appertains to Malian villages. It quotes an Order issued by the Lieutenant-Governor *ad interim* of the Sudan on 30 March 1935, "for the reorganization of the native administration in the colony of French Sudan", Article 2 of which provides that "the village is the native administrative unit. It comprises the whole of the population residing there and all the land dependent on it." For Mali, "the land dependent on" a village includes the farming hamlets. Burkina Faso argues, however, that the French administrators of the period were well aware of the phenomenon of the overlapping farming villages, and the impossibility of drawing an administrative map taking account of attachment on a "personal" basis or in relation to farming activities. This state of affairs necessitated a degree of flexibility, which was, in Burkina Faso's view, provided by the Order of 30 March 1935, since Article 7 provided that :

"The chiefs of a number of neighbouring villages may prepare among themselves, after consulting the councils of the villages concerned, collective agreements for fisheries, hunting, farmland, grazing lands and transhumance areas. In no circumstances may these agreements modify the laws or regulations in force, and they will be submitted for approval to the district head, who will have them issued in accordance with the terms of the decree of 2 May 1906 on native agreements."

Burkina Faso has also drawn attention to the considerable distances between the villages and the farming hamlets depending on them, these distances being imposed by the poor soil and the patterns of cultivation this necessitates. It has also pointed out that the frontier line already fixed by joint agreement between the Parties divides numerous villages from their farming hamlets. From this it concludes that excessive use of the concept of farming hamlets for delimitation purposes could have unfortunate results.

116. While under the colonial system a village may, for certain administrative purposes, have comprised all the land depending on it, the Chamber is by no means persuaded that when a village was a feature used

to define the composition — and therefore the geographical extent — of a wider administrative entity, the farming hamlets had always to be taken into consideration in drawing the boundary of that entity. In the colonial period, the fact that the inhabitants of one village in a French colony left in order to cultivate land lying on the territory of another neighbouring French colony, or a *fortiori* on the territory of another *cercle* belonging to the same colony, did not contradict the notion of a clearly-defined boundary between the various colonies or *cercles*. This was the situation inherited by the two Parties at the moment of achieving independence ; and it is the frontier as it existed at that moment which the Chamber is required to identify. The Parties have not requested the Chamber to decide what should become of the land rights and other rights which, on the eve of the independence of both States, were being exercised across the boundary between the two pre-existing colonies. If such rights had no impact on the position of that boundary, then they do not affect the line of the frontier, and it is this line alone which the Parties have requested the Chamber to indicate. From a practical point of view, the existence of such rights has posed no major problems, as is shown by the agreements which they have concluded to resolve the administrative problems which arise in the frontier districts of the two States. For example, an agreement of 25 February 1964 deals, among other matters, with the "Problems of land and the maintenance of rights of use on either side of the frontier", and it provides that "Rights of use of the nationals of the two States pertaining to farmland, pasturage, fisheries and waterpoints will be preserved in accordance with regional custom".

117. It is however also important not to over-systematize this distinction between the village as a territorial unit and the farming land dependent on it. In this matter, it all depends on the circumstances. The Chamber considers that it is only when it has examined the evidence and other information available to it relating to the extent of a particular village that it will be able to ascertain whether a particular piece of land is to be treated as part of that village despite its lack of a connection with it, or as a satellite hamlet which does not fall within the boundaries of the village in the strict sense.

* *

118. Since Order 2728 AP of 1935 defines the boundary between the *cercles* of Mopti and Ouahigouya in terms of villages "left" to the former *cercle*, these villages have to be identified, and their territorial extent ascertained. The first village mentioned in the Order is Yoro. As we have seen (paragraph 92 above), Burkina Faso does not deny that this village, which is situated some 15 kilometres west of the frontier line shown on the IGN 1:200,000 scale map, at the level of Lofou, is Malian. As for the geographical boundaries of this village, the Chamber notes that Mali has stated that it has no difficulty in accepting the line of the IGN 1:200,000 scale map up to a certain point, a point determined not by reference to the

extent of the village of Yoro, but according to that of the village of Dionouga. Since this line is also that proposed by Burkina Faso, the Chamber concludes that there is no dispute concerning this first part of the frontier.

119. The position of the village of Dionouga, which the Parties agree in identifying with the village of "Dioulouna" mentioned in Order 2728 AP, is defined, according to the report of a technical subcommission of the Mixed Technical Commission of Mali and Upper Volta dated 14 April 1972, by the geographical co-ordinates 1° 57' 00" W and 14° 32' 12" N. On the IGN map, this village is situated in the immediate vicinity of the frontier line on the Burkinabe side, close to the point where the line bends north-eastwards. In this sector, it is therefore clear that this line can no longer represent the boundary defined in Order 2728 AP, since the latter left the village of Dioulouna/Dionouga to the *cercle* of Mopti. The Chamber cannot therefore uphold Burkina Faso's submission that the frontier is "as shown on the 1/200,000 scale map of the French Institut géographique national, 1960 edition, the villages of Dioulouna . . . being located in Burkinabe territory". Mali, on the other hand, claims that the frontier in the vicinity of Dioulouna/Dionouga should run through "the mosque-shaped enclosure situated two kilometres to the north of Diguel".

120. In support of this submission, Mali quotes the minutes of the meeting of the Mixed Technical Commission of Mali and Upper Volta, held from 5 to 17 April 1972, and the information obtained on 5 September 1985 from the "older residents" of Dioulouna who, according to Mali, are themselves the repository of an ancient oral tradition. Of all this information, what the Chamber finds particularly noteworthy is the fact that, on the subject of Dioulouna, the local people told the Mixed Technical Commission that:

"under the colonial régime, track-making work for Dioulouna stopped at Tondigaria, at the level of the white stone (about 10 km to the south of Dioulouna) . . ."

and as regards the Burkinabe village of Diguel,

"under the colonial régime, the track-making work stopped at Sagarabane (Gravillons Rouges) at seven (7) kilometres approximately to the north [of the village of Diguel]".

In the Chamber's opinion, this information about the track-making works carried out at the behest of colonial administrators has a certain evidentiary value. First, this information is a guide to what, according to the aforementioned testimony, those administrators considered to be the boundaries of their districts. Only in its oral reply did Burkina Faso suggest that the recruitment of forced labour under the colonial régime was connected not with the district boundaries, but rather with the available

supply of labour, but produced no evidence of this. Secondly, such information shows how important these operations were in the lives of the population under the colonial régime; thus they had an accurate and reliable recollection of them. Moreover, it is reasonable to suppose that such operations have continued to take place from time to time until a fairly recent period. On the other hand, the tradition invoked in regard to the mosque-shaped enclosure goes back to a meeting between a colonial administrator and native chiefs held about 1913; and no minutes or other written evidence of that meeting have been produced.

121. Mali concedes that there is a margin of error, estimated at 23.5 per cent, in the distances quoted above, the true distance between the villages of Dioulouna and Diguel being 13, not 17 kilometres. Mali itself suggests that "if the information [obtained from the local inhabitants] is corrected in the light of this average error, the point [i.e., the meeting-point between the two villages] is situated at 7.650 kilometres from Dionouga and at 5.350 kilometres from Diguel". Although the Chamber does not think it necessary to endeavour to achieve such mathematical accuracy, it can nonetheless conclude that the administrative boundary at the relevant time during the colonial period intersected the track between Dioulouna/Dionouga and Diguel at a distance of approximately 7.5 kilometres to the south of Dionouga, and that the line of the frontier between Burkina Faso and Mali consequently does the same.

122. After Yoro and Dioulouna, Order 2728 AP goes on to mention the villages of Oukoulou and Agoulourou. According to Burkina Faso, Oukoulou could be the village today called Oukoulourou. Mali, in reliance mainly on a 1905 map (the map of central Niger compiled by Lieutenant Desplagnes), considers that the latter village is identical to Agoulourou in the 1935 text, and that Oukoulou is now called Kounia. The Chamber would emphasize that it is quite irrelevant to the present case whether or not the villages exist today; if in 1935, the Governor-General referred to certain villages in defining a boundary which was subsequently to become an international frontier, the fact that these villages have since disappeared does not result in any modification of the boundary so defined. The Chamber also considers it must reject the logic adopted by the Parties, of seeking to ascertain which village may nowadays be situated on the site of any one of the villages mentioned in Order 2728 AP, and to establish the present territorial limit of those villages in order to define the frontier. The boundary which the Chamber has to identify is the one which existed in 1932. The relevance of the 1935 Order lies in the fact that, as the Chamber has found, it defines in written form the situation prevailing in 1932.

123. Having concluded that the present-day village of Oukoulourou and the village of Agoulourou mentioned in Order 2728 AP are identical, Mali relies on the following information obtained by the Mixed Technical Commission in April 1972:

"For fifty-four (54) years, the inhabitants of Douna (Republic of Mali) have been farming at Selba and at Okoulourou, without prior permission from anybody, for the good reason that these areas belonged to them. No Voltans cultivate these lands.

At present, only one family from Douna is farming the Selba lands. The reason is :

- (a) the impoverishment of the soil ;
 (b) an exodus of young people following the deportation of their elderly parents, who were opposed to their villages being annexed to the *canton* of Hombori.

Under the colonial régime, track-making works for Douna stopped at the level of the Selba baobab tree (not far from an astronomic marker situated at the edge of the pool of Selba). The same operations for the village of Sô (Republic of Upper Volta) stopped at the level of the same baobab. Thus this baobab is the boundary between the two villages."

Mali therefore asks the Chamber to draw the frontier line through the Selba baobab.

124. Generally speaking, as the Chamber has observed above, track-making works are a significant element of the "*effectivités*" which may prove the intentions of the colonial administrators. But the question is not what was the geographical extent, taking into account the dependent land or the farming hamlets, of the village of Douna, which is neither mentioned in Order 2728 AP nor situated at the same spot as any of the villages there mentioned which have since disappeared. Even if the village of Agoulourou no longer exists, the Chamber nonetheless has to ascertain what its boundaries were in 1932-1935 ; the fact that a farming hamlet (Okoulourou) is now situated on the same spot and bears almost the same name, but is dependent on the village of Douna, does not warrant the conclusion that the village of Douna may determine the course of the line. At the present stage of its reasoning, the Chamber will merely state that the line it is to draw must run to the south of the villages of Kounia and Okoulourou, the location of which corresponds to that of Oukoulou and Agoulourou on the maps referred to in paragraphs 95 and 96 above, reserving for the moment the question of defining the boundaries of the two latter villages.

125. Order 2728 AP mentions next the village of Koubo, where there is some confusion of nomenclature. According to the minutes of the meetings of the Mixed Technical Commission of 8 and 9 April 1972 :

"From Douna the Commission went to the village of Kobou, situated at twenty-seven (27) km approximately to the east . . . When questioned, the dignitaries explained that the village Kobou and the farming hamlet Koubo should not be confused. The latter is situated about four (4) km to the south of Kobou.

We should note that although the village of Kobou is shown on the IGN 1/200,000 extract (Djibo sheet) 1960 edition, the hamlet of Koubo does not exist. On the other hand, there is a hamlet of Kobou about four (4) km to the south."

Subsequent passages in the minutes are devoted to the village of Kobou and the hamlet found to the south of it, but that hamlet is then spelled "Koubo" instead of "Kobo" as in the last paragraph quoted and on the IGN map. The minutes add the following details, supplied by the dignitaries of the village of Kobou :

"The village of Kobou has existed for sixty-nine (69) years. The farming hamlet with the name Koubo, situated about four (4) km to the south, originated from the village and is as old as the village itself. There is a well in it which was dug by the inhabitants of Kobou fourteen (14) years ago. No Voltans live there . . .

The boundary with Upper Volta is Tondegarian, to the south of Koundiri."

Mali claims that, according to oral tradition in the villages and among the nomads of the region, the frontier in this area is the Tondigaria, a highly characteristic discontinuous outcrop of white stones. It runs through the following points, which Mali cites in its submissions as determining the course of the line : Tondigaria (approximately 18 kilometres to the southeast of Kobou), Fourfaré Triaga, Fourfaré Wandé, Gariol and Gountouré Kiri (the latter lying south east of the pool of Soum).

126. The Chamber notes that Mali does not base its claim that the Tondigaria constitutes the frontier on anything connected with the location or extension of the village known in 1935 under the name of Koubo, whether that village now corresponds to the village of Kobou or to the hamlet of Kobo. Its claim is based solely on an oral tradition unrelated to the written title constituted by Order 2728 AP. The Chamber cannot interpret the text of the Order, which defines the boundary as "leaving to the *cercle* of Mopti the village of . . . Koubo", as referring to a geographical or topographical feature, however characteristic, which is not mentioned in the text of the Order, and for which no evidence has been offered that it defines the southward boundary of the "land depending" on the village of Koubo. The information available to the Chamber is not sufficient to establish with certainty whether it is the village of Kobou or the hamlet of Kobo which corresponds to the village of Koubo referred to in Order 2728 AP ; but given that the hamlet is only 4 kilometres from the village, the Chamber considers it reasonable to treat them as a whole, and to draw the line in such a manner as to leave both of them to Mali. Here again, the Chamber reserves for the moment the question of the exact position of this line.

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127. The line described in Order 2728 AP, after leaving to the *cercle* of Mopti the five villages just discussed, continues “markedly north-east”, “passing to the south of the pool of Toussougou and culminating in a point located to the east of the pool of Kétiouaire”. There is a problem as to the whereabouts of these pools: none of the maps contemporary with the Order which the Parties have been able to present to the Chamber shows any pools bearing these names. As far as the pool of Toussougou is concerned this is not surprising, since the Geographical Service of French West Africa had already informed the Director of Political and Administrative Affairs in the aforementioned note dated 11 July 1935 (paragraph 102), that this pool was one of the points given in the text of the projected description of the boundaries of the *cercle* of Mopti which did not appear on the official maps of his service. Only around 1960 did certain IGN maps show a village of Toussougou, as well as a hydrological feature (a pool or an “area liable to flooding”) to the south-west of this village called Fété Maraboulé. These maps are the 1:200,000 map of West Africa, sheet ND-30-XVII; 1:500,000 map of West Africa, sheet ND-30-N.E. This feature, according to Mali, is to be identified with the pool of Toussougou. Burkina Faso claims there are two separate pools, Toussougou and Maraboulé. Burkina Faso has filed a map, compiled in 1973 for the purpose of an inventory of hydraulic resources in Upper Volta, which records the existence of two pools. Mali explains that it is a single pool, the extent of which varies with the season: it shrinks in the dry season and swells in the rainy season.

128. The Chamber notes that there is at least one pool in the region of the village of Toussougou, according to both Parties, but the only evidence they have offered on the matter consists of maps. But the maps are far from clear or definitive in this regard. On the IGN map, two symbols to the south of the village indicate the existence of two water-pools; and the name “Fété Maraboulé” indicates an “area liable to flooding” which is surrounded and extended by “water logged areas”. A “geological reconnaissance map of Upper Volta” filed by Burkina Faso shows two features marked in blue which seem to be pools, but do not correspond in shape or position to those on the IGN map. The cartographic base of the map of water resources, also filed by Burkina Faso, is in fact the IGN map, on which symbols have been added to denote water resources. Obviously the Chamber is here confronted with a major difficulty, since it has only contradictory cartographic documents available to it. However, it considers that the 1973 map, compiled for the very purpose of providing an inventory of water resources, is a particularly valuable piece of evidence. On this map there are two distinct symbols, each representing a non-permanent pool; the pool of Fété Maraboulé is stated as being dry for nine months of the year, no details being given for the pool of Toussougou. The Chamber believes it can be inferred from this that even during the rainy season the two pools remain separate, forming two independent water points from the viewpoint of a register of water resources. Hence there is no

obvious or necessary identity between the pool of Fété Maraboulé and the pool of Toussougou referred to in Order 2728 AP.

129. What must also be taken into consideration is the impact of such an identification on the course of the line. According to the map of hydraulic resources, the pool of Toussougou is located at a latitude of approximately 14° 45'; the maximum southward extension of the pool of Fété Maraboulé lies at a latitude of approximately 14° 41'. The geographical co-ordinates of the point indicated by letter 191 CM2 are 1° 24' 15" W and 14° 43' 45" N; it therefore lies west of the two pools, on a parallel running between the southern point of the pool of Toussougou and the southern point of the pool of Fété Maraboulé. A straight line starting from the region of the villages of Kounia and Oukoulou and heading to the south of the pool of Toussougou would pass, not through this point, but about 6 kilometres to the south of it; a line with the same starting-point heading to the south of Fété Maraboulé would pass about 8.5 kilometres to the south of the point in question. As the Chamber has pointed out, there can be no certainty that the western extremity of the boundary between French Sudan and Upper Volta, as contemplated in letter 191 CM2, lay at exactly the point P, defined by the co-ordinates mentioned in that letter. Indeed this appears not to be the case, since neither of the two lines in question here passes through this point. Nevertheless, in interpreting the reference to the pool of Toussougou in Order 2728 AP, the Chamber believes that of the two possible interpretations it must opt for the one which would reduce to a minimum the margin of error involved in defining the tripoint given in letter 191 CM2, short of compelling grounds for choosing the contrary interpretation. It is also important to bear in mind that the village of Kobou, which was “left” to the *cercle* of Mopti by Order 2728 AP, is situated on approximately the same latitude as point P. If the line contemplated in the Order had run as far south of this village as the line heading to the south of Fété Maraboulé, it is doubtful whether it would have been thought necessary to mention this village.

130. Before investigating the position of the pool of Kétiouaire, also mentioned in Order 2728 AP, the Chamber considers it necessary to summarize the situation regarding the first segment of the line. Beginning from the point with the geographical co-ordinates 1° 59' 01" W and 14° 24' 40" N, defined in paragraph 112 above, the line heads northward, and for a distance of approximately 3.5 kilometres it follows the line shown in a broken series of small crosses on the IGN map of 1958-1960, as far as a point with the geographical co-ordinates 1° 58' 49" W and 14° 28' 30" N. At this point it turns eastwards, intersecting the track between Dionouga and Diguel about 7.5 kilometres to the south of Dionouga, and continues towards the village of Kounia. The line then has to “leave” to Mali: the straight line towards the pool of Toussougou. A boundary “leaving” certain villages to any particular administrative district may follow the exact

boundaries of these villages, whatever shape they take, and will result in a somewhat undulating line. Provided it observes the administrative appurtenance of the villages, a boundary may also follow a straight line or consist of a series of straight lines all running in the same general direction, with some minor deviations. The colonial maps of the period, for example, the 1926 *Atlas des cercles*, show clearly that the latter was the form most frequently taken by the *cercle* boundaries. It is also of relevance that the description given by the administrator of the *cercle* of Mopti of the *sub-division* boundary corresponding to the boundary contemplated in Order 2728 AP refers to a single line starting from the village of Yoro and subsequently "heading northeastward as far as the pool of Toussougou". The Chamber concludes that in adding the detail that the line was to "leave" to the *cercle* of Mopti the village of Yoro and the "four villages", the Geographical Service of French West Africa did not intend the line to take a more complex form as a result. In addition, there is no means of determining the precise extent of the villages of Agoulourou and Oukoulou in 1935. The Chamber therefore considers that a line which skirts the present-day villages of Kounia and Oukoulourou at a distance of 2 kilometres to the south corresponds to the boundary described in Order 2728 AP, as far as the course of this boundary can be determined in 1986.

131. According to Order 2728 AP, the line must next pass "to the south of the pool of Toussougou". For the reasons already explained, in the Chamber's view this pool is not the pool of Féto Maraboulé, but the smaller pool lying close to the village of Toussougou. The expression "to the south of the pool" does not have the same meaning as other expressions such as "passing through the southern point of the pool"; the gap between the line and the pool would be a consequence of the draftsman's intention, in Order 2728 AP, that the line should continue as far as a point "located to the east of the pool of Kétiouaire". Before defining the course of the line in relation to the pool of Toussougou, the Chamber must attempt to locate the pool of Kétiouaire.

132. The boundary of the *cercle* of Mopti "to the east", the boundary which according to Order 2728 AP divided it from the *cercle* of Dori in 1935, terminates at "a point located to the east of the pool of Kétiouaire". It should again be recalled that when drafting this Order, the Governor-General had received the reply of the Lieutenant-Governor of French Sudan dated 3 June 1935 to his letter of 19 February 1935. In his reply the Lieutenant-Governor had stated that the administrator of the *cercle* of Mopti was proposing: "that the pool of Kébanaire, situated almost on the boundary of the *cercles* of Mopti, Gourma-Rharous and Dori... should be included in the geographical description of the boundary...". At first, both Parties concluded from this that the pool of Kébanaire and the pool of Kétiouaire were one and the same, the name having been transcribed with two different spellings. During the oral proceedings, however, counsel for Burkina Faso expressed some doubt on this point. The Chamber notes that the modification proposed to the Lieutenant-Governor of French Sudan

by the administrator of the *cercle* of Mopti (see paragraph 101 above) also reveals a certain contradiction, at least if it is interpreted strictly according to its terms. If, as the *cercle* administrator proposed, the words "and the pool of Kébanaire" are added between the reference to mount Tabakarach and the words "and then bends south-west" contained in the text of the Governor-General's letter, it appears that the pool in question would have had to lie close to mount Tabakarach and in the vicinity of the bend between the east/west sector and the north-east/south-west sector of the line. But according to the *cercle* administrator himself, the pool was "situated almost on the boundary of the *cercles* of Mopti, Gourma-Rharous and Dori"; but the meeting-point of these *cercle* boundaries, according to all the available maps, lay on the north-east/south-west sector of the line, well to the south of mount Tabakarach.

133. The Chamber observes first, that none of the maps available to it show any pool bearing either of these names, and secondly, that the Upper Volta/Mali Mixed Technical Commission, during its working sessions between 5 and 17 April 1972, obtained little more than negative information. The local people, when questioned, were unaware of the existence of a pool of Kétiouaire, and the Malian inhabitants of Soum gave a location for it which Mali has since rejected. The Chamber also notes that the technical committee of cartographers appointed by the Legal Sub-Commission of the Organization of African Unity Mediation Commission was unable to throw any further light on the situation, though it did observe to the Legal Sub-Commission that, in any event, the pool of Kébanaire could not have been situated west of point P, "since it must lie between Tabakarach, already identified to the east, and this geographical point".

134. It is important not to lose sight of the fact that the line described in Order 2728 AP of 1935 as the boundary "to the east" of the *cercle* of Mopti, before reaching its end-point which was simultaneously the tripoint between the *cercles* of Mopti, Gourma-Rharous and Dori, had to pass through the tripoint between the *cercles* of Mopti, Ouahigouya and Dori, although there is no mention of this in Order 2728 AP (see sketch-map No. 2 above). Since the Chamber has chosen to proceed from west to east when indicating the line of the frontier, it would be logical for it to define this latter point before determining the position of the former, which is further to the east. But the Chamber has already explained (paragraph 110 above) why it cannot regard it as settled that the more westerly of these two points was in fact point P, the one defined by geographical co-ordinates contained in the letter 191 CM2 of 1935. Reserving this question, the Chamber will first pursue the question of the position of the pool of Kétiouaire.

135. Burkina Faso is of the opinion that, first, the pool of Kétiouaire/Kébanaire, "of which contradictory descriptions were given at a time when the region was poorly known, cannot be precisely located" and, secondly, that its localization is not necessary in order to draw the frontier line. It is true that the proposal made in 1935 by the administrator of the *cercle* of

Mopti, and transmitted by the Lieutenant-Governor of French Sudan to the Governor-General of French West Africa, for the incorporation in the description of the boundary between French Sudan and Niger of a reference to the pool of Kébanaire, was not apparently conceived as an essential factor in the definition of that boundary; the administrator of the *cercle* of Mopti seems rather to have intended it as a useful detail to make the description more precise and to facilitate its identification on the ground. The Chamber accordingly considers that it is not necessary to establish the position of the pool of Kébanaire for the purpose of interpreting the letter 191 CM2 of 1935. But this cannot be said of the interpretation of Order 2728 AP, since in that text the pool of Kétiouaire is an important element in the definition of the boundary. Burkina Faso has not had to deal with this point in its arguments, since in its view Order 2728 AP, having a modifying character, was rescinded in 1947 and cannot therefore be taken into account in defining the frontier line. Nevertheless, Burkina Faso has supplied no proof that not only the reference to the "four villages" but also the reference to the pool of Kétiouaire, was inconsistent with the situation prior to 1935. However that may be, the Chamber cannot evade its duty, to interpret Order 2728 AP and for that purpose to determine, if possible, the position of the pool of Kétiouaire.

136. Mali has attempted to situate the pool of Kébanaire/Kétiouaire with the help of a particular set of clues. The first of these is that, according to Order 2728 AP, the pool constitutes the culmination of a "line running markedly north-east, passing to the south of the pool of Toussougou". The second and third clues are that the letter from the Lieutenant-Governor of French Sudan enables the pool to be situated, first, to the south-west of mount Tabakarach, and secondly, almost on the boundary of the three *cercles* there mentioned. The fourth is that the boundary described as the "northern" boundary of the *cercle* of Mopti in Order 2728 AP begins from the point "located to the east of the pool of Kétiouaire", so that if the indications in the sentence defining this boundary were reversed, it would be possible to use the landmarks contained in it in order to locate the pool of Kétiouaire. The fifth of Mali's clues is that a pool or a fossil pool cannot be looked for on a plateau or a dune. Finally, the sixth clue is Mali's argument that the pool cannot be a pool which was known at the time by another name, otherwise that name would have been used; this means, according to Mali, that Kébanaire/Kétiouaire cannot be identified with the pool of Tin Taboré or the pool of Aféré. Mali has submitted to the Chamber a sketch-map to show the region within which it suggests that the pool must necessarily lie if its location is to comply with all these clues. Among Mali's conclusions is that

"the most plausible position for the pool of Kétiouaire is that of the

fossil pool with the geographical co-ordinates longitude 0° 46' 09" west, latitude 14° 56' 41" north. This pool, part of which is permanent, is the one named Tin Arkachen in 1977 by H. Barra of Orstom. It is the site of Forage Christine."

137. In the Chamber's opinion, the proper approach is not to attempt to determine at the outset whether or not the pools of Kébanaire and Kétiouaire are one and the same. It should first interpret Order 2728 AP, and then consider whether the conclusions it has reached warrant the identification of Kébanaire with Kétiouaire. If that were not established, the Chamber should take account only of the description of the boundary contained in letter 191 CM2 by the Governor-General of French West Africa, disregarding the modification proposed by the administrator of the *cercle* of Mopti which, as has been seen, was aimed only at making it more precise, and moreover contained an inherent contradiction.

138. Hence the question which arises is whether there is, or rather was in 1935, a pool lying both in a "markedly north-east" direction in relation to a point located "to the south of the pool of Toussougou", and in the vicinity of the tripoint of the *cercles* of Mopti, Gourma-Rharous and Dori, and to the west of the latter. In the text of Order 2728 AP, the meeting-point of the northern and eastern boundaries of the *cercle* of Mopti was situated not merely close to the pool of Kétiouaire, but "to the east" of it. If one were to assume Kébanaire and Kétiouaire to be identical, it must be concluded that on issuing the Order the Governor-General had information additional to that provided by the *commandant de cercle* of Mopti, both in respect of the pool of Kébanaire, in his letter-telegram of 19 March 1935 (paragraph 101 above), and in his description of the boundaries of the *subdivisions* of his *cercle* dated 25 May 1935 (paragraph 100 above). However that may be, it is obvious that the pool of Soum, situated some 24 kilometres to the east of the pool of Toussougou, requires particular examination. However, it is clear from the file that this pool, which was mentioned for the first time under this name in 1939, was thought to lie close to the meeting-point, not of the three *cercles* mentioned above of Mopti, Gourma-Rharous and Dori, but of the *cercles* of Mopti, Ouahigouya and Dori. A communication addressed by the *commandant de cercle* of Dori to the Governor of Niger on 18 December 1939 mentioned "the pool of Sum" as being "situated on the boundary of the *subdivision* of Douentza (*cercle* of Mopti) and of the *cercle* of Ouahigouya, to which it belongs". On 7 July 1943, the *cercle* administrator of Dori asked the *commandant de cercle* of Mopti for information concerning the position of the pool of "Souhoum", and "the position in relation to the latter, or in relation to the village of Kouna, of the meeting point between the *cercles* of Mopti, Ouahigouya and Dori". In his reply, the *commandant de cercle* of Mopti stated that, according to the information he had obtained during a visit to the pool, "it was certainly on the territory of the *canton* of Ari-

binda". There are no means of knowing whether, at the time of that visit, the *canton* of Aribinda belonged to the *cercle* of Dori (before 1933) or to that of Ouahigouya (after 1932).

139. According to one of the maps produced by Burkina Faso (sketch-map of French Africa on the scale 1:1,000,000, ND-30 sheet, Ouagadougou, 1946 edition (maps filed, No. 11 (C)), the distance between the two tripoints was approximately 38 kilometres. The distance between point P (assuming for the moment that the geographical co-ordinates of this point give a correct definition of the tripoint Mopti/Ouahigouya/Dori) and the pool of Soum as shown on the IGN 1:200,000 scale map of 1960, is approximately 36 kilometres. Two conclusions can be drawn from this. In the first place, the tripoint Mopti/Gourma-Rharous/Dori was not far distant from the pool of Soum, and it seems to have been located to the east of that pool. In the second place, it seems doubtful whether the tripoint Mopti/Ouahigouya/Dori can have lain as far west as implied by letter 191 CM2. It may also be thought that that letter placed the point too far to the north. It was of course based on the maps of the period, according to which the "northern" boundary of the *cercle* of Mopti (the course of which cannot however be very accurately discerned from these maps) was to intersect the northern boundary of the *cercle* of Dori in the vicinity of the point of co-ordinates 1° 01' 47" W and 14° 57' N, or 19.5 kilometres to the north of Soum. In an event, the pool of Soum lies in the right direction as regards the course of the line described in Order 2728 AP, in so far as concerns the segment skirting the village of Oukoulourou at a distance of 2 kilometres and then passing "to the south of the pool of Toussougou". These conclusions are in fact those which lead the Chamber to reject Mali's argument that the pool of Kébanaire/Kétiouaire is the fossil pool of Tin Arkachen which, in the Chamber's opinion, lies too far to the east.

140. According to Order 2728 AP, the end-point of the eastern boundary of the *cercle* of Mopti and the starting-point of the northern boundary of the *cercle* was located "to the east of the pool of Kétiouaire". According to this text, the pool accordingly lay within the acute angle formed by the meeting of the two boundaries, which means that it belonged to the *cercle* of Mopti. The pool of Kébanaire however, according to the administrator of the *cercle* of Mopti, was situated "almost on the boundary of the *cercles* of Mopti, Gourma-Rharous, and Dori" – that is, near the meeting-point of the eastern (Mopti/Dori) and northern (Mopti/Gourma-Rharous) boundaries of the *cercle* of Mopti. The proposal made by the administrator of the *cercle* of Mopti read as follows:

"The pool of Kébanaire, situated almost on the boundary of the *cercles* of Mopti, Gourma-Rharous, and Dori might be mentioned on page 2 (line 7), as follows: 'the summits of mounts Tin Eoult and Tabakarach and the pool of Kébanaire, etc. . . .'"

The expression "almost on the boundary" used by the administrator of

Mopti might suggest that the pool was within the *cercle* of Mopti, but "almost" on the boundary of that *cercle*. But what the administrator of the *cercle* of Mopti was proposing was not a clarification of the description of the boundary of the *cercle* which was under his own authority. As already pointed out (paragraph 132 above), his proposed modification of the drafting is only intelligible if the pool of Kébanaire lay much further to the north-east. What in fact he was proposing was that the boundary between two other *cercles*, Gourma-Rharous and Dori, should be described as passing the pool of Kébanaire. Consequently, this pool might have been in the *cercle* of Gourma-Rharous or that of Dori; it could not have belonged to the *cercle* of Mopti without being located close to the end-point of the boundary described in letter 191 CM2. As for the pool of Soum, according to the above-quoted administrative documents it belonged either to the *cercle* of Dori or to that of Ouahigouya.

141. Having regard to all the available information on the subject of the pool of Kétiouaire and the pool of Kébanaire, the Chamber's conclusion is as follows. The pool which appears on the maps subsequent to 1950 under the name of "pool of Soum" and which has been mentioned in administrative documents since 1939 seems to be the only one which might be identifiable as the one referred to in Order 2728 AP under the name of "Kétiouaire". This Order refers to a pool lying west of the tripoint where the *cercles* of Mopti, Gourma-Rharous and Dori met. The position of this point is itself far from certain, but according to all the information now available, only the pool of Soum would have lain close to the probable position of this point and to the west of it. On the other hand, the pool of Soum cannot simultaneously be the one referred to in letter 191 CM2 under the name of "Kébanaire". The Chamber must therefore observe that if the pool of Kébanaire or that of Kétiouaire had, between 1935 and 1939, acquired the new name of "pool of Soum", it is likely that some reference to this would have appeared in an administrative document, especially in view of the fact that the pool of Kétiouaire, at least, was a sufficiently well known topographic feature in 1935 to be used in defining the end-point of a *cercle* boundary. Hence there are two alternatives: either the pool of Soum is the pool called in 1935 Kétiouaire, and the position of the pool of Kébanaire remains unknown, or there is insufficient information available to the Chamber for it to identify or to locate either of these two pools. On due reflection, the Chamber does not consider that it should base its decision on the identification of the pool of Kétiouaire with the pool of Soum.

142. It is nonetheless necessary for it to examine the relationship between the pool of Soum and the administrative boundary of the 1930s which has to be defined, in the light of the documents produced by the Parties, including those which date from a more recent period, even those subsequent to the independence of both States. In applying international law, in this instance the principle of *uti possidetis*, to the facts of the case as they emerge from the evidence produced on either side, the Chamber finds

that the available information is not always sufficient to establish which of two possible lines coincides with the one which existed in 1932. The Chamber is therefore convinced that the pool of Soum is a frontier pool ; but it finds no indication dating from the colonial period from which it can be said that the line runs to the north of the pool, to the south of it or divides it. Furthermore, as explained above (paragraph 94), the question is not such that, in the absence of other grounds for a decision, the principle of the onus of proof can be brought into play.

143. Before examining more closely the situation in the region of the pool of Soum, the Chamber considers it necessary to define that segment of the line which lies between the village of Oukoulourou and the pool, in relation to the village of Kobou and the pool of Toussougou. As already seen, if the line is to comply with the wording of Order 2728 AP it must run "to the south of the pool of Toussougou", and the gap between the line and the pool will be a consequence of taking other landmarks into account, viz., the "four villages" to the west and the pool of Kétiouaire to the east. It has proved impossible to identify the pool of Kétiouaire, but the line must run through the pool of Soum. In view of what has been said above concerning the shape of *cercle* boundaries in colonial administrative practice, and in order to avoid too sharp a bend in the region of Toussougou, the Chamber considers that the line must connect the point located 2 kilometres to the south of Oukoulourou, mentioned in paragraph 130 above, with a point located 2.6 kilometres to the south of the pool of Toussougou, the geographical co-ordinates of this latter point being 1° 19' 05" W and 14° 43' 45" N. From there, the line continues towards the pool of Soum. The bearing of the line Oukoulourou-Toussougou is approximately 57°, the bearing of the line Toussougou-Soum approximately 76°, and the bearing of the hypothetical line connecting Oukoulourou and the pool of Soum approximately 63°. Hence the line which the Chamber has just indicated does, in its view, meet the requirements of Order 2728 AP, which refers to a line extending in a "markedly north-east" direction.

144. The line so defined does not pass through the point with the geographical co-ordinates 1° 24' 15" W and 14° 43' 45" N, mentioned in letter 191 CM2 from the Governor-General of 19 February 1935. These co-ordinates, which give an impression of precision, are taken from the maps of the period, especially the Blondel la Rougery map and the *Atlas des cercles* ; that precision is nowhere warranted by the cartographical resources used or the reliability of the surveys taken as a basis. In fact, as the Chamber has already observed (paragraph 109 above), from an examination of the topographical sources permitting a definition of the various *cercle* boundaries which together determine the western tripoint of Mopti/Ouahigouya/Dori, the Chamber concludes that this tripoint must have lain south-east of the point indicated by the geographical co-ordinates quoted. If the project of the Governor-General of French West Africa had become a regulation, it is obvious that the correctness of these co-ordinates would have amounted to an irrebuttable presumption ; but this is not the

case. In itself, the letter 191 CM2 only ranks as evidence of a boundary having "*de facto* value" at the time. It now transpires that the maps available at the time were not accurate enough to warrant defining a point from these maps by geographical co-ordinates of such precision. Thus the fact that these co-ordinates have been found to have been defined with an over-optimistic degree of precision does not contradict the Governor-General's intentions or deprive the letter of probative force.

* *

145. The Chamber now comes to the determination of the frontier line in the region of the pool of Soum. According to a report on rural water resources dated 7 January 1957, produced by Burkina Faso, the pool of Soum belongs to the category of "major temporary pools which dry out in the dry season" and on 31 December of the same year, the report of a tour of inspection mentions a "large pool of Soum which dries up . . . in March". The report notes that "in view of the size of their herds, the Soum herdsmen are requesting the construction of two field wells", and this work was recommended as a "measure of highest priority", on the ground that "Soum is the best stockbreeding centre in the Djibo *subdivision*" of the *cercle* of Ouahigouya, in Upper Volta. In a letter transmitting the minutes of a meeting of 15 January 1965, to be examined in the next paragraph, the *commandant de cercle* of Djibo states that "by the pool of Soum is meant the basin measuring 5 kilometres in length".

146. Mention should be made, in respect of the period subsequent to independence, of the record, among the diplomatic and other documentation submitted by both Parties to the Chamber, of an agreement concluded on 15 January 1965 between a Voltan and a Malian delegation, comprising *commandants de cercle* and other administrators on each side, which met "at Soum, a frontier pool". According to this record, the purpose of the meeting was "to pursue the adjustment of the line of the remainder of the frontier from the middle of the pool of Toussougou to the meeting-point of the *cercles* of Rharous and Dori". The text continues as follows :

"After a broad exchange of views by both delegations, the following was agreed :

A perpendicular line dividing the pool of Soum in two and running through the centre, leaving the village of Soum to the territory of Upper Volta and rejoining the boundary on map ND-30 XVII, July 1961 edition.

The northern part of this area falls to the Republic of Mali : the rest to the Republic of Upper Volta."

In his covering letter of 18 January 1965 transmitting the report of the meeting to the Minister of the Interior, the Djibo *commandant* explained this agreement as follows :

“The Malian delegation ultimately accepted . . . that the greater part of the Soum area belongs to Upper Volta except for the crucial point : the water reservoir measuring approximately 500 metres in diameter. As neither State is justified in claiming the whole of this water reservoir, it was divided according to the data in the Goutal report [that is, an inspection report of 26 February 1951, no copy of which is included in the file of the case].”

A sketch-map was annexed to the record of the agreement, and the *commandant* explained that the portion of the pool shown on the sketch as being attributed to Mali “formed a pocket of approximately 250 metres, solely to enable cattle from Mali to have access to the water supply”.

147. In its Memorial Mali emphasized that the only authority with jurisdiction at the time to make a definitive settlement of frontier problems was the Standing Joint Commission, on which sat the Ministers of the Interior of both countries. From this it argues that all the agreements concluded at the level of *commandants de cercle* which were not confirmed subsequently by that Commission must be treated as ineffectual. The Chamber agrees that such agreements, not approved by the competent authorities of each Party, do not have the binding force of a convention. Moreover, the Chamber has no intention of departing from the firmly established rule that

“The Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement.” (*Factory at Chorzów, Merits, P.C.I.J., Series A, No. 17, p. 51.*)

The Chamber however considers that it is entitled to take note of certain facts which emerge from a document submitted to the Chamber by each Party as an annex to a written pleading, that is, as one of the “relevant documents adduced in support of the contentions contained in the pleading” (Art. 50, para. 1, of the Rules of Court). Thus the Chamber observes that the *commandants* of the adjacent *cercles* of Douentza and Djibo each took a certain view ; above all, they agreed that the pool of Soum was a “frontier pool”, which had to be divided between the two *cercles*.

148. It should again be pointed out that the Chamber’s task in this case is to indicate the line of the frontier inherited by both States from the colonizers on their accession to independence. For the reasons explained above, this task amounts to ascertaining and defining the lines which formed the administrative boundaries of the colony of Upper Volta on 31 December 1932. Admittedly, the Parties could have modified the frontier existing on the critical date by a subsequent agreement. If the competent authorities had endorsed the agreement of 15 January 1965, it would have been unnecessary for the purpose of the present case to ascertain whether that agreement was of a declaratory or modifying charac-

ter in relation to the 1932 boundaries. But this did not happen, and the Chamber has received no mandate from the Parties to substitute its own free choice of an appropriate frontier for theirs. The Chamber must not lose sight either of the Court’s function, which is to decide in accordance with international law such disputes as are submitted to it, nor of the fact that the Chamber was requested by the Parties in their Special Agreement not to give indications to guide them in determining their common frontier, but to draw a line, and a precise line.

149. As it has explained, the Chamber can resort to that equity *infra legem*, which both Parties have recognized as being applicable in this case (see paragraph 27 above). In this respect the guiding concept is simply that “Equity as a legal concept is a direct emanation of the idea of justice” (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, p. 60, para. 71*). The Chamber would however stress more generally that to resort to the concept of equity in order to modify an established frontier would be quite unjustified. Especially in the African context, the obvious deficiencies of many frontiers inherited from colonization, from the ethnic, geographical or administrative standpoint, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the ground of considerations of equity. These frontiers, however unsatisfactory they may be, possess the authority of the *uti possidetis* and are thus fully in conformity with contemporary international law. Apart from the case of a decision *ex aequo et bono* reached with the assent of the Parties, “it is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law” (*Fisheries Jurisdiction, I.C.J. Reports 1974, p. 33, para. 78*). It is with a view to achieving a solution of this kind that the Chamber has to take account, not of the agreement of 15 January 1965, but of the circumstances in which that agreement was concluded.

150. The Chamber thus concludes that it must recognize that Soum is a frontier pool ; and that, in the absence of any precise indication in the texts of the position of the frontier line, the line should divide the pool of Soum in two, in an equitable manner. Although “Equity does not necessarily imply equality” (*North Sea Continental Shelf, I.C.J. Reports 1969, p. 49, para. 91*), where there are no special circumstances the latter is generally the best expression of the former. The line should therefore begin from the point lying south of the pool of Toussougou as defined in paragraph 143 above, and continue as a straight line as far as a point situated on the west bank of the pool of Soum, with the geographical co-ordinates 1° 05’ 34” W and 14° 47’ 04” N. It should then cross the pool in such a way as to divide the maximum area of the pool as shown on the 1960 IGN map in equal proportions between the two States.

* * *

151. In view of the impossibility of locating the pool of Kétiouaire, the Chamber can find no further indications in Order 2728 AP of 1935

whereby the frontier can be determined east of the pool of Soum. It is therefore now necessary to refer to the letter 191 CM2 of 19 February 1935 (paragraph 75 above). As already noted, Burkina Faso claims that the letter 191 CM2 is the authentic expression, by the authority possessing jurisdiction at the time, of its conviction as to the course of the boundary (paragraph 77 above), and the letter is therefore applicable for the purpose of determining the line of the frontier. For its part, the Chamber has reached the conclusion that this argument is correct (paragraph 85 above). It notes however that in its submissions Burkina Faso, when defining the reference factors to define the line which it proposes, makes a distinction between the area west of the point with the geographical co-ordinates $0^{\circ} 40' 47''$ W and $15^{\circ} 00' 03''$ N, and the area east of that point. To the west, the submissions are that

“the line is as shown on the 1:200,000 scale map of the French Institut géographique national (1960 edition), the villages of Dioulouna, Oukoulou, Agoulourou and Koubo being located in Burkinabe territory”,

whereas east of that point,

“the line corresponds to the information given in letter 191 CM2 of 15 February 1935 and on the 1:500,000 scale map, 1925 edition, as far as the northern point of the pool of In Abao”.

A map filed with the Burkinabe Memorial, consisting of a compilation of five sheets from the IGN 1:200,000 scale map, shows what Burkina Faso claims to be the “existing frontier” by means of a yellow band following the broken line of small crosses on that map, diverging only as regards the eastern part of the line, where the IGN line terminates at Fitiili, 12 kilometres north of the Kabia ford, and the yellow band at a point some 2.5 kilometres to the north of the ford.

152. Only during the oral proceedings did Burkina Faso explain its reasons for selecting the point $0^{\circ} 40' 47''$ W and $15^{\circ} 00' 03''$ N as the point where, for the definition of the line to the east, the 1:500,000 scale map of 1925 is to be substituted for the 1960 1:200,000 scale map as a base map. On the one hand, this point is supposedly located approximately at the latitude of Raf Naman, where the Béli region is customarily held to begin; on the other hand, this method of dividing the disputed frontier was taken from the report of the Legal Sub-Commission of the Organization of African Unity Mediation Commission. In this report, dated 14 June 1975, the Sub-Commission states that west of this point,

“the frontier is represented by a continuous line of small crosses indicating, on the part of the authors of the 1:200,000 map [of the IGN] the existence of clearly interpreted texts or a representation of unambiguous actual situations . . .”.

However, on referring to the IGN 1:200,000 scale map, it is found that a minor calculation error has crept into the text of the Legal Sub-Commission's report, and that this error recurred throughout the proceedings in the successive submissions by Burkina Faso: the first co-ordinate should have been: $0^{\circ} 50' 47''$ W.

153. With regard to the determination of the frontier between point P and mount Tabakarach, the Counter-Memorial of Burkina Faso emphasizes that the letter 191 CM2 indicates only that these two points are the starting-point and the finishing-point, and what was contemplated in the letter must have been a straight line between the two. Although the Blondel la Rougery map and the *Atlas des cercles* show the boundary as a straight line, other maps, including the IGN 1:200,000 scale map of 1960, replace it by a line with sections at different angles. The line on the IGN map consists of a straight sector running southwest as far as a point situated slightly to the northeast of the pool of Soum, and from that point a line in a west-southwest direction as far as point P. Mali drew the Chamber's attention to the discrepancies which emerge from a comparison between these two lines, and to give a visual illustration of these filed a map which combines the lines shown on the Blondel la Rougery map and the IGN 1960 map.

154. In the Chamber's view there is no doubt that letter 191 CM2 of 1935 was intended to define in textual form the boundary shown on the Blondel la Rougery map of 1925, and the Parties agree on this. It seems probable also that the *Atlas des cercles* was consulted for this purpose. But Mali has emphasized that these maps were provisional and inaccurate. In a study published in 1927, Commander Edouard de Martonne of the Geographical Service of French West Africa commented on the series of maps to which the Blondel la Rougery map belonged:

“these sheets, drawn with the help of the itinerary surveys, reconnaissances surveys and topographical work of various kinds kept at the headquarters of the Governorship General at Dakar, are, as indicated by the description ‘reconnaissance map’, basically subject to revision. Nothing could have made plainer than a map compiled like this how inadequate the existing documentation is, and how necessary it is to make a new start.”

Of the *cercle* maps, he states that:

“the frequent territorial changes introduced modifications to the *cercle* boundaries which are rarely depicted in the same way by adjacent districts”

and adds:

“as a result of the successive copying, it is not uncommon to find maps of neighbouring *cercles* which cannot be juxtaposed”.

The frontier between Upper Volta and French Sudan as shown on the Blondel la Rougery map follows a line of mountain crests. Mali argues that the majority of the place-names shown on that map had never been mentioned before (Tabakarach, Tin Eoult, Ouagou, Tahasouine) and that the orography described by this map now appears "entirely invented". Mali alleges that in this region, the Blondel la Rougery map "invented" a range of mountains which could not be traced either geographically or toponymically in 1960". For its part, Burkina Faso observes that the map in question shows mounts Tin Eoult and Tabakarach, which constitute, west of the pool of In Abao, the prolongation of the line of dunes and cliffs which dominates the eastern part of the marigot of the Béli. The Chamber notes that there is very little continuity as regards the use of place-names in this region, and that the orography shown on the Blondel la Rougery map is extremely sketchy; nevertheless, north of the Béli, there is a fairly marked relief from which a frontier can be defined in orographic terms.

155. The Chamber also notes that among the documents supplied by Mali is a report concerning the "Patrols of In Abao", compiled on 28 November 1940 by the head of the Ansongo *subdivision* (*cercle* of Gao, French Sudan), accompanied by a sketch-map, which shows that the Blondel la Rougery map was still being used as a base for the preparation of sketch-maps by the administrators. It is indeed clear that the sketch-map in question had been copied from the Blondel la Rougery map; in particular, the line of the colonial boundary [*"limite de colonies"*] shown on it matches the one appearing on the Blondel la Rougery map. This detail is the more noteworthy because the depiction on the sketch-map of the route followed by the Ansongo patrol unquestionably proves that the patrol followed the course of the Béli between In Abao and In Tangou; it entered the territory of the *cercle* of Dori, which belonged at the time to the colony of Niger. If the Béli, as Mali claims, was the frontier between the two colonies, or if there had been any doubt as to the course of this frontier, it is difficult to understand why the head of the Ansongo *subdivision* would have taken care to mark on his sketch-map the boundary shown on the Blondel la Rougery map, which had been made official by the letter 191 CM2 of 1935.

156. For reasons already explained above, the Chamber has not taken into account, for the frontier line, point P with the geographical co-ordinates mentioned in the letter 191 CM2, and has established that the frontier ran through the pool of Soum. In the Soum-Tabakarach sector, there is no longer any need to choose between the line shown on the Blondel la Rougery map and the line on the IGN map; in the absence of any other information to the contrary, letter 191 CM2 must necessarily be interpreted as contemplating a straight line linking mount Tabakarach to the tripoint at which the boundaries of the *cercles* of Mopti, Ouahigouya and Dori converged. That tripoint, identified in letter 191 CM2 in relation to the geodetic grid shown on the Blondel la Rougery map as correspond-

ing to the geographical co-ordinates of point P (1° 24' 15" W and 14° 43' 45" N), has in fact been found to lie further to the southeast, in the vicinity of the pool of Soum. From this the Chamber concludes that the frontier continues in a straight line, first from the pool of Soum to the point mentioned in Burkina Faso's submissions (0° 50' 47" W and 15° 00' 03" N), and from that point to mount Tabakarach. Notwithstanding the deficiencies of the Blondel la Rougery map as regards the orography of the region, the Chamber sees no reason why mount Tabakarach (or Tabakarach, see paragraph 76 above) should not be identified with the elevation which appears on the IGN 1:200,000 map under the name of Tin Tabakat, with the geographical co-ordinates 0° 44' W and 15° 05' N.

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157. At this stage of its reasoning, the Chamber must refer to the Order made by the Governor-General of French West Africa on 31 December 1922, for the "reorganization of the region of Timbuktu", which specified that the western boundary of the *cercle* of Gao ran through the "pools of Oussodia Mersi, [and] Inabao", and that the delimitation "from that point" (the pool of In Abao) followed "the northern boundary of Upper Volta". Since neither Party has shown that the "northern boundary of Upper Volta" was modified between 1922 and 1932, it follows that the boundary to be established by the Chamber must pass the pool of In Abao. That pool must, therefore, be identified and the frontier line must be determined in relation to it. For Mali, it is indisputable that this pool is a frontier point, although the indication given on certain maps that the frontier runs through the northern point of the pool seems, in its view, to be very much open to question. It will be recalled that Mali rejects the letter 191 CM2 which is quite definite in that regard; the boundary is described as passing, from east to west, through mounts Frontikato "the northern peak of mount Ouagou, the northern point of the pool of In Abao...".

158. The technical submission of the Mixed Technical Commission found, during research undertaken in 1972, that the name "In Abao" did not feature on the IGN 1:200,000 map which had been used as a reference document. It reported that "according to information obtained locally, this pool [lay] along the Béli watercourse", a marigot running from west to east on which is also found, further to the east, the Kabia ford taken by Mali to mark the end-point of the frontier. The submission likewise concluded — still on the basis of "information obtained locally" — that the pool of In Abao was located "between the pool of In Kacham to the east, the pool of In Amanam to the west and the pool of Tin Abao to the north". Lastly, it established geographical co-ordinates for the site of the pool "by determining its direction and distance from a large tree shown as a datum point on the map" of the IGN on the scale 1:200,000, those co-ordinates being: 0° 20' 40" W and 14° 59' 27" N. This is again a tripoint, marking

the conjunction in 1925 of the boundaries of three administrative districts, i.e., the Sudanese *cercles* of Gao and Hombori and the Voltan *cercle* of Dori. The sketch-map No. 5 below shows the contradiction between the various maps in regard to the position and area of the pool and the precise location of the above-mentioned boundaries in relation to the pool.

159. According to a document dating from 1954, originating from the Hydrological Service of French West Africa, which gives a list of water-points in northern Dori (Upper Volta), the pool of In Abao, located on the Béli, had a maximum width of about 200 to 250 metres and a length of approximately 2 kilometres. There were no draining wells and the pool dried up in December-January. During a visit to the area by the members of the Mixed Technical Commission in April 1972, the pool was found to have dried up. The list of waterpoints does not give the orientation of the pool, but a 1:200,000 map compiled in 1953 by the Direction fédérale des mines et de la géologie shows that it forms part of the Béli marigot, which runs from west to east. On the 1925 Blondel la Rougery map, the pool took the form of a triangle with its base running from east to west, and the frontier line shown on that map seems to touch the northern apex of that triangle. It has been suggested that this data on the 1925 map might be confirmed by the sketch-map annexed to the report compiled by the head of the Ansongo *subdivision* in 1940 on the "Patrols of In Abao" (paragraph 155 above). However, since the sketch-map was copied from the 1925 map, as already explained, it cannot constitute independent evidence.

160. The co-ordinates of the pool located by the Technical Sub-Commission in April 1972 were, as already seen : 0° 20' 40" W and 14° 59' 27" N. The broken line of small crosses appearing on the IGN 1960 map forms approximately a right angle, touching the watercourse of the Béli at a point with the approximate co-ordinates 0° 24' W and 15° 00' N. On this map the pool of Tin Kacham, which the Technical Subcommission found to lie to the east of the pool of In Abao, is shown extending over more than 2 kilometres, between approximately 0° 17' and 0° 19' W. The 1:200,000 map of the Direction fédérale des mines et de la géologie (1953) shows In Abao at the point with the co-ordinates 0° 28' W and 15° 02' N and Tin Kacham at the point with the co-ordinates 0° 23' W and 15° 00' N ; three dotted lines apparently depicting administrative boundaries meet just north of In Abao. Lastly, a map entitled "Hydrology of northern Dori (Upper Volta), Hydrological Service of French West Africa", dated 1954 gives the following details : In Abao 0° 25' W and 15° 02' N, In Kacham 0° 18' W and 15° 00' N, and a "territorial boundary" line intersecting the marigot of the Béli at In Kacham.

161. It is clear that the Chamber does not possess the necessary infor-

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① Carte BLONDEL LA ROUGERY [1925]

BLONDEL LA ROUGERY Map [1925]

② Carte de la direction fédérale des mines et de la géologie [Nov. 1953]

Map of the Federal Department of Mines and Geology [Nov. 1953]

③ Carte du service hydrologique de l'Afrique (occidentale) française [Nov. 1954]

Hydrological Service of French West Africa [Nov. 1954]

④ Carte géologique de reconnaissance de la Haute-Volta [1961]

Feuilles ND-30-SE et ND-30-NE Ouagadougou

Geological Reconnaissance Map of Upper Volta [1961]

Sheets ND-30-SE and ND-30-NE Ouagadougou

⑤ Carte de l'Afrique de l'Ouest au 1/200 000

Feuilles ND-30-XVIII Dori et ND-30-XXIV In Tillit [1960-1961]

Emplacement d'In ABAO figuré comme « Sable humide et alluvions »

Map of West Africa on a scale of 1:200 000

Sheets ND-30-XVIII Dori ND-30-XXIV in Tillit [1960-1961]

Site of In ABAO indicated as 'Wet sand and alluvial deposits'

⑥ Carte de l'Afrique de l'Ouest au 1/500 000 [1961]

Feuille ND-30-NE Hombori

« KACHAM » apparaît ici au lieu d'In ABAO et est figuré comme « Sables humides »

Map of French West Africa on a scale of 1:500 000 [1961]

Sheet ND-30-NE Hombori

Note 'KACHAM' appears at the site of In ABAO indicated as 'Wet sands'

mation to determine the exact geographical co-ordinates of the pool of In Abao. But in so far as the problem is caused by the possible confusion between the pool of In Abao and the pool of In Kacham, the Chamber can and must assist in resolving it. The triangular shape of the pool of In Abao on the 1925 Blondel la Rougery map seems to derive from the fact that it lies at the junction of two marigots; the Béli marigot, running from west to east, and another running from north to south which, on the 1925 map, bears the name "(Djodel)". On the map of the Direction fédérale des mines et de la géologie, several watercourses or marigots (In Avaroua, In Titoumane and In Koliba) converge at the pool which bears the name In Abao on this map. On the IGN 1:200,000 map of 1960, the broken line of small crosses touches the Béli where the latter joins the north-south marigots (In Abalou, In Habakar). Consequently, whatever the current names may be, it appears to the Chamber that for the purpose of determining the frontier, the pool of In Abao is the one lying at the junction of the two marigots.

162. The Chamber does not think that the conclusion can be drawn from the use of the expression "the northern point of the pool of In Abao" in the letter 191 CM2 of 1935 that the frontier should leave the whole pool to Burkina Faso. While the text of the Order of 31 December 1922 makes clear that the pool of In Abao was located on the northern boundary of Upper Volta, it made no reference to the "point" of the pool. That Order, after referring to the pool, continues with the words "from that point", but this does not mean that the line only touched the pool at one point. The boundary of the *cercle* of Gao passed the pool of In Abao, and there bent sharply to form a "point"; consequently, that point was located somewhere on the pool, although there is no indication of its precise location. The letter 191 CM2 did no more than interpret the 1922 Order in the light of the Blondel la Rougery map, which shows the pool as being triangular – which seems to be incorrect, or at least to be no longer the case. In spite of the letter 191 CM2, there seems to have been some uncertainty with regard to the tripoint of the *cercles* of Dori, Hombori and Timbuktu. The Blondel la Rougery map places this point at the apex of the triangle representing the pool of In Abao. However, on an administrative and economic map of the colony of Sudan drawn to a scale of 1:4,000,000 and dating from 1927 the *cercle* boundaries shown in the region in question do not run as far as the pool of In Abao; and in 1939 the *commandant de cercle* of Dori assumed that this tripoint lay at Dodbango, about 20 kilometres to the north of the pool of In Abao. Taking account especially of the shape of the pool as it appears on the technical maps of 1953-1954, and its connection with the junction of the marigots, the Chamber is of the opinion that, in the absence of more precise and reliable information concerning the relationship between the frontier line and the pool of In Abao, it must conclude that the boundary runs through the pool in such a way as to divide it between the two Parties.

163. This uncertainty regarding the shape and position of the pool of In

Abao also affects the course of the frontier line. The broken line of small crosses shown on the IGN map in the region of In Abao touches the Béli at only one point, and it is not certain that this point corresponds to the position of the pool indicating the junction of the two marigots. The Chamber concludes that the frontier must follow the IGN line as far as the point (point I, with the geographical co-ordinates 0° 26' 35" W and 15° 05' 00" N) where it turns south-east to join the Béli; and that further east it must rejoin the IGN line at point L (with the geographical co-ordinates 0° 14' 44" W and 15° 04' 46" N) where the line, after leaving the Béli to head north-eastward, again turns south-east to form an orographic boundary. It will be for the Parties, with the assistance of the experts appointed pursuant to Article IV of the Special Agreement, to fix the position of the pool of In Abao and to define two points (point J and point K) lying on the same parallel of latitude, such that a straight line drawn between these two points will divide the expanse of the pool in equal proportions between the Parties. The frontier line in this region will therefore consist of three straight lines linking, in turn, points I and J, J and K, and K and L. The line between points I and L shown on the map annexed, purely for illustrative purposes, to this Judgment (see paragraph 175 below) is based on the assumption that the centre of the pool of In Abao is situated at the point with the geographical co-ordinates 0° 23' 35" W and 15° 00' 15" N, and that the dividing line extends for 1 kilometre on either side, to the west and east of this point.

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164. For the whole region of the Béli, which forms the eastern sector of the disputed area, Mali, which has rejected the letter 191 CM2 of 1935, argues in favour of a frontier running along the marigot. The two Parties have debated at length the choice which was open to the colonial power, as between a hydrographic frontier (along the Béli) and an orographic frontier (along the crest line of the elevations to the north of the marigot). Whatever may have been the general policy of the colonial administration in such matters, the Chamber considers that the letter 191 CM2 serves to prove that the orographic boundary was adopted in this instance. What has now to be defined, in the light of all the available maps and documents, is the exact course of the line described in the 1935 letter, and of which the 1925 Blondel la Rougery map could give no more than an approximate indication, in view of its technical deficiencies. The pool of In Abao, the location of which the Chamber has now indicated in relation to the frontier, is shown both on the boundary given on the Blondel la Rougery map and on the boundary indicated by a broken series of crosses on the 1960 IGN map. As the Chamber has observed, the topographical representation afforded by that map enjoys the approval of both Parties, but Mali does not accept the validity of the frontier line shown on that map by a line of crosses. As for the eastern sector of the disputed area, the broken

line of small crosses which is drawn on the IGN map seems to be a topographical adaptation of the boundary shown on the 1925 Blondel la Rougery map, and repeated in the letter 191 CM2 of 1935, defined with increased precision in 1958-1959. Mali recognizes that the IGN line "seems to be fairly similar to that on the 1925 map, with the difference that a broken line is substituted for an unbroken one". The Chamber sees no reason to depart from the broken line of small crosses, which appears to be a faithful representation of the boundary described by the letter 191 CM2, except with regard to the easternmost part of the line where the problem arises of the position of mount N'Gouma.

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165. With regard to the final segment of the line, the essential question for the Chamber is therefore the position of the "heights of N'Gouma" mentioned in the erratum to the 1927 Order "fixing the boundaries of the colonies of Upper Volta and Niger". The Chamber has explained above (paragraph 72) Mali's criticisms of this text. It concluded that that text could not be set aside *in limine*, on the ground that the Order was invalidated by a factual error ; its value as evidence had to be weighed in order to determine the position of the end-point of the frontier. Mali considers that the Kabia ford was, in 1927, a frontier point between Niger and Upper Volta, but that the boundary between French Sudan and Upper Volta also ran through the Kabia ford, so that Kabia rather than mount N'Gouma would be the real tripoint between Niger, Burkina Faso and Mali.

166. In 1927, the map chiefly available for reference purposes was the 1925 Blondel la Rougery map which, in all probability, was based on information given in the map of the 1908-1909 Giroucourt expedition. These two maps distinctly located the Kabia ford on the Béli and showed high ground to the north of the Béli bearing the name "Mount Ngouma". The expression "*hauteurs de Ngouma*" which was to be employed in the erratum to the 1927 Order, appears on a map of 1908, the map of the military territory of Niger compiled by Lieutenant Petitperrin, which does not indicate the Kabia ford. On that map, to the west of the "*hauteurs de N'Gouma*", the word "N'Gouma" appears beside what seems to be a pool, and a "mount Kabir" is shown between the two names. Only on a sketch-map compiled by administrators in 1954, and on the 1960 IGN map (cf. paragraph 172 below) does the name "Ngouma" indicate an elevation to the southeast of the Kabia ford. This latter map, according to Mali, presents the only accurate picture of the situation.

167. The purpose of the 1927 Order was to fix the boundaries between the colonies of Upper Volta and Niger. In the region in question in the present case, the administrative districts concerned were the *cercle* of Dori,

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on the Voltan side, and the *cercle* of Tillabéry in Niger. The starting-point of the boundary between these two *cercles* also lay on the boundary between the Sudanese *cercle* of Gao to the north and the two *cercles* already mentioned. On 27 August 1927, the *commandant de cercle* of Dori sent the Governor of Upper Volta an inspection tour report together with a draft delimitation prepared "in consultation and in agreement with the *commandant de cercle* of Tillabéry". The Order fixing the boundaries between the two colonies was issued in Dakar four days later, on 31 August 1927, and the two Parties agree that, in view of the means of communication available at the time, the report and the draft from the *commandant de cercle* of Dori cannot possibly have been taken into account when the Order was issued. This being so, the similarities between the text proposed by the *commandant de cercle* and the one adopted by the Governor-General suggest that both texts were derived from a single original preliminary draft which has not been brought to light.

168. The projected delimitation between *cercles* proposed in the letter of 27 August 1927, begins as follows :

"The *cercles* of Dori and Tillabéry will henceforward be bounded as follows :

To the north by the existing boundary with Sudan (*cercle* of Gao) as far as the elevation [*à la hauteur*] of the mountain of N'Gouma, and then to the west by a line starting at the Kabia ford and heading southwards towards the Yatakala-Falagountou road . . ."

The Order issued on 31 August 1927 by the Governor-General of French West Africa begins with the following words :

"The boundaries of the colonies of Niger and Upper Volta are henceforth determined as follows :

1. Boundaries between the *cercle* of Tillabéry and Upper Volta :

This boundary is determined to the north by the existing boundary with Sudan (*cercle* of Gao) as far as the height of N'Gourma, and to the west by a line passing through the Kabia ford, mount Darouskoy . . ."

On 5 October 1927 an erratum to the Order was adopted. Mali considers that this was prompted by the arrival in Dakar of the letter from the *commandant de cercle* of Dori, but, since the text of the erratum departs further from that of the letter of 27 August 1927 than does that of the Order itself, this seems improbable. The erratum reads as follows :

"The boundaries of the colonies of Niger and Upper Volta are determined as follows :

A line starting at the heights of N'Gourma, passing through the Kabia ford (astronomic point), mount Arounskaye . . ."

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mount N'Gouma in letter 191 CM2; and nowhere did he suggest the inclusion of a reference to the Kabia ford, despite this being a significant topographical feature.

171. Mali has submitted to the Chamber a map on the scale 1:1,000,000 entitled "*Afrique occidentale française, nouvelle frontière de la Haute-Volta et du Niger (Suivant erratum du 5 octobre 1927 à l'arrêté en date du 31 août 1927)*" ["French West Africa, new frontier between Upper Volta and Niger (according to the erratum of 5 October 1927 to the Order dated 31 August 1927)"]. This map, already mentioned above, distinctly shows a frontier line between the two colonies running in a general west-east direction and passing to the north of the Kabia ford. The name "Hauteur de N'Gouma" ["Height of N'Gouma"] is marked on this line, also to the north of the ford. The map shows another frontier line, running from south to north, which passes through the ford to join the first line to the north of it, at the point marked with the name "Hauteur de N'Gouma". This map is thus absolutely positive and, if it were found to constitute an authoritative representation of the intention of the author of the erratum, there could be no doubt what conclusion should be drawn as to the interpretation of this text. However, Mali points out that this map contains no information as to which official body compiled it or which administrative authority approved the line shown on it, and moreover draws attention to the fact that in 1975 the Bureau des frontières of the French Institut géographique national stated: "To the best of our knowledge there is no specific map which interpreted the General Order of 31 August 1927 and its erratum of 5 October 1927." The Chamber, while not ascribing to this map submitted by Mali the authoritative status of a document explaining the Order and erratum, i.e., one issued with the colonial administration's stamp of approval, holds nevertheless that it cannot be overlooked as a piece of evidence; for even if it cannot be shown to have been drawn up by that administration, it remains certain that the map's compiler, having perused the governing texts, and possibly the accessible maps, had acquired a very clear understanding of the intention behind the texts, which enabled him afterwards to lend that intention cartographic expression. That does not mean that the map necessarily conveys the correct interpretation of the erratum, but it does at least tend to confirm that the difficulties of interpretation which Mali perceives in the text of the Order did not exist at the time, having arisen from the perusal of certain maps published subsequently.

172. Thus far the sources considered all combine to bear out the impression given by the maps, that mount N'Gouma or the heights of N'Gouma lie north of the Kabia ford. However, a sketch-map of the *cercle* of Tillabéry, dating from 1954, shows the boundary of the territory of Niger as a line of crosses running east-west, intersecting the Béli at the Kabia ford and then turning south. What is more, on this sketch-map, the name "Mts. N'Gouma" is assigned to some elevations found to the east

and slightly south of the ford. Burkina Faso argues that the compiler of the sketch-map must have reversed the positions of mount N'Gouma and mounts Gorotondi. As for the 1:200,000 IGN map published in 1960, it attaches the name "N'Gouma" to an elevation situated southeast of the Kabia ford — and, as the Chamber has already had occasion to note, the Parties are in broad agreement on the reliability of the IGN's work (paragraph 61 above). Mali has particularly sought to expose the shortcomings of the Blondel la Rougery map in altimetry, and has also pointed up the contrast in that respect between it and the 1960 IGN map. But from observations made on the ground in 1975 by the technical committee of cartographers, it is apparent that there are in fact features to the north of the Kabia ford which could qualify for the appellation "heights" of N'Gouma. From the altimetric information appearing on the IGN map around the Kabia ford, it may also be inferred that there are certain elevations ranged in a quarter-circle between a position north of the ford and another east-southeast of it, and that they constitute an ensemble which the name "N'Gouma" could reasonably be said to cover. This is a problem of toponymy rather than topography.

173. In the Chamber's opinion, the controversy between the Parties over the validity of the indications given by the 1960 IGN map has little relevance to the basic point at issue here. The Chamber has to construe a text dating from 1927 and for that purpose, or in the process of doing so, must seek to ascertain which elevations were called "heights of N'Gouma" at that time. It follows that, however reliable the cartographic techniques used in 1960, and however thorough the investigations carried out on the ground with a view to establishing an accurate toponymy for that precise time, these efforts would only be of value for the purpose of interpreting the 1927 Order and erratum if they had uncovered an oral tradition dating back at least to 1927 which was at variance with the indications given by the maps and documents of that earlier period. No evidence has been furnished of the existence of any such tradition. The Chamber accordingly reaches the twofold conclusion that the Governor-General, in the 1927 Order, as modified by the erratum, and hence in letter 191 CM2 of 1935, described an existing boundary which passed through elevations situated north of the Kabia ford, and that the administrators, rightly or wrongly, considered that these elevations were called by the local people the "heights of N'Gouma". The Chamber has simply to ascertain, therefore, the point where the boundary defined by the texts in question terminates within the above-described ensemble of elevations environing the ford. After minutely examining the topography shown on the IGN map, the Chamber finds that this point should be fixed 3 kilometres north of the ford, at the spot defined by the co-ordinates 0° 14' 39" E and 14° 54' 48" N.

174. The Chamber has already noted that the line of crosses shown on the 1:200,000 IGN map terminates in the east at a point which is too far north for this latter section of line to be deemed compatible with the terms of letter 191 CM2. It therefore remains to determine the point at which the

IGN line diverges from the line described in that letter. According to Burkina Faso, the "existing frontier" diverges from the IGN line at the point north of In Tangoum where the IGN line veers slightly northward. The Chamber notes that a straight line connecting the point on the IGN line which lies north-east of In Abao (point L, paragraph 163 above) with the end-point of the frontier line identified in the previous paragraph, coincides almost exactly with the line of small crosses shown on the IGN map between point L and the point situated north of In Tangoum. It concludes that this straight line must constitute the final segment of the line which it is required to draw.

* * *

175. The Chamber, having thus completed its examination of the case, is now in a position to fix the line of the frontier between the Parties in the disputed area. This frontier is defined, as far as possible, in terms of straight lines connecting geographic co-ordinates of points. The line of the frontier has been marked, purely for illustrative purposes, on a map which is a compilation of the relevant sheets of the 1:200,000 map of the Institut géographique national (Paris) (the sheets ND-30-XVII (Djibo, 1970 edition); ND-30-XXIV (In Tillit, 1958 edition); ND-31-XIX (Ansongo, 1959 edition); ND-30-XVIII (Dori, 1960 edition); and ND-31-XIII (Tera, 1961 edition)). This compilation of sheets into one map is annexed to the sealed copies of this Judgment¹.

* * *

176. By the terms of the Special Agreement (Art. IV), the Parties agreed to effect the demarcation of their frontier in the disputed area within one year of the delivery of this Judgment. They also requested the Chamber to nominate, in its Judgment, three experts to assist them in the demarcation operation. Both Parties renewed this request in the respective final submissions which they read at the end of the oral proceedings. The Chamber is ready to accept the task which the Parties have entrusted to it. However, having regard to the circumstances of the present case, the Chamber is of the opinion that it is inappropriate at this juncture to make the nomination requested by the Parties. It will do so later by means of an Order, after ascertaining the views of the Parties, particularly as regards the practical aspects of the exercise by the experts of their functions.

* * *

¹ A copy of this map, reduced in size, will be found in a pocket at the end of this fascicle or inside the back cover of *I.C.J. Reports 1986. [Note by the Registry.]*

177. In its above-mentioned Order of 10 January 1986, the Chamber stated that the provisional measures therein set out were indicated "pending its final decision in the proceedings instituted on 20 October 1983 by the notification of the Special Agreement" concluded between the Parties. It follows that such Order ceases to be operative upon the delivery of the present Judgment, and that the provisional measures lapse at the same time. In accordance with Article 41 of the Statute of the Court, notice of the provisional measures indicated was given forthwith to the Security Council of the United Nations through the Secretary-General; the Chamber notes that the Secretary-General will also receive a copy of the present Judgment, in accordance with Article 95 of the Rules of Court.

178. The Chamber nevertheless notes with satisfaction that the final communiqué of the first extraordinary conference of the Heads of State and Government of the member countries of the *Accord de non-agression et d'assistance en matière de défense* (ANAD), issued on 18 January 1986, reported that the Heads of State of Burkina Faso and the Republic of Mali had agreed "to withdraw all their armed forces from either side of the disputed area and to effect their return to their respective territories". The Chamber also notes that the Parties, having concluded a Special Agreement for the settlement of their dispute by a Chamber of the Court, did not merely by doing so undertake to comply with the Court's decisions pursuant to Article 94, paragraph 1, of the Charter of the United Nations, but also declared expressly in that Special Agreement that they "accept the Judgment of the Chamber given pursuant to the Special Agreement as final and binding upon them" (Art. IV, para. 1). Having completed its task, the Chamber is happy to record the adherence of both Parties to the international judicial process and to the peaceful settlement of disputes.

* * *

179. For these reasons,

THE CHAMBER,

Unanimously,

Decides

A. That the frontier line between Burkina Faso and the Republic of Mali in the disputed area, as defined in the Special Agreement concluded on 16 September 1983 between those two States, is as follows:

(1) From a point with the geographical co-ordinates 1° 59' 01" W and 14° 24' 40" N (point A), the line runs in a northerly direction following the broken line of small crosses appearing on the map of West Africa on the scale 1:200,000 published by the French Institut géographique national

(IGN) (hereinafter referred to as "the IGN line") as far as the point with the geographical co-ordinates 1° 58' 49" W and 14° 28' 30" N (point B).

(2) At point B, the line turns eastwards and intersects the track connecting Dionouga and Diguel at approximately 7.5 kilometres from Dionouga at a point with the geographical co-ordinates 1° 54' 24" W and 14° 29' 20" N (point C).

(3) From point C, the line runs approximately 2 kilometres to the south of the villages of Kouinia and Oukoulourou, passing through the point with the geographical co-ordinates 1° 46' 38" W and 14° 28' 54" N (point D), and the point with the co-ordinates 1° 40' 40" W and 14° 30' 03" N (point E).

(4) From point E, the line continues straight as far as a point with the geographical co-ordinates 1° 19' 05" W and 14° 43' 45" N (point F), situated approximately 2.6 kilometres to the south of the pool of Toussougou.

(5) From point F, the line continues straight as far as the point with the geographical co-ordinates 1° 05' 34" W and 14° 47' 04" N (point G) situated on the west bank of the pool of Soum, which it crosses in a general west-east direction and divides equally between the two States; it then turns in a generally north/north-easterly direction to rejoin the IGN line at the point with the geographical co-ordinates 0° 43' 29" W and 15° 05' 00" N (point H).

(6) From point H, the line follows the IGN line as far as the point with the geographical co-ordinates 0° 26' 35" W and 15° 05' 00" N (point I); from there it turns towards the south-east and continues straight as far as point J defined below.

(7) Points J and K, the geographical co-ordinates of which will be determined by the Parties with the assistance of the experts nominated pursuant to Article IV of the Special Agreement, fulfil three conditions: they are situated on the same parallel of latitude; point J lies on the west bank of the pool of In Abao and point K on the east bank of the pool; the line drawn between them will result in dividing the area of the pool equally between the Parties.

(8) At point K, the line turns towards the north-east and continues straight as far as the point with the geographical co-ordinates 0° 14' 44" W and 15° 04' 42" N (point L), and, from that point, continues straight to a point with the geographical co-ordinates 0° 14' 39" E and 14° 54' 48" N (point M), situated approximately 3 kilometres to the north of the Kabia ford.

B. That the Chamber will at a later date, by Order, nominate three experts in accordance with Article IV, paragraph 3, of the Special Agreement of 16 September 1983.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-second day of December, 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 transmitted to the Government of Burkina Faso and the Government of the Republic of Mali respectively.

(Signed) Mohammed BEDJAOUI,
President of the Chamber.

(Signed) Santiago TORRES BERNÁRDEZ,
Registrar.

Judges *ad hoc* LUCHAIRE and ABI-SAAAB append separate opinions to the Judgment of the Chamber.

(Initialed) M.B.
(Initialed) S.T.B.

**Katangese Peoples' Congress v. Zaire,
African Commission on Human and Peoples' Rights,
1992, 75/92**

75/92 Katangese Peoples' Congress v. Zaire

THE FACTS

1. The communication was submitted in 1992 by Mr. Gerard Moke, President of the Katangese Peoples' Congress requesting the African Commission on Human and Peoples' Rights:
 - To recognise the Katangese Peoples' Congress as a liberation movement entitled to support in the achievement of independence for Katanga.
 - To recognise the independence of Katanga.
 - To help secure the evacuation of Zaire from Katanga.

THE LAW

2. The claim is brought under Article 20(1) of the African Charter on Human Rights'. There are no allegations of specific breaches of other human rights apart from the claim of the denial of self-determination.
3. All peoples have a right to self-determination. There may however be controversy as to the definition of peoples and the content of the right. The issue in the case is not self-determination for all Zaireois as a people but specifically for the Katangese. Whether The Katangese consist of one or more ethnic groups is, for this purpose immaterial and no evidence has been adduced to that effect.
4. The Commission believes that self-determination may be exercised in any of the following ways - independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity.
5. The Commission is obligated to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter on Human and Peoples' Rights.
6. In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

FOR THE ABOVE REASONS, THE COMMISSION

declares that the case holds no evidence of violations of any rights under the African Charter. The request for independence for Katanga therefore has no merit under the African Charter on Human and Peoples' Rights.

**Reference by the Governor-General concerning
Certain Questions relating to the Secession of Quebec
from Canada, 1998, 2 S.C.R. 217**

IN THE MATTER OF Section 53 of the Supreme Court Act, R.S.C., 1985, c. S-26;

AND IN THE MATTER OF a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated the 30th day of September, 1996

Indexed as: Reference re Secession of Quebec

File No.: 25506.

1998: February 16, 17, 18, 19; 1998: August 20.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

reference by governor in council

Constitutional law -- Supreme Court of Canada -- Reference jurisdiction -- Whether Supreme Court's reference jurisdiction constitutional -- Constitution Act, 1867, s. 101 -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

Courts -- Supreme Court of Canada -- Reference jurisdiction -- Governor in Council referring to Supreme Court three questions relating to secession of Quebec from Canada -- Whether questions submitted fall outside scope of reference provision of Supreme Court Act -- Whether questions submitted justiciable -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

Constitutional law -- Secession of province -- Unilateral secession -- Whether Quebec can secede unilaterally from Canada under Constitution.

International law -- Secession of province of Canadian federation -- Right of self-determination -- Effectivity principle -- Whether international law gives Quebec right to secede unilaterally from Canada.

1. Pursuant to s. 53 of the *Supreme Court Act*, the Governor in Council referred the following questions to this Court:
2. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
3. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

4. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Issues regarding the Court's reference jurisdiction were raised by the *amicus curiae*. He argued that s. 53 of the *Supreme Court Act* was unconstitutional; that, even if the Court's reference jurisdiction was constitutionally valid, the questions submitted were outside the scope of s. 53; and, finally, that these questions were not justiciable.

Held: Section 53 of the *Supreme Court Act* is constitutional and the Court should answer the reference questions.

(1) *Supreme Court's Reference Jurisdiction*

Section 101 of the *Constitution Act, 1867* gives Parliament the authority to grant this Court the reference jurisdiction provided for in s. 53 of the *Supreme Court Act*. The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. While, in most instances, this Court acts as the exclusive ultimate appellate court in the country, an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction. Even if there were any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal". A "general court of appeal" may also properly undertake other legal functions, such as the rendering of advisory opinions. There is no constitutional bar to this Court's receipt of jurisdiction to undertake an advisory role.

The reference questions are within the scope of s. 53 of the *Supreme Court Act*. Question 1 is directed, at least in part, to the interpretation of the *Constitution Acts*, which are referred to in s. 53(1)(a). Both Questions 1 and 2 fall within s. 53(1)(d), since they relate to the powers of the legislature or government of a Canadian province. Finally, all three questions are "important questions of law or fact concerning any matter" and thus come within s. 53(2). In answering Question 2, the Court is not exceeding its jurisdiction by purporting to act as an international tribunal. The Court is providing an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation. Further, Question 2 is not beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law. More importantly, Question 2 does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the legislature or government of Quebec, institutions that exist as part of the Canadian legal order. International law must be addressed since it has been invoked as a consideration in the context of this Reference.

The reference questions are justiciable and should be answered. They do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions, as interpreted by the Court, are strictly limited to aspects of the legal framework in which

that democratic decision is to be taken. Since the reference questions may clearly be interpreted as directed to legal issues, the Court is in a position to answer them. The Court cannot exercise its discretion to refuse to answer the questions on a pragmatic basis. The questions raise issues of fundamental public importance and they are not too imprecise or ambiguous to permit a proper legal answer. Nor has the Court been provided with insufficient information regarding the present context in which the questions arise. Finally, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

(2) *Question 1*

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession.

The Court in this Reference is required to consider whether Quebec has a right to unilateral secession. Arguments in support of the existence of such a right were primarily based on the principle of democracy. Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values. Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Not, however, can the

reverse proposition be accepted: the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.

The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution" and not to usurp the prerogatives of the political forces that operate within that framework. The obligations identified by the Court are binding obligations under the Constitution. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

(3) *Question 2*

The Court was also required to consider whether a right to unilateral secession exists under international law. Some supporting an affirmative answer did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under

international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the "National Assembly, the legislature or the government of Quebec" do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

Although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of an unconstitutional declaration of secession leading to a *de facto* secession is not ruled out. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Even if granted, such recognition would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

(4) *Question 3*

In view of the answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

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Canada, [1993] 2 S.C.R. 995; *R. v. S. (S.)*, [1990] 2 S.C.R. 254; *Switzman v. Elbling*, [1957] S.C.R. 285; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; *Boucher v. The King*, [1951] S.C.R. 265; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *Reference re Education Act (Que.)*, [1993] 2 S.C.R. 511; *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Société des Acadiciens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49.

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Charter of the United Nations, Can. T.S. 1945 No. 7, Arts. 1(2), 55.

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- REFERENCE by the Governor in Council, pursuant to s. 53 of the *Supreme Court Act*, concerning the secession of Quebec from Canada.
- L. Yves Fortier, Q.C., Pierre Bienvenu, Warren J. Newman, Jean-Marc Aubry, Q.C., and Mary Dawson, Q.C., for the Attorney General of Canada.
- André Joffe-Coejur, Michel Paradis, Louis Masson, André Binette, Clément Samson, Martin Bédard and Martin St-Amant, for the *amicus curiae*.
- Donna J. Miller, Q.C., and Deborah L. Carlson, for the intervener the Attorney General of Manitoba.
- Graeme G. Mitchell and John D. Whyte, Q.C., for the intervener the Attorney General for Saskatchewan.
- Bernard W. Funston, for the intervener the Minister of Justice of the Northwest Territories.
- Stuart J. Whitley, Q.C., and Howard L. Kushner, for the intervener the Minister of Justice for the Government of the Yukon Territory.
- Agnès Laporte and Richard Gaudreau, for the intervener Kitigan Zibi Anishinabeg.
- Claude-Armand Sheppard, Paul Joffe and Andrew Orkin, for the intervener the Grand Council of the Crees (Eeyou Estchee).
- Peter W. Hutchins and Carol Hilling, for the intervener the Makivik Corporation.
- Michael Sherry, for the intervener the Chiefs of Ontario.

Raj Anand and *M. Kate Stephenson*, for the interveners the Minority Advocacy and Rights Council.

Mary Eberts and *Anne Bayefsky*, for the interveners the *AdHoc* Committee of Canadian Women on the Constitution.

Guy Bertrand and *Patrick Monahan*, for the interveners Guy Bertrand.

Stephen A. Scott, for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway.

Vincent Poulriot, on his own behalf.

//The Court//

The following is the judgment delivered by

THE COURT --

I. Introduction

1 This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government. The observation we made more than a decade ago in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (*Manitoba Language Rights Reference*), at p. 728, applies with equal force here: as in that case, the present one "combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity". In our view, it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge.

2 The questions posed by the Governor in Council by way of Order in Council P.C. 1996-1497, dated September 30, 1996, read as follows:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

3 Before turning to Question 1, as a preliminary matter, it is necessary to deal with the issues raised with regard to this Court's reference jurisdiction.

II. The Preliminary Objections to the Court's Reference Jurisdiction

4 The *amicus curiae* argued that s. 101 of the *Constitution Act, 1867* does not give Parliament the authority to grant this Court the jurisdiction provided for in s. 53 of the *Supreme Court Act*, R.S.C., 1985, c. S-26. Alternatively, it is submitted that even if Parliament were entitled to enact s. 53 of the *Supreme Court Act*, the scope of that section should be interpreted to exclude the kinds of questions the Governor in Council has submitted in this Reference. In particular, it is contended that this Court cannot answer Question 2, since it is a question of "pure" international law over which this Court has no jurisdiction. Finally, even if this Court's reference jurisdiction is constitutionally valid, and even if the questions are within the purview of s. 53 of the *Supreme Court Act*, it is argued that the three questions referred to the Court are speculative, of a political nature, and, in any event, are not ripe for judicial decision, and therefore are not justiciable.

5 Notwithstanding certain formal objections by the Attorney General of Canada, it is our view that the *amicus curiae* was within his rights to make the preliminary objections, and that we should deal with them.

A. The Constitutional Validity of Section 53 of the Supreme Court Act

6 In *Re References by Governor-General in Council* (1910), 43 S.C.R. 536, affirmed on appeal to the Privy Council, [1912] A.C. 571 (*sub nom. Attorney-General for Ontario v. Attorney-General for Canada*), the constitutionality of this Court's special jurisdiction was twice upheld. The Court is asked to revisit these decisions. In light of the significant changes in the role of this Court since 1912, and the very important issues raised in this Reference, it is appropriate to reconsider briefly the constitutional validity of the Court's reference jurisdiction.

7 Section 3 of the *Supreme Court Act* establishes this Court both as a "general court of appeal" for Canada and as an "additional court for the better administration of the laws of Canada". These two roles reflect the two heads of power enumerated in s. 101 of the *Constitution Act, 1867*. However, the "laws of Canada" referred to in s. 101 consist only of federal law and statute: see *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054, at pp. 1065-66. As a result, the phrase "additional courts" contained in s. 101 is an insufficient basis upon which to ground the special jurisdiction established in s. 53 of the *Supreme Court Act*, which clearly exceeds a consideration of federal law alone (see, e.g., s. 53(2)). Section 53 must therefore be taken as enacted pursuant to Parliament's power to create a "general court of appeal" for Canada.

8 Section 53 of the *Supreme Court Act* is *intra vires* Parliament's power under s. 101 if, in "pith and substance", it is legislation in relation to the constitution or organization of a "general court of appeal". Section 53 is defined by two leading characteristics -- it establishes an original jurisdiction in this Court and imposes a duty on the Court to render advisory opinions. Section 53 is therefore constitutionally valid only if (1) a "general court of appeal" may properly exercise an original jurisdiction; and (2) a "general court of appeal" may properly undertake other legal functions, such as the rendering of advisory opinions.

(1) May a Court of Appeal Exercise an Original Jurisdiction?

9 The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. In most instances, this Court acts as the exclusive ultimate appellate court in the country, and, as such, is properly constituted as the "general court of appeal" for Canada. Moreover, it is clear that an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction.

10 The English Court of Appeal, the U.S. Supreme Court and certain courts of appeal in Canada exercise an original jurisdiction in addition to their appellate functions. See *De Demko v. Home Secretary*, [1959] A.C. 654 (H.L.), at p. 660; *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445 (Man. C.A.), at p. 453; United States Constitution, art. III, § 2. Although these courts are not constituted under a head of power similar to s. 101, they certainly provide examples which suggest that there is nothing inherently self-contradictory about an appellate court exercising original jurisdiction on an exceptional basis.

11 It is also argued that this Court's original jurisdiction is unconstitutional because it conflicts with the original jurisdiction of the provincial superior courts and usurps the normal appellate process. However, Parliament's power to establish a general court of appeal pursuant to s. 101 is plenary, and takes priority over the province's power to control the administration of justice in s. 92(14). See *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 127 (P.C.). Thus, even if it could be said that there is any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal" provided, as discussed below, advisory functions are not to be considered inconsistent with the functions of a general court of appeal.

(2) May a Court of Appeal Undertake Advisory Functions?

12 The *amicus curiae* submits that

[TRANSLATION] [e]ither this constitutional power [to give the highest court in the federation jurisdiction to give advisory opinions] is expressly provided for by the Constitution, as is the case in India (*Constitution of India*, art. 143), or it is not provided

for therein and so it simply does not exist. This is what the Supreme Court of the United States has held. [Emphasis added.]

13 However, the U.S. Supreme Court did not conclude that it was unable to render advisory opinions because no such express power was included in the United States Constitution. Quite the contrary, it based this conclusion on the express limitation in art. III, § 2 restricting federal court jurisdiction to actual "cases" or "controversies". See, e.g., *Mistral v. United States*, 219 U.S. 346 (1911), at p. 362. This section reflects the strict separation of powers in the American federal constitutional arrangement. Where the "case or controversy" limitation is missing from their respective state constitutions, some American state courts do undertake advisory functions (e.g., in at least two states -- Alabama and Delaware -- advisory opinions are authorized, in certain circumstances, by statute: see Ala. Code 1975 § 12-2-10; Del. Code Ann. tit. 10, § 141 (1996 Supp.)).

14 In addition, the judicial systems in several European countries (such as Germany, France, Italy, Spain, Portugal and Belgium) include courts dedicated to the review of constitutional claims; these tribunals do not require a concrete dispute involving individual rights to examine the constitutionality of a new law -- an "abstract or objective question" is sufficient. See L. Favoreu, "American and European Models of Constitutional Justice", in D. S. Clark, ed., *Comparative and Private International Law* (1990), 105, at p. 113. The European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights also all enjoy explicit grants of jurisdiction to render advisory opinions. See *Treaty establishing the European Community*, Art. 228(6); Protocol No. 2 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, Europ. T.S. No. 5, p. 36; *Statute of the Inter-American Court of Human Rights*, Art. 2. There is no plausible basis on which to conclude that a court is, by its nature, inherently precluded from undertaking another legal function in tandem with its judicial duties.

15 Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 courts. Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the *Supreme Court Act* is therefore constitutionally valid.

B. *The Court's Jurisdiction Under Section 53*

16 Section 53 provides in its relevant parts as follows:

53. (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning

(a) the interpretation of the *Constitution Acts*;

...

(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

(2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *eiusdem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.

(3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

17 It is argued that even if Parliament were entitled to enact s. 53 of the *Supreme Court Act*, the questions submitted by the Governor in Council fall outside the scope of that section.

18 This submission cannot be accepted. Question 1 is directed, at least in part, to the interpretation of the *Constitution Acts*, which are referred to in s. 53(1)(a). Both Question 1 and Question 2 fall within s. 53(1)(d), since they relate to the powers of the legislature or government of a Canadian province. Finally, all three questions are clearly "important questions of law or fact concerning any matter" so that they must come within s. 53(2).

19 However, the *amicus curiae* has also raised some specific concerns regarding this Court's jurisdiction to answer Question 2. The question, on its face, falls within the scope of s. 53, but the concern is a more general one with respect to the jurisdiction of this Court, as a domestic tribunal, to answer what is described as a question of "pure" international law.

20 The first contention is that in answering Question 2, the Court would be exceeding its jurisdiction by purporting to act as an international tribunal. The simple answer to this submission is that this Court would not, in providing an advisory opinion in the context of a reference, be purporting to "act as" or substitute itself for an international tribunal. In accordance with well accepted principles of international law, this Court's answer to Question 2 would not purport to bind any other state or international tribunal that might subsequently consider a similar question. The Court nevertheless has jurisdiction to provide an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation.

21 Second, there is a concern that Question 2 is beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law.

22 This concern is groundless. In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system. For example, in *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208, the Court was required to determine whether, taking into account the principles of international law with respect to diplomatic immunity, a municipal council had the power to levy rates on certain properties owned by foreign governments. In two subsequent references, this Court used international law to determine whether the federal government or a province possessed proprietary rights in certain portions of the territorial sea and continental shelf (*Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86).

23 More importantly, Question 2 of this Reference does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the National Assembly, legislature or government of Quebec, institutions that clearly exist as part of the Canadian legal order. As will be seen, the *amicus curiae* himself submitted that the success of any initiative on the part of Quebec to secede from the Canadian federation would be governed by international law. In these circumstances, a consideration of international law in the context of this Reference about the legal aspects of the unilateral secession of Quebec is not only permissible but unavoidable.

C. Justiciability

24 It is submitted that even if the Court has jurisdiction over the questions referred, the questions themselves are not justiciable. Three main arguments are raised in this regard:

- (1) the questions are not justiciable because they are too "theoretical" or speculative;
- (2) the questions are not justiciable because they are political in nature;
- (3) the questions are not yet ripe for judicial consideration.

25 In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

26 Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately

addressed by a court of law. As we stated in *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 545:

While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. . . . In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch. [Emphasis added.]

Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

- (i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
- (ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

27 As to the "proper role" of the Court, it is important to underline, contrary to the submission of the *amicus curiae*, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the U.S. "political questions" doctrine therefore has no application. The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. As will be seen, the legal framework involves the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec.

28 As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.

29 Finally, we turn to the proposition that even though the questions referred to us are justiciable in the "reference" sense, the Court must still determine whether it should exercise its discretion to refuse to answer the questions on a pragmatic basis.

30 Generally, the instances in which the Court has exercised its discretion to refuse to answer a reference question that is otherwise justiciable can be broadly divided into two categories. First, where the question is too imprecise or ambiguous to permit a complete or accurate answer: see, e.g., *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (*Provincial Judges Reference*), at para. 256. Second, where the parties have not provided sufficient information to allow the Court to provide a complete or accurate answer: see, e.g., *Reference re Education System in Island of Montreal*, [1926] S.C.R. 246; *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 (*Senate Reference*); *Provincial Judges Reference*, at para. 257.

31 There is no doubt that the questions posed in this Reference raise difficult issues and are susceptible to varying interpretations. However, rather than refusing to answer at all, the Court is guided by the approach advocated by the majority on the "conventions" issue in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (*Patriation Reference*), at pp. 875-76:

If the questions are thought to be ambiguous, this Court should not, in a constitutional reference, be in a worse position than that of a witness in a trial and feel compelled simply to answer yes or no. Should it find that a question might be misleading, or should it simply avoid the risk of misunderstanding, the Court is free either to interpret the question . . . or it may qualify both the question and the answer. . . .

The Reference questions raise issues of fundamental public importance. It cannot be said that the questions are too imprecise or ambiguous to permit a proper legal answer. Nor can it be said that the Court has been provided with insufficient information regarding the present context in which the questions arise. Thus, the Court is duty bound in the circumstances to provide its answers.

III. Reference Questions

A. Question 1

Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

(1) Introduction

32 As we confirmed in *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at p. 806, "The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable." The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the *Provincial Judges*

Reference, supra, at para. 92. Finally, as was said in the *Patriation Reference, supra*, at p. 874, the Constitution of Canada includes

the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. The foundation and substance of these principles are addressed in the following paragraphs. We will then turn to their specific application to the first reference question before us.

(2) Historical Context: The Significance of Confederation

33 In our constitutional tradition, legality and legitimacy are linked. The precise nature of this link will be discussed below. However, at this stage, we wish to emphasize only that our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order.

34 Because this Reference deals with questions fundamental to the nature of Canada, it should not be surprising that it is necessary to review the context in which the Canadian union has evolved. To this end, we will briefly describe the legal evolution of the Constitution and the foundational principles governing constitutional amendments. Our purpose is not to be exhaustive, but to highlight the features most relevant in the context of this Reference.

35 Confederation was an initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada. It was not initiated by Imperial fiat. In March 1864, a select committee of the Legislative Assembly of the Province of Canada, chaired by George Brown, began to explore prospects for constitutional reform. The committee's report, released in June 1864, recommended that a federal union encompassing Canada East and Canada West, and perhaps the other British North American colonies, be pursued. A group of Reformers from Canada West, led by Brown, joined with Étienne P. Taché and John A. Macdonald in a coalition government for the purpose of engaging in constitutional reform along the lines of the federal model proposed by the committee's report.

36 An opening to pursue federal union soon arose. The leaders of the maritime colonies had planned to meet at Charlottetown in the fall to discuss the perennial topic of maritime union. The Province of Canada secured invitations to send a Canadian delegation. On September 1, 1864, 23 delegates (five from New Brunswick, five from Nova Scotia, five from Prince Edward Island, and eight from the Province of Canada) met in Charlottetown. After five days of discussion, the delegates reached agreement on a plan for federal union.

37 The salient aspects of the agreement may be briefly outlined. There was to be a federal union featuring a bicameral central legislature. Representation in the Lower House was to be based on population, whereas in the Upper House it was to be based on regional equality, the regions comprising Canada East, Canada West and the Maritimes. The significance of the adoption of a federal form of government cannot be exaggerated. Without it, neither the agreement of the delegates from Canada East nor that of the delegates from the maritime colonies could have been obtained.

38 Several matters remained to be resolved, and so the Charlottetown delegates agreed to meet again at Quebec in October, and to invite Newfoundland to send a delegation to join them. The Quebec Conference began on October 10, 1864. Thirty-three delegates (two from Newfoundland, seven from New Brunswick, five from Nova Scotia, seven from Prince Edward Island, and twelve from the Province of Canada) met over a two and a half week period. Precise consideration of each aspect of the federal structure preoccupied the political agenda. The delegates approved 72 resolutions, addressing almost all of what subsequently made its way into the final text of the *Constitution Act, 1867*. These included guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and "Property and Civil Rights in the Province" to the provinces). The protection of minorities was thus reaffirmed.

39 Legally, there remained only the requirement to have the Quebec Resolutions put into proper form and passed by the Imperial Parliament in London. However, politically, it was thought that more was required. Indeed, Resolution 70 provided that "The Sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference." (Cited in J. Pope, ed., *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (1895), at p. 52 (emphasis added).)

40 Confirmation of the Quebec Resolutions was achieved more smoothly in central Canada than in the Maritimes. In February and March 1865, the Quebec Resolutions were the subject of almost six weeks of sustained debate in both houses of the Canadian legislature. The Canadian Legislative Assembly approved the Quebec Resolutions in March 1865 with the support of a majority of members from both Canada East and Canada West. The governments of both Prince Edward Island and Newfoundland chose, in accordance with popular sentiment in both colonies, not to accede to the Quebec Resolutions. In New Brunswick, a general election was required before Premier Tilley's pro-Confederation party prevailed. In Nova Scotia, Premier Tupper ultimately obtained a resolution from the House of Assembly favouring Confederation.

41 Sixteen delegates (five from New Brunswick, five from Nova Scotia, and six from the Province of Canada) met in London in December 1866 to finalize the plan for Confederation. To this end, they agreed to some slight modifications and additions to the Quebec Resolutions. Minor changes were made to the distribution of powers, provision was made for the appointment of extra senators in the event of a deadlock between the House of Commons and the Senate, and certain religious minorities were given the right to appeal to the federal government where their denominational school rights were adversely affected by provincial legislation. The British North America Bill was drafted after the London Conference with the assistance of the Colonial Office, and was introduced into the House of Lords in February 1867. The Act passed third reading in the House of Commons on March 8, received royal assent on March 29, and was proclaimed on July 1, 1867. The Dominion of Canada thus became a reality.

42 There was an early attempt at secession. In the first Dominion election in September 1867, Premier Tupper's forces were decimated: members opposed to Confederation won 18 of Nova Scotia's 19 federal seats, and in the simultaneous provincial election, 36 of the 38 seats in the provincial legislature. Newly-elected Premier Joseph Howe led a delegation to the Imperial Parliament in London in an effort to undo the new constitutional arrangements, but it was too late. The Colonial Office rejected Premier Howe's plea to permit Nova Scotia to withdraw from Confederation. As the Colonial Secretary wrote in 1868:

The neighbouring province of New Brunswick has entered into the union in reliance on having with it the sister province of Nova Scotia; and vast obligations, political and commercial, have already been contracted on the faith of a measure so long discussed and so solemnly adopted. . . . I trust that the Assembly and the people of Nova Scotia will not be surprised that the Queen's government feel that they would not be warranted in advising the reversal of a great measure of state, attended by so many extensive consequences already in operation. . . .

(Quoted in H. Wade MacLauchlan, "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997), 76 *Can. Bar Rev.* 155, at p. 168.)

The interdependence characterized by "vast obligations, political and commercial", referred to by the Colonial Secretary in 1868, has, of course, multiplied immeasurably in the last 130 years.

43 Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity. It is pertinent, in the context of the present Reference, to mention the words of George-Étienne Cartier (cited in the *Parliamentary Debates on the subject of the Confederation* (1865), at p. 60):

Now, when we [are] united together, if union [is] attained, we [shall] form a political nationality with which neither the national origin, nor the religion of any individual, [will] interfere. It was lamented by some that we had this diversity of races, and hopes

were expressed that this distinctive feature would cease. The idea of unity of races [is] utopian -- it [is] impossible. Distinctions of this kind [will] always exist. Dissimilarity, in fact, appear[s] to be the order of the physical world and of the moral world, as well as in the political world. But with regard to the objection based on this fact, to the effect that a great nation [can] not be formed because Lower Canada [is] in great part French and Catholic, and Upper Canada [is] British and Protestant, and the Lower Provinces [are] mixed, it [is] futile and worthless in the extreme. . . . In our own Federation we [will] have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and his success [will] increase the prosperity and glory of the new Confederacy. . . . [W]e [are] of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.

The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments. The *Constitution Act, 1867* was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. Federalism was the political mechanism by which diversity could be reconciled with unity.

44 A federal-provincial division of powers necessitated a written constitution which circumscribed the powers of the new Dominion and Provinces of Canada. Despite its federal structure, the new Dominion was to have "a Constitution similar in Principle to that of the United Kingdom" (*Constitution Act, 1867*, preamble). Allowing for the obvious differences between the governance of Canada and the United Kingdom, it was nevertheless thought important to thus emphasize the continuity of constitutional principles, including democratic institutions and the rule of law; and the continuity of the exercise of sovereign power transferred from Westminster to the federal and provincial capitals of Canada.

45 After 1867, the Canadian federation continued to evolve both territorially and politically. New territories were admitted to the union and new provinces were formed. In 1870, Rupert's Land and the Northwest Territories were admitted and Manitoba was formed as a province. British Columbia was admitted in 1871, Prince Edward Island in 1873, and the Arctic Islands were added in 1880. In 1898, the Yukon Territory and in 1905, the provinces of Alberta and Saskatchewan were formed from the Northwest Territories. Newfoundland was admitted in 1949 by an amendment to the *Constitution Act, 1867*. The new territory of Nunavut was carved out of the Northwest Territories in 1993 with the partition to become effective in April 1999.

46 Canada's evolution from colony to fully independent state was gradual. The Imperial Parliament's passage of the *Statute of Westminster, 1931* (U.K.), 22 & 23 Geo. 5, c. 4, confirmed in law what had earlier been confirmed in fact by the Balfour Declaration of 1926, namely, that Canada was an independent country. Thereafter, Canadian law alone governed in Canada, except where Canada expressly consented to the continued application of Imperial legislation. Canada's

independence from Britain was achieved through legal and political evolution with an adherence to the rule of law and stability. The proclamation of the *Constitution Act, 1982* removed the last vestige of British authority over the Canadian Constitution and re-affirmed Canada's commitment to the protection of its minority, aboriginal, equality, legal and language rights, and fundamental freedoms as set out in the *Canadian Charter of Rights and Freedoms*.

47 Legal continuity, which requires an orderly transfer of authority, necessitated that the 1982 amendments be made by the Westminster Parliament, but the legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken in Canada within a legal framework which this Court, in the *Patriation Reference*, had ruled was in accordance with our Constitution. It should be noted, parenthetically, that the 1982 amendments did not alter the basic division of powers in ss. 91 and 92 of the *Constitution Act, 1867*, which is the primary textual expression of the principle of federalism in our Constitution, agreed upon at Confederation. It did, however, have the important effect that, despite the refusal of the government of Quebec to join in its adoption, Quebec has become bound to the terms of a Constitution that is different from that which prevailed previously, particularly as regards provisions governing its amendment, and the *Canadian Charter of Rights and Freedoms*. As to the latter, to the extent that the scope of legislative powers was thereafter to be constrained by the *Charter*, the constraint operated as much against federal legislative powers as against provincial legislative powers. Moreover, it is to be remembered that s. 33, the "notwithstanding clause", gives Parliament and the provincial legislatures authority to legislate on matters within their jurisdiction in derogation of the fundamental freedoms (s. 2), legal rights (ss. 7 to 14) and equality rights (s. 15) provisions of the *Charter*.

48 We think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability. We now turn to a discussion of the general constitutional principles that bear on the present Reference.

(3) Analysis of the Constitutional Principles

(a) Nature of the Principles

49 What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

50 Our Constitution has an internal architecture, or what the majority of this Court in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the *Provincial Judges Reference*, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the *Manitoba Language Rights Reference*, *supra*, at p. 750, we held that "the principle is clearly implicit in the very nature of a Constitution". The same may be said of the other three constitutional principles we underscore today.

51 Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

52 The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree", to invoke the famous description in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.

53 Given the existence of these underlying constitutional principles, what use may the Court make of them? In the *Provincial Judges Reference*, *supra*, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the *Provincial Judges Reference* that the effect of the preamble to the *Constitution Act, 1867* was to incorporate certain constitutional principles by reference, a point made earlier in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 462-63. In the *Provincial Judges Reference*, at para. 104, we determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text".

54 Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative

force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference*, *supra*, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada". It is to a discussion of those underlying constitutional principles that we now turn.

(b) *Federalism*

55 It is undisputed that Canada is a federal state. Yet many commentators have observed that, according to the precise terms of the *Constitution Act, 1867*, the federal system was only partial. See, e.g., K. C. Wheare, *Federal Government* (4th ed. 1963), at pp. 18-20. This was so because, on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces. Here again, however, a review of the written provisions of the Constitution does not provide the entire picture. Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light. For example, although the federal power of disallowance was included in the *Constitution Act, 1867*, the underlying principle of federalism triumphed early. Many constitutional scholars contend that the federal power of disallowance has been abandoned (e.g., P. W. Hogg, *Constitutional Law of Canada* (4th ed. 1997), at p. 120).

56 In a federal system of government such as ours, political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the *Constitution Act, 1867*. See, e.g., *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.), at pp. 441-42. It is up to the courts "to control the limits of the respective sovereignties": *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733, at p. 741. In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.

57 This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the *Patriation Reference*, *supra*, at pp. 905-9, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie J.J., dissenting in the *Patriation Reference*, at p. 821, considered federalism to be "the dominant principle of Canadian constitutional law". With the enactment of the *Charter*, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.

58 The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the

particular societal objective having regard to this diversity. The scheme of the *Constitution Act, 1867*, it was said in *Re the Initiative and Referendum Act*, [1919] A.C. 935 (P.C.), at p. 942, was

not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.

More recently, in *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1047, the majority of this Court held that differences between provinces "are a rational part of the political reality in the federal process". It was referring to the differential application of federal law in individual provinces, but the point applies more generally. A unanimous Court expressed similar views in *R. v. S. (S)*, [1990] 2 S.C.R. 254, at pp. 287-88.

59 The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the *Union Act, 1840* (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

60 Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters. All new provinces joining the federation sought to achieve similar objectives, which are no less vigorously pursued by the provinces and territories as we approach the new millennium.

(c) *Democracy*

61 Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.

62 The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in *OPSEU v. Ontario*, *supra*, at p. 57, confirmed that "the basic structure of our

Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels". As is apparent from an earlier line of decisions emanating from this Court, including *Switzman v. Elbling*, [1957] S.C.R. 285, *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, *Boucher v. The King*, [1951] S.C.R. 265, and *Reference re Alberta Statutes*, [1938] S.C.R. 100, the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the *Provincial Judges Reference*, *supra*, at para. 100, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.

63 Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the *Magna Carta* (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English *Bill of Rights* of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. "[T]he Canadian tradition", the majority of this Court held in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 186, is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation". Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system — such as women, minorities, and aboriginal peoples — have continued, with some success, to the present day.

64 Democracy is not simply concerned with the process of government. On the contrary, as suggested in *Switzman v. Elbling*, *supra*, at p. 306, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: *Reference re Provincial Electoral Boundaries*, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process. In considering the scope and purpose of the *Charter*, the Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

65 In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are "at the core of the system of representative government": *New Brunswick Broadcasting*, *supra*, at p. 387. In individual terms, the right to vote in elections to the House of Commons and the provincial

legislatures, and to be candidates in those elections, is guaranteed to "Every citizen of Canada" by virtue of s. 3 of the *Charter*. Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters (*Reference re Provincial Electoral Boundaries, supra*) and as candidates (*Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876). In addition, the effect of s. 4 of the *Charter* is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.

66 It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.

67 The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.

68 Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec, supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices,

and seeking to acknowledge and address those voices in the laws by which all in the community must live.

69 The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) *Constitutionalism and the Rule of Law*

70 The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Romcarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, *supra*, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

71 In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the *Manitoba Language Rights Reference* itself. A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference*, *supra*, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

72 The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial,

including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

73 An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

74 First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

75 The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

76 Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

77 In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

78 It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates — indeed, makes possible — a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.

(e) *Protection of Minorities*

79 The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises. As this Court observed in *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1173, and in *Reference re Education Act (Que.)*, [1993] 2 S.C.R. 511, at pp. 529-30, the protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. See also *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377, at pp. 401-2, and *Adler v. Ontario*, [1996] 3 S.C.R. 609. Similar concerns animated the provisions protecting minority language rights, as noted in *Société des Acadiciens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, at p. 564.

80 However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter's* provisions for the protection of minority rights. See, e.g., *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, and *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

81 The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional

structure even at the time of Confederation: *Senate Reference, supra*, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

82 Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

(4) The Operation of the Constitutional Principles in the Secession Context

83 Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession "[u]nder the Constitution of Canada". This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. As we shall see below, it is also argued that international law is a relevant standard by which the legality of a purported act of secession may be measured.

84 The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

85 The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within

Canadian territory, including, should it be so desired, the secession of Quebec from Canada. As this Court held in the *Manitoba Language Rights Reference*, *supra*, at p. 745, "[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government". The manner in which such a political will could be formed and mobilized is a somewhat speculative exercise, though we are asked to assume the existence of such a political will for the purpose of answering the question before us. By the terms of this Reference, we have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally.

86 The "unilateral" nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional stage is "unilateral". We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather, what is claimed by a right to secede "unilaterally" is the right to effectuate secession without prior negotiations with the other provinces and the federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

87 Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.

88 The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their

cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

89 What is the content of this obligation to negotiate? At this juncture, we confront the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations. This is mirrored by the distinction between the legality and the legitimacy of actions taken under the Constitution. We propose to focus first on the substantive obligations flowing from this obligation to negotiate; once the nature of those obligations has been described, it is easier to assess the appropriate means of enforcement of those obligations, and to comment on the distinction between legality and legitimacy.

90 The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject two absolutist propositions. One of those propositions is that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession. This proposition is attributed either to the supposed implications of the democratic principle of the Constitution, or to the international law principle of self-determination of peoples.

91 For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

92 However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that

other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

93 Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities "trumps" the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

94 In such circumstances, the conduct of the parties assumes primary constitutional significance. The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of all the participants in the negotiation process.

95 Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

96 No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities,

including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation. . . .

97 In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.

98 The respective roles of the courts and political actors in discharging the constitutional obligations we have identified follows ineluctably from the foregoing observations. In the *Patriation Reference*, a distinction was drawn between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions. It is also the case, however, that judicial intervention, even in relation to the law of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme.

99 The notion of justiciability is, as we earlier pointed out in dealing with the preliminary objection, linked to the notion of appropriate judicial restraint. We earlier made reference to the discussion of justiciability in *Reference re Canada Assistance Plan*, *supra*, at p. 545:

In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government.

In *Operation Dismantle*, *supra*, at p. 459, it was pointed out that justiciability is a "doctrine . . . founded upon a concern with the appropriate role of the courts as the forum for the resolution of

different types of disputes". An analogous doctrine of judicial restraint operates here. Also, as observed in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49 (the *Auditor General's* case), at p. 91:

There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

100 The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.

101 If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.

102 The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies, but as we explained in the *Auditor General's* case, *supra*, at p. 90, and *New Brunswick Broadcasting, supra*, the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.

103 To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important

ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.

104 Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

105 It will be noted that Question 1 does not ask how secession could be achieved in a constitutional manner, but addresses one form of secession only, namely unilateral secession. Although the applicability of various procedures to achieve lawful secession was raised in argument, each option would require us to assume the existence of facts that at this stage are unknown. In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination.

(5) Suggested Principle of Effectivity

106 In the foregoing discussion we have not overlooked the principle of effectivity, which was placed at the forefront in argument before us. For the reasons that follow, we do not think that the principle of effectivity has any application to the issues raised by Question 1. A distinction must be drawn between the right of a people to act, and their power to do so. They are not identical. A right is recognized in law: mere physical ability is not necessarily given status as a right. The fact that an individual or group can act in a certain way says nothing at all about the legal status or consequences of the act. A power may be exercised even in the absence of a right to do so, but if it is, then it is exercised without legal foundation. Our Constitution does not address powers in this sense. On the contrary, the Constitution is concerned only with the rights and obligations of individuals, groups and governments, and the structure of our institutions. It was suggested before us that the National Assembly, legislature or government of Quebec could unilaterally effect the secession of that province from Canada, but it was not suggested that they might do so as a matter of law: rather, it was contended that they simply could do so as a matter of fact. Although under the Constitution there is no right to pursue secession unilaterally, that is secession without principled negotiation, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community. The principles governing secession at international law are discussed in our answer to Question 2.

107 In our view, the alleged principle of effectivity has no constitutional or legal status in the sense that it does not provide an *ex ante* explanation or justification for an act. In essence, acceptance of a principle of effectivity would be tantamount to accepting that the National Assembly, legislature or government of Quebec may act without regard to the law, simply because it asserts the power to do so. So viewed, the suggestion is that the National Assembly, legislature or government of Quebec could purport to secede the province unilaterally from Canada in disregard of Canadian and international law. It is further suggested that if the secession bid was successful, a new legal order would be created in that province, which would then be considered an independent state.

108 Such a proposition is an assertion of fact, not a statement of law. It may or may not be true; in any event it is irrelevant to the questions of law before us. If, on the other hand, it is put forward as an assertion of law, then it simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected.

B. Question 2

Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

109 For reasons already discussed, the Court does not accept the contention that Question 2 raises a question of "pure" international law which this Court has no jurisdiction to address. Question 2 is posed in the context of a Reference to address the existence or non-existence of a right of unilateral secession by a province of Canada. The *amicus curiae* argues that this question ultimately falls to be determined under international law. In addressing this issue, the Court does not purport to act as an arbiter between sovereign states or more generally within the international community. The Court is engaged in rendering an advisory opinion on certain legal aspects of the continued existence of the Canadian federation. International law has been invoked as a consideration and it must therefore be addressed.

110 The argument before the Court on Question 2 has focused largely on determining whether, under international law, a positive legal right to unilateral secession exists in the factual circumstances assumed for the purpose of our response to Question 1. Arguments were also advanced to the effect that, regardless of the existence or non-existence of a positive right to unilateral secession, international law will in the end recognize effective political realities -- including the emergence of a new state -- as facts. While our response to Question 2 will address considerations raised by this alternative argument of "effectivity", it should first be noted that the existence of a positive legal entitlement is quite different from a prediction that the law will respond after the fact to a then existing political reality. These two concepts examine different points in time. The questions posed to the Court address legal rights in advance of a unilateral act of purported secession. While we touch below on the practice governing the international recognition of emerging states, the Court is as wary of entertaining speculation about the possible future conduct of sovereign states on the international level as it was under Question 1 to speculate about the possible future course of political negotiations among the participants in the Canadian federation. In both cases, the Reference questions are directed only to the legal framework within which the political actors discharge their various mandates.

(1) Secession at International Law

111 It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state. This is acknowledged by the experts who provided their opinions on behalf of both the *amicus curiae* and the Attorney General of Canada. Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found their argument (i) on the proposition that unilateral secession is not specifically prohibited and that what is not specifically prohibited is inferentially permitted; or (ii) on the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of "a people" to self-determination. The *amicus curiae* addressed the right of self-determination, but submitted that it was not applicable to the circumstances of Quebec within the Canadian federation, irrespective of the existence or non-existence of a referendum result in favour of secession. We agree on this point with the *amicus curiae*, for reasons that we will briefly develop.

(a) *Absence of a Specific Prohibition*

112 International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below. As will be seen, international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part (R. Y. Jennings, *The Acquisition of Territory in International Law* (1963), at pp. 8-9). Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion subject to the right of peoples to self-determination, a topic to which we now turn.

(b) *The Right of a People to Self-determination*

113 While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the "rights" of entities other than nation states -- such as the right of a people to self-determination.

114 The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law. (A. Cassese, *Self-determination of peoples: A legal reappraisal* (1995), at pp. 171-72; K. Doehring, "Self-Determination", in B. Simma, ed., *The Charter of the United Nations: A Commentary* (1994), at p. 70.)

115 Article 1 of the *Charter of the United Nations*, Can. T.S. 1945 No. 7, states in part that one of the purposes of the United Nations (U.N.) is:

Article 1

....

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

116 Article 55 of the U.N. Charter further states that the U.N. shall promote goals such as higher standards of living, full employment and human rights "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

117 This basic principle of self-determination has been carried forward and addressed in so many U.N. conventions and resolutions that, as noted by Doehring, *supra*, at p. 60:

The sheer number of resolutions concerning the right of self-determination makes their enumeration impossible.

118 For our purposes, reference to the following conventions and resolutions is sufficient. Article 1 of both the U.N.'s *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, and its *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

119 Similarly, the U.N. General Assembly's *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), 24 October 1970 (*Declaration on Friendly Relations*), states:

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

120 In 1993, the U.N. World Conference on Human Rights adopted the *Vienna Declaration and Programme of Action*, A/CONF.157/24, 25 June 1993, that reaffirmed Article 1 of the two above-mentioned covenants. The U.N. General Assembly's *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, GA Res. 50/6, 9 November 1995, also emphasizes the right to self-determination by providing that the U.N.'s member states will:

1.

Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. [Emphasis added.]

121 The right to self-determination is also recognized in other international legal documents. For example, the *Final Act of the Conference on Security and Co-operation in Europe*, 14 I.L.M. 1292 (1975) (*Heisinki Final Act*), states (in Part VIII):

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. [Emphasis added.]

122 As will be seen, international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise.

(i) Defining "Peoples"

123 International law grants the right to self-determination to "peoples". Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of "peoples", the result has been that the precise meaning of the term "people" remains somewhat uncertain.

124 It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

125 While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a "people", as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public

international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.

(ii) Scope of the Right to Self-determination

126 The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. External self-determination can be defined as in the following statement from the *Declaration on Friendly Relations* as

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

127 The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

128 The *Declaration on Friendly Relations*, the *Vienna Declaration* and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* are specific. They state, immediately after affirming a people's right to determine political, economic, social and cultural issues, that such rights are not to

be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction. . . . [Emphasis added.]

129 Similarly, while the concluding document of the Vienna Meeting in 1989 of the Conference on Security and Co-operation in Europe on the follow-up to the *Heisinki Final Act* again refers to peoples having the right to determine "their internal and external political status" (emphasis added), that statement is immediately followed by express recognition that the

participating states will at all times act, as stated in the *Helsinki Final Act*, "in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States" (emphasis added). Principle 5 of the concluding document states that the participating states (including Canada):

... confirm their commitment strictly and effectively to observe the principle of territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. No actions or situations in contravention of this principle will be recognized as legal by the participating States. [Emphasis added.]

Accordingly, the reference in the *Helsinki Final Act* to a people determining its external political status is interpreted to mean the expression of a people's external political status through the government of the existing state, save in the exceptional circumstances discussed below. As noted by Cassese, *supra*, at p. 287, given the history and textual structure of this document, its reference to external self-determination simply means that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State".

130 While the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.

(iii) Colonial and Oppressed Peoples

131 Accordingly, the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of "parent" states. However, as noted by Cassese, *supra*, at p. 334, there are certain defined contexts within which the right to the self-determination of peoples does allow that right to be exercised "externally", which, in the context of this Reference, would potentially mean secession:

... the right to external self-determination, which entails the possibility of choosing (or restoring) independence, has only been bestowed upon two classes of peoples (those under colonial rule or foreign occupation), based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant

Power and that their 'territorial integrity', all but destroyed by the colonialist or occupying Power, should be fully restored. . . .

132 The right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed, but is irrelevant to this Reference.

133 The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the *Declaration on Friendly Relations*:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

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

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

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

134 A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

135 Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold. As stated by the *amicus curiae*, Addendum to the factum of the *amicus curiae*, at paras. 15-16:

[TRANSLATION] 15. The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the *amicus curiae*, an oppressed people.

16. For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecer. During this period, Quebecers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minister and the Leader of the Official Opposition in the House of Commons were both Quebecers. At present, the Prime Minister of Canada, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff of the Canadian Armed Forces and the Canadian ambassador to the United States, not to mention the Deputy Secretary-General of the United Nations, are all Quebecers. The international achievements of Quebecers in most fields of human endeavour are too numerous to list. Since the dynamism of the Quebec people has been directed toward the business sector, it has been clearly successful in Quebec, the rest of Canada and abroad.

136 The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a "sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction".

137 The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

138 In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples", nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.

139 We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference.

(2) Recognition of a Factual/Political Reality: the "Effectivity" Principle

140 As stated, an argument advanced by the *amicus curiae* on this branch of the Reference was that, while international law may not ground a positive right to unilateral secession in the context of Quebec, international law equally does not prohibit secession and, in fact, international recognition would be conferred on such a political reality if it emerged, for example, via effective control of the territory of what is now the province of Quebec.

141 It is true that international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation. However, as mentioned at the outset, effectivity, as such, does not have any real applicability to Question 2, which asks whether a right to unilateral secession exists.

142 No one doubts that legal consequences may flow from political facts, and that "sovereignty is a political fact for which no purely legal authority can be constituted . . .". H. W. R. Wade, "The Basis of Legal Sovereignty", [1955] *Camb. L.J.* 172, at p. 196. Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. However, international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a "legal" right to secede in the first place. Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession.

143 As indicated in responding to Question 1, one of the legal norms which may be recognized by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the *de facto* secession is, or was, being pursued. The process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms. See, e.g., European Community Declaration on the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 31 I.L.M. 1486 (1992), at p. 1487. While national interest and perceived political advantage to the recognizing state obviously play an important role,

foreign states may also take into account their view as to the existence of a right to self-determination on the part of the population of the putative state, and a counterpart domestic evaluation, namely, an examination of the legality of the secession according to the law of the state from which the territorial unit purports to have seceded. As we indicated in our answer to Question 1, an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition. The notion that what is not explicitly prohibited is implicitly permitted has little relevance where (as here) international law refers the legality of secession to the domestic law of the seceding state and the law of that state holds unilateral secession to be unconstitutional.

144 As a court of law, we are ultimately concerned only with legal claims. If the principle of "effectivity" is no more than that "successful revolution begets its own legality" (S. A. de Smith, "Constitutional Lawyers in Revolutionary Situations" (1968), 7 *West. Ont. L. Rev.* 93, at p. 96), it necessarily means that legality follows and does not precede the successful revolution. *Ex hypothesi*, the successful revolution took place outside the constitutional framework of the predecessor state, otherwise it would not be characterized as "a revolution". It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right.

145 An argument was made to analogize the principle of effectivity with the second aspect of the rule of law identified by this Court in the *Manitoba Language Rights Reference*, *supra*, at p. 753, namely, avoidance of a legal vacuum. In that Reference, it will be recalled, this Court declined to strike down all of Manitoba's legislation for its failure to comply with constitutional dictates, out of concern that this would leave the province in a state of chaos. In so doing, we recognized that the rule of law is a constitutional principle which permits the courts to address the practical consequences of their actions, particularly in constitutional cases. The similarity between that principle and the principle of effectivity, it was argued, is that both attempt to refashion the law to meet social reality. However, nothing of our concern in the *Manitoba Language Rights Reference* about the severe practical consequences of unconstitutionality affected our conclusion that, as a matter of law, all Manitoba legislation at issue in that case was unconstitutional. The Court's declaration of unconstitutionality was clear and unambiguous. The Court's concern with maintenance of the rule of law was directed in its relevant aspect to the appropriate remedy, which in that case was to suspend the declaration of invalidity to permit appropriate rectification to take place.

146 The principle of effectivity operates very differently. It proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane. Our law has long recognized that through a combination of acquiescence and prescription, an illegal act may at some later point be accorded some form of legal status. In the law of property, for example, it is well known that a squatter on land may ultimately become the owner if the true owner sleeps on his or her right to repossess the land. In this way, a change in the factual circumstances

may subsequently be reflected in a change in legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected.

C. Question 3

In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

147 In view of our answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

IV. Summary of Conclusions

148 As stated at the outset, this Reference has required us to consider momentous questions that go to the heart of our system of constitutional government. We have emphasized that the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event a clear majority of Quebecers votes on a clear question in favour of secession.

149 The Reference requires us to consider whether Quebec has a right to unilateral secession. Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

150 The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right

implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

151 Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations.

152 The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

153 The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution", not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

154 We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e., a clear democratic expression of support on a clear question for Quebec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

155 Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

156 The reference questions are answered accordingly.

Judgment accordingly.

Solicitor for the Attorney General of Canada: George Thomson, Ottawa.

Solicitors appointed by the Court as amicus curiae: Joli-C{oe}ur Lacasse Lemieux Simard St-Pierre, Sainte-Foy.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.

Solicitor for the intervener the Minister of Justice of the Northwest Territories: Bernard W. Funston, Gloucester.

Solicitor for the intervener the Minister of Justice for the Government of the Yukon Territory: Stuart J. Whitley, Whitehorse.

Solicitor for the intervener Kitigan Zibi Anishinabeg: Agnès Laporte, Hull.

Solicitors for the intervener the Grand Council of the Crees (Eeyou Estchee): Robinson, Sheppard, Shapiro, Montréal.

Solicitors for the intervener the Makivik Corporation: Hutchins, Soroka & Dionne, Montréal.

Solicitor for the intervener the Chiefs of Ontario: Michael Sherry, Toronto.

Solicitors for the intervener the Minority Advocacy and Rights Council: Scott & Ayles, Toronto.

Solicitors for the intervener the Ad Hoc Committee of Canadian Women on the Constitution: Eberts Symes Street & Corbett, Toronto; Centre for Refugee Studies, North York.

Solicitors for the intervener Guy Bertrand: Guy Bertrand & Associés, Québec; Patrick Monahan, North York.

Solicitors for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteaway: Stephen A. Scott, Montréal.

Solicitors for the intervener Vincent Pouliot: Paquette & Associés, Montr-

**The African Commission on Human and Peoples'
Rights v. Great Socialist People's Libyan Arab
Jamahiriya, Order for Provisional Measures,
African Court on Human and Peoples' Rights,
2011, Application No. 004/2011**



AFRICAN UNION

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الاتحاد الأفريقي

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
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IN THE MATTER OF

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

v.

GREAT SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA

APPLICATION No. 004/2011

ORDER FOR PROVISIONAL MEASURES

The Court composed of: Gérard NIYUNGEKO, President; Sophia A.B. AKUFFO, Vice President; Jean MUTSINZI, Bernard M. NGOEPE, Modibo T. GUINDO, Fatsah OUGUERGOUZ, Joseph N. MULENGA, Augustino S.L. RAMADHANI, Duncan TAMBALA, Elsie N. THOMPSON and Sylvain ORÉ - Judges; and Robert ENO - Acting Registrar,

In the matter of:

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

v.

GREAT SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA

After deliberations,

Having regard to the application dated the 3rd of March 2011, received at the Registry of the Court on 16 March 2011, by the African Commission on Human and Peoples' Rights (hereinafter referred to as the Commission), instituting proceedings against the Great Socialist People's Libyan Arab Jamahiriya (hereinafter referred to as Libya), for serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples' Rights (hereinafter referred to as the Charter);

Having regard to Article 27 (2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as the Protocol) and Rule 51 of the Rules of Court;

Makes the following Order:

1. Whereas, in its application, the Commission submits that it received successive complaints against Libya, during its 9th Extraordinary Session held in Banjul (The Gambia) from the 23rd of February to the 3rd of March 2011;
2. Whereas, the Commission submits that the complaints allege:

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- that following the detention of an opposition lawyer, peaceful demonstrations took place on the 16th of February 2011 in the Eastern Libyan city of Benghazi,
- that on the 19th of February 2011, there were other demonstrations in Benghazi, Al Baida, Ajdabiya, Zawiya and Derna, which were violently suppressed by security forces who opened fire at random on the demonstrators killing and injuring many people,
- that hospital sources reported that on the 20th of February 2011 they received individuals who had died or been injured with bullet wounds in the chest, neck and head,
- that Libyan security forces engaged in excessive use of heavy weapons and machine guns against the population, including targeted aerial bombardment and all types of attacks, and
- that these amount to serious violations of the right to life and to the integrity of persons, freedom of expression, demonstration and assembly.

3. Whereas, the Commission concludes that these actions amount to serious and widespread violations of the rights enshrined in Articles 1, 2, 4, 5, 9, 11, 12, 13 and 23 of the Charter;

4. Whereas, on the 21st of March 2011, the Registry of the Court acknowledged receipt of the application, in accordance with Rule 34(1) of the Rules of Court;

5. Whereas, on the 22nd of March 2011, the Registry forwarded copies of the application to Libya, in accordance with Rule 35 (2) (a) of the Rules of Court, and invited Libya to indicate, within thirty (30) days of receipt of the application, the names and addresses of its representatives, in accordance with Rule 35 (4) (a), whereas the Registry further invited Libya to respond to the application within sixty (60) days, in accordance with Rule 37 of the Rules;

6. Whereas, by letter dated the 22nd of March 2011, the Registry informed the Chairperson of the African Union Commission, and through him, the Executive Council of the African Union, and all the other States Parties

to the Protocol, of the filing of the application, in accordance with Rule 35(3) of the Rules;

7. Whereas, by letter dated the 23rd of March 2011, the Registry forwarded copies of the application to the complainants that seized the Commission, in accordance with Rule 35 (2)(e) of the Rules;

8. Whereas, by letter dated the 23rd of March 2011, the Registry informed the parties to the application that, given the extreme gravity and urgency of the matter, the Court might, on its own accord, and in accordance with Article 27(2) of the Protocol and Rule 51(1) of its Rules, issue provisional measures;

9. Whereas in its application, the Commission did not request the Court to order provisional measures;

10. Whereas, however, under Article 27 (2) of the Protocol and Rule 51 (1) of the Rules, the Court is empowered to order provisional measures *proprio motu* "in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons" and "which it deems necessary to adopt in the interest of the parties or of justice";

11. Whereas, it is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions;

12. Whereas, given the particular circumstances of the case, the Court has decided to invoke its powers under these provisions;

13. Whereas, in the present situation where there is an imminent risk of loss of human life and in view of the ongoing conflict in Libya that makes it difficult to serve the application timeously on the Respondent and to arrange a hearing accordingly, the Court decided to make an order for provisional measures without written pleadings or oral hearings;

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14. Whereas, in dealing with an application, the Court has to ascertain that it has jurisdiction under Articles 3 and 5 of the Protocol;

15. Whereas, however, before ordering provisional measures, the Court need not finally satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction;

16. Whereas, Article 3 (1) of the Protocol provides that 'the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned';

17. Whereas, Libya ratified the Charter on the 19th of July 1986 which came into force on the 21st of October 1986; whereas, Libya ratified the Protocol on the 19th of November 2003 which came into force on the 25th of January 2004; and Libya is a party to both instruments;

18. Whereas, Article 5 (1) (a) of the Protocol lists the Commission as one of the entities entitled to submit cases to the Court;

19. Whereas, in the light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the application;

20. Whereas, it appears from the application that there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the application;

21. Whereas, the application alleges that international organizations, mentioned below, both universal and regional, to which Libya is a member, have considered the situation prevailing in Libya:

- On the 23rd of February 2011, the Peace and Security Council of the African Union "express[ed] deep concern with the situation in the Great Socialist People's Libyan Arab Jamahiriya and strongly condemn[ed] the indiscriminate and excessive use of force and lethal weapons against peaceful protesters, in violation of human rights and International Humanitarian Law, (

which continues to contribute to the loss of human life and the destruction of property";

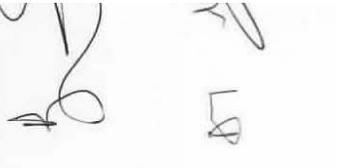
- On the 21st of February 2011, the Secretary General of the Arab League called for an end to violence, stating that the demands of Arab people for change are legitimate and the Arab League has suspended Libya;

- The United Nations Security Council in Resolution 1970 (2011) adopted on the 26th of February 2011, denounced 'the gross and systematic violations of human rights, including, the repression of peaceful demonstrators', noting further that 'the systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity'; and decided to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

22. Whereas, in the opinion of the Court, there is therefore a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the application, in particular, in relation to the rights to life and to physical integrity of persons as guaranteed in the Charter;

23. Whereas, in the light of the foregoing, the Court finds that the circumstances require it to order, as a matter of great urgency and without any proceedings, provisional measures, in accordance with Article 27 (2) of the Protocol and Rule 51 of its Rules;

24. Whereas, measures ordered by the Court would necessarily be provisional in nature and would not in any way prejudice the findings the Court might make on its jurisdiction, the admissibility of the application and the merits of the case;

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25. For these reasons,

THE COURT, unanimously orders the following provisional measures:

- 1) The Great Socialist People's Libyan Arab Jamahiriya must immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party.
- 2) The Great Socialist People's Libyan Arab Jamahiriya must report to the Court within a period of fifteen (15) days from the date of receipt of the Order, on the measures taken to implement this Order.

Done at Arusha, this twenty fifth day of March in the year Two Thousand and Eleven, in Arabic, English and French, the English text being authoritative.

Signed:

Gérard NIYUNGEKO, President

Sophia A.B. AKUFFO, Vice-President

Jean MUTSINZI, Judge

Bernard M. NGOEPE, Judge

Modibo T. GUINDO, Judge

Fatsah OUGUERGOUZ, Judge

Joseph N. MULENGA, Judge

Augustino S.L. RAMADHANI, Judge

Duncan TAMBALA, Judge

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Elsie N. THOMPSON, Judge

Sylvain ORÉ, Judge, and

Robert ENO, Acting Registrar

**The Social and Economic Rights Action Centre and
the Centre for Economic and Social Rights v. Nigeria,
African Commission on Human and Peoples' Rights,
2001, 155/96**

Rapporteur:	Commissioner Dankwa
20 th Session:	Commissioner Dankwa
21 st Session:	Commissioner Dankwa
22 nd Session:	Commissioner Dankwa
23 rd Session:	Commissioner Dankwa
24 th Session:	Commissioner Dankwa
25 th Session:	Commissioner Dankwa
26 th Session:	Commissioner Dankwa
27 th Session:	Commissioner Dankwa
28 th Session:	Commissioner Dankwa
29 th Session:	Commissioner Dankwa
30 th Session:	Commissioner Dankwa

Summary of Facts:

1. The Communication alleges that the military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.
2. The Communication alleges that the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.
3. The Communication alleges that the Nigerian Government has condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies. The Communication contains a memo from the Rivers State Internal Security Task Force, calling for "ruthless military operations".
4. The Communication alleges that the Government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. The Government has withheld from Ogoni Communities information on the

- dangers created by oil activities. Ogoni Communities have not been involved in the decisions affecting the development of Ogoniland.
5. The Government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organisations from entering Ogoniland to undertake such studies. The government has also ignored the concerns of Ogoni Communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders.
 6. The Communication alleges that the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands.
 7. The Communication alleges that in the course of the last three years, Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP's non-violent campaign in opposition to the destruction of their environment by oil companies. Some of the attacks have involved uniformed combined forces of the police, the army, the air-force, and the navy, armed with armoured tanks and other sophisticated weapons. In other instances, the attacks have been conducted by unidentified gunmen, mostly at night. The military-type methods and the calibre of weapons used in such attacks strongly suggest the involvement of the Nigerian security forces. The complete failure of the Government of Nigeria to investigate these attacks, let alone punish the perpetrators, further implicates the Nigerian authorities.
 8. The Nigerian Army has admitted its role in the ruthless operations which have left thousands of villagers homeless. The admission is recorded in several memos exchanged between officials of the SPDC and the Rivers State Internal Security Task Force, which has devoted itself to the suppression of the Ogoni campaign. One such memo calls for "ruthless military operations" and "wasting operations coupled with psychological tactics of displacement". At a public meeting recorded on video, Major Okuntimo, head of the Task Force, described the repeated invasion of Ogoni villages by his troops, how unarmed villagers running from the troops were shot from behind, and the homes of suspected MOSOP activists were ransacked and destroyed. He stated his commitment to rid the communities of members and supporters of MOSOP.
 9. The Communication alleges that the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni Communities.

Complaint:

10. The communication alleges violations of Articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter.

Procedure:

11. The communication was received by the Commission on 14th March 1996. The documents were sent with a video.

12. On 13th August 1996 letters acknowledging receipt of the Communication were sent to both Complainants.

13. On 13th August 1996, a copy of the Communication was sent to the Government of Nigeria.

14. At the 20th Ordinary Session held in Grand Bay, Mauritius in October 1996, the Commission declared the Communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria.

15. On 10th December 1996, the Secretariat sent a Note Verbale and letters to this effect to the government and the Complainants respectively.

16. At its 21st Ordinary Session held in April 1997, the Commission postponed taking decision on the merits to the next session, pending the receipt of written submissions from the Complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.

17. On 22nd May 1997, the Complainants were informed of the Commission's decision, while the State was informed on 28th May 1997.

18. At the 22nd Ordinary Session, the Commission postponed taking a decision on the case pending the discussion of the Nigerian Mission report.

19. At the 23rd Ordinary Session held in Banjul, The Gambia the Commission postponed consideration of the case to the next session due to lack of time.

20. On 25th June 1998, the Secretariat of the Commission sent letters to all parties concerned informing them of the status of the Communication.

21. At the 24th Ordinary Session, the Commission postponed consideration of the above Communication to the next session.

22. On 26th November 1998, the parties were informed of the Commission's decision.

23. At the 25th Ordinary Session of the Commission held in Bujumbura, Burundi, the Commission further postponed consideration of this communication to the 26th Ordinary Session.

24. The above decision was conveyed through separate letters of 11th May 1999 to the parties.
25. At its 26th Ordinary Session held in Kigali, Rwanda, the Commission deferred taking a decision on the merits of the case to the next session.

26. This decision was communicated to the parties on 24th January 2000.

27. Following the request of the Nigerian authorities through a Note Verbale of 16th February 2000 on the status of pending communications, the Secretariat, among other things, informed the government that this communication was set down for a decision on the merits at the next session.

28. At the 27th Ordinary Session of the Commission held in Algeria from 27th April to 11th May 2000, the Commission deferred further consideration of the case to the 28th Ordinary Session.

29. The above decision was communicated to the parties on 12th July 2000.

30. At the 28th Ordinary Session of the Commission held in Cotonou, Benin from 26th October to 6th November 2000, the Commission deferred further consideration of the case to the next session. During that session, the Respondent State submitted a Note Verbale stating the actions taken by the Government of the Federal Republic of Nigeria in respect of all the communications filed against it, including the present one. In respect of the instant communication, the note verbale admitted the gravamen of the complaints but went on to state the remedial measures being taken by the new civilian administration and they included :-

- Establishing for the first time in the history of Nigeria, a Federal Ministry of Environment with adequate resources to address environmental related issues prevalent in Nigeria and as a matter of priority in the Niger delta area
- Enacting into law the establishment of the Niger Delta Development Commission (NDDC) with adequate funding to address the environmental and social related problems of the Niger delta area and other oil producing areas of Nigeria
- Inaugurating the Judicial Commission of Inquiry to investigate the issues of human rights violations. In addition, the representatives of the Ogoni people have submitted petitions to the Commission of Inquiry on these issues and these are presently being reviewed in Nigeria as a top priority matter

31. The above decision was communicated to the parties on 14th November 2000.

32. At the 29th Ordinary Session held in Tripoli, Libya from 23rd April to 7th May 2001, the Commission decided to defer the final consideration of the case to the next session to be held in Banjul, the Gambia in October 2001.

33. The above decision was communicated to the parties on 6th June 2001.

34. At its 30th session held in Banjul, the Gambia from 13th to 27th October 2001, the African Commission reached a decision on the merits of this communication.

LAW Admissibility

35. Article 56 of the African Charter governs admissibility. All of the conditions of this Article are met by the present communication. Only the exhaustion of local remedies requires close scrutiny.

36. Article 56(5) requires that local remedies, if any, be exhausted, unless these are unduly prolonged.

37. One purpose of the exhaustion of local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgements of law at the national and international levels. Where a right is not well provided for in domestic law such that no case is likely to be heard, potential conflict does not arise. Similarly, if the right is not well provided for, there cannot be effective remedies, or any remedies at all.

38. Another rationale for the exhaustion requirement is that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal. (See the Commission's decision on Communications 25/89, 47/90, 56/91 and 100/93 World Organisation Against Torture et al./Zaire: 53). The exhaustion of domestic remedies requirement should be properly understood as ensuring that the State concerned has ample opportunity to remedy the situation of which applicants complain. It is not necessary here to recount the international attention that Ogoniland has received to argue that the Nigerian government has had ample notice and, over the past several decades, more than sufficient opportunity to give domestic remedies.

39. Requiring the exhaustion of local remedies also ensures that the African Commission does not become a tribunal of first instance for cases for which an effective domestic remedy exists.

40. The present communication does not contain any information on domestic court actions brought by the Complainants to halt the violations alleged. However, the Commission on numerous occasions brought this complaint to the attention of the government at the time but no response was made to the Commission's requests. In such cases the Commission has held that in the absence of a substantive response from the Respondent State it must decide on the facts provided by the Complainants and treat them as given. (See Communications 25/89, 47/90, 56/91, 100/93, World Organisation Against Torture et al./Zaire, Communication 60/91 Constitutional Right Project/Nigeria and Communication 101/93 Civil Liberties Organisation/Nigeria).

41. The Commission takes cognisance of the fact that the Federal Republic of Nigeria has incorporated the African Charter on Human and Peoples' Rights into its domestic law with the result that all the rights contained therein can be invoked in Nigerian courts including those violations alleged by the Complainants. However, the Commission is

aware that at the time of submitting this communication, the then Military government of Nigeria had enacted various decrees ousting the jurisdiction of the courts and thus depriving the people in Nigeria of the right to seek redress in the courts for acts of government that violate their fundamental human rights¹. In such instances, and as in the instant communication, the Commission is of the view that no adequate domestic remedies are existent (See Communication 129/94 Civil Liberties Organisation/Nigeria).

42. It should also be noted that the new government in their Note Verbale referenced 127/2000 submitted at the 28th session of the Commission held in Cotonou, Benin, admitted to the violations committed then by stating, "there is no denying the fact that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area".

The Commission therefore declared the communication admissible.

Merits

43. The present Communication alleges a concerted violation of a wide range of rights guaranteed under the African Charter for Human and Peoples' Rights. Before we venture into the inquiry whether the Government of Nigeria has violated the said rights as alleged in the Complaint, it would be proper to establish what is generally expected of governments under the Charter and more specifically vis-à-vis the rights themselves.

44. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both civil and political rights and social and economic-generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to **respect, protect, promote, and fulfil these rights**. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.²

45. At a primary level, the obligation to **respect** entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.³ With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of

¹ See The Constitution (Suspension and Modification) Decree 1993

² See generally, Asbjørn Eide, "Economic, Social and Cultural Rights As Human Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (Eds.) *Economic, Social, and Cultural Rights: A Textbook* (1995) pp. 21-40

³ Krzysztof Drzewicki, "Internationalization of Human Rights and Their Juridization" in Rajja Hanski and Markku Suksi (Eds.), Second Revised Edition, *An Introduction to the International Protection of Human Rights: A Textbook* (1999), p. 31.

rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.

46. At a secondary level, the State is obliged to **protect** right-holders against other subjects by legislation and provision of effective remedies.⁴ This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to **promote** the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

47. The last layer of obligation requires the State to **fulfil** the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).⁵

48. Thus States are generally burdened with the above set of duties when they commit themselves under human rights instruments. Emphasising the all embracing nature of their obligations, the International Covenant on Economic, Social, and Cultural Rights, for instance, under Article 2(1), stipulates exemplarily that States “*undertake to take steps...by all appropriate means, including particularly the adoption of legislative measures.*” Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties. Whether the government of Nigeria has, by its conduct, violated the provisions of the African Charter as claimed by the Complainants is examined here below.

49. In accordance with Articles 60 and 61 of the African Charter, this communication is examined in the light of the provisions of the African Charter and the relevant international and regional human rights instruments and principles. The Commission thanks the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter. It is a matter of regret that the only written response from the government of Nigeria is an admission of the gravamen of the complaints which is contained in a note verbale and which we have reproduced above at paragraph 30. In the circumstances, the

⁴ Drzewicki, *ibid*.

⁵ See Eide, Krause and Rosas, *op cit.*, p. 38

Commission is compelled to proceed with the examination of the matter on the basis of the uncontested allegations of the Complainants, which are consequently accepted by the Commission.

50. The Complainants allege that the Nigerian government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter by failing to fulfill the minimum duties required by these rights. This, the Complainants allege, the government has done by -:

- Directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population,
- Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage
- Failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations

Article 16 of the African Charter reads:

“(1) *Every individual shall have the right to enjoy the best attainable state of physical and mental health.*”

(2) *States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.*”

Article 24 of the African Charter reads:

“*All peoples shall have the right to a general satisfactory environment favourable to their development.*”

51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.⁶ As has been rightly observed by Alexander Kiss, “an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.”⁷

52. The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in

⁶ See also General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural rights

⁷ Human Rights in the Twenty first Century: A Global Challenge Edited by Kathleen E. Mahoney and Paul Mahoney. Article by Alexander Kiss “ Concept and Possible Implications of the Right to Environment at page 553

Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual⁸.

53. Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

54. We now examine the conduct of the government of Nigeria in relation to Articles 16 and 24 of the African Charter. Undoubtedly and admittedly, the government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken as outlined in the preceding paragraph and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.

55. The Complainants also allege a violation of Article 21 of the African Charter by the government of Nigeria. The Complainants allege that the Military government of Nigeria was involved in oil production and thus did not monitor or regulate the operations of the oil companies and in so doing paved a way for the Oil Consortiums to exploit oil reserves in Ogoniland. Furthermore, in all their dealings with the Oil Consortiums, the government did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland. The destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population⁹, may well be said to constitute a violation of Article 21.

Article 21 provides

1. *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.*
2. *In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.*

⁸ See Scott Leckie "the Right to Housing" in Economic, social and cultural rights (ed) Eide, Krause and Rosas, Martinus Nijhoff Publishers 1995

⁹ See a report by the Industry and Energy Operations Division West Central Africa Department "Defining an Environmental Development Strategy for the Niger Delta." Volume 1 - Paragraph B(1.6 - 1.7) at Page 2-3

3. *The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.*
4. *States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.*
5. *States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.*

56. The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.

57. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties (*See Union des Jeunes Avocats /Chad*¹⁰). This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velásquez Rodríguez v. Honduras*¹¹. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the State is further emphasised in the practice of the European Court of Human Rights, in *X and Y v. Netherlands*¹². In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

58. The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.

¹⁰ Communication 74/92

¹¹ See, Inter-American Court of Human Rights, *Velásquez Rodríguez* Case, Judgment of July 19, 1988, Series C, No. 4

¹² 91 ECHR (1985) (Ser. A) at 32.

59. The Complainants also assert that the Military government of Nigeria massively and systematically violated the right to adequate housing of members of the Ogoni community under Article 14 and implicitly recognised by Articles 16 and 18(1) of the African Charter.

Article 14 of the Charter reads:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

Article 18(1) provides:

"The family shall be the natural unit and basis of society. It shall be protected by the State..."

60. Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.

61. At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs.¹³ Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.¹⁴ The right to shelter even goes further than a roof over ones head. It extends to embody the individual's right to be let alone and to live in peace- whether under a roof or not.

62. The protection of the rights guaranteed in Articles 14, 16 and 18 (1) leads to the same conclusion. As regards the earlier right, and in the case of the Ogoni People, the Government of Nigeria has failed to fulfil these two minimum obligations. The

¹³ Scott Leckie, "The Right to Housing" in Eide, Krause and Rosas, op cit., 107-123, at p.

113

¹⁴ Ibid. pp.113-114

government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter.

63. The particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term "forced evictions" by the Committee on Economic Social and Cultural Rights which defines this term as "the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection"¹⁵. Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths.... Evictions break up families and increase existing levels of homelessness.¹⁶ In this regard, **General Comment No. 4 (1991)** of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats" (E/1992/23, annex III. Paragraph 8(a)). The conduct of the Nigerian government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right.

64. The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22). By its violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.

65. The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.

66. The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government has again fallen short of what is

¹⁵ See General Comment No.7 (1997) on the right to adequate housing (Article 11.1): Forced Evictions

¹⁶ Ibid. p. 113

expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.

67. The Complainants also allege that the Nigerian Government has violated Article 4 of the Charter which guarantees the inviolability of human beings and everyone's right to life and integrity of the person respected. Given the wide spread violations perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated. The Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorisations and killings. The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole. The Commission conducted a mission to Nigeria from the 7th – 14th March 1997 and witnessed first hand the deplorable situation in Ogoni land including the environmental degradation.

68. The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter.

69. The Commission does not wish to fault governments that are labouring under difficult circumstances to improve the lives of their people. The situation of the people of Ogoniland, however, requires, in the view of the Commission, a reconsideration of the Government's attitude to the allegations contained in the instant communication. The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities. The Commission however takes note of the efforts of the present civilian administration to redress the atrocities that were committed by the previous military administration as illustrated in the Note Verbale referred to in paragraph 30 of this decision.

For the above reasons, the Commission,

Finds the Federal Republic of Nigeria in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples' Rights;

Appeals to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

- Stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Security Task Force and permitting citizens and independent investigators free access to the territory;
- Conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations;
- Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;
- Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and
- Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

Urges the government of the Federal Republic of Nigeria to keep the African Commission informed of the outcome of the work of -:

- The Federal Ministry of Environment which was established to address environmental and environment related issues prevalent in Nigeria, and as a matter of priority, in the Niger Delta area including the Ogoni land;
- The Niger Delta Development Commission (NDDC) enacted into law to address the environmental and other social related problems in the Niger Delta area and other oil producing areas of Nigeria; and
- The Judicial Commission of Inquiry inaugurated to investigate the issues of human rights violations.

*Done at the 30th Ordinary Session, held in Banjul, The Gambia
from 13th to 27th October 2001*