



# INTERNATIONAL LAW FELLOWSHIP PROGRAMME

The Hague, The Netherlands  
24 June – 2 August 2013



## STUDY MATERIALS PART IV

Codification Division of the United Nations Office of Legal Affairs



INTERNATIONAL LAW  
FELLOWSHIP PROGRAMME

The Hague, The Netherlands  
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INTERNATIONAL HUMANITARIAN LAW  
PROFESSOR YVES SANDOZ

Codification Division of the United Nations Office of Legal Affairs

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**INTERNATIONAL HUMANITARIAN LAW**  
**PROFESSOR YVES SANDOZ**

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2. Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949

For text, see the *The Geneva Conventions of August 12, 1949, International Committee of the Red Cross*, p. 51

3. Geneva Convention (III) relative to the Treatment of Prisoners of War, 1949

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4. Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949

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28. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226 236
29. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3 259
30. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43 278

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32. I.C.R.C., *Commentary of the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, I.C.R.C., 1952 (only available in electronic format)
33. I.C.R.C., *Commentary of the Geneva Convention IV relative to the Protection of Civilian Persons in Time of War*, Geneva, I.C.R.C., 1958 (only available in electronic format)
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38. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary international humanitarian law*, eds., Cambridge, ICRC/Cambridge University Press, Vol. I, Rules, 2005 (only available in electronic format)
39. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary international humanitarian law*, eds., Cambridge, ICRC/Cambridge University Press, Vol. II, Practice, 2005 (only available in electronic format)
40. Niels Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ed., Geneva, ICRC, 2009 (only available in electronic format)



**UN Codification Division : International Fellowship Programme  
The Hague, 24 June – 2 August**

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**International Humanitarian Law  
Yves Sandoz**

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**OUTLINES**

**Monday, 1 July**

**I. Introduction to International Humanitarian Law (IHL)**

- A. Main developments of IHL from the origin to today
- B. Fundaments and principles of IHL
- C. Analysis of the evolution of the relationship between the legality of the use of force (*jus ad bellum*) and the rules to be respected in warfare (*jus in bello*)
- D. Evolution of the relationship between IHL, Human Rights and Refugee Law
- E. Application/Applicability of IHL (International Armed Conflicts, Non-International Armed Conflicts, Internationalized Non-International Armed Conflicts).
- F. The problem of the “War on terror”
- G. Internal disturbances and tensions; urban violence.

**Tuesday, 2 July**

**II. Protection of wounded, sick and shipwrecked**

- A. Definitions
- B. Respect, protection and human treatment
- C. Medical personnel, units and transport
- D. Protective emblems
- E. Specificities of naval warfare

**III. Combatants and direct participation in hostilities**

- A. Status of combatant
- B. Armed forces and other groups having the status of combatant
- C. Notion of direct participation in hostilities
- D. Other persons directly participating in hostilities
  - a. spies
  - b. mercenaries
  - c. private military companies
  - d. civilians occasionally participating in hostilities
- E. Governmental and dissident armed forces in non-international armed conflicts

#### **IV. Prisoners of war (POW) and other detainees in armed conflicts**

- A. Definition of a POW
- B. Capture, evacuations and registration
- C. Rights in detention
- D. Repatriation
- E. Detention of persons having participated in hostilities without having the status of combatant
- F. Detention of fighters captured in non-international armed conflicts
- G. Civilian internees
- H. Other civilians detained in armed conflicts
- I. Specific problem of persons captured in the so-called “war on terror”
- J. Visit to detainees and current detention’s problems

**Wednesday, 3 July**

#### **V. Protection of Civilians in the hands of the Enemy Power**

- A. Generalities
- B. Civilians on the territory of the Enemy Power
- C. Special protection of some persons and objects
  - a. Women
  - b. Children
  - c. Journalists
  - d. Refugees and internally displaced persons
  - e. Missing persons
  - f. Cultural objects
  - g. Objects indispensable to the survival
  - h. Works and installations containing dangerous forces

#### **VI. Occupation**

- A. Definition: beginning and end of occupation
- B. Prohibition of unilateral annexation
- C. Rights and duties of the occupying power
- D. Problems encountered in a long-lasting occupation

#### **VII. Humanitarian Assistance**

- A. Restrictive conditions of the IVth Convention of 1949
- B. Ameliorations through the Additional Protocols of 1977
- C. Notion and limits of the “right of humanitarian intervention”

**VIII. Conduct of hostilities**

- A. Methods and means of warfare
  - a. Basic principles
  - b. Definition of military objectives ; problems of dual use objects and of collateral civilian damages
  - c. Cyberwarfare and new technologies
- B. Prohibition or restriction to use certain conventional weapons
- C. Prohibition of weapons of mass destruction

**IX. Implementation of International Humanitarian Law**

- A. Preventive measures
- B. Means of control
- C. Repression of violations and development of international justice

**X. Future perspectives**

- A. Eventual adaptation of IHL ('asymmetrical wars'; international terrorism; high-level organized and transnational criminality)
- B. What role for IHL to face the 21<sup>st</sup> century main challenges?

**Convention for the Protection of Cultural Property in the  
Event of Armed Conflict (with Regulations for the Execution  
of the Convention), 1954**

## CONVENTION<sup>1</sup> FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT. DONE AT THE HAGUE, ON 14 MAY 1954

The High Contracting Parties,

Recognizing that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction;

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;

Guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907<sup>2</sup> and in the Washington Pact of 15 April, 1935;<sup>3</sup>

Being of the opinion that such protection cannot be effective unless both national and international measures have been taken to organize it in time of peace;

Being determined to take all possible steps to protect cultural property;

Have agreed upon the following provisions:

<sup>1</sup> Came into force on 7 August 1956, three months after the deposit of five instruments of ratification, in accordance with article 33. Instruments of ratification or accession (a) have been deposited on behalf of the following States on the dates indicated:

	Date of deposit	Date of entry into force
Egypt . . . . .	17 August 1955	7 August 1956
San Marino . . . . .	9 February 1956	7 August 1956
Burma . . . . .	10 February 1956	7 August 1956
Yugoslavia . . . . .	13 February 1956	7 August 1956
Mexico . . . . .	7 May 1956	7 August 1956
Hungary . . . . .	17 May 1956	17 August 1956
Poland . . . . .	6 August 1956	6 November 1956
Bulgaria (a) . . . . .	7 August 1956	7 November 1956

<sup>2</sup> Convention concerning Laws and Customs of War on Land. Concluded at the Second Peace Conference at The Hague, October 18th, 1907; *British and Foreign State Papers*, Vol. 100, p. 338, and League of Nations, *Treaty Series*, Vol. LIV, p. 437; Vol. LXXII, p. 488, and Vol. CLX, p. 456. Convention concerning Bombardments by Naval Forces in Time of War. Concluded at the Second Peace Conference at The Hague, October 18th, 1907; *British and Foreign State Papers*, Vol. 100, p. 401, and League of Nations, *Treaty Series*, Vol. LIV, p. 439, and Vol. CLX, p. 458.

<sup>3</sup> De Martens, *Nouveau Recueil général de Traités*, troisième série, tome XXXIII, p. 650.

### CHAPTER I

## GENERAL PROVISIONS REGARDING PROTECTION

### Article 1

#### DEFINITION OF CULTURAL PROPERTY

For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments".

### Article 2

#### PROTECTION OF CULTURAL PROPERTY

For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.

### Article 3

#### SAFEGUARDING OF CULTURAL PROPERTY

The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.

### Article 4

#### RESPECT FOR CULTURAL PROPERTY

1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High

Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

4. They shall refrain from any act directed by way of reprisals against cultural property.

5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.

#### Article 5

##### OCCUPATION

1. Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.

2. Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation.

3. Any High Contracting Party whose government is considered their legitimate government by members of a resistance movement, shall, if possible, draw their attention to the obligation to comply with those provisions of the Convention dealing with respect for cultural property.

#### Article 6

##### DISTINCTIVE MARKING OF CULTURAL PROPERTY

In accordance with the provisions of Article 16, cultural property may bear a distinctive emblem so as to facilitate its recognition.

#### Article 7

##### MILITARY MEASURES

1. The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.

2. The High Contracting Parties undertake to plan or establish in peacetime, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it.

#### CHAPTER II

##### SPECIAL PROTECTION

#### Article 8

##### GRANTING OF SPECIAL PROTECTION

1. There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they :

(a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;

(b) are not used for military purposes.

2. A refuge for movable cultural property may also be placed under special protection, whatever its location, if it is so constructed that, in all probability, it will not be damaged by bombs.

3. A centre containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the centre.

4. The guarding of cultural property mentioned in paragraph 1 above by armed custodians specially empowered to do so, or the presence, in the

vicinity of such cultural property, of police forces normally responsible for the maintenance of public order shall not be deemed to be use for military purposes.

5. If any cultural property mentioned in paragraph 1 of the present Article is situated near an important military objective as defined in the said paragraph, it may nevertheless be placed under special protection if the High Contracting Party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic therefrom. In that event, such diversion shall be prepared in time of peace.

6. Special protection is granted to cultural property by its entry in the "International Register of Cultural Property under Special Protection". This entry shall only be made, in accordance with the provisions of the present Convention and under the conditions provided for in the Regulations<sup>1</sup> for the execution of the Convention.

#### Article 9

##### IMMUNITY OF CULTURAL PROPERTY UNDER SPECIAL PROTECTION

The High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any act of hostility directed against such property and, except for the cases provided for in paragraph 5 of Article 8, from any use of such property or its surroundings for military purposes.

#### Article 10

##### IDENTIFICATION AND CONTROL

During an armed conflict, cultural property under special protection shall be marked with the distinctive emblem described in Article 16, and shall be open to international control as provided for in the Regulations for the execution of the Convention.

#### Article 11

##### WITHDRAWAL OF IMMUNITY

1. If one of the High Contracting Parties commits, in respect of any item of cultural property under special protection, a violation of the obligations under Article 9, the opposing Party shall, so long as this violation persists, be released from the obligation to ensure the immunity of the property concerned. Nevertheless, whenever possible, the latter Party shall first request the cessation of such violation within a reasonable time.

<sup>1</sup> See p. 270 of this volume.

2. Apart from the case provided for in paragraph 1 of the present Article, immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.

3. The Party withdrawing immunity shall, as soon as possible, so inform the Commissioner-General for cultural property provided for in the Regulations for the execution of the Convention, in writing, stating the reasons.

#### CHAPTER III

### TRANSPORT OF CULTURAL PROPERTY

#### Article 12

##### TRANSPORT UNDER SPECIAL PROTECTION

1. Transport exclusively engaged in the transfer of cultural property, whether within a territory or to another territory, may, at the request of the High Contracting Party concerned, take place under special protection in accordance with the conditions specified in the Regulations for the execution of the Convention.

2. Transport under special protection shall take place under the international supervision provided for in the aforesaid Regulations and shall display the distinctive emblem described in Article 16.

3. The High Contracting Parties shall refrain from any act of hostility directed against transport under special protection.

#### Article 13

##### TRANSPORT IN URGENT CASES

1. If a High Contracting Party considers that the safety of certain cultural property requires its transfer and that the matter is of such urgency that the procedure laid down in Article 12 cannot be followed, especially at the beginning of an armed conflict, the transport may display the distinctive emblem described in Article 16, provided that an application for immunity referred to in Article 12 has not already been made and refused. As far as possible, notification of transfer should be made to the opposing Parties. Nevertheless, transport conveying cultural property to the territory of another country may not display the distinctive emblem unless immunity has been expressly granted to it.

2. The High Contracting Parties shall take, so far as possible, the necessary precautions to avoid acts of hostility directed against the transport described in paragraph 1 of the present Article and displaying the distinctive emblem.

#### Article 14

##### IMMUNITY FROM SEIZURE, CAPTURE AND PRIZE

1. Immunity from seizure, placing in prize, or capture shall be granted to :
  - (a) cultural property enjoying the protection provided for in Article 12 or that provided for in Article 13;
  - (b) the means of transport exclusively engaged in the transfer of such cultural property.
2. Nothing in the present Article shall limit the right of visit and search.

#### CHAPTER IV

##### PERSONNEL

#### Article 15

##### PERSONNEL

As far as is consistent with the interests of security, personnel engaged in the protection of cultural property shall, in the interests of such property, be respected and, if they fall into the hands of the opposing Party, shall be allowed to continue to carry out their duties whenever the cultural property for which they are responsible has also fallen into the hands of the opposing Party.

#### CHAPTER V

##### THE DISTINCTIVE EMBLEM

##### EMBLEM OF THE CONVENTION

1. The distinctive emblem of the Convention shall take the form of a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).
2. The emblem shall be used alone, or repeated three times in a triangular formation (one shield below), under the conditions provided for in Article 17.

#### Article 17

##### USE OF THE EMBLEM

1. The distinctive emblem repeated three times may be used only as a means of identification of :
  - (a) immovable cultural property under special protection;
  - (b) the transport of cultural property under the conditions provided for in Articles 12 and 13;
  - (c) improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention.
2. The distinctive emblem may be used alone only as a means of identification of :
  - (a) cultural property not under special protection;
  - (b) the persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention;
  - (c) the personnel engaged in the protection of cultural property;
  - (d) the identity cards mentioned in the Regulations for the execution of the Convention.
3. During an armed conflict, the use of the distinctive emblem in any other cases than those mentioned in the preceding paragraphs of the present Article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.
4. The distinctive emblem may not be placed on any immovable cultural property unless at the same time there is displayed an authorization duly dated and signed by the competent authority of the High Contracting Party.

#### CHAPTER VI

##### SCOPE OF APPLICATION OF THE CONVENTION

#### Article 18

##### APPLICATION OF THE CONVENTION

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event 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 or more of them.
2. 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.

3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless 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 has declared that it accepts the provisions thereof and so long as it applies them.

#### Article 19

##### CONFLICTS NOT OF AN INTERNATIONAL CHARACTER

1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

2. The parties to the conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

3. The United Nations Educational, Scientific and Cultural Organization may offer its services to the parties to the conflict.

4. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

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#### CHAPTER VII

##### EXECUTION OF THE CONVENTION

#### Article 20

##### REGULATIONS FOR THE EXECUTION OF THE CONVENTION

The procedure by which the present Convention is to be applied is defined in the Regulations for its execution, which constitute an integral part thereof.

#### Article 21

##### PROTECTING POWERS

The present Convention and the Regulations for its execution shall be applied with the co-operation of the Protecting Powers responsible for safeguarding the interests of the Parties to the conflict.

#### Article 22

##### CONCILIATION PROCEDURE

1. The Protecting Powers shall lend their good offices in all cases where they may deem it useful in the interests of cultural property, particularly if

there is disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention or the Regulations for its execution.

2. For this purpose, each of the Protecting Powers may, either at the invitation of one Party, of the Director-General of the United Nations Educational, Scientific and Cultural Organization, or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate on suitably chosen neutral territory. The Parties to the conflict shall be bound to give effect to the proposals for meeting made to them. The Protecting Powers shall propose for approval by the Parties to the conflict a person belonging to a neutral Power or a person presented by the Director-General of the United Nations Educational, Scientific and Cultural Organization, which person shall be invited to take part in such a meeting in the capacity of Chairman.

#### Article 23

##### ASSISTANCE OF UNESCO

1. The High Contracting Parties may call upon the United Nations Educational, Scientific and Cultural Organization for technical assistance in organizing the protection of their cultural property, or in connexion with any other problem arising out of the application of the present Convention or the Regulations for its execution. The Organization shall accord such assistance within the limits fixed by its programme and by its resources.

2. The Organization is authorized to make, on its own initiative, proposals on this matter to the High Contracting Parties.

#### Article 24

##### SPECIAL AGREEMENTS

1. The High Contracting Parties may conclude special agreements for all matters concerning which they deem it suitable to make separate provision.

2. No special agreement may be concluded which would diminish the protection afforded by the present Convention to cultural property and to the personnel engaged in its protection.

#### Article 25

##### DISSEMINATION OF THE CONVENTION

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Convention and the Regulations for its execution as widely as possible in their respective countries.

They undertake, in particular, to include the study thereof in their programmes of military and, if possible, civilian training, so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property.

#### Article 26

##### TRANSLATIONS, REPORTS

1. The High Contracting Parties shall communicate to one another, through the Director-General of the United Nations Educational, Scientific and Cultural Organization, the official translations of the present Convention and of the Regulations for its execution.
2. Furthermore, at least once every four years, they shall forward to the Director-General a report giving whatever information they think suitable concerning any measures being taken, prepared or contemplated by their respective administrations in fulfilment of the present Convention and of the Regulations for its execution.

#### Article 27

##### MEETINGS

1. The Director-General of the United Nations Educational, Scientific and Cultural Organization may, with the approval of the Executive Board, convene meetings of representatives of the High Contracting Parties. He must convene such a meeting if at least one-fifth of the High Contracting Parties so request.
2. Without prejudice to any other functions which have been conferred on it by the present Convention or the Regulations for its execution, the purpose of the meeting will be to study problems concerning the application of the Convention and of the Regulations for its execution, and to formulate recommendations in respect thereof.
3. The meeting may further undertake a revision of the Convention or the Regulations for its execution if the majority of the High Contracting Parties are represented, and in accordance with the provisions of Article 39.

#### Article 28

##### SANCTIONS

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

### FINAL PROVISIONS

#### Article 29

##### LANGUAGES

1. The present Convention is drawn up in English, French, Russian and Spanish, the four texts being equally authoritative.
2. The United Nations Educational, Scientific and Cultural Organization shall arrange for translations of the Convention into the other official languages of its General Conference.

#### Article 30

##### SIGNATURE

The present Convention shall bear the date of 14 May, 1954 and, until the date of 31 December, 1954, shall remain open for signature by all States invited to the Conference which met at The Hague from 21 April, 1954 to 14 May, 1954.

#### Article 31

##### RATIFICATION

1. The present Convention shall be subject to ratification by signatory States in accordance with their respective constitutional procedures.
2. The instruments of ratification shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

#### Article 32

##### ACCESSION

From the date of its entry into force, the present Convention shall be open for accession by all States mentioned in Article 30 which have not signed it, as well as any other State invited to accede by the Executive Board of the United Nations Educational, Scientific and Cultural Organization. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

#### Article 33

##### ENTRY INTO FORCE

1. The present Convention shall enter into force three months after five instruments of ratification have been deposited.

2. Thereafter, it shall enter into force, for each High Contracting Party, three months after the deposit of its instrument of ratification or accession.
3. The situations referred to in Articles 18 and 19 shall give immediate effect to ratifications or accessions deposited by the Parties to the conflict either before or after the beginning of hostilities or occupation. In such cases the Director-General of the United Nations Educational, Scientific and Cultural Organization shall transmit the communications referred to in Article 38 by the speediest method.

#### *Article 34*

##### EFFECTIVE APPLICATION

1. Each State Party to the Convention on the date of its entry into force shall take all necessary measures to ensure its effective application within a period of six months after such entry into force.
2. This period shall be six months from the date of deposit of the instruments of ratification or accession for any State which deposits its instrument of ratification or accession after the date of the entry into force of the Convention.

#### *Article 35*

##### TERRITORIAL EXTENSION OF THE CONVENTION

Any High Contracting Party may, at the time of ratification or accession, or at any time thereafter, declare by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, that the present Convention shall extend to all or any of the territories for whose international relations it is responsible. The said notification shall take effect three months after the date of its receipt.

#### *Article 36*

##### RELATION TO PREVIOUS CONVENTIONS

1. In the relations between Powers which are bound by the Conventions of The Hague concerning the Laws and Customs of War on Land (IV) and concerning Naval Bombardment in Time of War (IX), whether those of 29 July, 1899 or those of 18 October, 1907, and which are Parties to the present Convention, this last Convention shall be supplementary to the aforementioned Convention (IX) and to the Regulations annexed to the aforementioned Convention (IV) and shall substitute for the emblem described in Article 5 of the aforementioned Convention (IX) the emblem described in Article 16 of the present Convention, in cases in which the present Convention and the Regulations for its execution provide for the use of this distinctive emblem.

2. In the relations between Powers which are bound by the Washington Pact of 15 April, 1935 for the Protection of Artistic and Scientific Institutions and of Historic Monuments (Roerich Pact) and which are Parties to the present Convention, the latter Convention shall be supplementary to the Roerich Pact and shall substitute for the distinguishing flag described in Article III of the Pact the emblem defined in Article 16 of the present Convention, in cases in which the present Convention and the Regulations for its execution provide for the use of this distinctive emblem.

#### *Article 37*

##### DENUNCIATION

1. Each High Contracting Party may denounce the present Convention, on its own behalf, or on behalf of any territory for whose international relations it is responsible.
2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
3. The denunciation shall take effect one year after the receipt of the instrument of denunciation. However, if, on the expiry of this period, the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities, or until the operations of repatriating cultural property are completed, whichever is the later.

#### *Article 38*

##### NOTIFICATIONS

The Director-General of the United Nations Educational, Scientific and Cultural Organization shall inform the States referred to in Articles 30 and 32, as well as the United Nations, of the deposit of all the instruments of ratification, accession or acceptance provided for in Articles 31, 32 and 39 and of the notifications and denunciations provided for respectively in Articles 35, 37 and 39.

#### *Article 39*

##### REVISION OF THE CONVENTION AND OF THE REGULATIONS FOR ITS EXECUTION

1. Any High Contracting Party may propose amendments to the present Convention or the Regulations for its execution. The text of any proposed amendment shall be communicated to the Director-General of the United

Nations Educational, Scientific and Cultural Organization who shall transmit it to each High Contracting Party with the request that such Party reply within four months stating whether it:

- (a) desires that a Conference be convened to consider the proposed amendment;
- (b) favours the acceptance of the proposed amendment without a Conference; or
- (c) favours the rejection of the proposed amendment without a Conference.

2. The Director-General shall transmit the replies, received under paragraph 1 of the present Article, to all High Contracting Parties.

3. If all the High Contracting Parties which have, within the prescribed time-limit, stated their views to the Director-General of the United Nations Educational, Scientific and Cultural Organization, pursuant to paragraph 1 (b) of this Article, inform him that they favour acceptance of the amendment without a Conference, notification of their decision shall be made by the Director-General in accordance with Article 38. The amendment shall become effective for all the High Contracting Parties on the expiry of ninety days from the date of such notification.

4. The Director-General shall convene a Conference of the High Contracting Parties to consider the proposed amendment if requested to do so by more than one-third of the High Contracting Parties.

5. Amendments to the Convention or to the Regulations for its execution, dealt with under the provisions of the preceding paragraph, shall enter into force only after they have been unanimously adopted by the High Contracting Parties represented at the Conference and accepted by each of the High Contracting Parties.

6. Acceptance by the High Contracting Parties of amendments to the Convention or to the Regulations for its execution, which have been adopted by the Conference mentioned in paragraphs 4 and 5, shall be effected by the deposit of a formal instrument with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

7. After the entry into force of amendments to the present Convention or to the Regulations for its execution, only the text of the Convention or of the Regulations for its execution thus amended shall remain open for ratification or accession.

#### Article 40

##### REGISTRATION

In accordance with Article 102 of the Charter of the United Nations, the present Convention shall be registered with the Secretariat of the United Nations

at the request of the Director-General of the United Nations Educational, Scientific and Cultural Organization.

IN FAITH WHEREOF the undersigned, duly authorized, have signed the present Convention.

DONE at The Hague, this fourteenth day of May, 1954, in a single copy which shall be deposited in the archives of the United Nations Educational, Scientific and Cultural Organization, and certified true copies of which shall be delivered to all the States referred to in Articles 30 and 32 as well as to the United Nations.

### REGULATIONS FOR THE EXECUTION OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

#### CHAPTER I

#### CONTROL

#### Article 1

##### INTERNATIONAL LIST OF PERSONS

On the entry into force of the Convention, the Director-General of the United Nations Educational, Scientific and Cultural Organization shall compile an international list consisting of all persons nominated by the High Contracting Parties as qualified to carry out the functions of Commissioner-General for Cultural Property. On the initiative of the Director-General of the United Nations Educational, Scientific and Cultural Organization, this list shall be periodically revised on the basis of requests formulated by the High Contracting Parties.

#### Article 2

##### ORGANIZATION OF CONTROL

As soon as any High Contracting Party is engaged in an armed conflict to which Article 18 of the Convention applies:

(a) It shall appoint a representative for cultural property situated in its territory; if it is in occupation of another territory, it shall appoint a special representative for cultural property situated in that territory;

(b) The Protecting Power acting for each of the Parties in conflict with such High Contracting Party shall appoint delegates accredited to the latter in conformity with Article 3 below;

(c) A Commissioner-General for Cultural Property shall be appointed to such High Contracting Party in accordance with Article 4.

### Article 3

#### APPOINTMENT OF DELEGATES OF PROTECTING POWERS

The Protecting Power shall appoint its delegates from among the members of its diplomatic or consular staff or, with the approval of the Party to which they will be accredited, from among other persons.

### Article 4

#### APPOINTMENT OF COMMISSIONER-GENERAL

1. The Commissioner-General for Cultural Property shall be chosen from the international list of persons by joint agreement between the Party to which he will be accredited and the Protecting Powers acting on behalf of the opposing Parties.
2. Should the Parties fail to reach agreement within three weeks from the beginning of their discussions on this point, they shall request the President of the International Court of Justice to appoint the Commissioner-General, who shall not take up his duties until the Party to which he is accredited has approved his appointment.

### Article 5

#### FUNCTIONS OF DELEGATES

The delegates of the Protecting Powers shall take note of violations of the Convention, investigate, with the approval of the Party to which they are accredited, the circumstances in which they have occurred, make representations locally to secure their cessation and, if necessary, notify the Commissioner-General of such violations. They shall keep him informed of their activities.

### Article 6

#### FUNCTIONS OF THE COMMISSIONER-GENERAL

1. The Commissioner-General for Cultural Property shall deal with all matters referred to him in connexion with the application of the Convention, in conjunction with the representative of the Party to which he is accredited and with the delegates concerned.
2. He shall have powers of decision and appointment in the cases specified in the present Regulations.

3. With the agreement of the Party to which he is accredited, he shall have the right to order an investigation or to conduct it himself.

4. He shall make any representations to the Parties to the conflict or to their Protecting Powers which he deems useful for the application of the Convention.

5. He shall draw up such reports as may be necessary on the application of the Convention and communicate them to the Parties concerned and to their Protecting Powers. He shall send copies to the Director-General of the United Nations Educational, Scientific and Cultural Organization, who may make use only of their technical contents.

6. If there is no Protecting Power, the Commissioner-General shall exercise the functions of the Protecting Power as laid down in Articles 21 and 22 of the Convention.

### Article 7

#### INSPECTORS AND EXPERTS

1. Whenever the Commissioner-General for Cultural Property considers it necessary, either at the request of the delegates concerned or after consultation with them, he shall propose, for the approval of the Party to which he is accredited, an inspector of cultural property to be charged with a specific mission. An inspector shall be responsible only to the Commissioner-General.

2. The Commissioner-General, delegates and inspectors may have recourse to the services of experts, who will also be proposed for the approval of the Party mentioned in the preceding paragraph.

### Article 8

#### DISCHARGE OF THE MISSION OF CONTROL

The Commissioners-General for Cultural Property, delegates of the Protecting Powers, inspectors and experts shall in no case exceed their mandates. In particular, they shall take account of the security needs of the High Contracting Party to which they are accredited and shall in all circumstances act in accordance with the requirements of the military situation as communicated to them by that High Contracting Party.

### Article 9

#### SUBSTITUTES FOR PROTECTING POWERS

If a Party to the conflict does not benefit or ceases to benefit from the activities of a Protecting Power, a neutral State may be asked to undertake those functions of a Protecting Power which concern the appointment of a Commis-

sioner-General for Cultural Property in accordance with the procedure laid down in Article 4 above. The Commissioner-General thus appointed shall, if need be, entrust to inspectors the functions of delegates of Protecting Powers as specified in the present Regulations.

#### Article 10

##### EXPENSES

The remuneration and expenses of the Commissioner-General for Cultural Property, inspectors and experts shall be met by the Party to which they are accredited. Remuneration and expenses of delegates of the Protecting Powers shall be subject to agreement between those Powers and the States whose interests they are safeguarding.

#### CHAPTER II

### SPECIAL PROTECTION

#### Article 11

##### IMPROVISED REFUGES

1. If, during an armed conflict, any High Contracting Party is induced by unforeseen circumstances to set up an improvised refuge and desires that it should be placed under special protection, it shall communicate this fact forthwith to the Commissioner-General accredited to that Party.

2. If the Commissioner-General considers that such a measure is justified by the circumstances and by the importance of the cultural property sheltered in this improvised refuge, he may authorize the High Contracting Party to display on such refuge the distinctive emblem defined in Article 16 of the Convention. He shall communicate his decision without delay to the delegates of the Protecting Powers who are concerned, each of whom may, within a time-limit of 30 days, order the immediate withdrawal of the emblem.

3. As soon as such delegates have signified their agreement or if the time-limit of 30 days has passed without any of the delegates concerned having made an objection, and if, in the view of the Commissioner-General, the refuge fulfils the conditions laid down in Article 8 of the Convention, the Commissioner-General shall request the Director-General of the United Nations Educational, Scientific and Cultural Organization to enter the refuge in the Register of Cultural Property under Special Protection.

#### Article 12

##### INTERNATIONAL REGISTER OF CULTURAL PROPERTY UNDER SPECIAL PROTECTION

1. An "International Register of Cultural Property under Special Protection" shall be prepared.

2. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall maintain this Register. He shall furnish copies to the Secretary-General of the United Nations and to the High Contracting Parties.

3. The Register shall be divided into sections, each in the name of a High Contracting Party. Each section shall be sub-divided into three paragraphs, headed: Refuges, Centres containing Monuments, Other Immovable Cultural Property. The Director-General shall determine what details each section shall contain.

#### Article 13

##### REQUESTS FOR REGISTRATION

1. Any High Contracting Party may submit to the Director-General of the United Nations Educational, Scientific and Cultural Organization an application for the entry in the Register of certain refuges, centres containing monuments or other immovable cultural property situated within its territory. Such application shall contain a description of the location of such property and shall certify that the property complies with the provisions of Article 8 of the Convention.

2. In the event of occupation, the Occupying Power shall be competent to make such application.

3. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall, without delay, send copies of applications for registration to each of the High Contracting Parties.

#### Article 14

##### OBJECTIONS

1. Any High Contracting Party may, by letter addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, lodge an objection to the registration of cultural property. This letter must be received by him within four months of the day on which he sent a copy of the application for registration.

2. Such objection shall state the reasons giving rise to it, the only valid grounds being that:

(a) the property is not cultural property;

(b) the property does not comply with the conditions mentioned in Article 8 of the Convention.

3. The Director-General shall send a copy of the letter of objection to the High Contracting Parties without delay. He shall, if necessary, seek the advice

of the International Committee on Monuments, Artistic and Historical Sites and Archaeological Excavations and also, if he thinks fit, of any other competent organization or person.

4. The Director-General, or the High Contracting Party requesting registration, may make whatever representations they deem necessary to the High Contracting Parties which lodged the objection, with a view to causing the objection to be withdrawn.

5. If a High Contracting Party which has made an application for registration in time of peace becomes involved in an armed conflict before the entry has been made, the cultural property concerned shall at once be provisionally entered in the Register, by the Director-General, pending the confirmation, withdrawal or cancellation of any objection that may be, or may have been, made.

6. If, within a period of six months from the date of receipt of the letter of objection, the Director-General has not received from the High Contracting Party lodging the objection a communication stating that it has been withdrawn, the High Contracting Party applying for registration may request arbitration in accordance with the procedure in the following paragraph.

7. The request for arbitration shall not be made more than one year after the date of receipt by the Director-General of the letter of objection. Each of the two Parties to the dispute shall appoint an arbitrator. When more than one objection has been lodged against an application for registration, the High Contracting Parties which have lodged the objections shall, by common consent, appoint a single arbitrator. These two arbitrators shall select a chief arbitrator from the international list mentioned in Article 1 of the present Regulations. If such arbitrators cannot agree upon their choice, they shall ask the President of the International Court of Justice to appoint a chief arbitrator who need not necessarily be chosen from the international list. The arbitral tribunal thus constituted shall fix its own procedure. There shall be no appeal from its decisions.

8. Each of the High Contracting Parties may declare, whenever a dispute to which it is a Party arises, that it does not wish to apply the arbitration procedure provided for in the preceding paragraph. In such cases, the objection to an application for registration shall be submitted by the Director-General to the High Contracting Parties. The objection will be confirmed only if the High Contracting Parties so decide by a two-third majority of the High Contracting Parties voting. The vote shall be taken by correspondence, unless the Director-General of the United Nations Educational, Scientific and Cultural Organization deems it essential to convene a meeting under the powers conferred upon him by Article 27 of the Convention. If the Director-General decides to proceed with the vote by correspondence, he shall invite the High Contracting Parties to

transmit their votes by sealed letter within six months from the day on which they were invited to do so.

### Article 15

#### REGISTRATION

1. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall cause to be entered in the Register, under a serial number, each item of property for which application for registration is made, provided that he has not received an objection within the time-limit prescribed in paragraph 1 of Article 14.

2. If an objection has been lodged, and without prejudice to the provision of paragraph 5 of Article 14, the Director-General shall enter property in the Register only if the objection has been withdrawn or has failed to be confirmed following the procedures laid down in either paragraph 7 or paragraph 8 of Article 14.

3. Whenever paragraph 3 of Article 11 applies, the Director-General shall enter property in the Register if so requested by the Commissioner-General for Cultural Property.

4. The Director-General shall send without delay to the Secretary-General of the United Nations, to the High Contracting Parties, and, at the request of the Party applying for registration, to all other States referred to in Articles 30 and 32 of the Convention, a certified copy of each entry in the Register. Entries shall become effective thirty days after despatch of such copies.

### Article 16

#### CANCELLATION

1. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall cause the registration of any property to be cancelled:

(a) at the request of the High Contracting Party within whose territory the cultural property is situated;

(b) if the High Contracting Party which requested registration has denounced the Convention, and when that denunciation has taken effect;

(c) in the special case provided for in Article 14, paragraph 5, when an objection has been confirmed following the procedures mentioned either in paragraph 7 or in paragraph 8 of Article 14.

2. The Director-General shall send without delay, to the Secretary-General of the United Nations and to all States which received a copy of the entry in the Register, a certified copy of its cancellation. Cancellation shall take effect thirty days after the despatch of such copies.

## CHAPTER III

## TRANSPORT OF CULTURAL PROPERTY

*Article 17*

## PROCEDURE TO OBTAIN IMMUNITY

1. The request mentioned in paragraph 1 of Article 12 of the Convention shall be addressed to the Commissioner-General for Cultural Property. It shall mention the reasons on which it is based and specify the approximate number and the importance of the objects to be transferred, their present location, the location now envisaged, the means of transport to be used, the route to be followed, the date proposed for the transfer, and any other relevant information.
2. If the Commissioner-General, after taking such opinions as he deems fit, considers that such transfer is justified, he shall consult those delegates of the Protecting Powers who are concerned, on the measures proposed for carrying it out. Following such consultation, he shall notify the Parties to the conflict concerned of the transfer, including in such notification all useful information.
3. The Commissioner-General shall appoint one or more inspectors, who shall satisfy themselves that only the property stated in the request is to be transferred and that the transport is to be by the approved methods and bears the distinctive emblem. The inspector or inspectors shall accompany the property to its destination.

21

*Article 18*

## TRANSPORT ABROAD

Where the transfer under special protection is to the territory of another country, it shall be governed not only by Article 12 of the Convention and by Article 17 of the present Regulations, but by the following further provisions :

- (a) while the cultural property remains on the territory of another State, that State shall be its depository and shall extend to it as great a measure of care as that which it bestows upon its own cultural property of comparable importance;
- (b) the depository State shall return the property only on the cessation of the conflict; such return shall be effected within six months from the date on which it was requested;
- (c) during the various transfer operations, and while it remains on the territory of another State, the cultural property shall be exempt from confiscation and may not be disposed of either by the depositor or by the depository. Nevertheless, when the safety of the property requires it, the depository may, with the assent of the depositor, have the property transported to the territory of a third country, under the conditions laid down in the present article;

No. 3511

(d) the request for special protection shall indicate that the State to whose territory the property is to be transferred accepts the provisions of the present Article.

*Article 19*

## OCCUPIED TERRITORY

Whenever a High Contracting Party occupying territory of another High Contracting Party transfers cultural property to a refuge situated elsewhere in that territory, without being able to follow the procedure provided for in Article 17 of the Regulations, the transfer in question shall not be regarded as misappropriation within the meaning of Article 4 of the Convention, provided that the Commissioner-General for Cultural Property certifies in writing, after having consulted the usual custodians, that such transfer was rendered necessary by circumstances.

## CHAPTER IV

## THE DISTINCTIVE EMBLEM

*Article 20*

## AFFIXING OF THE EMBLEM

1. The placing of the distinctive emblem and its degree of visibility shall be left to the discretion of the competent authorities of each High Contracting Party. It may be displayed on flags or armlets; it may be painted on an object or represented in any other appropriate form.
2. However, without prejudice to any possible fuller markings, the emblem shall, in the event of armed conflict and in the cases mentioned in Articles 12 and 13 of the Convention, be placed on the vehicles of transport so as to be clearly visible in daylight from the air as well as from the ground.  
The emblem shall be visible from the ground :
  - (a) at regular intervals sufficient to indicate clearly the perimeter of a centre containing monuments under special protection;
  - (b) at the entrance to other immovable cultural property under special protection.

*Article 21*

## IDENTIFICATION OF PERSONS

1. The persons mentioned in Article 17, paragraph 2 (b) and (c) of the Convention may wear an armet bearing the distinctive emblem, issued and stamped by the competent authorities.

No. 3511

2. Such persons shall carry a special identity card bearing the distinctive emblem. This card shall mention at least the surname and first names, the date of birth, the title or rank, and the function of the holder. The card shall bear the photograph of the holder as well as his signature or his fingerprints, or both. It shall bear the embossed stamp of the competent authorities.

3. Each High Contracting Party shall make out its own type of identity card, guided by the model annexed, by way of example, to the present Regulations. The High Contracting Parties shall transmit to each other a specimen of the model they are using. Identity cards shall be made out, if possible, at least in duplicate, one copy being kept by the issuing Power.

4. The said persons may not, without legitimate reason, be deprived of their identity card or of the right to wear the armband.

Reverse side

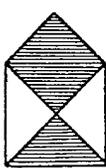
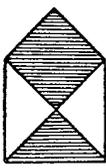
Height Eyes Hair	Photo of bearer  Embossed stamp of authority issuing card
Other distinguishing marks	

Signature of bearer or both fingerprints or both

Front

IDENTITY CARD

for personnel engaged in the protection of cultural property

Surname .....  
 First names .....  
 Date of Birth .....  
 Title or Rank .....  
 Function .....  
 is the bearer of this card under the terms of the Convention of The Hague, dated 14 May, 1954, for the Protection of Cultural Property in the event of Armed Conflict.

Date of issue .....  
 Number of Card .....

For Afghanistan :  
 Por Afganistán :  
 Pour l'Afghanistan :  
 За Афганистан :

For the People's Republic of Albania :  
 Por la República Popular de Albania :  
 Pour la République populaire d'Albanie :  
 За Албанскую Народную Республику :

For the German Federal Republic :  
 Por la República Federal Alemana :  
 Pour la République fédérale d'Allemagne :  
 За Германскую Федеральную Республику :

K. BUNGER

For Andorra :  
 Por Andorra :  
 Pour Andorre :  
 За Андорру :

Por el Principado Civil de la Mitra de Urgel en Andorra<sup>1 2</sup> :

Juan TEIXIDOR

For the Kingdom of Saudi-Arabia :  
 Por el Reino de Arabia Saudita :  
 Pour le Royaume de l'Arabie Saoudite :  
 За Королевство Саудовской Аравии :

For the Argentine Republic :  
 Por la República Argentina :  
 Pour la République Argentine :  
 За Аргентинскую Республику :

For Australia :  
 Por Australia :  
 Pour l'Australie :  
 За Австралию :

Alfred STIRLING

<sup>1</sup> For the Bishop of Urgel, Co-Prince of Andorra.  
<sup>2</sup> Pour l'évêque d'Urgel, Coprince d'Andorre.

For Austria :  
 Por Austria :  
 Pour l'Autriche :  
 За Австрию :

Alois VOELGRUBER  
 31.12.1954

For Belgium :  
 Por Bélgica :  
 Pour la Belgique :  
 За Бельгию :

*Ad referendum*  
 M. NYNS

For Bolivia :  
 Por Bolivia :  
 Pour la Bolivie :  
 За Боливию :

For Brazil :  
 Por Brasil :  
 Pour le Brésil :  
 За Бразилию :

Caio DE MELLO FRANCO  
 31.12.1954

For the Bulgarian People's Republic :  
 Por la República Popular de Bulgaria :  
 Pour la République populaire de Bulgarie :  
 За Болгарскую Народную Республику :

For the Kingdom of Cambodia :  
 Por el Reino de Cambodia :  
 Pour le Royaume du Cambodge :  
 За Королевство Камбоджа :

Nhiek TIOULONG  
 17.12.1954

For Canada :  
 Por Canadá :  
 Pour le Canada :  
 За Канаду :

- For Egypt :  
 Por Egipto :  
 Pour l'Égypte :  
 За Египет :  
 Mahmoud Saleh EL-FALAKI  
 30.12.1954
- For Ecuador :  
 Por Ecuador :  
 Pour l'Équateur :  
 За Эквадор :  
 Carlos MORALES CHACON
- For Spain :  
 Por España :  
 Pour l'Espagne :  
 За Испанию :  
 Juan TEIXIDOR  
 Juan Manuel CASTRO-RIAL CANOSA
- For the United States of America :  
 Por los Estados Unidos de América :  
 Pour les États-Unis d'Amérique :  
 За Соединенные Штаты Америки :  
 Leonard CARMICHAEL
- For Ethiopia :  
 Por Etiópia :  
 Pour l'Éthiopie :  
 За Эфиопию :
- For Finland :  
 Por Finlandia :  
 Pour la Finlande :  
 За Финляндию :
- For France :  
 Por Francia :  
 Pour la France :  
 За Францию :

- For Ceylon :  
 Por Ceilán :  
 Pour Ceylan :  
 За Цейлон :
- For Chile :  
 Por Chile :  
 Pour le Chili :  
 За Чили :
- For China :  
 Por China :  
 Pour la Chine :  
 За Китай :  
 Chen YUAN
- For the Republic of Colombia :  
 Por la República de Colombia :  
 Pour la République de Colombie :  
 За Республику Колумбии :
- For the Republic of Korea :  
 Por la República de Corea :  
 Pour la République de Corée :  
 За Корейскую Республику :
- For Costa Rica :  
 Por Costa Rica :  
 Pour le Costa-Rica :  
 За Коста-Рика :
- For Cuba :  
 Por Cuba :  
 Pour Cuba :  
 За Кубу :  
 Hilda LABRADA BERNAL
- For Denmark :  
 Por Dinamarca :  
 Pour le Danemark :  
 За Данию :  
 Johannes BRØNSTED  
 18.10.1954

- For Iran :  
 Por Irán :  
 Pour l'Iran :  
 За Иран :  
*Ad referendum*  
 G. A. RAADI
- For Ireland :  
 Por Irlanda :  
 Pour l'Irlande :  
 За Ирландию :  
 Josephine McNEILL
- For Iceland :  
 Por Islandia :  
 Pour l'Islande :  
 За Исландию :
- For the State of Israel :  
 Por el Estado de Israel :  
 Pour l'État d'Israël :  
 За Государство Израиль :  
 M. AMIR
- For Italy :  
 Por Italia :  
 Pour l'Italie :  
 За Италию :  
 Giorgio ROSI
- For Japan :  
 Por Japón :  
 Pour le Japon :  
 За Японию :  
 Suetasa OKAMOTO  
 6.9.1954
- For the Hashemite Kingdom of Jordan :  
 Por el Reino Hachemita de Jordania :  
 Pour le Royaume Hachémite de Jordanie :  
 За Хашимитское Королевство Иордании :  
 Ihsan HASHEM  
 22.12.1954
- For the Kingdom of Laos :  
 Por el Reino de Laos :  
 Pour le Royaume du Laos :  
 За Королевство Лаос :

- For Greece :  
 Por Grecia :  
 Pour la Grèce :  
 За Грецию :  
 Constantin EUSTATHIADES  
 Spiridon MARINATOS
- For Guatemala :  
 Por Guatemala :  
 Pour le Guatemala :  
 За Гватемалу :
- For the Republic of Haiti :  
 Por la República de Haïti :  
 Pour la République d'Haïti :  
 За Республику Гаити :
- For the Republic of Honduras :  
 Por la República de Honduras :  
 Pour la République de Honduras :  
 За Республику Гондурас :
- For the Hungarian People's Republic :  
 Por la República Popular de Hungría :  
 Pour la République populaire de Hongrie :  
 За Венгерскую Народную Республику :  
 FAI B.
- For India :  
 Por India :  
 Pour l'Inde :  
 За Индию :  
 N. P. CHAKRAVARTI
- For the Republic of Indonesia :  
 Por la República de Indonesia :  
 Pour la République d'Indonésie :  
 За Индонезийскую Республику :  
 M. HUTASOIT  
 24.12.1954
- For Iraq :  
 Por Irak :  
 Pour l'Irak :  
 За Ирак :  
 F. BASMACHI

For Nicaragua :  
 Por Nicaragua :  
 Pour le Nicaragua :  
 За Никарагуа :

H. H. ZWILLENBERG

For Norway :  
 Por Noruega :  
 Pour la Norvège :  
 За Норвегию :

Guthorn KAVLI  
*Ad referendum*

For New Zealand :  
 Por Nueva Zelandia :  
 Pour la Nouvelle-Zélande :  
 За Новую Зеландию :

Jane ROBERTSON MCKENZIE  
 20.12.1954

For Pakistan :  
 Por Pakistán :  
 Pour le Pakistan :  
 За Пакистан :

For Panama :  
 Por Panamá :  
 Pour Panama :  
 За Панаму :

For Paraguay :  
 Por Paraguay :  
 Pour le Paraguay :  
 За Парагвай :

For the Netherlands :  
 Por los Países Bajos :  
 Pour les Pays-Bas :  
 За Нидерланды :

P. T'J. ROHLING

For Peru :  
 Por Perú :  
 Pour le Pérou :  
 За Перу :

For the Lebanon :  
 Por Líbano :  
 Pour le Liban :  
 За Ливан :

Charles Daoud AMMOUN  
 25.5.1954

For Liberia :  
 Por Liberia :  
 Pour le Libéria :  
 За Либерию :

For Libya :  
 Por Libia :  
 Pour la Libye :  
 За Ливно :

A. H. KHANNAK

For Liechtenstein :  
 Por Liechtenstein :  
 Pour le Liechtenstein :  
 За Лихтенштейн :

For Luxembourg :  
 Por Luxemburgo :  
 Pour le Luxembourg :  
 За Люксембург :

J. MEYERS

For Mexico :  
 Por Mexico :  
 Pour le Mexique :  
 За Мексику :

J. TORRES BODET  
 29.12.1954

For Monaco :  
 Por Mónaco :  
 Pour Monaco :  
 За Монако :

Jean J. REY

For Nepal :  
 Por Nepal :  
 Pour le Népal :  
 За Непал :

For the Rumanian People's Republic :  
 Por la República Popular de Rumania :  
 Pour la République populaire roumaine :  
 За Румынскую Народную Республику :

A. LAZAREANU

For the United Kingdom of Great Britain and Northern Ireland :  
 Por el Reino Unido de la Gran Bretaña e Irlanda del Norte :  
 Pour le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord :  
 За Соединенное Королевство Великобритании и Северной Ирландии :

Gladwyn JEVV  
 30.12.1954

For the Republic of San Marino :  
 Por la República de San Marino :  
 Pour la République de Saint-Marin :  
 За Республику Сан-Марино :

A. DONATI

For the Holy See :  
 Por la Santa Sede :  
 Pour le Saint-Siège :  
 За Ватикан :

For the Republic of El Salvador :  
 Por la República de El Salvador :  
 Pour la République du Salvador :  
 За Республику Эль Сальвадор :

Jacob Philip KRUSEMAN

For Sweden :  
 Por Suecia :  
 Pour la Suède :  
 За Швецию :

For the Confederation of Switzerland :  
 Por la Confederación Suiza :  
 Pour la Confédération suisse :  
 За Швейцарскую Конфедерацию :

For the Republic of the Philippines :  
 Por la República de Filipinas :  
 Pour la République des Philippines :  
 За Филиппинскую Республику :

J. P. BANTUG

For the People's Republic of Poland :  
 Por la República Popular de Polonia :  
 Pour la République populaire de Pologne :  
 За Польскую Народную Республику :

Stanislaw LORENTZ

For Portugal :  
 Por Portugal :  
 Pour le Portugal :  
 За Португалию :

Fernando Quartin DE OLIVEIRA BASTOS  
 (*Ad referendum*)

For the Dominican Republic :  
 Por la República Dominicana :  
 Pour la République Dominicaine :  
 За Доминиканскую Республику :

For the Byelorussian Soviet Socialist Republic :  
 Por la República Socialista Soviética de Bielorrusia :  
 Pour la République socialiste soviétique de Biélorussie :  
 За Белорусскую Советскую Социалистическую Республику :

С приложением заявления<sup>1 2</sup>  
 Павел ЛЮТАРОВИЧ

For the Ukrainian Soviet Socialist Republic :  
 Por la República Socialista Soviética de Ucrania :  
 Pour la République socialiste soviétique de l'Ukraine :  
 За Украинскую Советскую Социалистическую Республику :

С приложением заявления<sup>3 4</sup>  
 Я. СІРЧЕНКО

<sup>1</sup> With attached declaration. For the text of the declaration see p. 356 of this volume.  
<sup>2</sup> Avec déclaration jointe. Voir p. 356 de ce volume, texte de la déclaration.

<sup>3</sup> With attached declaration. For the text of the declaration see p. 356 of this volume.

<sup>4</sup> Avec déclaration jointe. Voir p. 356 de ce volume, texte de la déclaration.

For the Republic of Syria :  
 Por la República de Siria :  
 Pour la République de Syrie :  
 За Республику Сирию :

George J. ТОМЕН

For the Republic of Czechoslovakia :  
 Por la República de Checoslovaquia :  
 Pour la République de Tchécoslovaquie :  
 За Чехословацкую Республику :

Dr. Vladimír ZÁK

For Thailand :  
 Por Tailandia :  
 Pour la Thaïlande :  
 За Таиланд :

For Turkey :  
 Por Turquía :  
 Pour la Turquie :  
 За Турцию :

For the Union of Burma :  
 Por la Unión Birmana :  
 Pour l'Union Birmane :  
 За Бирманский Союз :

Subject to ratification by the Government of the  
 Union of Burma<sup>1</sup>  
 Soe TINT  
 31.12.1954

For the Union of South Africa :  
 Por la Unión Sudafricana :  
 Pour l'Union Sud-Africaine :  
 За Южно-Африканский Союз :

<sup>1</sup> Sous réserve de ratification par le Gouvernement de l'Union birmane.

For the Union of Soviet Socialist Republics :  
 Por la Unión de Repúblicas Socialistas Soviéticas :  
 Pour l'Union des Républiques socialistes soviétiques :  
 За Союз Советских Социалистических Республик :

С приложением заявления<sup>1 2</sup>  
 В. КЕМЕНОВ

For the Oriental Republic of Uruguay :  
 Por la República Oriental del Uruguay :  
 Pour la République orientale de l'Uruguay :  
 За Республику Уругвай :

V. SAMROGNARO

For the United States of Venezuela :  
 Por los Estados Unidos de Venezuela :  
 Pour les États-Unis du Venezuela :  
 За Соединенные Штаты Венесуэлы :

For the State of Viet-Nam :  
 Por el Estado de Vietnam :  
 Pour l'État du Viet-Nam :  
 За Государство Вьет-Нам :

For Yemen :  
 Por Yemen :  
 Pour le Yémen :  
 За Йемен :

For the Federal People's Republic of Yugoslavia :  
 Por la República Federal Popular de Yugoslavia :  
 Pour la République fédérale populaire de Yougoslavie :  
 За Югославскую Федеративную Народную Республику :

Milan RISTIĆ  
 Cvito FISKOVIĆ

<sup>1</sup> With attached declaration. For the text of the declaration see p. 357 of this volume.

<sup>2</sup> Avec déclaration jointe. Voir texte de la déclaration, p. 357 de ce volume.

DECLARATIONS MADE AT THE DÉCLARATIONS FAITES AU  
TIME OF SIGNATURE OF THE MOMENT DE LA SIGNATURE  
CONVENTION DE LA CONVENTION

BYELORUSSIAN SOVIET RÉPUBLIQUE SOCIALISTE  
SOCIALIST REPUBLIC SOVIÉTIQUE DE BIÉLORUSSIE

[RUSSIAN TEXT — TEXTE RUSSE]

« Подписывая Конвенцию и Регламент, представитель Белорусской ССР отмечает, что отдельные положения, включенные в Конвенцию и Регламент, снижают роль этих соглашений в деле обеспечения защиты культурных ценностей в случае вооруженного конфликта и, поэтому, не могут считаться удовлетворительными ».

[TRANSLATION<sup>1</sup> — TRANSDUCTION]

On signing the Convention and Regulations, the representative of the Byelorussian Soviet Socialist Republic notes that various provisions included in the Convention and Regulations weaken these agreements with regard to the conservation and defence of cultural property in the event of armed conflict and that, for that reason, he could not express his satisfaction.

[TRANSDUCTION<sup>1</sup> — TRANSLATION]

En signant la Convention et le Règlement le représentant de la République Soviétique Socialiste Biélorussienne déclare que différentes dispositions incluses dans la Convention et le Règlement diminuent le rôle de ces accords en ce qui concerne la préservation et la défense des biens culturels en cas de conflit armé et qu'il ne peut pour cette raison s'en déclarer satisfait.

UKRAINIAN SOVIET SOCIALIST REPUBLIC

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE D'UKRAINE

[RUSSIAN TEXT — TEXTE RUSSE]

« Подписывая Конвенцию и ее Исполнительный Регламент, считаю необходимым отметить, что ряд включенных в Конвенцию и Регламент положений являются неудовлетворительными, так как они снижают значение этих соглашений для дела обеспечения защиты культурных ценностей в случае вооруженного конфликта ».

<sup>1</sup> Translation provided by the United Nations Educational, Scientific and Cultural Organization.

[TRANSLATION<sup>1</sup> — TRANSDUCTION]

On signing the Convention and the Regulations for its Execution, I believe it essential to state that a large number of provisions of the Convention and Regulations are unsatisfactory since they weaken the meaning of the agreements for the purpose of conserving and defending cultural property in the event of armed conflict.

UNION OF SOVIET SOCIALIST REPUBLIC

UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES

[RUSSIAN TEXT — TEXTE RUSSE]

« Делегация Союза Советских Социалистических Республик, подписывая Конвенцию о защите культурных ценностей в случае вооруженного конфликта и ее Исполнительный Регламент, отмечает, что ряд положений, включенных в Конвенцию и Регламент, снижают значение этих соглашений для обеспечения защиты культурных ценностей в случае вооруженного конфликта и являются, поэтому, неудовлетворительными ».

[TRANSLATION<sup>1</sup> — TRANSDUCTION]

On signing the Convention for the Conservation of Cultural Property in the Event of Armed Conflict and the Regulations for its Execution, the USSR delegation states that both the Convention and the Regulations contain a large number of provisions which weaken its effectiveness for the preservation and defence of cultural property in the event of armed conflict and are, for that reason, unsatisfactory.

[TRANSDUCTION<sup>1</sup> — TRANSLATION]

La délégation de l'Union des Républiques Soviétiques Socialistes en signant la Convention pour la préservation des biens culturels en cas de conflit armé et son Règlement d'exécution, déclare que la Convention et le Règlement contiennent de nombreuses dispositions qui diminuent la signification de ces accords pour la conservation et la défense des biens culturels en cas de conflit armé et paraissent de ce fait insatisfaisants.

<sup>1</sup> Translation provided by the United Nations Educational, Scientific and Cultural Organization.

<sup>1</sup> Traduction fournie par l'Organisation des Nations Unies pour l'éducation, la science et la culture.

## PROTOCOL<sup>1</sup>

The High Contracting Parties are agreed as follows :

### I

1. Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article I of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May, 1954.<sup>2</sup>
2. Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory.
3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.

4. The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph.

### II

5. Cultural property coming from the territory of a High Contracting Party and deposited by it in the territory of another High Contracting Party for the purpose of protecting such property against the dangers of an armed conflict, shall be returned by the latter, at the end of hostilities, to the competent authorities of the territory from which it came.

<sup>1</sup> Came into force on 7 August 1956, three months after the deposit of five instruments of ratification, in accordance with paragraph 10. Instruments of ratification or accession (a) have been deposited on behalf of the following States on the dates indicated :

	<i>Date of deposit</i>	<i>Date of entry into force</i>
Egypt . . . . .	17 August 1955	7 August 1956
San Marino . . . . .	9 February 1956	7 August 1956
Burma . . . . .	10 February 1956	7 August 1956
Yugoslavia . . . . .	13 February 1956	7 August 1956
Mexico . . . . .	7 May 1956	7 August 1956
Poland . . . . .	6 August 1956	6 November 1956
Hungary (a) . . . . .	16 August 1956	16 November 1956

<sup>2</sup> See p. 240 of this volume.

### III

6. The present Protocol shall bear the date of 14 May, 1954 and, until the date of 31 December, 1954, shall remain open for signature by all States invited to the Conference which met at The Hague from 21 April, 1954 to 14 May, 1954.

7. (a) The present Protocol shall be subject to ratification by signatory States in accordance with their respective constitutional procedures.

(b) The instruments of ratification shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

8. From the date of its entry into force, the present Protocol shall be open for accession by all States mentioned in paragraph 6 which have not signed it as well as any other State invited to accede by the Executive Board of the United Nations Educational, Scientific and Cultural Organization. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

9. The States referred to in paragraphs 6 and 8 may declare, at the time of signature, ratification or accession, that they will not be bound by the provisions of Section I or by those of Section II of the present Protocol.

10. (a) The present Protocol shall enter into force three months after five instruments of ratification have been deposited.

(b) Thereafter, it shall enter into force, for each High Contracting Party, three months after the deposit of its instrument of ratification or accession.

(c) The situations referred to in Articles 18 and 19 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May, 1954, shall give immediate effect to ratifications and accessions deposited by the Parties to the conflict either before or after the beginning of hostilities or occupation. In such cases, the Director-General of the United Nations Educational, Scientific and Cultural Organization shall transmit the communications referred to in paragraph 14 by the speediest method.

11. (a) Each State Party to the Protocol on the date of its entry into force shall take all necessary measures to ensure its effective application within a period of six months after such entry into force.

(b) This period shall be six months from the date of deposit of the instruments of ratification or accession for any State which deposits its instrument of ratification or accession after the date of the entry into force of the Protocol.

12. Any High Contracting Party may, at the time of ratification or accession, or at any time thereafter, declare by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, that the present Protocol shall extend to all or any of the territories for whose international relations it is responsible. The said notification shall take effect three months after the date of its receipt.

13. (a) Each High Contracting Party may denounce the present Protocol, on its own behalf, or on behalf of any territory for whose international relations it is responsible.

(b) The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

(c) The denunciation shall take effect one year after receipt of the instrument of denunciation. However, if, on the expiry of this period, the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities, or until the operations of repatriating cultural property are completed, whichever is the later.

14. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall inform the States referred to in paragraphs 6 and 8, as well as the United Nations, of the deposit of all the instruments of ratification, accession or acceptance provided for in paragraphs 7, 8 and 15 and the notifications and denunciations provided for respectively in paragraphs 12 and 13.

15. (a) The present Protocol may be revised if revision is requested by more than one-third of the High Contracting Parties.

(b) The Director-General of the United Nations Educational, Scientific and Cultural Organization shall convene a Conference for this purpose.

(c) Amendments to the present Protocol shall enter into force only after they have been unanimously adopted by the High Contracting Parties represented at the Conference and accepted by each of the High Contracting Parties.

(d) Acceptance by the High Contracting Parties of amendments to the present Protocol, which have been adopted by the Conference mentioned in subparagraphs (b) and (c), shall be effected by the deposit of a formal instrument with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

(e) After the entry into force of amendments to the present Protocol, only the text of the said Protocol thus amended shall remain open for ratification or accession.

In accordance with Article 102 of the Charter of the United Nations, the present Protocol shall be registered with the Secretariat of the United Nations at the request of the Director-General of the United Nations Educational, Scientific and Cultural Organization.

IN FAITH WHEREOF the undersigned, duly authorized, have signed the present Protocol.

DONE at The Hague, this fourteenth day of May, 1954, in English, French, Russian and Spanish, the four texts being equally authoritative, in a single copy which shall be deposited in the archives of the United Nations Educational, Scientific and Cultural Organization, and certified true copies of which shall be delivered to all the States referred to in paragraphs 6 and 8 as well as to the United Nations.

**Protocol to the Convention for the Protection of Cultural  
Property in the Event of Armed Conflict, 1954**

The High Contracting Parties are agreed as follows:

I

1. Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May, 1954.

2. Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory.

3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.

4. The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph.

II

5. Cultural property coming from the territory of a High Contracting Party and deposited by it in the territory of another High Contracting Party for the purpose of protecting such property against the dangers of an armed conflict, shall be returned by the latter, at the end of hostilities, to the competent authorities of the territory from which it came.

III

6. The present Protocol shall bear the date of 14 May, 1954 and, until the date of 31 December, 1954, shall remain open for signature by all States invited to the Conference which met at The Hague from 21 April, 1954 to 14 May, 1954.

PROTOCOL

PROTOCOLO

PROTOCOLE

ПРОТОКОЛ

7. (a) The present Protocol shall be subject to ratification by signatory States in accordance with their respective constitutional procedures.
- (b) The instruments of ratification shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
8. From the date of its entry into force, the present Protocol shall be open for accession by all States mentioned in paragraph 6 which have not signed it as well as any other State invited to accede by the Executive Board of the United Nations Educational, Scientific and Cultural Organization. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
9. The States referred to in paragraphs 6 and 8 may declare, at the time of signature, ratification or accession, that they will not be bound by the provisions of Section I or by those of Section II of the present Protocol.
10. (a) The present Protocol shall enter into force three months after five instruments of ratification have been deposited.
- (b) Thereafter, it shall enter into force, for each High Contracting Party, three months after the deposit of its instrument of ratification or accession.
- (c) The situations referred to in Articles 18 and 19 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May, 1954, shall give immediate effect to ratifications and accessions deposited by the Parties to the conflict either before or after the beginning of hostilities or occupation. In such cases, the Director-General of the United Nations Educational, Scientific and Cultural Organization shall transmit the communications referred to in paragraph 14 by the speediest method.
11. (a) Each State Party to the Protocol on the date of its entry into force shall take all necessary measures to ensure its effective application within a period of six months after such entry into force.
- (b) This period shall be six months from the date of deposit of the instruments of ratification or accession for any State which deposits its instrument of ratification or accession after the date of the entry into force of the Protocol.
12. Any High Contracting Party may, at the time of ratification or accession, or at any time thereafter, declare by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, that the present Protocol shall extend to all or any of the territories for whose international relations it is responsible. The said notification shall take effect three months after the date of its receipt.
13. (a) Each High Contracting Party may denounce the present Protocol, on its own behalf, or on behalf of any territory for whose international relations it is responsible.
- (b) The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
- (c) The denunciation shall take effect one year after receipt of the instrument of denunciation. However, if, on the expiry of this period, the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities, or until the operations of repatriating cultural property are completed, whichever is the later.
14. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall inform the States referred to in paragraphs 6 and 8, as well as the United Nations, of the deposit of all the instruments of ratification, accession or acceptance provided for in paragraphs 7, 8 and 15 and the notifications and denunciations provided for respectively in paragraphs 12 and 13.
15. (a) The present Protocol may be revised if revision is requested by more than one-third of the High Contracting Parties.
- (b) The Director-General of the United Nations Educational, Scientific and Cultural Organization shall convene a Conference for this purpose.

(c) Amendments to the present Protocol shall enter into force only after they have been unanimously adopted by the High Contracting Parties represented at the Conference and accepted by each of the High Contracting Parties.

(d) Acceptance by the High Contracting Parties of amendments to the present Protocol, which have been adopted by the Conference mentioned in subparagraphs (b) and (c), shall be effected by the deposit of a formal instrument with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

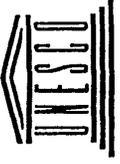
(e) After the entry into force of amendments to the present Protocol, only the text of the said Protocol thus amended shall remain open for ratification or accession.

In accordance with Article 102 of the Charter of the United Nations, the present Protocol shall be registered with the Secretariat of the United Nations at the request of the Director-General of the United Nations Educational, Scientific and Cultural Organization.

In faith whereof the undersigned, duly authorized, have signed the present Protocol.

Done at The Hague, this fourteenth day of May, 1954, in English, French, Russian and Spanish, the four texts being equally authoritative, in a single copy which shall be deposited in the archives of the United Nations Educational, Scientific and Cultural Organization, and certified true copies of which shall be delivered to all the States referred to in paragraphs 6 and 8 as well as to the United Nations.

**Second Protocol to the Hague Convention of 1954 for the  
Protection of Cultural Property in the Event of Armed Conflict,  
1999**



## Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict

The Hague, 26 March 1999

Second Protocol to the Hague Convention of 1954 for the Protection  
of Cultural Property in the Event of Armed Conflict  
The Hague, 26 March 1999

Deuxième Protocole relatif à la Convention de La Haye de 1954  
pour la protection des biens culturels en cas de conflit armé  
La Haye, 26 mars 1999

Segundo Protocolo de la Convención de La Haya de 1954  
para la Protección de los Bienes Culturales en caso de Conflicto Armado  
La Haya, 26 de marzo de 1999

Второй протокол к Гаагской Конвенции о защите  
культурных ценностей в случае Вооруженного Конфликта 1954 года.  
Гаага, 26 марта 1999 года

البروتوكول الثاني لاتفاقية لاهاي لعام ١٩٥٤ الخاصة  
بحماية الممتلكات الثقافية في حالة نزاع مسلح  
لاهاي، ٢٦ مارس/أذار ١٩٩٩

关于在武装冲突情况下保护文化财产的公约  
(海牙, 1954年)的第二项议定书

海牙, 1999年 3月 26日

The Parties,

Conscious of the need to improve the protection of cultural property in the event of armed conflict and to establish an enhanced system of protection for specifically designated cultural property;

Reaffirming the importance of the provisions of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at the Hague on 14 May 1954, and emphasizing the necessity to supplement these provisions through measures to reinforce their implementation;

Desiring to provide the High Contracting Parties to the Convention with a means of being more closely involved in the protection of cultural property in the event of armed conflict by establishing appropriate procedures therefor;

Considering that the rules governing the protection of cultural property in the event of armed conflict should reflect developments in international law;

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of this Protocol;

Have agreed as follows:

Article 1 Definitions

For the purposes of this Protocol:

- (a) "Party" means a State Party to this Protocol;
- (b) "cultural property" means cultural property as defined in Article 1 of the Convention;
- (c) "Convention" means the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on 14 May 1954;
- (d) "High Contracting Party" means a State Party to the Convention;
- (e) "enhanced protection" means the system of enhanced protection established by Articles 10 and 11;
- (f) "military objective" means an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage;
- (g) "illicit" means under compulsion or otherwise in violation of the applicable rules of the domestic law of the occupied territory or of international law.
- (h) "List" means the International List of Cultural Property under Enhanced Protection established in accordance with Article 27, sub-paragraph 1(b);
- (i) "Director-General" means the Director-General of UNESCO;
- (j) "UNESCO" means the United Nations Educational, Scientific and Cultural Organization;
- (k) "First Protocol" means the Protocol for the Protection of Cultural Property in the Event of Armed Conflict done at The Hague on 14 May 1954;

Article 2 Relation to the Convention

This Protocol supplements the Convention in relations between the Parties.

Article 3 Scope of application

- 1. In addition to the provisions which shall apply in time of peace, this Protocol shall apply in situations referred to in Article 18 paragraphs 1 and 2 of the Convention and in Article 22 paragraph 1.
- 2. When one of the parties to an armed conflict is not bound by this Protocol, the Parties to this Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to a State party to the conflict which is not bound by it, if the latter accepts the provisions of this Protocol and so long as it applies them.

The application of the provisions of Chapter 3 of this Protocol is without prejudice to:

- (a) the application of the provisions of Chapter I of the Convention and of Chapter 2 of this Protocol;
- (b) the application of the provisions of Chapter II of the Convention save that, as between Parties to this Protocol or as between a Party and a State which accepts and applies this Protocol in accordance with Article 3 paragraph 2, where cultural property has been granted both special protection and enhanced protection, only the provisions of enhanced protection shall apply.

Chapter 2 General provisions regarding protection

Article 5 Safeguarding of cultural property

Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.

Article 6 Respect for cultural property

With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:

- (a) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:
  - i. that cultural property has, by its function, been made into a military objective; and
  - ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;
- (b) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;

- (c) the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;
- (d) in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.

Article 7 Precautions in attack

Without prejudice to other precautions required by international humanitarian law in the conduct of military operations, each Party to the conflict shall:

- (a) do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention;
- (b) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention;
- (c) refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and
- (d) cancel or suspend an attack if it becomes apparent:

- (i) that the objective is cultural property protected under Article 4 of the Convention;
- (ii) that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.

Article 8 Precautions against the effects of hostilities

The Parties to the conflict shall, to the maximum extent feasible:

- (a) remove movable cultural property from the vicinity of military objectives or provide for adequate *in situ* protection;
- (b) avoid locating military objectives near cultural property.

Article 9 Protection of cultural property in occupied territory

- 1. Without prejudice to the provisions of Articles 4 and 5 of the Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:
  - (a) any illicit export, other removal or transfer of ownership of cultural property;
  - (b) any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property;

- (c) any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.
- 2. Any archaeological excavation of, alteration to, or change of use of, cultural property in occupied territory shall, unless circumstances do not permit, be carried out in close co-operation with the competent national authorities of the occupied territory.

**Chapter 3** **Enhanced Protection**

Article 10 Enhanced protection

Cultural property may be placed under enhanced protection provided that it meets the following three conditions:

- (a) it is cultural heritage of the greatest importance for humanity;
- (b) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
- (c) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

Article 11 The granting of enhanced protection

- 1. Each Party should submit to the Committee a list of cultural property for which it intends to request the granting of enhanced protection.
- 2. The Party which has jurisdiction or control over the cultural property may request that it be included in the List to be established in accordance with Article 27 sub-paragraph 1(b). This request shall include all necessary information related to the criteria mentioned in Article 10. The Committee may invite a Party to request that cultural property be included in the List.
- 3. Other Parties, the International Committee of the Blue Shield and other non-governmental organisations with relevant expertise may recommend specific cultural property to the Committee. In such cases, the Committee may decide to invite a Party to request inclusion of that cultural property in the List.
- 4. Neither the request for inclusion of cultural property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State, nor its inclusion, shall in any way prejudice the rights of the parties to the dispute.
- 5. Upon receipt of a request for inclusion in the List, the Committee shall inform all Parties of the request. Parties may submit representations regarding such a request to the Committee within sixty days. These representations shall be made only on the basis of the criteria mentioned in Article 10. They shall be specific and related to facts. The Committee shall consider the representations, providing the Party requesting inclusion with a reasonable opportunity to respond before taking the decision. When such representations are before the Committee, decisions for inclusion in the List shall be taken, notwithstanding Article 26, by a majority of four-fifths of its members present and voting.

6. In deciding upon a request, the Committee should ask the advice of governmental and non-governmental organisations, as well as of individual experts.

7. A decision to grant or deny enhanced protection may only be made on the basis of the criteria mentioned in Article 10.

8. In exceptional cases, when the Committee has concluded that the Party requesting inclusion of cultural property in the List cannot fulfil the criteria of Article 10 sub-paragraph (b), the Committee may decide to grant enhanced protection, provided that the requesting Party submits a request for international assistance under Article 32.

9. Upon the outbreak of hostilities, a Party to the conflict may request, on an emergency basis, enhanced protection of cultural property under its jurisdiction or control by communicating this request to the Committee. The Committee shall transmit this request immediately to all Parties to the conflict. In such cases the Committee will consider representations from the Parties concerned on an expedited basis. The decision to grant provisional enhanced protection shall be taken as soon as possible and, notwithstanding Article 26, by a majority of four-fifths of its members present and voting. Provisional enhanced protection may be granted by the Committee pending the outcome of the regular procedure for the granting of enhanced protection, provided that the provisions of Article 10 sub-paragraphs (a) and (c) are met.

10. Enhanced protection shall be granted to cultural property by the Committee from the moment of its entry in the List.

11. The Director-General shall, without delay, send to the Secretary-General of the United Nations and to all Parties notification of any decision of the Committee to include cultural property on the List.

#### Article 12 Immunity of cultural property under enhanced protection

The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack or from any use of the property or its immediate surroundings in support of military action.

#### Article 13 Loss of enhanced protection

1. Cultural property under enhanced protection shall only lose such protection:
  - (a) if such protection is suspended or cancelled in accordance with Article 14; or
  - (b) If, and for as long as, the property has, by its use, become a military objective.
2. In the circumstances of sub-paragraph 1(b), such property may only be the object of attack if:
  - (a) the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);
  - (b) all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property;

- (c) unless circumstances do not permit, due to requirements of immediate self-defence:
  - (i) the attack is ordered at the highest operational level of command;
  - (ii) effective advance warning is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and
  - (iii) Reasonable time is given to the opposing forces to redress the situation.

#### Article 14 Suspension and cancellation of enhanced protection

1. Where cultural property no longer meets any one of the criteria in Article 10 of this Protocol, the Committee may suspend its enhanced protection status or cancel that status by removing that cultural property from the List.

2. In the case of a serious violation of Article 12 in relation to cultural property under enhanced protection arising from its use in support of military action, the Committee may suspend its enhanced protection status. Where such violations are continuous, the Committee may exceptionally cancel the enhanced protection status by removing the cultural property from the List.

3. The Director-General shall, without delay, send to the Secretary-General of the United Nations and to all Parties to this Protocol notification of any decision of the Committee to suspend or cancel the enhanced protection of cultural property.

4. Before taking such a decision, the Committee shall afford an opportunity to the Parties to make their views known.

### **Chapter 4 Criminal responsibility and jurisdiction**

#### Article 15 Serious violations of this Protocol

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:

- (a) making cultural property under enhanced protection the object of attack;
  - (b) using cultural property under enhanced protection or its immediate surroundings in support of military action;
  - (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
  - (d) making cultural property protected under the Convention and this Protocol the object of attack;
  - (e) Theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.
2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences

punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

#### Article 16 Jurisdiction

1. Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases:

- (a) when such an offence is committed in the territory of that State;
- (b) when the alleged offender is a national of that State;
- (c) in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.

2. With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention:

- (a) this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law;
- (b) Except in so far as a State which is not Party to this Protocol may accept and apply its provisions in accordance with Article 3 paragraph 2, members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them.

#### Article 17 Prosecution

1. The Party in whose territory the alleged offender of an offence set forth in Article 15 sub-paragraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.

2. Without prejudice to, if applicable, the relevant rules of international law, any person regarding whom proceedings are being carried out in connection with the Convention or this Protocol shall be guaranteed fair treatment and a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favorable to such person than those provided by international law.

#### Article 18 Extradition

1. The offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Protocol. Parties undertake to include such offences in every extradition treaty to be subsequently concluded between them.

2. When a Party makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, the requested Party may, at its option, consider the present Protocol as the legal basis for extradition in respect of offences as set forth in Article 15 sub-paragraphs 1 (a) to (c).

3. Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences set forth in Article 15 sub-paragraphs 1 (a) to (c) as extraditable offences between them, subject to the conditions provided by the law of the requested Party.

4. If necessary, offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be treated, for the purposes of extradition between Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the Parties that have established jurisdiction in accordance with Article 16 paragraph 1.

#### Article 19 Mutual legal assistance

1. Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 15, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, Parties shall afford one another assistance in accordance with their domestic law.

#### Article 20 Grounds for refusal

1. For the purpose of extradition, offences set forth in Article 15 sub-paragraphs 1 (a) to (c), and for the purpose of mutual legal assistance, offences set forth in Article 15 shall not be regarded as political offences nor as offences connected with political offences nor as offences inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such offences may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

2. Nothing in this Protocol shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested Party has substantial grounds for believing that the request for extradition for offences set forth in Article 15 sub-paragraphs 1 (a) to (c) or for mutual legal assistance with respect to offences set forth in Article 15 has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

#### Article 21 Measures regarding other violations

Without prejudice to Article 28 of the Convention, each Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

- (a) any use of cultural property in violation of the Convention or this Protocol;

- (b) any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol.

## **Chapter 5 The protection of cultural property in armed conflicts not of an international character**

### **Article 22 Armed conflicts not of an international character**

1. This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.
3. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
4. Nothing in this Protocol shall prejudice the primary jurisdiction of a Party in whose territory an armed conflict not of an international character occurs over the violations set forth in Article 15.
5. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the Party in the territory of which that conflict occurs.
6. The application of this Protocol to the situation referred to in paragraph 1 shall not affect the legal status of the parties to the conflict.
7. UNESCO may offer its services to the parties to the conflict.

## **Chapter 6 Institutional Issues**

### **Article 23 Meeting of the Parties**

1. The Meeting of the Parties shall be convened at the same time as the General Conference of UNESCO, and in co-ordination with the Meeting of the High Contracting Parties, if such a meeting has been called by the Director-General.
2. The Meeting of the Parties shall adopt its Rules of Procedure.
3. The Meeting of the Parties shall have the following functions:
  - (a) to elect the Members of the Committee, in accordance with Article 24 paragraph 1;
  - (b) to endorse the Guidelines developed by the Committee in accordance with Article 27 sub-paragraph 1(a);
  - (c) to provide guidelines for, and to supervise the use of the Fund by the Committee;

- (d) to consider the report submitted by the Committee in accordance with Article 27 sub-paragraph 1(d);
- (e) to discuss any problem related to the application of this Protocol, and to make recommendations, as appropriate.

4. At the request of at least one-fifth of the Parties, the Director-General shall convene an Extraordinary Meeting of the Parties.

### **Article 24 Committee for the Protection of Cultural Property in the Event of Armed Conflict**

1. The Committee for the Protection of Cultural Property in the Event of Armed Conflict is hereby established. It shall be composed of twelve Parties which shall be elected by the Meeting of the Parties.
2. The Committee shall meet once a year in ordinary session and in extra-ordinary sessions whenever it deems necessary.
3. In determining membership of the Committee, Parties shall seek to ensure an equitable representation of the different regions and cultures of the world.
4. Parties members of the Committee shall choose as their representatives persons qualified in the fields of cultural heritage, defence or international law, and they shall endeavour, in consultation with one another, to ensure that the Committee as a whole contains adequate expertise in all these fields.

### **Article 25 Term of office**

1. A Party shall be elected to the Committee for four years and shall be eligible for immediate re-election only once.
2. Notwithstanding the provisions of paragraph 1, the term of office of half of the members chosen at the time of the first election shall cease at the end of the first ordinary session of the Meeting of the Parties following that at which they were elected. These members shall be chosen by lot by the President of this Meeting after the first election.

### **Article 26 Rules of procedure**

1. The Committee shall adopt its Rules of Procedure.
2. A majority of the members shall constitute a quorum. Decisions of the Committee shall be taken by a majority of two-thirds of its members voting.
3. Members shall not participate in the voting on any decisions relating to cultural property affected by an armed conflict to which they are parties.

### **Article 27 Functions**

1. The Committee shall have the following functions:

- (a) to develop Guidelines for the implementation of this Protocol;
- (b) to grant, suspend or cancel enhanced protection for cultural property and to establish, maintain and promote the List of Cultural Property under Enhanced Protection;
- (c) to monitor and supervise the implementation of this Protocol and promote the identification of cultural property under enhanced protection;
- (d) to consider and comment on reports of the Parties, to seek clarifications as required, and prepare its own report on the implementation of this Protocol for the Meeting of the Parties;
- (e) to receive and consider requests for international assistance under Article 32;
- (f) to determine the use of the Fund;
- (g) to perform any other function which may be assigned to it by the Meeting of the Parties.

2. The functions of the Committee shall be performed in co-operation with the Director-General.

3. The Committee shall co-operate with international and national governmental and non-governmental organizations having objectives similar to those of the Convention, its First Protocol and this Protocol. To assist in the implementation of its functions, the Committee may invite to its meetings, in an advisory capacity, eminent professional organizations such as those which have formal relations with UNESCO, including the International Committee of the Blue Shield (ICBS) and its constituent bodies. Representatives of the International Centre for the Study of the Preservation and Restoration of Cultural Property (Rome Centre) (ICCROM) and of the International Committee of the Red Cross (ICRC) may also be invited to attend in an advisory capacity.

#### Article 28    Secretariat

The Committee shall be assisted by the Secretariat of UNESCO which shall prepare the Committee's documentation and the agenda for its meetings and shall have the responsibility for the implementation of its decisions.

#### Article 29    The Fund for the Protection of Cultural Property in the Event of Armed Conflict

1. A Fund is hereby established for the following purposes:
  - (a) to provide financial or other assistance in support of preparatory or other measures to be taken in peacetime in accordance with, *inter alia*, Article 5, Article 10 sub-paragraph (b) and Article 30; and
  - (b) to provide financial or other assistance in relation to emergency, provisional or other measures to be taken in order to protect cultural property during periods of armed

conflict or of immediate recovery after the end of hostilities in accordance with, *inter alia*, Article 8 sub-paragraph (a).

2. The Fund shall constitute a trust fund, in conformity with the provisions of the financial regulations of UNESCO.

3. Disbursements from the Fund shall be used only for such purposes as the Committee shall decide in accordance with the guidelines as defined in Article 23 sub-paragraph 3(c). The Committee may accept contributions to be used only for a certain programme or project, provided that the Committee shall have decided on the implementation of such programme or project.

4. The resources of the Fund shall consist of:

- (a) voluntary contributions made by the Parties;
- (b) contributions, gifts or bequests made by:
  - (i) other States;
  - (ii) UNESCO or other organizations of the United Nations system;
  - (iii) other intergovernmental or non-governmental organizations; and
  - (iv) public or private bodies or individuals;
- (c) any interest accruing on the Fund;
- (d) funds raised by collections and receipts from events organized for the benefit of the Fund; and
- (e) all other resources authorized by the guidelines applicable to the Fund.

#### **Chapter 7**    **Dissemination of Information and International Assistance**

##### Article 30    Dissemination

1. The Parties shall endeavour by appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect for cultural property by their entire population.
2. The Parties shall disseminate this Protocol as widely as possible, both in time of peace and in time of armed conflict.
3. Any military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to the application of this Protocol, shall be fully acquainted with the text thereof. To this end the Parties shall, as appropriate:
  - (a) incorporate guidelines and instructions on the protection of cultural property in their military regulations;

- (b) develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes;
- (c) communicate to one another, through the Director-General, information on the laws, administrative provisions and measures taken under sub-paragraphs (a) and (b);
- (d) communicate to one another, as soon as possible, through the Director-General, the laws and administrative provisions which they may adopt to ensure the application of this Protocol.

Article 31 International cooperation

In situations of serious violations of this Protocol, the Parties undertake to act, jointly through the Committee, or individually, in cooperation with UNESCO and the United Nations and in conformity with the Charter of the United Nations.

Article 32 International assistance

1. A Party may request from the Committee international assistance for cultural property under enhanced protection as well as assistance with respect to the preparation, development or implementation of the laws, administrative provisions and measures referred to in Article 10.
2. A party to the conflict, which is not a Party to this Protocol but which accepts and applies provisions in accordance with Article 3, paragraph 2, may request appropriate international assistance from the Committee.

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3. The Committee shall adopt rules for the submission of requests for international assistance and shall define the forms the international assistance may take.
4. Parties are encouraged to give technical assistance of all kinds, through the Committee, to those Parties or parties to the conflict who request it.

Article 33 Assistance of UNESCO

1. A Party may call upon UNESCO for technical assistance in organizing the protection of its cultural property, such as preparatory action to safeguard cultural property, preventive and organizational measures for emergency situations and compilation of national inventories of cultural property, or in connection with any other problem arising out of the application of this Protocol. UNESCO shall accord such assistance within the limits fixed by its programme and by its resources.
2. Parties are encouraged to provide technical assistance at bilateral or multilateral level.
3. UNESCO is authorized to make, on its own initiative, proposals on these matters to the Parties.

**Chapter 8 Execution of this Protocol**

Article 34 Protecting Powers

This Protocol shall be applied with the co-operation of the Protecting Powers responsible for safeguarding the interests of the Parties to the conflict.

Article 35 Conciliation procedure

1. The Protecting Powers shall lend their good offices in all cases where they may deem it useful in the interests of cultural property, particularly if there is disagreement between the Parties to the conflict as to the application or interpretation of the provisions of this Protocol.
2. For this purpose, each of the Protecting Powers may, either at the invitation of one Party, of the Director-General, or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate, on the territory of a State not party to the conflict. The Parties to the conflict shall be bound to give effect to the proposals for a meeting made to them. The Protecting Powers shall propose for approval by the Parties to the conflict a person belonging to a State not party to the conflict or a person presented by the Director-General, which person shall be invited to take part in such a meeting in the capacity of Chairman.

Article 36 Conciliation in absence of Protecting Powers

1. In a conflict where no Protecting Powers are appointed the Director-General may lend good offices or act by any other form of conciliation or mediation, with a view to settling the disagreement.
2. At the invitation of one Party or of the Director-General, the Chairman of the Committee may propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate, on the territory of a State not party to the conflict.

Article 37 Translations and reports

1. The Parties shall translate this Protocol into their official languages and shall communicate these official translations to the Director-General.
2. The Parties shall submit to the Committee, every four years, a report on the implementation of this Protocol.

Article 38 State responsibility

No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation.

## Chapter 9 Final Clauses

### Article 39 Languages

This Protocol is drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authentic.

### Article 40 Signature

This Protocol shall bear the date of 26 March 1999. It shall be opened for signature by all High Contracting Parties at The Hague from 17 May 1999 until 31 December 1999.

### Article 41 Ratification, acceptance or approval

1. This Protocol shall be subject to ratification, acceptance or approval by High Contracting Parties which have signed this Protocol, in accordance with their respective constitutional procedures.

2. The instruments of ratification, acceptance or approval shall be deposited with the Director-General.

### Article 42 Accession

1. This Protocol shall be open for accession by other High Contracting Parties from 1 January 2000.

2. Accession shall be effected by the deposit of an instrument of accession with the Director-General.

### Article 43 Entry into force

1. This Protocol shall enter into force three months after twenty instruments of ratification, acceptance, approval or accession have been deposited.

2. Thereafter, it shall enter into force, for each Party, three months after the deposit of its instrument of ratification, acceptance, approval or accession.

### Article 44 Entry into force in situations of armed conflict

The situations referred to in Articles 18 and 19 of the Convention shall give immediate effect to ratifications, acceptances or approvals of or accessions to this Protocol deposited by the parties to the conflict either before or after the beginning of hostilities or occupation. In such cases the Director-General shall transmit the communications referred to in Article 46 by the speediest method.

### Article 45 Denunciation

1. Each Party may denounce this Protocol.
2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General.

3. The denunciation shall take effect one year after the receipt of the instrument of denunciation. However, if, on the expiry of this period, the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities, or until the operations of repatriating cultural property are completed, whichever is the later.

### Article 46 Notifications

The Director-General shall inform all High Contracting Parties as well as the United Nations, of the deposit of all the instruments of ratification, acceptance, approval or accession provided for in Articles 41 and 42 and of denunciations provided for Article 45.

### Article 47 Registration with the United Nations

In conformity with Article 102 of the Charter of the United Nations, this Protocol shall be registered with the Secretariat of the United Nations at the request of the Director-General.

IN FAITH WHEREOF the undersigned, duly authorized, have signed the present Protocol.

DONE at The Hague, this twenty-sixth day of March 1999, in a single copy which shall be deposited in the archives of the UNESCO, and certified true copies of which shall be delivered to all the High Contracting Parties.

**Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, 1980**

**Protocol on Non-Detectable Fragments (Protocol I), 1980**

**Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 1980**

**Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980**

**Protocol on Blinding Laser Weapons (Protocol IV), 1995**

**Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as amended on 3 May 1996)**

**Amendment to Article I of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 2001**

**Protocol on Explosive Remnants of War (Protocol V), 2003**



No. 22495

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## Treaty Series

*Treaties and international agreements  
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## MULTILATERAL

**Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (with protocols). Concluded at Geneva on 10 October 1980**

*Authentic texts: Arabic, Chinese, English, French, Russian and Spanish.  
Registered ex officio on 2 December 1983.*

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VOLUME 1342

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## MULTILATÉRAL

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## Recueil des Traités

*Traités et accords internationaux  
enregistrés  
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au Secrétariat de l'Organisation des Nations Unies*

**Convention sur l'interdiction ou la limitation de l'emploi de certaines armes classiques qui peuvent être considérées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination (avec protocoles). Conclue à Genève le 10 octobre 1980**

*Textes authentiques : arabe, chinois, anglais, français, russe et espagnol.  
Enregistrée d'office le 2 décembre 1983.*

United Nations • Nations Unies  
New York, 1992

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### CONVENTION<sup>1</sup> ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS

#### The High Contracting Parties,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Further recalling the general principle of the protection of the civilian population against the effects of hostilities,

Basing themselves on the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, and on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering,

Also recalling that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment,

<sup>1</sup> The Convention, including the three Protocols, came into force on 2 December 1983 in respect of the following States, i.e., six months after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations, in accordance with article 5 (1) and (3):

State	Date of deposit of the instrument of ratification, acceptance (A) or accession (B) and of acceptance of Protocols I, II and III	State	Date of deposit of the instrument of ratification, acceptance (A) or accession (B) and of acceptance of Protocols I, II and III
Austria	14 March 1983	Japan	9 June 1982 A
Bulgaria	15 October 1982	Lao People's Democratic Republic	3 January 1983 a
Burmese Socialist Republic	23 June 1982	Mexico	11 February 1982
China	7 April 1982	Mongolia	8 June 1983
Czechoslovakia	31 August 1982	Poland	2 June 1982
Denmark	7 July 1982	Sweden	7 July 1982
Ecuador	4 May 1982	Switzerland	20 August 1982
Finland	8 April 1982	Ukrainian Soviet Socialist Republic	23 June 1982
German Democratic Republic	20 July 1982	Union of Soviet Socialist Republics	10 June 1982
Hungary	14 June 1982	Yugoslavia	24 May 1983

Subsequently, the Convention came into force for the following State six months after the date on which it deposited its instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations, in accordance with article 5 (2):

State	Date of deposit of the instrument of ratification and of acceptance of Protocols I, II and III
Norway	7 June 1983

(With effect from 7 December 1983.)

Confirming their determination that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience,

Desiring to contribute to international détente, the ending of the arms race and the building of confidence among States, and hence to the realization of the aspiration of all peoples to live in peace,

Recognizing the importance of pursuing every effort which may contribute to progress towards general and complete disarmament under strict and effective international control,

Reaffirming the need to continue the codification and progressive development of the rules of international law applicable in armed conflict,

Wishing to prohibit or restrict further the use of certain conventional weapons and believing that the positive results achieved in this area may facilitate the main talks on disarmament with a view to putting an end to the production, stockpiling and proliferation of such weapons,

Emphasizing the desirability that all States become parties to this Convention and its annexed Protocols, especially the militarily significant States,

Bearing in mind that the General Assembly of the United Nations and the United Nations Disarmament Commission may decide to examine the question of a possible broadening of the scope of the prohibitions and restrictions contained in this Convention and its annexed Protocols,

Further bearing in mind that the Committee on Disarmament may decide to consider the question of adopting further measures to prohibit or restrict the use of certain conventional weapons,

Have agreed as follows:

#### Article 1. SCOPE OF APPLICATION

This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims,<sup>1</sup> including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.<sup>2</sup>

#### Article 2. RELATIONS WITH OTHER INTERNATIONAL AGREEMENTS

Nothing in this Convention or its annexed Protocols shall be interpreted as detracting from other obligations imposed upon the High Contracting Parties by international humanitarian law applicable in armed conflict.

#### Article 3. SIGNATURE

This Convention shall be open for signature by all States at United Nations Headquarters in New York for a period of twelve months from 10 April 1981.

#### Article 4. RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

1. This Convention is subject to ratification, acceptance or approval by the Signatories. Any State which has not signed this Convention may accede to it.

2. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

<sup>1</sup> United Nations, *Treaty Series*, vol. 75, p. 2.

<sup>2</sup> *Ibid.*, vol. 1125, p. 3.

3. Expressions of consent to be bound by any of the Protocols annexed to this Convention shall be optional for each State, provided that at the time of the deposit of its instrument of ratification, acceptance or approval of this Convention or of accession thereto, that State shall notify the Depositary of its consent to be bound by any two or more of these Protocols.

4. At any time after the deposit of its instrument of ratification, acceptance or approval of this Convention or of accession thereto, a State may notify the Depositary of its consent to be bound by any annexed Protocol by which it is not already bound.

5. Any Protocol by which a High Contracting Party is bound shall for that Party form an integral part of this Convention.

#### Article 5. ENTRY INTO FORCE

1. This Convention shall enter into force six months after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For any State which deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force six months after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

3. Each of the Protocols annexed to this Convention shall enter into force six months after the date by which twenty States have notified their consent to be bound by it in accordance with paragraph 3 or 4 of Article 4 of this Convention.

4. For any State which notifies its consent to be bound by a Protocol annexed to this Convention after the date by which twenty States have notified their consent to be bound by it, the Protocol shall enter into force six months after the date on which that State has notified its consent so to be bound.

#### Article 6. DISSEMINATION

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate this Convention and those of its annexed Protocols by which they are bound as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction, so that those instruments may become known to their armed forces.

#### Article 7. TREATY RELATIONS UPON ENTRY INTO FORCE OF THIS CONVENTION

1. When one of the parties to a conflict is not bound by an annexed Protocol, the parties bound by this Convention and that annexed Protocol shall remain bound by them in their mutual relations.

2. Any High Contracting Party shall be bound by this Convention and any Protocol annexed thereto which is in force for it, in any situation contemplated by Article 1, in relation to any State which is not a party to this Convention or bound by the relevant annexed Protocol, if the latter accepts and applies this Convention or the relevant Protocol, and so notifies the Depositary.

3. The Depositary shall immediately inform the High Contracting Parties concerned of any notification received under paragraph 2 of this Article.

4. This Convention, and the annexed Protocols by which a High Contracting Party is bound, shall apply with respect to an armed conflict against that High Contracting Party of the type referred to in Article 1, paragraph 4, of Additional Protocol I to the Geneva Convention of 12 August 1949 for the Protection of War Victims:

(a) Where the High Contracting Party is also a party to Additional Protocol I and an authority referred to in Article 96, paragraph 3, of that Protocol has undertaken to apply the Geneva Conventions and Additional Protocol I in accordance with Article 96, paragraph 3, of the said Protocol, and undertakes to apply this Convention and the relevant annexed Protocols in relation to that conflict, or

(b) Where the High Contracting Party is not a party to Additional Protocol I and an authority of the type referred to in subparagraph (a) above accepts and applies the obligations of the Geneva Conventions and of this Convention and the relevant annexed Protocols in relation to that conflict. Such an acceptance and application shall have in relation to that conflict the following effects:

(i) The Geneva Conventions and this Convention and its relevant annexed Protocols are brought into force for the parties to the conflict with immediate effect;

(ii) The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions, this Convention and its relevant annexed Protocols; and

(iii) The Geneva Conventions, this Convention and its relevant annexed Protocols are equally binding upon all parties to the conflict.

The High Contracting Party and the authority may also agree to accept and apply the obligations of Additional Protocol I to the Geneva Conventions on a reciprocal basis.

#### Article 8. REVIEW AND AMENDMENTS

1. (a) At any time after the entry into force of this Convention any High Contracting Party may propose amendments to this Convention or any annexed Protocol by which it is bound. Any proposal for an amendment shall be communicated to the Depositary, who shall notify it to all the High Contracting Parties and shall seek their views on whether a conference should be convened to consider the proposal. If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, he shall promptly convene a conference to which all High Contracting Parties shall be invited. States not parties to this Convention shall be invited to the conference as observers.

(b) Such a conference may agree upon amendments which shall be adopted and shall enter into force in the same manner as this Convention and the annexed Protocols, provided that amendments to this Convention may be adopted only by the High Contracting Parties and that amendments to a specific annexed Protocol may be adopted only by the High Contracting Parties which are bound by that Protocol.

2. (a) At any time after the entry into force of this Convention any High Contracting Party may propose additional protocols relating to other categories of conventional weapons not covered by the existing annexed protocols. Any such proposal for an additional protocol shall be communicated to the Depositary, who shall notify it to all the High Contracting Parties in accordance with subparagraph 1 (a) of this Article. If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, the Depositary shall promptly convene a conference to which all States shall be invited.

(b) Such a conference may agree, with the full participation of all States represented at the conference, upon additional protocols which shall be adopted in the same manner as this Convention, shall be annexed thereto and shall enter into force as provided in paragraphs 3 and 4 of Article 5 of this Convention.

3. (a) If, after a period of ten years following the entry into force of this Convention, no conference has been convened in accordance with subparagraph 1 (a) or 2 (a) of this Article, any High Contracting Party may request the Depositary to convene a conference to which all High Contracting Parties shall be invited to review the scope and operation of this Convention and the Protocols annexed thereto and to consider any proposal for amendments of this Convention or of the existing Protocols. States not parties to this Convention shall be invited as observers to the conference. The conference may agree upon amendments which shall be adopted and enter into force in accordance with subparagraph 1 (b) above.

(b) At such conference consideration may also be given to any proposal for additional protocols relating to other categories of conventional weapons not covered by the existing annexed Protocols. All States represented at the conference may participate fully in such consideration. Any additional protocols shall be adopted in the same manner as this Convention, shall be annexed thereto and shall enter into force as provided in paragraphs 3 and 4 of Article 5 of this Convention.

(c) Such a conference may consider whether provision should be made for the convening of a further conference at the request of any High Contracting Party if, after a similar period to that referred to in subparagraph 3 (a) of this Article, no conference has been convened in accordance with subparagraph 1 (a) or 2 (a) of this Article.

#### Article 9. DENUNCIATION

1. Any High Contracting Party may denounce this Convention or any of its annexed Protocols by so notifying the Depositary.

2. Any such denunciation shall only take effect one year after receipt by the Depositary of the notification of denunciation. If, however, on the expiry of that year the denouncing High Contracting Party is engaged in one of the situations referred to in Article 1, the Party shall continue to be bound by the obligations of this Convention and of the relevant annexed Protocols until the end of the armed conflict or occupation and, in any case, until the termination of operations connected with the final release, repatriation or re-establishment of the persons protected by the rules of international law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peace-keeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions.

3. Any denunciation of this Convention shall be considered as also applying to all annexed Protocols by which the denouncing High Contracting Party is bound.

4. Any denunciation shall have effect only in respect of the denouncing High Contracting Party.

5. Any denunciation shall not affect the obligations already incurred, by reason of an armed conflict, under this Convention and its annexed Protocols by such denouncing High Contracting Party in respect of any act committed before this denunciation becomes effective.

#### Article 10. DEPOSITARY

1. The Secretary-General of the United Nations shall be the Depositary of this Convention and of its annexed Protocols.

2. In addition to his usual functions, the Depositary shall inform all States of:

(a) Signatures affixed to this Convention under Article 3;

(b) Deposits of instruments of ratification, acceptance or approval or accession to this Convention deposited under Article 4;

(c) Notifications of consent to be bound by annexed Protocols under Article 4;

(d) The dates of entry into force of this Convention and of each of its annexed Protocols under Article 5; and

(e) Notifications of denunciation received under Article 9 and their effective date.

#### Article 11. AUTHENTIC TEXTS

The original of this Convention with the annexed Protocols, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Depositary, who shall transmit certified true copies thereof to all States.

### PROTOCOL ON NON-DETECTABLE FRAGMENTS

#### (PROTOCOL I)

It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.

### PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES

#### (PROTOCOL II)

#### Article 1. MATERIAL SCOPE OF APPLICATION

This Protocol relates to the use on land of the mines, booby-traps and other devices defined herein, including mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways.

#### Article 2. DEFINITIONS

For the purpose of this Protocol:

1. "Mine" means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle, and "remotely delivered mine" means any mine so defined delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.

2. "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.

3. "Other devices" means manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.

4. "Military objective" means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

5. "Civilian objects" are all objects which are not military objectives as defined in paragraph 4.

6. "Recording" means a physical, administrative and technical operation designed to obtain, for the purpose of registration in the official records, all available information facilitating the location of minefields, mines and booby-traps.

*Article 3. GENERAL RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES*

1. This Article applies to:
  - (a) Mines;
  - (b) Booby-traps; and
  - (c) Other devices.
2. It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians.
3. The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:
  - (a) Which is not on, or directed against, a military objective; or
  - (b) Which employs a method or means of delivery which cannot be directed at a specific military objective; or
  - (c) Which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
4. All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

*Article 4. RESTRICTIONS ON THE USE OF MINES OTHER THAN REMOTELY DELIVERED MINES, BOOBY-TRAPS AND OTHER DEVICES IN POPULATED AREAS*

1. This Article applies to:
  - (a) Mines other than remotely delivered mines;
  - (b) Booby-traps; and
  - (c) Other devices.
2. It is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:
  - (a) They are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party; or
  - (b) Measures are taken to protect civilians from their effects, for example, the posting of warning signs, the posting of sentries, the issue of warnings or the provision of fences.

*Article 5. RESTRICTIONS ON THE USE OF REMOTELY DELIVERED MINES*

1. The use of remotely delivered mines is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives, and unless:
  - (a) Their location can be accurately recorded in accordance with Article 7 (1) (a); or
  - (b) An effective neutralizing mechanism is used on each such mine, that is to say, a self-actuating mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position, or a remotely-controlled mechanism which is designed to render harmless or destroy a mine when the mine no longer serves the military purpose for which it was placed in position.
2. Effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit.

*Article 6. PROHIBITION ON THE USE OF CERTAIN BOOBY-TRAPS*

1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use:
  - (a) Any booby-trap in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached; or
  - (b) Booby-traps which are in any way attached to or associated with:
    - (i) Internationally recognized protective emblems, signs or signals;
    - (ii) Sick, wounded or dead persons;
    - (iii) Burial or cremation sites or graves;
    - (iv) Medical facilities, medical equipment, medical supplies or medical transportations;
    - (v) Children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
    - (vi) Food or drink;
    - (vii) Kitchen utensils or appliances except in military establishments, military locations or military supply depots;
    - (viii) Objects clearly of a religious nature;
    - (ix) Historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
    - (x) Animals or their carcasses.
2. It is prohibited in all circumstances to use any booby-trap which is designed to cause superfluous injury or unnecessary suffering.

*Article 7. RECORDING AND PUBLICATION OF THE LOCATION OF MINEFIELDS, MINES AND BOOBY-TRAPS*

1. The parties to a conflict shall record the location of:
  - (a) All pre-planned minefields laid by them; and
  - (b) All areas in which they have made large-scale and pre-planned use of booby-traps.
2. The parties shall endeavour to ensure the recording of the location of all other minefields, mines and booby-traps which they have laid or placed in position.
3. All such records shall be retained by the parties who shall:
  - (a) Immediately after the cessation of active hostilities:
    - (i) Take all necessary and appropriate measures, including the use of such records, to protect civilians from the effects of minefields, mines and booby-traps; and either
    - (ii) In cases where the forces of neither party are in the territory of the adverse party, make available to each other and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines and booby-traps in the territory of the adverse party; or
    - (iii) Once complete withdrawal of the forces of the parties from the territory of the adverse party has taken place, make available to the adverse party and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines and booby-traps in the territory of the adverse party;
  - (b) When a United Nations force or mission performs functions in any area, make available to the authority mentioned in Article 8 such information as is required by that Article;
  - (c) Whenever possible, by mutual agreement, provide for the release of information concerning the location of minefields, mines and booby-traps, particularly in agreements governing the cessation of hostilities.

*Article 8.* PROTECTION OF UNITED NATIONS FORCES AND MISSIONS FROM THE EFFECTS OF MINEFIELDS, MINES AND BOOBY-TRAPS

1. When a United Nations force or mission performs functions of peace-keeping, observation or similar functions in any area, each party to the conflict shall, if requested by the head of the United Nations force or mission in that area, as far as it is able:

- (a) Remove or render harmless all mines or booby-traps in that area;
- (b) Take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby-traps while carrying out its duties; and
- (c) Make available to the head of the United Nations force or mission in that area, all information in the party's possession concerning the location of minefields, mines and booby-traps in that area.

2. When a United Nations fact-finding mission performs functions in any area, any party to the conflict concerned shall provide protection to that mission except where, because of the size of such mission, it cannot adequately provide such protection. In that case it shall make available to the head of the mission the information in its possession concerning the location of minefields, mines and booby-traps in that area.

*Article 9.* INTERNATIONAL CO-OPERATION IN THE REMOVAL OF MINEFIELDS, MINES AND BOOBY-TRAPS

After the cessation of active hostilities, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance — including, in appropriate circumstances, joint operations — necessary to remove or otherwise render ineffective minefields, mines and booby-traps placed in position during the conflict.

TECHNICAL ANNEX TO THE PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES (PROTOCOL II)

*Guidelines on Recording*

Whenever an obligation for the recording of the location of minefields, mines and booby-traps arises under the Protocol, the following guidelines shall be taken into account.

1. With regard to pre-planned minefields and large-scale and pre-planned use of booby-traps:
  - (a) Maps, diagrams or other records should be made in such a way as to indicate the extent of the minefield or booby-trapped area; and
  - (b) The location of the minefield or booby-trapped area should be specified by relation to the co-ordinates of a single reference point and by the estimated dimensions of the area containing mines and booby-traps in relation to that single reference point.
2. With regard to other minefields, mines and booby-traps laid or placed in position:

In so far as possible, the relevant information specified in paragraph 1 above should be recorded so as to enable the areas containing minefields, mines and booby-traps to be identified.

PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF INCENDIARY WEAPONS

(PROTOCOL III)

*Article 1.* DEFINITIONS

For the purpose of this Protocol:

1. "Incendiary weapon" means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat,

or a combination thereof, produced by a chemical reaction of a substance delivered on the target.

(a) Incendiary weapons can take the form of, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.

(b) Incendiary weapons do not include:

- (i) Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems;
  - (ii) Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.
2. "Concentration of civilians" means any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads.
  3. "Military objective" means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
  4. "Civilian objects" are all objects which are not military objectives as defined in paragraph 3.
  5. "Feasible precautions" are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

*Article 2.* PROTECTION OF CIVILIANS AND CIVILIAN OBJECTS

1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.

2. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.

3. It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

4. It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.



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VOLUME 2024

**Recueil des Traités**

*Traités et accords internationaux  
enregistrés  
ou classés et inscrits au répertoire  
au Secrétariat de l'Organisation des Nations Unies*

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New York, 2001

**No. 22495. Multilateral**

CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS (WITH PROTOCOLS I, II AND III). GENEVA, 10 OCTOBER 1980<sup>1</sup>

ADDITIONAL PROTOCOL TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS (PROTOCOL IV, ENTITLED PROTOCOL ON BLINDING LASER WEAPONS). VIENNA, 13 OCTOBER 1995

Entry into force : 30 July 1998, in accordance with article 2 of the Additional Protocol

Authentic texts : Arabic, Chinese, English, French, Russian and Spanish \*  
Registration with the Secretariat of the United Nations : ex officio, 30 July 1998

**No. 22495. Multilatéral**

CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION (AVEC PROTOCOLES I, II ET III). GENÈVE, 10 OCTOBRE 1980<sup>1</sup>

PROTOCOLE ADDITIONNEL À LA CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION (PROTOCOLE IV INTITULÉ PROTOCOLE RELATIF AUX ARMES À LASER AVEUGLANTES). VIENNE, 13 OCTOBRE 1995

Entrée en vigueur : 30 juillet 1998, conformément à l'article 2 du Protocole additionnel

Textes authentiques : arabe, chinois, anglais, français, russe et espagnol  
Enregistrement auprès du Secrétariat des Nations Unies : d'office, 30 juillet 1998

\* For the Spanish text of the Protocol, See Corrigenda at the back of the volume

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[ ENGLISH TEXT — TEXTE ANGLAIS ]

ADDITIONAL PROTOCOL TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS

ENTRY INTO FORCE

Article 2.

This Protocol shall enter into force as provided in paragraphs 3 and 4 of Article 5 of the Convention.

Article 1.

ADDITIONAL PROTOCOL

The following protocol shall be annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects ("the Convention") as Protocol IV:

"PROTOCOL ON BLINDING LASER WEAPONS

(PROTOCOL IV)

Article 1

It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. The High Contracting Parties shall not transfer such weapons to any State or non-State entity.

Article 2.

In the employment of laser systems, the High Contracting Parties shall take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision. Such precautions shall include training of their armed forces and other practical measures.

Article 3.

Blinding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by the prohibition of this Protocol.

Article 4.

For the purpose of this Protocol "permanent blindness" means irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery. Serious disability is equivalent to visual acuity of less than 20/200 Snellen measured using both eyes."



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New York, 2001

PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES AS AMENDED ON 3 MAY 1996 (PROTOCOL II AS AMENDED ON 3 MAY 1996) ANNEXED TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS. GENEVA, 3 MAY 1996

**Entry into force :** 3 December 1998, in accordance with article 2 of the Protocol  
**Authentic texts :** Arabic, Chinese, English, French, Russian and Spanish  
**Registration with the Secretariat of the United Nations :** ex officio, 3 December 1998

PROTOCOLE SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DES MINES, PIÈGES ET AUTRES DISPOSITIFS, TEL QU'IL A ÉTÉ MODIFIÉ LE 3 MAI 1996 (PROTOCOLE II, TEL QU'IL A ÉTÉ MODIFIÉ LE 3 MAI 1996) ANNEXÉ À LA CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION. GENÈVE, 3 MAI 1996

**Entrée en vigueur :** 3 décembre 1998, conformément à l'article 2 du Protocole  
**Textes authentiques :** arabe, chinois, anglais, français, russe et espagnol  
**Enregistrement auprès du Secrétariat des Nations Unies :** d'office, 3 décembre 1998

[ ENGLISH TEXT — TEXTE ANGLAIS ]

**PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES AS AMENDED ON 3 MAY 1996 (PROTOCOL II AS AMENDED ON 3 MAY 1996) ANNEXED TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS**

**ARTICLE I. AMENDED PROTOCOL**

The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices (Protocol II), annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects ("the Convention") is hereby amended. The text of the Protocol as amended will read as follows:

**"Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices as Amended on 3 May 1996  
(Protocol II as amended on 3 May 1996)**

*Article I. Scope of application*

1. This Protocol relates to the use on land of the mines, booby-traps and other devices, defined herein, including mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways.
2. This Protocol shall apply, in addition to situations referred to in Article 1 of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.
3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol.
4. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
5. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

6. The application of the provisions of this Protocol to parties to a conflict, which are not High Contracting Parties that have accepted this Protocol, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

*Article 2. Definitions*

For the purpose of this Protocol:

1. "Mine" means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.
2. "Remotely-delivered mine" means a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft. Mines delivered from a land-based system from less than 500 metres are not considered to be "remotely delivered", provided that they are used in accordance with Article 5 and other relevant Articles of this Protocol.
3. "Anti-personnel mine" means a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.
4. "Booby-trap" means any device or material which is designed, constructed, or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.
5. "Other devices" means manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.
6. "Military objective" means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
7. "Civilian objects" are all objects which are not military objectives as defined in paragraph 6 of this Article.
8. "Minefield" is a defined area in which mines have been emplaced and "mined area" is an area which is dangerous due to the presence of mines. "Phoney minefield" means an area free of mines that simulates a minefield. The term "minefield" includes phoney mine fields.
9. "Recording" means a physical, administrative and technical operation designed to obtain, for the purpose of registration in official records, all available information facilitating the location of minefields, mined areas, mines, booby-traps and other devices.
10. "Self-destruction mechanism" means an incorporated or externally attached automatically-functioning mechanism which secures the destruction of the munition into which it is incorporated or to which it is attached.
11. "Self-neutralization mechanism" means an incorporated automatically-functioning mechanism which renders inoperable the munition into which it is incorporated.

12. "Self-deactivating" means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example, a battery, that is essential to the operation of the munition.

13. "Remote control" means control by commands from a distance.

14. "Anti-handling device" means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with the mine.

15. "Transfer" involves, in addition to the physical movement of mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced mines.

*Article 3. General restrictions on the use of mines, booby-traps and other devices*

1. This Article applies to:

- (a) Mines;
- (b) Booby-traps; and
- (c) Other devices.

2. Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol.

3. It is prohibited in all circumstances to use any mine, booby-trap or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering.

4. Weapons to which this Article applies shall strictly comply with the standards and limitations specified in the Technical Annex with respect to each particular category.

5. It is prohibited to use mines, booby-traps or other devices which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations.

6. It is prohibited to use a self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning.

7. It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects.

8. The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:

(a) Which is not on, or directed against, a military objective. In case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used;

(b) Which employs a method or means of delivery which cannot be directed at a specific military objective; or

(c) Which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

9. Several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are not to be treated as a single military objective.

10. All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. These circumstances include, but are not limited to:

(a) The short- and long-term effect of mines upon the local civilian population, for the duration of the mine field;

(b) Possible measures to protect civilians (for example, fencing, signs, warning and monitoring);

(c) The availability and feasibility of using alternatives; and

(d) The short- and long-term military requirements for a minefield.

11. Effective advance warning shall be given of any emplacement of mines, booby-traps and other devices which may affect the civilian population, unless circumstances do not permit.

*Article 4. Restrictions on the use of anti-personnel mines*

It is prohibited to use anti-personnel mines which are not detectable, as specified in paragraph 2 of the Technical Annex.

*Article 5. Restrictions on the use of anti-personnel mines other than remotely-delivered mines*

1. This Article applies to anti-personnel mines other than remotely-delivered mines.

2. It is prohibited to use weapons to which this Article applies which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex, unless:

(a) Such weapons are placed within a perimeter-marked area which is monitored by military personnel and protected by fencing or other means, to ensure the effective exclusion of civilians from the area. The marking must be of a distinct and durable character and must at least be visible to a person who is about to enter the perimeter-marked area; and

(b) Such weapons are cleared before the area is abandoned, unless the area is turned over to the forces of another State which accept responsibility for the maintenance of the protections required by this Article and the subsequent clearance of those weapons.

3. A party to a conflict is relieved from further compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article only if such compliance is not feasible due to forcible loss of control of the area as a result of enemy military action, including situations where direct enemy military action makes it impossible to comply. If that party regains control of the area, it shall resume compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article.

4. If the forces of a party to a conflict gain control of an area in which weapons to which this Article applies have been laid, such forces shall, to the maximum extent feasible, maintain and, if necessary, establish the protections required by this Article until such weapons have been cleared.

5. All feasible measures shall be taken to prevent the unauthorized removal, defacement, destruction or concealment of any device, system or material used to establish the perimeter of a perimeter-marked area.

6. Weapons to which this Article applies which propel fragments in a horizontal arc of less than 90 degrees and which are placed on or above the ground may be used without the measures provided for in sub-paragraph 2 (a) of this Article for a maximum period of 72 hours, if:

- (a) They are located in immediate proximity to the military unit that emplaced them; and
- (b) The area is monitored by military personnel to ensure the effective exclusion of civilians.

Article 6. Restrictions on the use of remotely-delivered mines

1. It is prohibited to use remotely-delivered mines unless they are recorded in accordance with sub-paragraph I(b) of the Technical Annex.

2. It is prohibited to use remotely-delivered anti-personnel mines which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex.

3. It is prohibited to use remotely-delivered mines other than anti-personnel mines, unless, to the extent feasible, they are equipped with an effective self-destruction or self-neutralization mechanism and have a back-up self-deactivation feature, which is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position.

4. Effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit.

Article 7. Prohibitions on the use of booby-traps and other devices

1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use booby-traps and other devices which are in any way attached to or associated with:

- (a) Internationally recognized protective emblems, signs or signals;

- (b) Sick, wounded or dead persons;
- (c) Burial or cremation sites or graves;
- (d) Medical facilities, medical equipment, medical supplies or medical transportation;
- (e) Children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
- (f) Food or drink;
- (g) Kitchen utensils or appliances except in military establishments, military locations or military supply depots;
- (h) Objects clearly of a religious nature;
- (i) Historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- (j) Animals or their carcasses.

2. It is prohibited to use booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material.

3. Without prejudice to the provisions of Article 3, it is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:

- (a) They are placed on or in the close vicinity of a military objective; or
- (b) Measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences.

Article 8. Transfers

1. In order to promote the purposes of this Protocol, each High Contracting Party:

- (a) Undertakes not to transfer any mine the use of which is prohibited by this Protocol;
- (b) Undertakes not to transfer any mine to any recipient other than a State or a State agency authorized to receive such transfers;

(c) Undertakes to exercise restraint in the transfer of any mine the use of which is restricted by this Protocol. In particular, each High Contracting Party undertakes not to transfer any anti-personnel mines to States which are not bound by this Protocol, unless the recipient State agrees to apply this Protocol; and

(d) Undertakes to ensure that any transfer in accordance with this Article takes place in full compliance, by both the transferring and the recipient State, with the relevant provisions of this Protocol and the applicable norms of international humanitarian law.

2. In the event that a High Contracting Party declares that it will defer compliance with specific provisions on the use of certain mines, as provided for in the Technical Annex, sub-paragraph 1 (a) of this Article shall however apply to such mines.

3. All High Contracting Parties, pending the entry into force of this Protocol, will refrain from any actions which would be inconsistent with sub-paragraph 1 (a) of this Article.

*Article 9. Recording and use of information on minefields, mined areas, mines, booby-traps and other devices*

1. All information concerning minefields, mined areas, mines, booby-traps and other devices shall be recorded in accordance with the provisions of the Technical Annex.
2. All such records shall be retained by the parties to a conflict, who shall, without delay after the cessation of active hostilities, take all necessary and appropriate measures, including the use of such information, to protect civilians from the effects of minefields, mined areas, mines, booby-traps and other devices in areas under their control.

At the same time, they shall also make available to the other party or parties to the conflict and to the Secretary-General of the United Nations all such information in their possession concerning minefields, mined areas, mines, booby-traps and other devices laid by them in areas no longer under their control; provided, however, subject to reciprocity, where the forces of a party to a conflict are in the territory of an adverse party, either party may withhold such information from the Secretary-General and the other party, to the extent that security interests require such withholding, until neither party is in the territory of the other. In the latter case, the information withheld shall be disclosed as soon as those security interests permit. Wherever possible, the parties to the conflict shall seek, by mutual agreement, to provide for the release of such information at the earliest possible time in a manner consistent with the security interests of each party.

3. This Article is without prejudice to the provisions of Articles 10 and 12 of this Protocol.

*Article 10. Removal of mine fields, mined areas, mines, booby-traps and other devices and international cooperation*

1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.
2. High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.
3. With respect to minefields, mined areas, mines, booby-traps and other devices laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 2 of this Article, to the extent permitted by such party, technical and material assistance necessary to fulfil such responsibility.
4. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.

*Article 11. Technological cooperation and assistance*

1. Each High Contracting Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Protocol and means of mine clearance. In particular, High Contracting Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.
2. Each High Contracting Party undertakes to provide information to the database on mine clearance established within the United Nations System, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.
3. Each High Contracting Party in a position to do so shall provide assistance for mine clearance through the United Nations System, other international bodies or on a bilateral basis, or contribute to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance.
4. Requests by High Contracting Parties for assistance, substantiated by relevant information, may be submitted to the United Nations, to other appropriate bodies or to other States. These requests may be submitted to the Secretary-General of the United Nations, who shall transmit them to all High Contracting Parties and to relevant international organizations.
5. In the case of requests to the United Nations, the Secretary-General of the United Nations, within the resources available to the Secretary-General of the United Nations, may take appropriate steps to assess the situation and, in cooperation with the requesting High Contracting Party, determine the appropriate provision of assistance in mine clearance or implementation of the Protocol. The Secretary-General may also report to High Contracting Parties on any such assessment as well as on the type and scope of assistance required.
6. Without prejudice to their constitutional and other legal provisions, the High Contracting Parties undertake to cooperate and transfer technology to facilitate the implementation of the relevant prohibitions and restrictions set out in this Protocol.
7. Each High Contracting Party has the right to seek and receive technical assistance, where appropriate, from another High Contracting Party on specific relevant technology, other than weapons technology, as necessary and feasible, with a view to reducing any period of deferral for which provision is made in the Technical Annex.

*Article 12. Protection from the effects of minefields, mined areas, mines, booby-traps and other devices*

1. Application
  - (a) With the exception of the forces and missions referred to in sub-paragraph 2(a)(i) of this Article, this Article applies only to missions which are performing functions in an area with the consent of the High Contracting Party on whose territory the functions are performed.

(b) The application of the provisions of this Article to parties to a conflict which are not High Contracting Parties shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

(c) The provisions of this Article are without prejudice to existing international humanitarian law, or other international instruments as applicable, or decisions by the Security Council of the United Nations, which provide for a higher level of protection to personnel functioning in accordance with this Article.

2. Peace-keeping and certain other forces and mission

(a) This paragraph applies to:

(i) Any United Nations force or mission performing peace-keeping, observation or similar functions in any area in accordance with the Charter of the United Nations; and

(ii) Any mission established pursuant to Chapter VIII of the Charter of the United Nations and performing its functions in the area of a conflict.

(b) Each High Contracting Party or party to a conflict, if so requested by the head of a force or mission to which this paragraph applies, shall:

(i) So far as it is able, take such measures as are necessary to protect the force or mission from the effects of mines, booby-traps and other devices in any area under its control;

(ii) If necessary in order effectively to protect such personnel, remove or render harmless, so far as it is able, all mines, booby-traps and other devices in that area; and

(iii) Inform the head of the force or mission of the location of all known minefields, mined areas, mines, booby-traps and other devices in the area in which the force or mission is performing its functions and, so far as is feasible, make available to the head of the force or mission all information in its possession concerning such minefields, mined areas, mines, booby-traps and other devices.

3. Humanitarian and fact-finding missions of the United Nations System

(a) This paragraph applies to any humanitarian or fact-finding mission of the United Nations System.

(b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:

(i) Provide the personnel of the mission with the protections set out in sub-paragraph 2(b)(i) of this Article; and

(ii) If access to or through any place under its control is necessary for the performance of the mission's functions and in order to provide the personnel of the mission with safe passage to or through that place:

(aa) Unless on-going hostilities prevent, inform the head of the mission of a safe route to that place if such information is available; or

(bb) If information identifying a safe route is not provided in accordance with sub-paragraph (aa), so far as is necessary and feasible, clear a lane through minefields.

4. Missions of the International Committee of the Red Cross

(a) This paragraph applies to any mission of the International Committee of the Red Cross performing functions with the consent of the host State or States as provided for by

the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.

(b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:

(i) Provide the personnel of the mission with the protections set out in sub-paragraph 2(b)(i) of this Article; and

(ii) Take the measures set out in sub-paragraph 3(b)(ii) of this Article.

5. Other humanitarian missions and missions of enquiry

(a) Insofar as paragraphs 2, 3 and 4 of this Article do not apply to them, this paragraph applies to the following missions when they are performing functions in the area of a conflict or to assist the victims of a conflict:

(i) Any humanitarian mission of a national Red Cross or Red Crescent society or of their International Federation;

(ii) Any mission of an impartial humanitarian organization, including any impartial humanitarian demining mission; and

(iii) Any mission of enquiry established pursuant to the provisions of the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.

(b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall, so far as is feasible:

(i) Provide the personnel of the mission with the protections set out in sub-paragraph 2(b)(i) of this Article; and

(ii) Take the measures set out in sub-paragraph 3(b)(ii) of this Article.

6. Confidentiality

All information provided in confidence pursuant to this Article shall be treated by the recipient in strict confidence and shall not be released outside the force or mission concerned without the express authorization of the provider of the information.

7. Respect for laws and regulations

Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, personnel participating in the forces and missions referred to in this Article shall:

(a) Respect the laws and regulations of the host State; and

### *Article 13. Consultations of High Contracting Parties*

(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

1. The High Contracting Parties undertake to consult and cooperate with each other on all issues related to the operation of this Protocol. For this purpose, a conference of High Contracting Parties shall be held annually.

2. Participation in the annual conferences shall be determined by their agreed Rules of Procedure.

3. The work of the conference shall include:

- (a) Review of the operation and status of this Protocol;
  - (b) Consideration of matters arising from reports by High Contracting Parties according to paragraph 4 of this Article;
  - (c) Preparation for review conferences; and
  - (d) Consideration of the development of technologies to protect civilians against indiscriminate effects of mines.
4. The High Contracting Parties shall provide annual reports to the Depositary, who shall circulate them to all High Contracting Parties in advance of the conference, on any of the following matters:
- (a) Dissemination of information on this Protocol to their armed forces and to the civilian population;
  - (b) Mine clearance and rehabilitation programmes;
  - (c) Steps taken to meet technical requirements of this Protocol and any other relevant information pertaining thereto;
  - (d) Legislation related to this Protocol;
  - (e) Measures taken on international technical information exchange, on international cooperation on mine clearance, and on technical cooperation and assistance; and
  - (f) Other relevant matters.

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5. The cost of the Conference of High Contracting Parties shall be borne by the High Contracting Parties and States not parties participating in the work of the conference, in accordance with the United Nations scale of assessment adjusted appropriately.

#### *Article 14. Compliance*

1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control.
2. The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.
3. Each High Contracting Party shall also require that its armed forces issue relevant military instructions and operating procedures and that armed forces personnel receive training commensurate with their duties and responsibilities to comply with the provisions of this Protocol.
4. The High Contracting Parties undertake to consult each other and to cooperate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

## TECHNICAL ANNEX

### 1. Recording

- (a) Recording of the location of mines other than remotely-delivered mines, minefields, mined areas, booby-traps and other devices shall be carried out in accordance with the following provisions:
  - (i) The location of the minefields, mined areas and areas of booby-traps and other devices shall be specified accurately by relation to the coordinates of at least two reference points and the estimated dimensions of the area containing these weapons in relation to those reference points;
  - (ii) Maps, diagrams or other records shall be made in such a way as to indicate the location of minefields, mined areas, booby-traps and other devices in relation to reference points, and these records shall also indicate their perimeters and extent; and
  - (iii) For purposes of detection and clearance of mines, booby-traps and other devices, maps, diagrams or other records shall contain complete information on the type, number, emplacement method, type of fuse and life time, date and time of laying, anti-handling devices (if any) and other relevant information on all these weapons laid. Whenever feasible the minefield record shall show the exact location of every mine, except in row minefields where the row location is sufficient. The precise location and operating mechanism of each booby-trap laid shall be individually recorded.
- (b) The estimated location and area of remotely-delivered mines shall be specified by coordinates of reference points (normally corner points) and shall be ascertained and when feasible marked on the ground at the earliest opportunity. The total number and type of mines laid, the date and time of laying and the self-destruction time periods shall also be recorded.
- (c) Copies of records shall be held at a level of command sufficient to guarantee their safety as far as possible.
- (d) The use of mines produced after the entry into force of this Protocol is prohibited unless they are marked in English or in the respective national language or languages with the following information:
  - (i) Name of the country of origin;
  - (ii) Month and year of production; and
  - (iii) Serial number or lot number.

The marking should be visible, legible, durable and resistant to environmental effects, as far as possible.
2. Specifications on detectability
  - (a) With respect to anti-personnel mines produced after 1 January 1997, such mines shall incorporate in their construction a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.

(b) With respect to anti-personnel mines produced before 1 January 1997, such mines shall either incorporate in their construction, or have attached prior to their emplacement, in a manner not easily removable, a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.

(c) In the event that a High Contracting Party determines that it cannot immediately comply with sub-paragraph (b), it may declare at the time of its notification of consent to be bound by this Protocol that it will defer compliance with sub-paragraph (b) for a period not to exceed 9 years from the entry into force of this Protocol. In the meantime it shall, to the extent feasible, minimize the use of anti-personnel mines that do not so comply.

### 3. Specifications on self-destruction and self-deactivation

(a) All remotely-delivered anti-personnel mines shall be designed and constructed so that no more than 10% of activated mines will fail to self-destruct within 30 days after emplacement, and each mine shall have a back-up self-deactivation feature designed and constructed so that, in combination with the self-destruction mechanism, no more than one in one thousand activated mines will function as a mine 120 days after emplacement.

(b) All non-remotely delivered anti-personnel mines, used outside marked areas, as defined in Article 5 of this Protocol, shall comply with the requirements for self-destruction and self-deactivation stated in sub-paragraph (a).

(c) In the event that a High Contracting Party determines that it cannot immediately comply with sub-paragraphs (a) and/or (b), it may declare at the time of its notification of consent to be bound by this Protocol, that it will, with respect to mines produced prior to the entry into force of this Protocol, defer compliance with sub-paragraphs (a) and/or (b) for a period not to exceed 9 years from the entry into force of this Protocol.

During this period of deferral, the High Contracting Party shall:

(i) Undertake to minimize, to the extent feasible, the use of anti-personnel mines that do not so comply; and

(ii) With respect to remotely-delivered anti-personnel mines, comply with either the requirements for self-destruction or the requirements for self-deactivation and, with respect to other anti-personnel mines comply with at least the requirements for self-deactivation.

### 4. International signs for minefields and mined areas

Signs similar to the example attached and as specified below shall be utilized in the marking of minefields and mined areas to ensure their visibility and recognition by the civilian population:

(a) Size and shape: a triangle or square no smaller than 28 centimetres (11 inches) by 20 centimetres (7.9 inches) for a triangle, and 15 centimetres (6 inches) per side for a square;

(b) Colour: red or orange with a yellow reflecting border;

(c) Symbol: the symbol illustrated in the Attachment, or an alternative readily recognizable in the area in which the sign is to be displayed as identifying a dangerous area;

(d) Language: the sign should contain the word "mines" in one of the six official languages of the Convention (Arabic, Chinese, English, French, Russian and Spanish) and the language or languages prevalent in that area; and

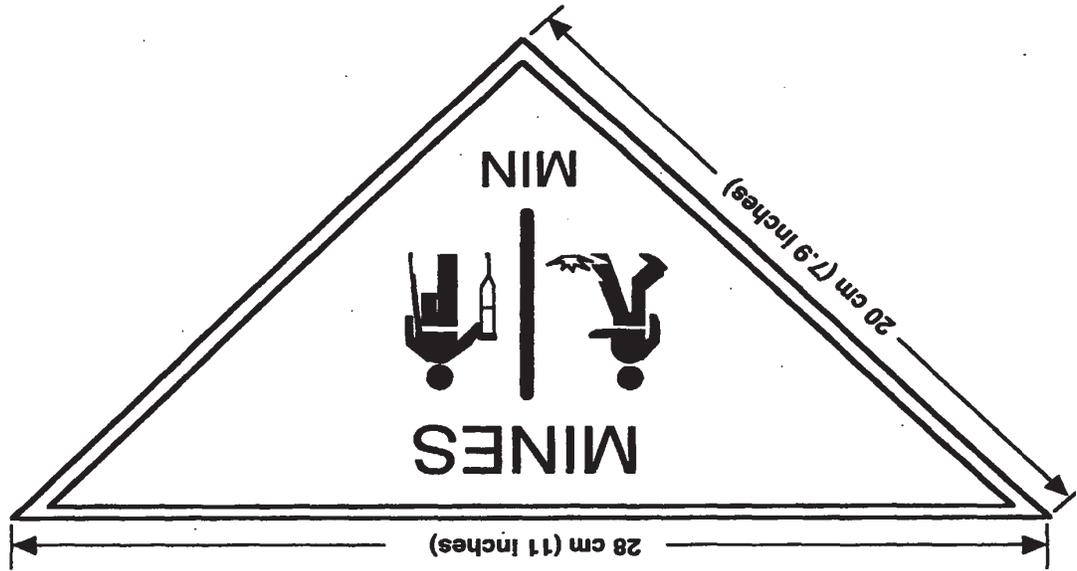
(e) Spacing: signs should be placed around the minefield or mined area at a distance sufficient to ensure their visibility at any point by a civilian approaching the area."

Attachment

ARTICLE 2. ENTRY INTO FORCE

This amended Protocol shall enter into force as provided for in paragraph 1 (b) of Article 8 of the Convention.

# Warning Sign for Areas Containing Mines





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New York, 2005

**No. 22495. Multilateral**

CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS (WITH PROTOCOLS I, II AND III). GENEVA, 10 OCTOBER 1980<sup>1</sup>

AMENDMENT TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS. GENEVA, 21 DECEMBER 2001

**Entry into force** : 18 May 2004, in accordance with article 8, paragraph 1 (b) of the Convention which reads, in part, as follows: "amendments ... shall enter into force in the same manner as the Convention and the annexed Protocols (i.e. ... six months after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession." (see following page)

**Authentic texts** : Arabic, Chinese, English, French, Russian and Spanish  
**Registration with the Secretariat of the United Nations** : ex officio, 18 May 2004

**No. 22495. Multilatéral**

CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION (AVEC PROTOCOLES I, II ET III). GENÈVE, 10 OCTOBRE 1980<sup>1</sup>

AMENDEMENT À LA CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION. GENÈVE, 21 DÉCEMBRE 2001

**Entrée en vigueur** : 18 mai 2004, conformément à l'alinéa b) du paragraphe 1 de l'article 8 de la Convention qui se lit, en partie, comme suit : "les amendements ... entreront en vigueur de la même manière que la présente Convention et les Protocoles y annexés (soit .... six mois après la date de dépôt du vingtième instrument de ratification, d'acceptation, d'approbation ou d'adhésion.)" (voir la page suivante)

**Textes authentiques** : arabe, chinois, anglais, français, russe et espagnol  
**Enregistrement auprès du Secrétariat des Nations Unies** : d'office, 18 mai 2004

<sup>1</sup> United Nations, *Treaty Series*, vol. 1342, No. I-22495 — Nations Unies, *Recueil des Traités*, vol. 1342, no I-22495.

**AMENDMENT TO ARTICLE I OF THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS (CCW)**

The following decision to amend Article I of the Convention in order to expand the scope of its application to non-international armed conflicts was made by the States Parties at the Second Review Conference held from 11 to 21 December 2001. This decision appears in the Final Declaration of the Second Review Conference, as contained in document CCW/CONF.II/2.

“DECIDE to amend Article I of the Convention to read as follows:

“1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.

2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

4. Nothing in this Convention or its annexed Protocols shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

5. Nothing in this Convention or its annexed Protocols shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

6. The application of the provisions of this Convention and its annexed Protocols to parties to a conflict which are not High Contracting Parties that have accepted this Convention or its annexed Protocols, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

7. The provisions of Paragraphs 2-6 of this Article shall not prejudice additional Protocols adopted after 1 January 2002, which may apply, exclude or modify the scope of their application in relation to this Article.”



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New York, 2010

PROTOCOL ON EXPLOSIVE REMNANTS OF WAR TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS (PROTOCOL V). GENEVA, 28 NOVEMBER 2003

PROTOCOLE RELATIF AUX RESTES EXPLOSIFS DE GUERRE À LA CONVENTION SUR L'INTERDICTION OU LA LIMITATION DE L'EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPANT SANS DISCRIMINATION (PROTOCOLE V). GENÈVE, 28 NOVEMBRE 2003

**Entry into force :** 12 November 2006, in accordance with article 5 (3) and (4) of the Convention

**Entrée en vigueur :** 12 novembre 2006, conformément à l'article 5 (3) et 4) de la Convention

**Authentic texts :** Arabic, Chinese, English, French, Russian and Spanish

**Textes authentiques :** arabe, chinois, anglais, français, russe et espagnol

**Registration with the Secretariat of the United Nations :** ex officio, 12 November 2006

**Enregistrement auprès du Secrétariat des Nations Unies :** d'office, 12 novembre 2006

## PROTOCOL ON EXPLOSIVE REMNANTS OF WAR

The High Contracting Parties,

Recognising the serious post-conflict humanitarian problems caused by explosive remnants of war,

Conscious of the need to conclude a Protocol on post-conflict remedial measures of a generic nature in order to minimise the risks and effects of explosive remnants of war,

And willing to address generic preventive measures, through voluntary best practices specified in a Technical Annex for improving the reliability of munitions, and therefore minimising the occurrence of explosive remnants of war,

Have agreed as follows:

### *Article 1. General provision and scope of application*

1. In conformity with the Charter of the United Nations and of the rules of the international law of armed conflict applicable to them, High Contracting Parties agree to comply with the obligations specified in this Protocol, both individually and in co-operation with other High Contracting Parties, to minimise the risks and effects of explosive remnants of war in post-conflict situations.

2. This Protocol shall apply to explosive remnants of war on the land territory including internal waters of High Contracting Parties.

3. This Protocol shall apply to situations resulting from conflicts referred to in Article 1, paragraphs 1 to 6, of the Convention, as amended on 21 December 2001.

4. Articles 3, 4, 5 and 8 of this Protocol apply to explosive remnants of war other than existing explosive remnants of war as defined in Article 2, paragraph 5 of this Protocol.

### *Article 2. Definitions*

For the purpose of this Protocol,

1. Explosive ordnance means conventional munitions containing explosives, with the exception of mines, booby traps and other devices as defined in Protocol II of this Convention as amended on 3 May 1996.

2. Unexploded ordnance means explosive ordnance that has been primed, fused, armed, or otherwise prepared for use and used in an armed conflict. It may have been fired, dropped, launched or projected and should have exploded but failed to do so.

3. Abandoned explosive ordnance means explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fused, armed or otherwise prepared for use.

4. Explosive remnants of war means unexploded ordnance and abandoned explosive ordnance.

5. Existing explosive remnants of war means unexploded ordnance and abandoned explosive ordnance that existed prior to the entry into force of this Protocol for the High Contracting Party on whose territory it exists.

### *Article 3. Clearance, removal or destruction of explosive remnants of war*

1. Each High Contracting Party and party to an armed conflict shall bear the responsibilities set out in this Article with respect to all explosive remnants of war in territory under its control. In cases where a user of explosive ordnance which has become explosive remnants of war, does not exercise control of the territory, the user shall, after the cessation of active hostilities, provide where feasible, inter alia technical, financial, material or human resources assistance, bilaterally or through a mutually agreed third party, including inter alia through the United Nations system or other relevant organisations, to facilitate the marking and clearance, removal or destruction of such explosive remnants of war.

2. After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control. Areas affected by explosive remnants of war which are assessed pursuant to paragraph 3 of this Article as posing a serious humanitarian risk shall be accorded priority status for clearance, removal or destruction.

3. After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall take the following measures in affected territories under its control, to reduce the risks posed by explosive remnants of war:

- (a) survey and assess the threat posed by explosive remnants of war;
- (b) assess and prioritise needs and practicability in terms of marking and clearance, removal or destruction;
- (c) mark and clear, remove or destroy explosive remnants of war;
- (d) take steps to mobilise resources to carry out these activities.

4. In conducting the above activities High Contracting Parties and parties to an armed conflict shall take into account international standards, including the International Mine Action Standards.

5. High Contracting Parties shall co-operate, where appropriate, both among themselves and with other states, relevant regional and international organisations and non-governmental organisations on the provision of inter alia technical, financial, material and human resources assistance including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil the provisions of this Article.

### *Article 4. Recording, retaining and transmission of information*

1. High Contracting Parties and parties to an armed conflict shall to the maximum extent possible and as far as practicable record and retain information on the use of explo-

sive ordnance or abandonment of explosive ordnance, to facilitate the rapid marking and clearance, removal or destruction of explosive remnants of war, risk education and the provision of relevant information to the party in control of the territory and to civilian populations in that territory.

2. High Contracting Parties and parties to an armed conflict which have used or abandoned explosive ordnance which may have become explosive remnants of war shall, without delay after the cessation of active hostilities and as far as practicable, subject to these parties' legitimate security interests, make available such information to the party or parties in control of the affected area, bilaterally or through a mutually agreed third party including *inter alia* the United Nations or, upon request, to other relevant organisations which the party providing the information is satisfied are or will be undertaking risk education and the marking and clearance, removal or destruction of explosive remnants of war in the affected area.

3. In recording, retaining and transmitting such information, the High Contracting Parties should have regard to Part 1 of the Technical Annex.

*Article 5. Other precautions for the protection of the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war*

1. High Contracting Parties and parties to an armed conflict shall take all feasible precautions in the territory under their control affected by explosive remnants of war to protect the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war. Feasible precautions are those precautions which are practicable or practicably possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. These precautions may include warnings, risk education to the civilian population, marking, fencing and monitoring of territory affected by explosive remnants of war, as set out in Part 2 of the Technical Annex.

*Article 6. Provisions for the protection of humanitarian missions and organisations from the effects of explosive remnants of war*

1. Each High Contracting Party and party to an armed conflict shall:
  - (a) Protect, as far as feasible, from the effects of explosive remnants of war, humanitarian missions and organisations that are or will be operating in the area under the control of the High Contracting Party or party to an armed conflict and with that party's consent.
  - (b) Upon request by such a humanitarian mission or organisation, provide, as far as feasible, information on the location of all explosive remnants of war that it is aware of in territory where the requesting humanitarian mission or organisation will operate or is operating.
2. The provisions of this Article are without prejudice to existing International Humanitarian Law or other international instruments as applicable or decisions by the Security Council of the United Nations which provide for a higher level of protection.

*Article 7. Assistance with respect to existing explosive remnants of war*

1. Each High Contracting Party has the right to seek and receive assistance, where appropriate, from other High Contracting Parties, from states non-party and relevant international organisations and institutions in dealing with the problems posed by existing explosive remnants of war.
2. Each High Contracting Party in a position to do so shall provide assistance in dealing with the problems posed by existing explosive remnants of war, as necessary and feasible. In so doing, High Contracting Parties shall also take into account the humanitarian objectives of this Protocol, as well as international standards including the International Mine Action Standards.

*Article 8. Co-operation and assistance*

1. Each High Contracting Party in a position to do so shall provide assistance for the marking and clearance, removal or destruction of explosive remnants of war, and for risk education to civilian populations and related activities *inter alia* through the United Nations system, other relevant international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations, or on a bilateral basis.
2. Each High Contracting Party in a position to do so shall provide assistance for the care and rehabilitation and social and economic reintegration of victims of explosive remnants of war. Such assistance may be provided *inter alia* through the United Nations system, relevant international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations, or on a bilateral basis.
3. Each High Contracting Party in a position to do so shall contribute to trust funds within the United Nations system, as well as other relevant trust funds, to facilitate the provision of assistance under this Protocol.
4. Each High Contracting Party shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information other than weapons related technology, necessary for the implementation of this Protocol. High Contracting Parties undertake to facilitate such exchanges in accordance with national legislation and shall not impose undue restrictions on the provision of clearance equipment and related technological information for humanitarian purposes.
5. Each High Contracting Party undertakes to provide information to the relevant databases on mine action established within the United Nations system, especially information concerning various means and technologies of clearance of explosive remnants of war, lists of experts, expert agencies or national points of contact on clearance of explosive remnants of war and, on a voluntary basis, technical information on relevant types of explosive ordnance.
6. High Contracting Parties may submit requests for assistance substantiated by relevant information to the United Nations, to other appropriate bodies or to other states. These requests may be submitted to the Secretary-General of the United Nations, who shall

transmit them to all High Contracting Parties and to relevant international organisations and non-governmental organisations.

7. In the case of requests to the United Nations, the Secretary-General of the United Nations, within the resources available to the Secretary-General of the United Nations, may take appropriate steps to assess the situation and in co-operation with the requesting High Contracting Party and other High Contracting Parties with responsibility as set out in Article 3 above, recommend the appropriate provision of assistance. The Secretary-General may also report to High Contracting Parties on any such assessment as well as on the type and scope of assistance required, including possible contributions from the trust funds established within the United Nations system.

#### *Article 9. Generic preventive measures*

1. Bearing in mind the different situations and capacities, each High Contracting Party is encouraged to take generic preventive measures aimed at minimising the occurrence of explosive remnants of war, including, but not limited to, those referred to in part 3 of the Technical Annex.
2. Each High Contracting Party may, on a voluntary basis, exchange information related to efforts to promote and establish best practices in respect of paragraph 1 of this Article.

#### *Article 10. Consultations of High Contracting Parties*

1. The High Contracting Parties undertake to consult and co-operate with each other on all issues related to the operation of this Protocol. For this purpose, a Conference of High Contracting Parties shall be held as agreed to by a majority, but no less than eighteen High Contracting Parties.
2. The work of the conferences of High Contracting Parties shall include:
  - (a) review of the status and operation of this Protocol;
  - (b) consideration of matters pertaining to national implementation of this Protocol, including national reporting or updating on an annual basis.
  - (c) preparation for review conferences.
3. The costs of the Conference of High Contracting Parties shall be borne by the High Contracting Parties and States not parties participating in the Conference, in accordance with the United Nations scale of assessment adjusted appropriately.

#### *Article 11. Compliance*

1. Each High Contracting Party shall require that its armed forces and relevant agencies or departments issue appropriate instructions and operating procedures and that its personnel receive training consistent with the relevant provisions of this Protocol.
2. The High Contracting Parties undertake to consult each other and to co-operate with each other bilaterally, through the Secretary-General of the United Nations or through

other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

## TECHNICAL ANNEX

This Technical Annex contains suggested best practice for achieving the objectives contained in Articles 4, 5 and 9 of this Protocol. This Technical Annex will be implemented by High Contracting Parties on a voluntary basis.

1. Recording, storage and release of information for Unexploded Ordnance (UXO) and Abandoned Explosive Ordnance (AXO)

(a) Recording of information: Regarding explosive ordnance which may have become UXO a State should endeavour to record the following information as accurately as possible:

- (i) the location of areas targeted using explosive ordnance;
- (ii) the approximate number of explosive ordnance used in the areas under (i);
- (iii) the type and nature of explosive ordnance used in areas under (i);
- (iv) the general location of known and probable UXO;

Where a State has been obliged to abandon explosive ordnance in the course of operations, it should endeavour to leave AXO in a safe and secure manner and record information on this ordnance as follows:

- (v) the location of AXO;
  - (vi) the approximate amount of AXO at each specific site;
  - (vii) the types of AXO at each specific site.
- (b) Storage of information: Where a State has recorded information in accordance with paragraph (a), it should be stored in such a manner as to allow for its retrieval and subsequent release in accordance with paragraph (c).

(c) Release of information: Information recorded and stored by a State in accordance with paragraphs (a) and (b) should, taking into account the security interests and other obligations of the State providing the information, be released in accordance with the following provisions:

- (i) Content:  
On UXO the released information should contain details on:
  - (1) the general location of known and probable UXO;
  - (2) the types and approximate number of explosive ordnance used in the targeted areas;
  - (3) the method of identifying the explosive ordnance including colour, size and shape and other relevant markings;
  - (4) the method for safe disposal of the explosive ordnance.
- On AXO the released information should contain details on:
  - (5) the location of the AXO;
  - (6) the approximate number of AXO at each specific site;
  - (7) the types of AXO at each specific site;

(8) the method of identifying the AXO, including colour, size and shape;

(9) information on type and methods of packing for AXO;

(10) state of readiness;

(11) the location and nature of any booby traps known to be present in the area of AXO.

(ii) Recipient: The information should be released to the party or parties in control of the affected territory and to those persons or institutions that the releasing State is satisfied are, or will be, involved in UXO or AXO clearance in the affected area, in the education of the civilian population on the risks of UXO or AXO.

(iii) Mechanism: A State should, where feasible, make use of those mechanisms established internationally or locally for the release of information, such as through UNMAS, IMSMA, and other expert agencies, as considered appropriate by the releasing State.

(iv) Timing: The information should be released as soon as possible, taking into account such matters as any ongoing military and humanitarian operations in the affected areas, the availability and reliability of information and relevant security issues.

2. Warnings, risk education, marking, fencing and monitoring

## Key terms

(a) Warnings are the punctual provision of cautionary information to the civilian population, intended to minimise risks caused by explosive remnants of war in affected territories.

(b) Risk education to the civilian population should consist of risk education programmes to facilitate information exchange between affected communities, government authorities and humanitarian organisations so that affected communities are informed about the threat from explosive remnants of war. Risk education programmes are usually a long term activity.

Best practice elements of warnings and risk education

(c) All programmes of warnings and risk education should, where possible, take into account prevailing national and international standards, including the International Mine Action Standards.

(d) Warnings and risk education should be provided to the affected civilian population which comprises civilians living in or around areas containing explosive remnants of war and civilians who transit such areas.

(e) Warnings should be given, as soon as possible, depending on the context and the information available. A risk education programme should replace a warnings programme as soon as possible. Warnings and risk education always should be provided to the affected communities at the earliest possible time.

(f) Parties to a conflict should employ third parties such as international organisations and non-governmental organisations when they do not have the resources and skills to deliver efficient risk education.

(g) Parties to a conflict should, if possible, provide additional resources for warnings and risk education. Such items might include: provision of logistical support, production of risk education materials, financial support and general cartographic information.

Marking, fencing, and monitoring of an explosive remnants of war affected area

(h) When possible, at any time during the course of a conflict and thereafter, where explosive remnants of war exist the parties to a conflict should, at the earliest possible time and to the maximum extent possible, ensure that areas containing explosive remnants of war are marked, fenced and monitored so as to ensure the effective exclusion of civilians, in accordance with the following provisions.

(i) Warning signs based on methods of marking recognised by the affected community should be utilised in the marking of suspected hazardous areas. Signs and other hazardous area boundary markers should as far as possible be visible, legible, durable and resistant to environmental effects and should clearly identify which side of the marked boundary is considered to be within the explosive remnants of war affected area and which side is considered to be safe.

(j) An appropriate structure should be put in place with responsibility for the monitoring and maintenance of permanent and temporary marking systems, integrated with national and local risk education programmes.

### 3. Generic preventive measures

States producing or procuring explosive ordnance should to the extent possible and as appropriate endeavour to ensure that the following measures are implemented and respected during the life-cycle of explosive ordnance.

#### (a) Munitions manufacturing management

(i) Production processes should be designed to achieve the greatest reliability of munitions.

(ii) Production processes should be subject to certified quality control measures.

(iii) During the production of explosive ordnance, certified quality assurance standards that are internationally recognised should be applied.

(iv) Acceptance testing should be conducted through live-fire testing over a range of conditions or through other validated procedures.

(v) High reliability standards should be required in the course of explosive ordnance transactions and transfers.

#### (b) Munitions management

In order to ensure the best possible long-term reliability of explosive ordnance, States are encouraged to apply best practice norms and operating procedures with respect to its storage, transport, field storage, and handling in accordance with the following guidance.

(i) Explosive ordnance, where necessary, should be stored in secure facilities or appropriate containers that protect the explosive ordnance and its components in a controlled atmosphere, if necessary.

(ii) A State should transport explosive ordnance to and from production facilities, storage facilities and the field in a manner that minimises damage to the explosive ordnance.

(iii) Appropriate containers and controlled environments, where necessary, should be used by a State when stockpiling and transporting explosive ordnance.

(iv) The risk of explosions in stockpiles should be minimised by the use of appropriate stockpile arrangements.

(v) States should apply appropriate explosive ordnance logging, tracking and testing procedures, which should include information on the date of manufacture of each number, lot or batch of explosive ordnance, and information on where the explosive ordnance has been, under what conditions it has been stored, and to what environmental factors it has been exposed.

(vi) Periodically, stockpiled explosive ordnance should undergo, where appropriate, live-firing testing to ensure that munitions function as desired.

(vii) Sub-assemblies of stockpiled explosive ordnance should, where appropriate, undergo laboratory testing to ensure that munitions function as desired.

(viii) Where necessary, appropriate action, including adjustment to the expected shelf-life of ordnance, should be taken as a result of information acquired by logging, tracking and testing procedures, in order to maintain the reliability of stockpiled explosive ordnance.

#### (c) Training

The proper training of all personnel involved in the handling, transporting and use of explosive ordnance is an important factor in seeking to ensure its reliable operation as intended. States should therefore adopt and maintain suitable training programmes to ensure that personnel are properly trained with regard to the munitions with which they will be required to deal.

#### (d) Transfer

A State planning to transfer explosive ordnance to another State that did not previously possess that type of explosive ordnance should endeavour to ensure that the receiving State has the capability to store, maintain and use that explosive ordnance correctly.

#### (e) Future production

A State should examine ways and means of improving the reliability of explosive ordnance that it intends to produce or procure, with a view to achieving the highest possible reliability.

**San Remo Manual on International Law Applicable to Armed  
Conflicts at Sea, 1994**

# **San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994**

Full text

## **PART I : GENERAL PROVISIONS**

### **SECTION I : SCOPE OF APPLICATION OF THE LAW**

1. The parties to an armed conflict at sea are bound by the principles and rules of international humanitarian law from the moment armed force is used.

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

### **SECTION II : ARMED CONFLICTS AND THE LAW OF SELF-DEFENCE**

3. The exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter of the United Nations is subject to the conditions and limitations laid down in the Charter, and arising from general international law, including in particular the principles of necessity and proportionality.

4. The principles of necessity and proportionality apply equally to armed conflict at sea and require that the conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict, required to repel an armed attack against it and to restore its security.

5. How far a State is justified in its military actions against the enemy will depend upon the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed.

6. The rules set out in this document and any other rules of international humanitarian law shall apply equally to all parties to the conflict. The equal application of these rules to all parties to the conflict shall not be affected by the international responsibility that may have been incurred by any of them for the outbreak of the conflict.

### **SECTION III : ARMED CONFLICTS IN WHICH THE SECURITY COUNCIL HAS TAKEN ACTION**

7. Notwithstanding any rule in this document or elsewhere on the law of neutrality, where the Security Council, acting in accordance with its powers under Chapter VII of the Charter of the United Nations, has identified one or more of the parties to an armed conflict as responsible for resorting to force in violation of international law, neutral States:

- (a) are bound not to lend assistance other than humanitarian assistance to that State; and
- (b) may lend assistance to any State which has been the victim of a breach of the peace or an act of aggression by that State.

8. Where, in the course of an international armed conflict, the Security Council has taken preventive or enforcement action involving the application of economic measures under Chapter VII of the Charter, Member States of the United Nations may not rely upon the law of neutrality to justify conduct which would be incompatible with their obligations under the Charter or under decisions of the Security Council.

9. Subject to paragraph 7, where the Security Council has taken a decision to use force, or to authorize the use of force by a particular State or States, the rules set out in this document and any other rules of international humanitarian law applicable to armed conflicts at sea shall apply to all parties to any such conflict which may ensue.

### **SECTION IV : AREAS OF NAVAL WARFARE**

10. Subject to other applicable rules of the law of armed conflict at sea contained in this document or elsewhere, hostile actions by naval forces may be conducted in, on or over:

- (a) the territorial sea and internal waters, the land territories, the exclusive economic zone and continental shelf and, where applicable, the archipelagic waters, of belligerent States;
- (b) the high seas; and
- (c) subject to paragraphs 34 and 35, the exclusive economic zone and the continental shelf of neutral States.

11. The parties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing:

- (a) rare or fragile ecosystems; or
- (b) the habitat of depleted, threatened or endangered species or other forms of marine life.

12. In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States.

## **SECTION V : DEFINITIONS**

13. For the purposes of this document:

- (a) international humanitarian law means international rules, established by treaties or custom, which limit the right of parties to a conflict to use the methods or means of warfare of their choice, or which protect States not party to the conflict or persons and objects that are, or may be, affected by the conflict;
- (b) attack means an act of violence, whether in offence or in defence;
- (c) collateral casualties or collateral damage means the loss of life of, or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives;
- (d) neutral means any State not party to the conflict;
- (e) hospital ships, coastal rescue craft and other medical transports means vessels that are protected under the Second Geneva Convention of 1949 and Additional Protocol I of 1977;
- (f) medical aircraft means an aircraft that is protected under the Geneva Conventions of 1949 and Additional Protocol I of 1977;
- (g) warship means a ship belonging to the armed forces of a State bearing the external marks distinguishing the character and nationality of such a ship, under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline;
- (h) auxiliary vessel means a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service;
- (i) merchant vessel means a vessel, other than a warship, an auxiliary vessel, or a State vessel such as a customs or police vessel, that is engaged in commercial or private service;
- (j) military aircraft means an aircraft operated by commissioned units of the armed forces of a State having the military marks of that State, commanded by a member of the armed forces and manned by a crew subject to regular armed forces discipline;
- (k) auxiliary aircraft means an aircraft, other than a military aircraft, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service;
- (l) civil aircraft means an aircraft other than a military, auxiliary, or State aircraft such as a customs or police aircraft, that is engaged in commercial or private service;
- (m) civil airliner means a civil aircraft that is clearly marked and engaged in carrying civilian passengers in scheduled or non-scheduled services along Air Traffic Service routes.

## **PART II : REGIONS OF OPERATIONS**

### **SECTION I : INTERNAL WATERS, TERRITORIAL SEA AND ACHIPELAGIC WATERS**

14. Neutral waters consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters, of neutral States. Neutral airspace consists of the airspace over neutral waters and the land territory of neutral States.

15. Within and over neutral waters, including neutral waters comprising an international strait and waters in which the right of archipelagic sea lanes passage may be exercised, hostile actions by belligerent forces are forbidden. A neutral State must take such measures as are consistent with Section II of this Part, including the exercise of surveillance, as the means at its disposal allow, to prevent the violation of its neutrality by belligerent forces.

16. Hostile actions within the meaning of paragraph 15 include, inter alia:

- (a) attack on or capture of persons or objects located in, on or over neutral waters or territory;
- (b) use as a base of operations, including attack on or capture of persons or objects located outside neutral waters, if the attack or seizure is conducted by belligerent forces located in, on or over neutral waters;
- (c) laying of mines; or
- (d) visit, search, diversion or capture.

17. Belligerent forces may not use neutral waters as a sanctuary.

18. Belligerent military and auxiliary aircraft may not enter neutral airspace. Should they do so, the neutral State shall use the means at its disposal to require the aircraft to land within its territory and shall intern the aircraft and its crew for the duration of the armed conflict. Should the aircraft fail to follow the instructions to land, it may be attacked, subject to the special rules relating to medical aircraft as specified in paragraphs 181-183.

19. Subject to paragraphs 29 and 33, a neutral State may, on a non-discriminatory basis, condition, restrict or prohibit the entrance to or passage through its neutral waters by belligerent warships and auxiliary vessels.

20. Subject to the duty of impartiality, and to paragraphs 21 and 23-33, and under such regulations as it may establish, a neutral State may, without jeopardizing its neutrality, permit the following acts within its neutral waters:

- (a) passage through its territorial sea, and where applicable its archipelagic waters, by warships, auxiliary vessels and prizes of belligerent States; warships, auxiliary vessels and prizes may employ pilots of the neutral State during passage;
- (b) replenishment by a belligerent warship or auxiliary vessel of its food, water and fuel sufficient to reach a port in its own territory; and
- (c) repairs of belligerent warships or auxiliary vessels found necessary by the neutral State to make them seaworthy; such repairs may not restore or increase their fighting strength.

21. A belligerent warship or auxiliary vessel may not extend the duration of its passage through neutral waters, or its presence in those waters for replenishment or repair, for longer than 24 hours unless unavoidable on account of damage or the stress of weather. The foregoing rule does not apply in international straits and waters in which the right of archipelagic sea lanes passage is exercised.

22. Should a belligerent State be in violation of the regime of neutral waters, as set out in this document, the neutral State is under an obligation to take the measures necessary to terminate the violation. If the neutral State fails to terminate the violation of its neutral waters by a belligerent, the opposing belligerent must so notify the neutral State and give that neutral State a reasonable time to terminate the violation by the belligerent. If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.

## **SECTION II : INTERNATIONAL STRAITS AND ARCHIPELAGIC SEA LANES**

### **General rules**

23. Belligerent warships and auxiliary vessels and military and auxiliary aircraft may exercise the rights of passage through, under or over neutral international straits and of archipelagic sea lanes passage provided by general international law.

24. The neutrality of a State bordering an international strait is not jeopardized by the transit passage of belligerent warships, auxiliary vessels, or military or auxiliary aircraft, nor by the innocent passage of belligerent warships or auxiliary vessels through that strait.

25. The neutrality of an archipelagic State is not jeopardized by the exercise of archipelagic sea lanes passage by belligerent warships, auxiliary vessels, or military or auxiliary aircraft.

26. Neutral warships, auxiliary vessels, and military and auxiliary aircraft may exercise the rights of passage provided by general international law through, under and over belligerent international straits and archipelagic waters. The neutral State should, as a precautionary measure, give timely notice of its exercise of the rights of

passage to the belligerent State.

#### Transit passage and archipelagic sea lanes passage

27. The rights of transit passage and archipelagic sea lanes passage applicable to international straits and archipelagic waters in peacetime continue to apply in times of armed conflict. The laws and regulations of States bordering straits and archipelagic States relating to transit passage and archipelagic sea lanes passage adopted in accordance with general international law remain applicable.

28. Belligerent and neutral surface ships, submarines and aircraft have the rights of transit passage and archipelagic sea lanes passage through, under, and over all straits and archipelagic waters to which these rights generally apply.

29. Neutral States may not suspend, hamper, or otherwise impede the right of transit passage nor the right of archipelagic sea lanes passage.

30. A belligerent in transit passage through, under and over a neutral international strait, or in archipelagic sea lanes passage through, under and over neutral archipelagic waters, is required to proceed without delay, to refrain from the threat or use of force against the territorial integrity or political independence of the neutral littoral or archipelagic State, or in any other manner inconsistent with the purposes of the Charter of the United Nations, and otherwise to refrain from any hostile actions or other activities not incident to their transit. Belligerents passing through, under and over neutral straits or waters in which the right of archipelagic sea lanes passage applies are permitted to take defensive measures consistent with their security, including launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerents in transit or archipelagic sea lanes passage may not, however, conduct offensive operations against enemy forces, nor use such neutral waters as a place of sanctuary nor as a base of operations.

#### Innocent passage

31. In addition to the exercise of the rights of transit and archipelagic sea lanes passage, belligerent warships and auxiliary vessels may, subject to paragraphs 19 and 21, exercise the right of innocent passage through neutral international straits and archipelagic waters in accordance with general international law.

32. Neutral vessels may likewise exercise the right of innocent passage through belligerent international straits and archipelagic waters.

33. The right of non-suspendable innocent passage ascribed to certain international straits by international law may not be suspended in time of armed conflict.

#### SECTION III : EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF

34. If hostile actions are conducted within the exclusive economic zone or on the continental shelf of a neutral State, belligerent States shall, in addition to observing the other applicable rules of the law of armed conflict at sea, have due regard for the rights and duties of the coastal State, inter alia, for the exploration and exploitation of the economic resources of the exclusive economic zone and the continental shelf and the protection and preservation of the marine environment. They shall, in particular, have due regard for artificial islands, installations, structures and safety zones established by neutral States in the exclusive economic zone and on the continental shelf.

35. If a belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State, the belligerent shall notify that State, and shall ensure, inter alia, that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State. Due regard shall also be given to the protection and preservation of the marine environment.

#### SECTION IV : HIGH SEAS AND SEA-BED BEYOND NATIONAL JURISDICTION

36. Hostile actions on the high seas shall be conducted with due regard for the exercise by neutral States of rights of exploration and exploitation of the natural resources of the sea-bed, and ocean floor, and the subsoil thereof, beyond national jurisdiction.

37. Belligerents shall take care to avoid damage to cables and pipelines laid on the sea-bed which do not

exclusively serve the belligerents.

### **PART III : BASIC RULES AND TARGET DISCRIMINATION**

#### **SECTION I : BASIC RULES**

38. In any armed conflict the right of the parties to the conflict to choose methods or means of warfare is not unlimited.

39. Parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives.

40. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

41. Attacks shall be limited strictly to military objectives. Merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this document.

42. In addition to any specific prohibitions binding upon the parties to a conflict, it is forbidden to employ methods or means of warfare which:

- (a) are of a nature to cause superfluous injury or unnecessary suffering; or
- (b) are indiscriminate, in that:
  - (i) they are not, or cannot be, directed against a specific military objective; or
  - (ii) their effects cannot be limited as required by international law as reflected in this document.

43. It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

44. Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.

45. Surface ships, submarines and aircraft are bound by the same principles and rules.

#### **SECTION II : PRECAUTIONS IN ATTACK**

46. With respect to attacks, the following precautions shall be taken:

- (a) those who plan, decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not objects which are not military objectives are present in an area of attack;
- (b) in the light of the information available to them, those who plan, decide upon or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives;
- (c) they shall furthermore take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral casualties or damage; and
- (d) an attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole; an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.

Section VI of this Part provides additional precautions regarding civil aircraft.

#### **SECTION III : ENEMY VESSELS AND AIRCRAFT EXEMPT FROM ATTACK**

Classes of vessels exempt from attack

47. The following classes of enemy vessels are exempt from attack:

- (a) hospital ships;
- (b) small craft used for coastal rescue operations and other medical transports;
- (c) vessels granted safe conduct by agreement between the belligerent parties including:

- (i) cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war;
- (ii) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
- (d) vessels engaged in transporting cultural property under special protection;
- (e) passenger vessels when engaged only in carrying civilian passengers;
- (f) vessels charged with religious, non-military scientific or philanthropic missions, vessels collecting scientific data of likely military applications are not protected;
- (g) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection;
- (h) vessels designated or adapted exclusively for responding to pollution incidents in the marine environment;
- (i) vessels which have surrendered;
- (j) life rafts and life boats.

#### Conditions of exemption

48. Vessels listed in paragraph 47 are exempt from attack only if they:

- (a) are innocently employed in their normal role;
- (b) submit to identification and inspection when required; and
- (c) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

#### Loss of exemption

##### Hospital ships

49. The exemption from attack of a hospital ship may cease only by reason of a breach of a condition of exemption in paragraph 48 and, in such a case, only after due warning has been given naming in all appropriate cases a reasonable time limit to discharge itself of the cause endangering its exemption, and after such warning has remained unheeded.

50. If after due warning a hospital ship persists in breaking a condition of its exemption, it renders itself liable to capture or other necessary measures to enforce compliance.

51. A hospital ship may only be attacked as a last resort if:

- (a) diversion or capture is not feasible;
- (b) no other method is available for exercising military control;
- (c) the circumstances of non-compliance are sufficiently grave that the hospital ship has become, or may be reasonably assumed to be, a military objective; and
- (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

##### All other categories of vessels exempt from attack

52. If any other class of vessel exempt from attack breaches any of the conditions of its exemption in paragraph 48, it may be attacked only if:

- (a) diversion or capture is not feasible;
- (b) no other method is available for exercising military control;
- (c) the circumstances of non-compliance are sufficiently grave that the vessel has become, or may be reasonably assumed to be, a military objective; and
- (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

#### Classes of aircraft exempt from attack

53. The following classes of enemy aircraft are exempt from attack:

- (a) medical aircraft;
- (b) aircraft granted safe conduct by agreement between the parties to the conflicts; and
- (c) civil airliners.

#### Conditions of exemption for medical aircraft

54. Medical aircraft are exempt from attack only if they:

- (a) have been recognized as such;
- (b) are acting in compliance with an agreement as specified in paragraph 177;
- (c) fly in areas under the control of own or friendly forces; or
- (d) fly outside the area of armed conflict.

In other instances, medical aircraft operate at their own risk.

Conditions of exemption for aircraft granted safe conduct

55. Aircraft granted safe conduct are exempt from attack only if they:

- (a) are innocently employed in their agreed role;
- (b) do not intentionally hamper the movements of combatants; and
- (c) comply with the details of the agreement, including availability for inspection.

Conditions of exemption for civil airliners

56. Civil airliners are exempt from attack only if they:

- (a) are innocently employed in their normal role; and
- (b) do not intentionally hamper the movements of combatants.

Loss of exemption

57. If aircraft exempt from attack breach any of the applicable conditions of their exemption as set forth in paragraphs 54-56, they may be attacked only if:

- (a) diversion for landing, visit and search, and possible capture, is not feasible;
- (b) no other method is available for exercising military control;
- (c) the circumstances of non-compliance are sufficiently grave that the aircraft has become, or may be reasonably assumed to be, a military objective; and
- (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or anticipated.

58. In case of doubt whether a vessel or aircraft exempt from attack is being used to make an effective contribution to military action, it shall be presumed not to be so used.

#### **SECTION IV : OTHER ENEMY VESSELS AND AIRCRAFT**

Enemy merchant vessels

59. Enemy merchant vessels may only be attacked if they meet the definition of a military objective in paragraph 40.

60. The following activities may render enemy merchant vessels military objectives:

- (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
- (b) acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;
- (c) being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
- (d) sailing under convoy of enemy warships or military aircraft;
- (e) refusing an order to stop or actively resisting visit, search or capture;
- (f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely defective systems such as chaff; or
- (g) otherwise making an effective contribution to military action, e.g., carrying military materials.

61. Any attacks on these vessels is subject to the basic rules set out in paragraphs 38-46.

Enemy civil aircraft

62. Enemy civil aircraft may only be attacked if they meet the definition of a military objective in paragraph 40.

63. The following activities may render enemy civil aircraft military objectives:

- (a) engaging in acts of war on behalf of the enemy, e.g., laying mines, minesweeping, laying or monitoring acoustic sensors, engaging in electronic warfare, intercepting or attacking other civil aircraft, or providing targeting information to enemy forces;
- (b) acting as an auxiliary aircraft to an enemy's armed forces, e.g., transporting troops or military cargo, or refuelling military aircraft;
- (c) being incorporated into or assisting the enemy's intelligence-gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
- (d) flying under the protection of accompanying enemy warships or military aircraft;
- (e) refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire control equipment that could reasonably be construed to be part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent military aircraft;
- (f) being armed with air-to-air or air-to-surface weapons; or
- (g) otherwise making an effective contribution to military action.

64. Any attack on these aircraft is subject to the basic rules set out in paragraphs 38-46.

#### Enemy warships and military aircraft

65. Unless they are exempt from attack under paragraphs 47 or 53, enemy warships and military aircraft and enemy auxiliary vessels and aircraft are military objectives within the meaning of paragraph 40.

66. They may be attacked, subject to the basic rules in paragraphs 38-46.

### **SECTION V : NEUTRAL MERCHANT VESSELS AND CIVIL AIRCRAFT**

#### Neutral merchant vessels

67. Merchant vessels flying the flag of neutral States may not be attacked unless they:

- (a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
- (b) engage in belligerent acts on behalf of the enemy;
- (c) act as auxiliaries to the enemy's armed forces;
- (d) are incorporated into or assist the enemy's intelligence system;
- (e) sail under convoy of enemy warships or military aircraft; or
- (f) otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.

68. Any attack on these vessels is subject to the basic rules in paragraphs 38-46.

69. The mere fact that a neutral merchant vessel is armed provides no grounds for attacking it.

#### Neutral civil aircraft

70. Civil aircraft bearing the marks of neutral States may not be attacked unless they:

- (a) are believed on reasonable grounds to be carrying contraband, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible;
- (b) engage in belligerent acts on behalf of the enemy;
- (c) act as auxiliaries to the enemy's armed forces;
- (d) are incorporated into or assist the enemy's intelligence system; or
- (e) otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or

intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.

71. Any attack on these aircraft is subject to the basic rules in paragraphs 38-46.

#### **SECTION VI : PRECAUTIONS REGARDING CIVIL AIRCRAFT**

72. Civil aircraft should avoid areas of potentially hazardous military activity.

73. In the immediate vicinity of naval operations, civil aircraft shall comply with instructions from the belligerents regarding their heading and altitude.

74. Belligerent and neutral States concerned, and authorities providing air traffic services, should establish procedures whereby commanders of warships and military aircraft are aware on a continuous basis of designated routes assigned to or flight plans filed by civil aircraft in the area of military operations, including information on communication channels, identification modes and codes, destination, passengers and cargo.

75. Belligerent and neutral States should ensure that a Notice to Airmen (NOTAM) is issued providing information on military activities in areas potentially hazardous to civil aircraft, including activation of danger areas or temporary airspace restrictions. This NOTAM should include information on:

- (a) frequencies upon which the aircraft should maintain a continuous listening watch;
- (b) continuous operation of civil weather-avoidance radar and identification modes and codes;
- (c) altitude, course and speed restrictions;
- (d) procedures to respond to radio contact by the military forces and to establish two-way communications; and
- (e) possible action by the military forces if the NOTAM is not complied with and the civil aircraft is perceived by those military forces to be a threat.

76. Civil aircraft should file the required flight plan with the cognizant Air Traffic Service, complete with information as to registration, destination, passengers, cargo, emergency communication channels, identification modes and codes, updates en route and carry certificates as to registration, airworthiness, passengers and cargo. They should not deviate from a designated Air Traffic Service route or flight plan without Air Traffic Control clearance unless unforeseen conditions arise, e.g., safety or distress, in which case appropriate notification should be made immediately.

77. If a civil aircraft enters an area of potentially hazardous military activity, it should comply with relevant NOTAMs. Military forces should use all available means to identify and warn the civil aircraft, by using, inter alia, secondary surveillance radar modes and codes, communications, correlation with flight plan information, interception by military aircraft, and, when possible, contacting the appropriate Air Traffic Control facility.

#### **PART IV : METHODS AND MEANS OF WARFARE AT SEA**

##### **SECTION I : MEANS OF WARFARE**

###### **Missiles and other projectiles**

78. Missiles and projectiles, including those with over-the-horizon capabilities, shall be used in conformity with the principles of target discrimination as set out in paragraphs 38-46.

###### **Torpedoes**

79. It is prohibited to use torpedoes which do not sink or otherwise become harmless when they have completed their run.

###### **Mines**

80. Mines may only be used for legitimate military purposes including the denial of sea areas to the enemy.

81. Without prejudice to the rules set out in paragraph 82, the parties to the conflict shall not lay mines unless effective neutralization occurs when they have become detached or control over them is otherwise lost.

82. It is forbidden to use free-floating mines unless:

- (a) they are directed against a military objective; and
- (b) they become harmless within an hour after loss of control over them.

83. The laying of armed mines or the arming of pre-laid mines must be notified unless the mines can only detonate against vessels which are military objectives.

84. Belligerents shall record the locations where they have laid mines.

85. Mining operations in the internal waters, territorial sea or archipelagic waters of a belligerent State should provide, when the mining is first executed, for free exit of shipping of neutral States.

86. Mining of neutral waters by a belligerent is prohibited.

87. Mining shall not have the practical effect of preventing passage between neutral waters and international waters.

88. The minelaying States shall pay due regard to the legitimate uses of the high seas by, inter alia, providing safe alternative routes for shipping of neutral States.

89. Transit passage through international straits and passage through waters subject to the right of archipelagic sea lanes passage shall not be impeded unless safe and convenient alternative routes are provided.

90. After the cessation of active hostilities, parties to the conflict shall do their utmost to remove or render harmless the mines they have laid, each party removing its own mines. With regard to mines laid in the territorial seas of the enemy, each party shall notify their position and shall proceed with the least possible delay to remove the mines in its territorial sea or otherwise render the territorial sea safe for navigation.

91. In addition to their obligations under paragraph 90, parties to the conflict shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance, including in appropriate circumstances joint operations, necessary to remove minefields or otherwise render them harmless.

92. Neutral States do not commit an act inconsistent with the laws of neutrality by clearing mines laid in violation of international law.

## **SECTION II : METHODS OF WARFARE**

### **Blockade**

93. A blockade shall be declared and notified to all belligerents and neutral States.

94. The declaration shall specify the commencement, duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.

95. A blockade must be effective. The question whether a blockade is effective is a question of fact.

96. The force maintaining the blockade may be stationed at a distance determined by military requirements.

97. A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document.

98. Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked.

99. A blockade must not bar access to the ports and coasts of neutral States.

100. A blockade must be applied impartially to the vessels of all States.

101. The cessation, temporary lifting, re-establishment, extension or other alteration of a blockade must be declared and notified as in paragraphs 93 and 94.

102. The declaration or establishment of a blockade is prohibited if:

- (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
- (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

- (a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
- (b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

104. The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.

### Zones

105. A belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea.

106. Should a belligerent, as an exceptional measure, establish such a zone:

- (a) the same body of law applies both inside and outside the zone;
- (b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principles of proportionality;
- (c) due regard shall be given to the rights of neutral States to legitimate uses of the seas;
- (d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided:
  - (i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State;
  - (ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; and
- (e) the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.

107. Compliance with the measures taken by one belligerent in the zone shall not be construed as an act harmful to the opposing belligerent.

108. Nothing in this Section should be deemed to derogate from the customary belligerent right to control neutral vessels and aircraft in the immediate vicinity of naval operations.

### **SECTION III : DECEPTION, RUSES OF WAR AND PERFIDY**

109. Military and auxiliary aircraft are prohibited at all times from feigning exempt, civilian or neutral status.

110. Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag, and at all times from actively simulating the status of:

- (a) hospital ships, small coastal rescue craft or medical transports;
- (b) vessels on humanitarian missions;
- (c) passenger vessels carrying civilian passengers;
- (d) vessels protected by the United Nations flag;
- (e) vessels guaranteed safe conduct by prior agreement between the parties, including cartel vessels;
- (f) vessels entitled to be identified by the emblem of the red cross or red crescent; or
- (g) vessels engaged in transporting cultural property under special protection.

111. Perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or

is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy. Perfidious acts include the launching of an attack while feigning:

- (a) exempt, civilian, neutral or protected United Nations status;
- (b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts.

## **PART V : MEASURES SHORT OF ATTACK: INTERCEPTION, VISIT, SEARCH, DIVERSION AND CAPTURE**

### **SECTION I : DETERMINATION OF ENEMY CHARACTER OF VESSELS AND AIRCRAFT**

112. The fact that a merchant vessel is flying the flag of an enemy State or that a civil aircraft bears the marks of an enemy State is conclusive evidence of its enemy character.

113. The fact that a merchant vessel is flying the flag of a neutral State or a civil aircraft bears the marks of a neutral State is *prima facie* evidence of its neutral character.

114. If the commander of a warship suspects that a merchant vessel flying a neutral flag in fact has enemy character, the commander is entitled to exercise the right of visit and search, including the right of diversion for search under paragraph 121.

115. If the commander of a military aircraft suspects that a civil aircraft with neutral marks in fact has enemy character, the commander is entitled to exercise the right of interception and, if circumstances require, the right to divert for the purpose of visit and search.

116. If, after visit and search, there is reasonable ground for suspicion that the merchant vessel flying a neutral flag or a civil aircraft with neutral marks has enemy character, the vessel or aircraft may be captured as prize subject to adjudication.

117. Enemy character can be determined by registration, ownership, charter or other criteria.

### **SECTION II : VISIT AND SEARCH OF MERCHANT VESSELS**

#### Basic rules

118. In exercising their legal rights in an international armed conflict at sea, belligerent warships and military aircraft have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.

119. As an alternative to visit and search, a neutral merchant vessel may, with its consent, be diverted from its declared destination.

#### Merchant vessels under convoy of accompanying neutral warships

120. A neutral merchant vessel is exempt from the exercise of the right of visit and search if it meets the following conditions:

- (a) it is bound for a neutral port;
- (b) it is under the convoy of an accompanying neutral warship of the same nationality or a neutral warship of a State with which the flag State of the merchant vessel has concluded an agreement providing for such convoy;
- (c) the flag State of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; and
- (d) the commander of the neutral warship provides, if requested by the commander of an intercepting belligerent warship or military aircraft, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.

#### Diversion for the purpose of visit and search

121. If visit and search at sea is impossible or unsafe, a belligerent warship or military aircraft may divert a merchant vessel to an appropriate area or port in order to exercise the right of visit and search.

#### Measures of supervision

122. In order to avoid the necessity of visit and search, belligerent States may establish reasonable measures for the inspection of cargo of neutral merchant vessels and certification that a vessel is not carrying contraband.

123. The fact that a neutral merchant vessel has submitted to such measures of supervision as the inspection of its cargo and grant of certificates of non-contraband cargo by one belligerent is not an act of unneutral service with regard to an opposing belligerent.

124. In order to obviate the necessity for visit and search, neutral States are encouraged to enforce reasonable control measures and certification procedures to ensure that their merchant vessels are not carrying contraband.

### **SECTION III : INTERCEPTION, VISIT AND SEARCH OF CIVIL AIRCRAFT**

#### **Basic rules**

125. In exercising their legal rights in an international armed conflict at sea, belligerent military aircraft have a right to intercept civil aircraft outside neutral airspace where there are reasonable grounds for suspecting they are subject to capture. If, after interception, reasonable grounds for suspecting that a civil aircraft is subject to capture still exist, belligerent military aircraft have the right to order the civil aircraft to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.

If there is no belligerent airfield that is safe and reasonably accessible for visit and search, a civil aircraft may be diverted from its declared destination.

126. As an alternative to visit and search:

- (a) an enemy civil aircraft may be diverted from its declared destination;
- (b) a neutral civil aircraft may be diverted from its declared destination with its consent.

Civil aircraft under the operational control of an accompanying neutral military aircraft or warship

127. A neutral civil aircraft is exempt from the exercise of the right of visit and search if it meets the following conditions:

- (a) it is bound for a neutral airfield;
- (b) it is under the operational control of an accompanying:
  - (i) neutral military aircraft or warship of the same nationality; or
  - (ii) neutral military aircraft or warship of a State with which the flag State of the civil aircraft has concluded an agreement providing for such control;
- (c) the flag State of the neutral military aircraft or warship warrants that the neutral civil aircraft is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; and
- (d) the commander of the neutral military aircraft or warship provides, if requested by the commander of an intercepting belligerent military aircraft, all information as to the character of the civil aircraft and its cargo as could otherwise be obtained by visit and search.

#### **Measures of interception and supervision**

128. Belligerent States should promulgate and adhere to safe procedures for intercepting civil aircraft as issued by the competent international organization.

129. Civil aircraft should file the required flight plan with the cognizant Air Traffic Service, complete with information as to registration, destination, passengers, cargo, emergency communication channels, identification modes and codes, updates en route and carry certificates as to registration, airworthiness, passengers and cargo. They should not deviate from a designated Air Traffic Service route or flight plan without Air Traffic Control clearance unless unforeseen conditions arise, e.g., safety or distress, in which case appropriate notification should be made immediately.

130. Belligerents and neutrals concerned, and authorities providing air traffic services, should establish procedures whereby commanders of warships and military aircraft are continuously aware of designated routes assigned to and flight plans filed by civil aircraft in the area of military operations, including information on communication channels, identification modes and codes, destination, passengers and cargo.

131. In the immediate vicinity of naval operations, civil aircraft shall comply with instructions from the combatants regarding their heading and altitude.

132. In order to avoid the necessity of visit and search, belligerent States may establish reasonable measures for the inspection of the cargo of neutral civil aircraft and certification that an aircraft is not carrying contraband.

133. The fact that a neutral civil aircraft has submitted to such measures of supervision as the inspection of its cargo and grant of certificates of non-contraband cargo by one belligerent is not an act of unneutral service with regard to an opposing belligerent.

134. In order to obviate the necessity for visit and search, neutral States are encouraged to enforce reasonable control measures and certification procedures to ensure that their civil aircraft are not carrying contraband.

#### **SECTION IV : CAPTURE OF ENEMY VESSELS AND GOODS**

135. Subject to the provisions of paragraph 136, enemy vessels, whether merchant or otherwise, and goods on board such vessels may be captured outside neutral waters. Prior exercise of visit and search is not required.

136. The following vessels are exempt from capture:

- (a) hospital ships and small craft used for coastal rescue operations;
- (b) other medical transports, so long as they are needed for the wounded, sick and shipwrecked on board;
- (c) vessels granted safe conduct by agreement between the belligerent parties including:
  - (i) cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war; and
  - (ii) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
- (d) vessels engaged in transporting cultural property under special protection;
- (e) vessels charged with religious, non-military scientific or philanthropic missions; vessels collecting scientific data of likely military applications are not protected;
- (f) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection; and
- (g) vessels designed or adapted exclusively for responding to pollution incidents in the marine environment when actually engaged in such activities.

137. Vessels listed in paragraph 136 are exempt from capture only if they:

- (a) are innocently employed in their normal role;
- (b) do not commit acts harmful to the enemy;
- (c) immediately submit to identification and inspection when required; and
- (d) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

138. Capture of a merchant vessel is exercised by taking such vessel as prize for adjudication. If military circumstances preclude taking such a vessel as prize at sea, it may be diverted to an appropriate area or port in order to complete capture. As an alternative to capture, an enemy merchant vessel may be diverted from its declared destination.

139. Subject to paragraph 140, a captured enemy merchant vessel may, as an exceptional measure, be destroyed when military circumstances preclude taking or sending such a vessel for adjudication as an enemy prize, only if the following criteria are met beforehand:

- (a) the safety of passengers and crew is provided for; for this purpose, the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured in the prevailing sea and weather conditions by the proximity of land or the presence of another vessel which is in a position to take them on board;
- (b) documents and papers relating to the prize are safeguarded; and
- (c) if feasible, personal effects of the passengers and crew are saved.

140. The destruction of enemy passenger vessels carrying only civilian passengers is prohibited at sea. For the safety of the passengers, such vessels shall be diverted to an appropriate area or port in order to complete capture.

#### **SECTION V : CAPTURE OF ENEMY CIVIL AIRCRAFT AND GOODS**

141. Subject to the provisions of paragraph 142, enemy civil aircraft and goods on board such aircraft may be captured outside neutral airspace. Prior exercise of visit and search is not required.

142. The following aircraft are exempt from capture:

- (a) medical aircraft; and
- (b) aircraft granted safe conduct by agreement between the parties to the conflict.

143. Aircraft listed in paragraph 142 are exempt from capture only if they:

- (a) are innocently employed in their normal role;
- (b) do not commit acts harmful to the enemy;
- (c) immediately submit to interception and identification when required;
- (d) do not intentionally hamper the movement of combatants and obey orders to divert from their track when required; and
- (e) are not in breach of a prior agreement.

144. Capture is exercised by intercepting the enemy civil aircraft, ordering it to proceed to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible and, on landing, taking the aircraft as a prize for adjudication. As an alternative to capture, an enemy civil aircraft may be diverted from its declared destination.

145. If capture is exercised, the safety of passengers and crew and their personal effects must be provided for. The documents and papers relating to the prize must be safeguarded.

#### **SECTION VI : CAPTURE OF NEUTRAL MERCHANT VESSELS AND GOODS**

146. Neutral merchant vessels are subject to capture outside neutral waters if they are engaged in any of the activities referred to in paragraph 67 or if it is determined as a result of visit and search or by other means, that they:

- (a) are carrying contraband;
- (b) are on a voyage especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy;
- (c) are operating directly under enemy control, orders, charter, employment or direction;
- (d) present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
- (e) are violating regulations established by a belligerent within the immediate area of naval operations; or
- (f) are breaching or attempting to breach a blockade.

Capture of a neutral merchant vessel is exercised by taking such vessel as prize for adjudication.

147. Goods on board neutral merchant vessels are subject to capture only if they are contraband.

148. Contraband is defined as goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict.

149. In order to exercise the right of capture referred to in paragraphs 146(a) and 147, the belligerent must have published contraband lists. The precise nature of a belligerent's contraband list may vary according to the particular circumstances of the armed conflict. Contraband lists shall be reasonably specific.

150. Goods not on the belligerent's contraband list are 'free goods', that is, not subject to capture. As a minimum, 'free goods' shall include the following:

- (a) religious objects;
- (b) articles intended exclusively for the treatment of the wounded and sick and for the prevention of disease;
- (c) clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe that such goods will be diverted to other purpose, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes;
- (d) items destined for prisoners of war, including individual parcels and collective relief shipments containing

- food, clothing, educational, cultural, and recreational articles;
- (e) goods otherwise specifically exempted from capture by international treaty or by special arrangement between belligerents; and
  - (f) other goods not susceptible for use in armed conflict,

151. Subject to paragraph 152, a neutral vessel captured in accordance with paragraph 146 may, as an exceptional measure, be destroyed when military circumstances preclude taking or sending such a vessel for adjudication as an enemy prize, only if the following criteria are met beforehand:

- (a) the safety of passengers and crew is provided for; for this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured in the prevailing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board;
- (b) documents and papers relating to the captured vessel are safeguarded; and
- (c) if feasible, personal effects of the passengers and crew are saved.

Every effort should be made to avoid destruction of a captured neutral vessel. Therefore, such destruction shall not be ordered without there being entire satisfaction that the captured vessel can neither be sent into a belligerent port, nor diverted, nor properly released. A vessel may not be destroyed under this paragraph for carrying contraband unless the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo. Destruction shall be subject to adjudication.

152. The destruction of captured neutral passenger vessels carrying civilian passengers is prohibited at sea. For the safety of the passengers, such vessels shall be diverted to an appropriate port in order to complete capture provided for in paragraph 146.

#### **SECTION VII : CAPTURE OF NEUTRAL CIVIL AIRCRAFT AND GOODS**

153. Neutral civil aircraft are subject to capture outside neutral airspace if they are engaged in any of the activities in paragraph 70 or if it is determined as a result of visit and search or by any other means, that they:

- (a) are carrying contraband;
- (b) are on a flight especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy;
- (c) are operating directly under enemy control, orders, charter, employment or direction;
- (d) present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
- (e) are violating regulations established by a belligerent within the immediate area of naval operations; or
- (f) are engaged in a breach of blockade.

154. Goods on board neutral civil aircraft are subject to capture only if they are contraband.

155. The rules regarding contraband as prescribed in paragraphs 148-150 shall also apply to goods on board neutral civil aircraft.

156. Capture is exercised by intercepting the neutral civil aircraft, ordering it to proceed to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible and, on landing and after visit and search, taking it as prize for adjudication. If there is no belligerent airfield that is safe and reasonably accessible, a neutral civil aircraft may be diverted from its declared destination.

157. As an alternative to capture, a neutral civil aircraft may, with its consent, be diverted from its declared destination.

158. If capture is exercised, the safety of passengers and crew and their personal effects must be provided for. The documents and papers relating to the prize must be safeguarded.

#### **PART VI : PROTECTED PERSONS, MEDICAL TRANSPORTS AND MEDICAL AIRCRAFT GENERAL RULES**

159. Except as provided for in paragraph 171, the provisions of this Part are not to be construed as in any way departing from the provisions of the Second Geneva Convention of 1949 and Additional Protocol I of 1977 which

contain detailed rules for the treatment of the wounded, sick and shipwrecked and for medical transports.

160. The parties to the conflict may agree, for humanitarian purposes, to create a zone in a defined area of the sea in which only activities consistent with those humanitarian purposes are permitted.

#### **SECTION I : PROTECTED PERSONS**

161. Persons on board vessels and aircraft having fallen into the power of a belligerent or neutral shall be respected and protected. While at sea and thereafter until determination of their status, they shall be subject to the jurisdiction of the State exercising power over them.

162. Members of the crews of hospital ships may not be captured during the time they are in the service of these vessels. Members of the crews of rescue craft may not be captured while engaging in rescue operations.

163. Persons on board other vessels or aircraft exempt from capture listed in paragraphs 136 and 142 may not be captured.

164. Religious and medical personnel assigned to the spiritual and medical care of the wounded, sick and shipwrecked shall not be considered prisoners of war. They may, however, be retained as long as their services for the medical or spiritual needs of prisoners of war are needed.

165. Nationals of an enemy State, other than those specified in paragraphs 162-164, are entitled to prisoner-of-war status and may be made prisoners of war if they are:

- (a) members of the enemy's armed forces;
- (b) persons accompanying the enemy's armed forces;
- (c) crew members of auxiliary vessels or auxiliary aircraft;
- (d) crew members of enemy merchant vessels or civil aircraft not exempt from capture, unless they benefit from more favourable treatment under other provisions of international law; or
- (e) crew members of neutral merchant vessels or civil aircraft that have taken a direct part in the hostilities on the side of the enemy, or served as an auxiliary for the enemy.

166. Nationals of a neutral State:

- (a) who are passengers on board enemy or neutral vessels or aircraft are to be released and may not be made prisoners of war unless they are members of the enemy's armed forces or have personally committed acts of hostility against the captor;
- (b) who are members of the crew of enemy warships or auxiliary vessels or military aircraft or auxiliary aircraft are entitled to prisoner-of-war status and may be made prisoners of war;
- (c) who are members of the crew of enemy or neutral merchant vessels or civil aircraft are to be released and may not be made prisoners of war unless the vessel or aircraft has committed an act covered by paragraphs 60, 63, 67 or 70, or the member of the crew has personally committed an act of hostility against the captor.

167. Civilian persons other than those specified in paragraphs 162-166 are to be treated in accordance with the Fourth Geneva Convention of 1949.

168. Persons having fallen into the power of a neutral State are to be treated in accordance with Hague Conventions V and XIII of 1907 and the Second Geneva Convention of 1949.

#### **SECTION II : MEDICAL TRANSPORTS**

169. In order to provide maximum protection for hospital ships from the moment of the outbreak of hostilities, States may beforehand make general notification of the characteristics of their hospital ships as specified in Article 22 of the Second Geneva Convention of 1949. Such notification should include all available information on the means whereby the ship may be identified.

170. Hospital ships may be equipped with purely defective means of defence, such as chaff and flares. The presence of such equipment should be notified.

171. In order to fulfil most effectively their humanitarian mission, hospital ships should be permitted to use cryptographic equipment. The equipment shall not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military advantage.

172. Hospital ships, small craft used for coastal rescue operations and other medical transports are encouraged to implement the means of identification set out in Annex I of Additional Protocol I of 1977.

173. These means of identification are intended only to facilitate identification and do not, of themselves, confer protected status.

### **SECTION III : MEDICAL AIRCRAFT**

174. Medical aircraft shall be protected and respected as specified in the provisions of this document.

175. Medical aircraft shall be clearly marked with the emblem of the red cross or red crescent, together with their national colours, on their lower, upper and lateral surfaces. Medical aircraft are encouraged to implement the other means of identification set out in Annex I of Additional Protocol I of 1977 at all times. Aircraft chartered by the International Committee of the Red Cross may use the same means of identification as medical aircraft. Temporary medical aircraft which cannot, either for lack of time or because of their characteristics, be marked with the distinctive emblem should use the most effective means of identification available.

176. Means of identification are intended only to facilitate identification and do not, of themselves, confer protected status.

177. Parties to the conflict are encouraged to notify medical flights and conclude agreements at all times, especially in areas where control by any party to the conflict is not clearly established. When such an agreement is concluded, it shall specify the altitudes, times and routes for safe operation and should include means of identification and communications.

178. Medical aircraft shall not be used to commit acts harmful to the enemy. They shall not carry any equipment intended for the collection or transmission of intelligence data. They shall not be armed, except for small arms for self-defence, and shall only carry medical personnel and equipment.

179. Other aircraft, military or civilian, belligerent or neutral, that are employed in the search for, rescue or transport of the wounded, sick and shipwrecked, operate at their own risk, unless pursuant to prior agreement between the parties to the conflict.

180. Medical aircraft flying over areas which are physically controlled by the opposing belligerent, or over areas the physical control of which is not clearly established, may be ordered to land to permit inspection. Medical aircraft shall obey any such order.

181. Belligerent medical aircraft shall not enter neutral airspace except by prior agreement. When within neutral airspace pursuant to agreement, medical aircraft shall comply with the terms of the agreement. The terms of the agreement may require the aircraft to land for inspection at a designated airport within the neutral State. Should the agreement so require, the inspection and follow-on action shall be conducted in accordance with paragraphs 182-183.

182. Should a medical aircraft, in the absence of an agreement or in deviation from the terms of an agreement, enter neutral airspace, either through navigational error or because of an emergency affecting the safety of the flight, it shall make every effort to give notice and to identify itself. Once the aircraft is recognized as a medical aircraft by the neutral State, it shall not be attacked but may be required to land for inspection. Once it has been inspected, and if it is determined in fact to be a medical aircraft, it shall be allowed to resume its flight.

183. If the inspection reveals that the aircraft is not a medical aircraft, it may be captured, and the occupants shall, unless agreed otherwise between the neutral State and the parties to the conflict, be detained in the neutral State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take part in the hostilities.

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## **I N T E R N A T I O N A L   H U M A N I T A R I A N   L A W**

International Committee of the Red Cross

**Convention on the prohibition of the development, production  
and stockpiling of bacteriological (biological) and toxin  
weapons and on their destruction, 1972**

No. 14860

MULTILATERAL

**Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction. Opened for signature at London, Moscow and Washington on 10 April 1972**

*Authentic texts: English, Russian, French, Spanish and Chinese.*

*Registered by the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America on 15 July 1976.*

MULTILATÉRAL

**Convention sur l'interdiction de la mise au point, de la fabrication et du stockage des armes bactériologiques (biologiques) ou à toxines et sur leur destruction. Ouverte à la signature à Londres, Moscou et Washington le 10 avril 1972**

*Textes authentiques : anglais, russe, français, espagnol et chinois. Enregistrée par les États-Unis d'Amérique, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et l'Union des Républiques socialistes soviétiques le 15 juillet 1976.*

**CONVENTION<sup>1</sup> ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION AND STOCKPILING OF BACTERIOLOGICAL (BIOLOGICAL) AND TOXIN WEAPONS AND ON THEIR DESTRUCTION**

The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament, including the prohibition and elimination of all types of weapons of mass destruction, and convinced that the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and their elimination

<sup>1</sup> Came into force in respect of the following States on 26 March 1975, i.e. when twenty-two Governments, including the Governments designated as depositaries (the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America), had deposited their instruments of ratification, in accordance with article XIV (3). Instruments of ratification were deposited as follows:

State	Date of deposit of the instrument of ratification in London (L), Moscow (M) or Washington (W)
Afghanistan	1975 (L)
Austria*	1973 (L,M,W)
Bahados	1973 (W)
Brazil	1973 (L,M,W)
Bulgaria	1972 (L)
	2 August
	13 September
	19 September
	26 March
	1972 (M)
	1975 (M)
	18 September
	17 December
	1973 (W)
	6 November
	13 November
	1973 (W)
	21 November
	1973 (M)
	30 April
	1973 (L,M,W)
	1 March
	1973 (L,M,W)
	23 February
	12 March
	1975 (W)
	4 September
	1973 (W)
	1 October
	1973 (L)
	4 February
	1974 (L,M,W)
	28 November
	1972 (M)
	1973 (W)
	19 December
	1972 (L,M,W)
	15 February
	1973 (L,M,W)
	15 July
	1974 (L,M,W)
	22 August
	1973 (L,W)
	27 August
	1973 (M)
	27 October
	1972 (L,W)
	18 July
	1972 (W)
	26 July
	1972 (L)
	1 August
	1972 (M)
	20 March
	1973 (M)
	22 March
	1973 (W)
	25 April
	1973 (L)
	26 March
	1975 (W)
	13 June
	1975 (L)
	7 August
	1972 (W)
	11 January
	1973 (L)
	15 January
	1973 (M)
	8 April
	1974 (L,M,W)
	5 September
	1972 (W)
	14 September
	1972 (L)
	20 October
	1972 (M)
	13 December
	1972 (W)
	18 December
	1972 (L)
	10 January
	1973 (M)

(Continued on page 165)

tion, through effective measures, will facilitate the achievement of general and complete disarmament under strict and effective international control.

Recognising the important significance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of

(Footnote 1 continued from page 164)

State	Date of deposit of the instrument of ratification or accession (a) in London (L), Moscow (M) or Washington (W)
Niger	23 June 1972 (W)
Nigeria	3 July 1973 (W)
	9 July 1973 (L)
	20 July 1973 (M)
Norway	1 August 1973 (L,W)
	23 August 1973 (M)
Pakistan	25 September 1974 (M)
	3 October 1974 (L,W)
Panama	20 March 1974 (W)
Philippines	21 May 1973 (W)
Poland	25 January 1973 (L,M,W)
Republic of China*	9 February 1973 (W)
San Marino	11 March 1975 (L)
	17 March 1975 (W)
	27 March 1975 (W)
Saudi Arabia	24 May 1972 (W)
Senegal	26 March 1975 (W)
Tunisia	18 May 1973 (W)
	30 May 1973 (M)
	6 June 1973 (L)
Turkey	25 October 1974 (M)
	4 November 1974 (L)
	5 November 1974 (W)
	26 March 1975 (L,M,W)

Warfare, signed at Geneva on 17 June 1925,<sup>1</sup> and conscious also of the contribution which the said Protocol has already made, and continues to make, to mitigating the horrors of war,

Reaffirming their adherence to the principles and objectives of that Protocol and calling upon all States to comply strictly with them,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Geneva Protocol of 17 June 1925,

Desiring to contribute to the strengthening of confidence between peoples and the general improvement of the international atmosphere,

Desiring also to contribute to the realisation of the purposes and principles of the Charter of the United Nations,

Convinced of the importance and urgency of eliminating from the arsenals of States, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents,

Recognising that an agreement on the prohibition of bacteriological (biological) and toxin weapons represents a first possible step towards the achievement of agreement on effective measures also for the prohibition of the development, production and stockpiling of chemical weapons, and determined to continue negotiations to that end,

Determined, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons,

Convinced that such use would be repugnant to the conscience of mankind and that no effort should be spared to minimise this risk,

Have agreed as follows:

*Article I.* Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

- (1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
- (2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

*Article II.* Each State Party to this Convention undertakes to destroy, or to divert to peaceful purposes, as soon as possible but not later than nine months after the entry into force of the Convention, all agents, toxins, stockpiles, weapons, equipment and means of delivery

(Footnote 1 continued from page 165)

State	Date of deposit of the instrument of ratification or accession (a) in London (L), Moscow (M) or Washington (W)
Greece	10 December 1975 (W)
Kenya	7 January 1976 a (L)
Sweden	5 February 1976 (L,M,W)
Luxembourg	23 March 1976 (L,M,W)
Cuba	21 April 1976 (M)
Switzerland*	4 May 1976 (L,M,W)
Paraguay	9 June 1976 a (W)
Sierra Leone	29 June 1976 (W)

\* For the text of the reservation and declarations made upon ratification, see p. 237 of this volume.  
<sup>1</sup> League of Nations, *Treaty Series*, vol. XCIV, p. 65.

ration, through effective measures, will facilitate the achievement of general and complete disarmament under strict and effective international control.

Recognising the important significance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of

(Footnote 1 continued from page 164)

State	Date of deposit of the instrument of ratification or accession (a) in London (L), Moscow (M) or Washington (W)
Malta	17 April 1975 (L)
Qatar	17 April 1975 (L)
Benin	15 May 1975 (W)
Portugal	15 May 1975 (L,M,W)
Rwanda	20 May 1975 (L,M,W)
Ethiopia	26 May 1975 (L,M)
	26 June 1975 (W)
Thailand	28 May 1975 (W)
Italy	30 May 1975 (L,M,W)
Jordan	30 May 1975 (M)
	2 June 1975 (W)
	2 June 1975 (L)
	6 June 1975 (L)
Ghana	7 August 1975 (W)
Nicaragua	13 August 1975 a (L)
Jamaica	16 September 1975 (L)
Zaire	30 October 1975 (W)
Bolivia	30 October 1975 (W)
South Africa	3 November 1975 (W)
Singapore	2 December 1975 (L,M,W)

Subsequently, the Convention entered into force for the following States on the date of the deposit of their instrument of ratification or accession, in accordance with article XIV (4):

State	Date of deposit of the instrument of ratification or accession (a) in London (L), Moscow (M) or Washington (W)
Malta	17 April 1975 (L)
Qatar	17 April 1975 (L)
Benin	15 May 1975 (W)
Portugal	15 May 1975 (L,M,W)
Rwanda	20 May 1975 (L,M,W)
Ethiopia	26 May 1975 (L,M)
	26 June 1975 (W)
Thailand	28 May 1975 (W)
Italy	30 May 1975 (L,M,W)
Jordan	30 May 1975 (M)
	2 June 1975 (W)
	2 June 1975 (L)
	6 June 1975 (L)
Ghana	7 August 1975 (W)
Nicaragua	13 August 1975 a (L)
Jamaica	16 September 1975 (L)
Zaire	30 October 1975 (W)
Bolivia	30 October 1975 (W)
South Africa	3 November 1975 (W)
Singapore	2 December 1975 (L,M,W)

(Continued on page 166)

specified in Article I of the Convention, which are in its possession or under its jurisdiction or control. In implementing the provisions of this Article all necessary safety precautions shall be observed to protect populations and the environment.

*Article III.* Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organisations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of the Convention.

*Article IV.* Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.

*Article V.* The States Parties to this Convention undertake to consult one another and to co-operate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention. Consultation and co-operation pursuant to this Article may also be undertaken through appropriate international procedures within the framework of the United Nations and in accordance with its Charter.

*Article VI.* (1) Any State Party to this Convention which finds that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all possible evidence confirming its validity, as well as a request for its consideration by the Security Council.

(2) Each State Party to this Convention undertakes to co-operate in carrying out any investigation which the Security Council may initiate, in accordance with the provisions of the Charter of the United Nations, on the basis of the complaint received by the Council. The Security Council shall inform the States Parties to the Convention of the results of the investigation.

*Article VII.* Each State Party to this Convention undertakes to provide or support assistance, in accordance with the United Nations Charter, to any Party to the Convention which so requests, if the Security Council decides that such Party has been exposed to danger as a result of violation of the Convention.

*Article VIII.* Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925.

*Article IX.* Each State Party to this Convention affirms the recognised objective of effective prohibition of chemical weapons and, to this end, undertakes to continue negotiations in good faith with a view to reaching early agreement on effective measures for the prohibition of their development, production and stockpiling and for their destruction, and on appropriate measures concerning equipment and means of delivery specifically designed for the production or use of chemical agents for weapons purposes.

*Article X.* (1) The States Parties to this Convention undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the use of bacteriological (biological) agents and toxins for peaceful purposes. Parties to the Convention in a position to do so shall also co-operate in contributing individually or together with other States or international organisations to the further development and application of scientific discoveries in the

field of bacteriology (biology) for the prevention of disease, or for other peaceful purposes.

(2) This Convention shall be implemented in a manner designed to avoid hampering the economic or technological development of States Parties to the Convention or international co-operation in the field of peaceful bacteriological (biological) activities, including the international exchange of bacteriological (biological) agents and toxins and equipment for the processing, use or production of bacteriological (biological) agents and toxins for peaceful purposes in accordance with the provisions of the Convention.

*Article XI.* Any State Party may propose amendments to this Convention. Amendments shall enter into force for each State Party accepting the amendments upon their acceptance by a majority of the States Parties to the Convention and thereafter for each remaining State Party on the date of acceptance by it.

*Article XII.* Five years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the Convention by submitting a proposal to this effect to the Depository Governments, a conference of States Parties to the Convention shall be held at Geneva, Switzerland, to review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention, including the provisions concerning negotiations on chemical weapons, are being realised. Such review shall take into account any new scientific and technological developments relevant to the Convention.

*Article XIII.* (1) This Convention shall be of unlimited duration.

(2) Each State Party to this Convention shall in exercising its national sovereignty have the right to withdraw from the Convention if it decides that extraordinary events, related to the subject matter of the Convention, have jeopardised the supreme interests of its country. It shall give notice of such withdrawal to all other States Parties to the Convention and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardised its supreme interests.

*Article XIV.* (1) This Convention shall be open to all States for signature. Any State which does not sign the Convention before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.

(2) This Convention shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America, which are hereby designated the Depository Governments.

(3) This Convention shall enter into force after the deposit of instruments of ratification by twenty-two Governments, including the Governments designated as Depositories of the Convention.

(4) For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

(5) The Depository Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or of accession and the date of the entry into force of this Convention, and of the receipt of other notices.

(6) This Convention shall be registered by the Depository Governments pursuant to Article 102 of the Charter of the United Nations.

*Article XV* This Convention, the English, Russian, French, Spanish and Chinese texts of which are equally authentic, shall be deposited in the archives of the Depository Governments. Duly certified copies of the Convention shall be transmitted by the Depository Governments to the Governments of the signatory and acceding States.

**Convention on the Prohibition of the Development, Production,  
Stockpiling and Use of Chemical Weapons and on their  
Destruction, 1993**

# CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION, STOCKPILING AND USE OF CHEMICAL WEAPONS AND ON THEIR DESTRUCTION

## PREAMBLE

The States Parties to this Convention,

determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction,

Desiring to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and

<sup>1</sup> Came into force on 29 April 1997, in accordance with article XXI:

Participant	Date of deposit of the instrument of ratification	Participant	Date of deposit of the instrument of ratification
Albania	11 May 1994	Latvia	23 July 1996
Algeria	14 August 1995	Lesotho	7 December 1994
Argentina	2 October 1995	Maldives	31 May 1994
Armenia	27 January 1995	Mauritius	9 February 1993
Australia	6 May 1994	Mexico	29 August 1994
Austria	17 August 1995	Monaco	1 June 1995
Belarus	11 July 1996	Mongolia	17 January 1995
Brazil	13 March 1996	Morocco	28 December 1995
Bulgaria	10 August 1994	Namibia	24 November 1995
Cameroon	16 September 1996	Netherlands	30 June 1995
Canada	26 September 1996	(For the Kingdom in Europe.)	
Chile	12 July 1996	New Zealand	15 July 1996
Cook Islands	15 July 1994	Norway	7 April 1994
Costa Rica	31 May 1996	Oman	8 February 1995
Côte d'Ivoire	18 December 1995	Papua New Guinea	17 April 1996
Croatia	23 May 1995	Paraguay	1 December 1994
Czech Republic	6 March 1996	Peru	20 July 1995
Denmark	13 July 1995	Poland	23 August 1995
Ecuador	6 September 1995	Portugal	10 September 1996
El Salvador	30 October 1995	(Confirming the declaration made upon signature*)	
Ethiopia	13 May 1996	Republic of Moldova	8 July 1996
Fiji	20 January 1993	Romania	15 February 1995
Finland	7 February 1995	Saudi Arabia	9 August 1996
France	2 March 1995	Seychelles	7 April 1993
Georgia	27 November 1995	Slovakia	27 October 1995
Germany	12 August 1994	South Africa	13 September 1995
(Confirming the declaration made upon signature*)		Spain	3 August 1994
Greece	22 December 1994	(Confirming the declaration made upon signature*)	
(Confirming the declaration made upon signature*)		Sri Lanka	19 August 1994
Hungary	31 October 1996	Sweden	17 June 1993
India	3 September 1996	Switzerland	10 March 1995
Ireland	24 June 1996	Tajikistan	11 January 1995
(Confirming the declaration made upon signature*)		Turkmenistan	29 September 1994
Italy	8 December 1995	United Kingdom of Great Britain and Northern Ireland	13 May 1996
(Confirming the declaration made upon signature*)		Uruguay	6 October 1994
Japan	15 September 1995	Uzbekistan	23 July 1996

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objectives of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 (the Geneva Protocol of 1925),<sup>2</sup>

Recognizing that this Convention reaffirms principles and objectives of and obligations assumed under the Geneva Protocol of 1925, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction signed at London, Moscow and Washington on 10 April 1972,<sup>3</sup>

Bearing in mind the objective contained in Article IX of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,

Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925,

Recognizing the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare,

Considering that achievements in the field of chemistry should be used exclusively for the benefit of mankind,

Desiring to promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under this Convention in order to enhance the economic and technological development of all States Parties,

(Footnote 1 continued from page 317)

Subsequently, and prior to the entry into force of the Convention, the following States also deposited instruments of ratification on the dates indicated hereafter to take effect on 29 April 1997, i.e., the date of entry into force of the Convention.

Participant	Date of deposit of the instrument of ratification	Participant	Date of deposit of the instrument of ratification
Swaziland	20 November 1996	Bangladesh	25 April 1997
Philippines	11 December 1996	China	25 April 1997
Belgium	27 January 1997	(With a declaration.**)	
(Confirming the declaration made upon signature*)		Equatorial Guinea	25 April 1997
Bosnia and Herzegovina	25 February 1997	Kenya	25 April 1997
Lao People's Democratic Republic	25 February 1997	United States of America	25 April 1997
Niger	9 April 1997	(With a statement.**)	
Saint Lucia	9 April 1997	Zimbabwe	25 April 1997
Luxembourg	15 April 1997	Bahrain	28 April 1997
(Confirming the declaration made upon signature*)		Iceland	28 April 1997
Tunisia	15 April 1997	Malta	28 April 1997
Togo	23 April 1997	Republic of Korea	28 April 1997
(Confirming the declaration made upon signature*)		Suriname	28 April 1997

\* See p. 470 of volume 1975 for the texts of the declarations made upon signature.

\*\* See p. 473 of volume 1975 for the texts of the declarations made upon ratification.

<sup>2</sup> League of Nations, *Treaty Series*, vol. XCIV, p. 65.

<sup>3</sup> United Nations, *Treaty Series*, vol. 1015, p. 163.

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Convinced that the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives,

Have agreed as follows:

#### ARTICLE I

##### GENERAL OBLIGATIONS

1. Each State Party to this Convention undertakes never under any circumstances:
  - (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
  - (b) To use chemical weapons;
  - (c) To engage in any military preparations to use chemical weapons;
  - (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

∞ 2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.

4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

5. Each State Party undertakes not to use riot control agents as a method of warfare.

#### ARTICLE II

##### DEFINITIONS AND CRITERIA

For the purposes of this Convention:

1. "Chemical Weapons" means the following, together or separately:
  - (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;

(b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;

(c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

#### 2. "Toxic Chemical" means:

Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(For the purpose of implementing this Convention, toxic chemicals which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

#### 3. "Precursor" means:

Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

(For the purpose of implementing this Convention, precursors which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

#### 4. "Key Component of Binary or Multicomponent Chemical Systems" (hereinafter referred to as "key component") means:

The precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

#### 5. "Old Chemical Weapons" means:

- (a) Chemical weapons which were produced before 1925; or
- (b) Chemical weapons produced in the period between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons.

#### 6. "Abandoned Chemical Weapons" means:

Chemical weapons, including old chemical weapons, abandoned by a State after 1 January 1975 on the territory of another State without the consent of the latter.

## 7. "Riot Control Agent" means:

Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

## 8. "Chemical Weapons Production Facility":

(a) Means any equipment, as well as any building housing such equipment, that was designed, constructed or used at any time since 1 January 1946:

(i) As part of the stage in the production of chemicals ("final technological stage") where the material flows would contain, when the equipment is in operation:

- (1) Any chemical listed in Schedule 1 in the Annex on Chemicals; or
- (2) Any other chemical that has no use, above 1 tonne per year on the territory of a State Party or in any other place under the jurisdiction or control of a State Party, for purposes not prohibited under this Convention, but can be used for chemical weapons purposes;

or

(ii) For filling chemical weapons, including, *inter alia*, the filling of chemicals listed in Schedule 1 into munitions, devices or bulk storage containers; the filling of chemicals into containers that form part of assembled binary munitions and devices or into chemical submunitions that form part of assembled unitary munitions and devices, and the loading of the containers and chemical submunitions into the respective munitions and devices;

(b) Does not mean:

- (i) Any facility having a production capacity for synthesis of chemicals specified in subparagraph (a) (i) that is less than 1 tonne;
- (ii) Any facility in which a chemical specified in subparagraph (a) (i) is or was produced as an unavoidable by-product of activities for purposes not prohibited under this Convention, provided that the chemical does not exceed 3 per cent of the total product and that the facility is subject to declaration and inspection under the Annex on Implementation and Verification (hereinafter referred to as "Verification Annex"); or

(iii) The single small-scale facility for production of chemicals listed in Schedule 1 for purposes not prohibited under this Convention as referred to in Part VI of the Verification Annex.

## 9. "Purposes Not Prohibited Under this Convention" means:

- (a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
- (b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;
- (c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;
- (d) Law enforcement including domestic riot control purposes.

## 10. "Production Capacity" means:

The annual quantitative potential for manufacturing a specific process is not yet operational, planned to be used at the relevant facility. It shall be deemed to be equal to the nameplate capacity or, if the nameplate capacity is not available, to the design capacity. The maximum quantity for the production output under conditions optimized for more test-runs. The design capacity is the corresponding theoretically calculated product output.

11. "Organization" means the Organization for the Prohibition of Chemical Weapons established pursuant to Article VIII of this Convention.

## 12. For the purposes of Article VI:

- (a) "Production" of a chemical means its formation through chemical reaction;
- (b) "Processing" of a chemical means a physical process, such as formulation, extraction and purification, in which a chemical is not converted into another chemical;
- (c) "Consumption" of a chemical means its conversion into another chemical via a chemical reaction.

## ARTICLE III

## DECLARATIONS

1. Each State Party shall submit to the Organization, not later than 30 days after this Convention enters into force for it, the following declarations, in which it shall:

## (a) With respect to chemical weapons:

- (i) Declare whether it owns or possesses any chemical weapons, or whether there are any chemical weapons located in any place under its jurisdiction or control;
- (ii) Specify the precise location, aggregate quantity and detailed inventory of chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraphs 1 to 3, of the Verification Annex, except for those chemical weapons referred to in sub-paragraph (iii);
- (iii) Report any chemical weapons on its territory that are owned and possessed by another State and located in any place under the jurisdiction or control of another State, in accordance with Part IV (A), paragraph 4, of the Verification Annex;
- (iv) Declare whether it has transferred or received, directly or indirectly, any chemical weapons since 1 January 1946 and specify the transfer or receipt of such weapons, in accordance with Part IV (A), paragraph 5, of the Verification Annex;
- (v) Provide its general plan for destruction of chemical weapons that it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraph 6, of the Verification Annex;

## (b) With respect to old chemical weapons and abandoned chemical weapons:

- (i) Declare whether it has on its territory old chemical weapons and provide all available information in accordance with Part IV (B), paragraph 3, of the Verification Annex;
- (ii) Declare whether there are abandoned chemical weapons on its territory and provide all available information in accordance with Part IV (B), paragraph 8, of the Verification Annex;
- (iii) Declare whether it has abandoned chemical weapons on the territory of other States and provide all available information in accordance with Part IV (B), paragraph 10, of the Verification Annex;
- (c) With respect to chemical weapons production facilities:
- (i) Declare whether it has or has had any chemical weapons production facility under its ownership or possession, or

that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946;

- (ii) Specify any chemical weapons production facility it has or has had under its ownership or possession or that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946, in accordance with Part V, paragraph 1, of the Verification Annex, except for those facilities referred to in sub-paragraph (iii);
- (iii) Report any chemical weapons production facility on its territory that another State has or has had under its ownership and possession and that is or has been located in any place under the jurisdiction or control of another State at any time since 1 January 1946, in accordance with Part V, paragraph 2, of the Verification Annex;
- (iv) Declare whether it has transferred or received, directly or indirectly, any equipment for the production of chemical weapons since 1 January 1946 and specify the transfer or receipt of such equipment, in accordance with Part V, paragraphs 3 to 5, of the Verification Annex;
- (v) Provide its general plan for destruction of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, in accordance with Part V, paragraph 6, of the Verification Annex;
- (vi) Specify actions to be taken for closure of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, in accordance with Part V, paragraph 1 (i), of the Verification Annex;
- (vii) Provide its general plan for any temporary conversion of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, into a chemical weapons destruction facility, in accordance with Part V, paragraph 7, of the Verification Annex;
- (d) With respect to other facilities:
- Specify the precise location, nature and general scope of activities of any facility or establishment under its ownership or possession, or located in any place under its jurisdiction or control, and that has been designed, constructed or used since 1 January 1946 primarily for development of chemical weapons. Such declaration shall include, *inter alia*, laboratories and test and evaluation sites;

(e) With respect to riot control agents: Specify the chemical name, structural formula and Chemical Abstracts Service (CAS) registry number, if assigned, of each chemical it holds for riot control purposes. This declaration shall be updated not later than 30 days after any change becomes effective.

2. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

#### ARTICLE IV

##### CHEMICAL WEAPONS

1. The provisions of this Article and the detailed procedures for its implementation shall apply to all chemical weapons owned or possessed by a State Party, or that are located in any place under its jurisdiction or control, except old chemical weapons and abandoned chemical weapons to which Part IV (B) of the Verification Annex applies.

2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.

3. All locations at which chemical weapons specified in paragraph 1 are stored or destroyed shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments, in accordance with Part IV (A) of the Verification Annex.

4. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (a), has been submitted, provide access to chemical weapons specified in paragraph 1 for the purpose of systematic verification of the declaration through on-site inspection. Thereafter, each State Party shall not remove any of these chemical weapons, except to a chemical weapons destruction facility. It shall provide access to such chemical weapons, for the purpose of systematic on-site verification.

5. Each State Party shall provide access to any chemical weapons destruction facilities and their storage areas, that it owns or possesses, or that are located in any place under its jurisdiction or control, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments.

6. Each State Party shall destroy all chemical weapons specified in paragraph 1 pursuant to the Verification Annex and in accordance with the agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than two years after this Convention enters into force for it and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such chemical weapons at a faster rate.

7. Each State Party shall:

(a) Submit detailed plans for the destruction of chemical weapons specified in paragraph 1 not later than 60 days before each annual destruction period begins, in accordance with Part IV (A), paragraph 29, of the Verification Annex; the detailed plans shall encompass all stocks to be destroyed during the next annual destruction period;

(b) Submit declarations annually regarding the implementation of its plans for destruction of chemical weapons specified in paragraph 1, not later than 60 days after the end of each annual destruction period; and

(c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons specified in paragraph 1 have been destroyed.

8. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 6, it shall destroy chemical weapons specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.

9. Any chemical weapons discovered by a State Party after the initial declaration of chemical weapons shall be reported, secured and destroyed in accordance with Part IV (A) of the Verification Annex.

10. Each State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall transport, sample, store and destroy chemical weapons in accordance with its national standards for safety and emissions.

11. Any State Party which has on its territory chemical weapons that are owned or possessed by another State, or that are located in any place under the jurisdiction or control of another State, shall make the fullest efforts to ensure that these chemical weapons are removed from its territory not later than one year after this Convention enters into force for it. If they are not removed within one year, the State Party may request the Organization and other States Parties to provide assistance in the destruction of these chemical weapons.

12. Each State Party undertakes to cooperate with other States Parties that request information or assistance on a bilateral basis or through the Technical Secretariat regarding methods and technologies for the safe and efficient destruction of chemical weapons.

13. In carrying out verification activities pursuant to this Article and Part IV (A) of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical weapons storage and their destruction among States Parties.

To this end, the Executive Council shall decide to limit verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

- (a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part IV (A) of the Verification Annex;
- (b) Implementation of such an agreement provides for sufficient assurance of compliance with the relevant provisions of this Convention; and
- (c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.

14. If the Executive Council takes a decision pursuant to paragraph 13, the Organization shall have the right to monitor the implementation of the bilateral or multilateral agreement.

15. Nothing in paragraphs 13 and 14 shall affect the obligation of a State Party to provide declarations pursuant to Article III, this Article and Part IV (A) of the Verification Annex.

16. Each State Party shall meet the costs of destruction of chemical weapons it is obliged to destroy. It shall also meet the costs of verification of storage and destruction of these chemical weapons unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 13, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

17. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

#### ARTICLE V

##### CHEMICAL WEAPONS PRODUCTION FACILITIES

1. The provisions of this Article and the detailed procedures for its implementation shall apply to any and all chemical weapons production facilities owned or possessed by a State Party, or that are located in any place under its jurisdiction or control.
2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.
3. All chemical weapons production facilities specified in paragraph 1 shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with Part V of the Verification Annex.

4. Each State Party shall cease immediately all activity at chemical weapons production facilities specified in paragraph 1, except activity required for closure.

5. No State Party shall construct any new chemical weapons production facilities or modify any existing facilities for the purpose of chemical weapons production or for any other activity prohibited under this Convention.

6. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (c), has been submitted, provide access to chemical weapons production facilities specified in paragraph 1, for the purpose of systematic verification of the declaration through on-site inspection.

7. Each State Party shall:

- (a) Close, not later than 90 days after this Convention enters into force for it, all chemical weapons production facilities specified in paragraph 1, in accordance with Part V of the Verification Annex, and give notice thereof; and

- (b) Provide access to chemical weapons production facilities specified in paragraph 1, subsequent to closure, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments in order to ensure that the facility remains closed and is subsequently destroyed.

8. Each State Party shall destroy all chemical weapons production facilities specified in paragraph 1 and related facilities and equipment, pursuant to the Verification Annex and in accordance with an agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than one year after this Convention enters into force for it, and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such facilities at a faster rate.

9. Each State Party shall:

- (a) Submit detailed plans for destruction of chemical weapons production facilities specified in paragraph 1, not later than 180 days before the destruction of each facility begins;

- (b) Submit declarations annually regarding the implementation of its plans for the destruction of all chemical weapons production facilities specified in paragraph 1, not later than 90 days after the end of each annual destruction period; and

- (c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons production facilities specified in paragraph 1 have been destroyed.

10. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 8, it shall destroy chemical weapons production facilities specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.

11. Each State Party, during the destruction of chemical weapons production facilities, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall destroy chemical weapons production facilities in accordance with its national standards for safety and emissions.

12. Chemical weapons production facilities specified in paragraph 1 may be temporarily converted for destruction of chemical weapons in accordance with Part V, paragraphs 16 to 25, of the Verification Annex. Such a converted facility must be destroyed as soon as it is no longer in use for destruction of chemical weapons but, in any case, not later than 10 years after entry into force of this Convention.

13. A State Party may request, in exceptional cases of compelling need, permission to use a chemical weapons production facility specified in paragraph 1 for purposes not prohibited under this Convention. Upon the recommendation of the Executive Council, the Conference of the States Parties shall decide whether or not to approve the request and shall establish the conditions upon which approval is contingent in accordance with Part V, Section D, of the Verification Annex.

14. The chemical weapons production facility shall be converted in such a manner that the converted facility is not more capable of being reconverted into a chemical weapons production facility than any other facility used for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes not involving chemicals listed in Schedule 1.

15. All converted facilities shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with Part V, Section D, of the Verification Annex.

16. In carrying out verification activities pursuant to this Article and Part V of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical weapons production facilities and their destruction among States Parties.

To this end, the Executive Council shall decide to limit the verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

(a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part V of the Verification Annex;

(b) Implementation of the agreement provides for sufficient assurance of compliance with the relevant provisions of this Convention; and

(c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.

17. If the Executive Council takes a decision pursuant to paragraph 16, the Organization shall have the right to monitor the implementation of the bilateral or multilateral agreement.

18. Nothing in paragraphs 16 and 17 shall affect the obligation of a State Party to make declarations pursuant to Article III, this Article and Part V of the Verification Annex.

19. Each State Party shall meet the costs of destruction of chemical weapons production facilities it is obliged to destroy. It shall also meet the costs of verification under this Article unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 16, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

#### ARTICLE VI

##### ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION

1. Each State Party has the right, subject to the provisions of this Convention, to develop, produce, otherwise acquire, retain, transfer and use toxic chemicals and their precursors for purposes not prohibited under this Convention.

2. Each State Party shall adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention. To this end, and in order to verify that activities are in accordance with obligations under this Convention, each State Party shall subject toxic chemicals and their precursors listed in Schedules 1, 2 and 3 of the Annex on Chemicals, facilities related to such chemicals, and other facilities as specified in the Verification Annex, that are located on its territory or in any other place under its jurisdiction or control, to verification measures as provided in the Verification Annex.

3. Each State Party shall subject chemicals listed in Schedule 1 (hereinafter referred to as "Schedule 1 chemicals") to the prohibitions on production, acquisition, retention, transfer and use as specified in Part VI of the Verification Annex. It shall subject Schedule 1 chemicals and facilities specified in Part VI of the Verification Annex to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with that Part of the Verification Annex.

4. Each State Party shall subject chemicals listed in Schedule 2 (hereinafter referred to as "Schedule 2 chemicals") and facilities specified in Part VII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.
5. Each State Party shall subject chemicals listed in Schedule 3 (hereinafter referred to as "Schedule 3 chemicals") and facilities specified in Part VIII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.
6. Each State Party shall subject facilities specified in Part IX of the Verification Annex to data monitoring and eventual on-site verification in accordance with that Part of the Verification Annex unless decided otherwise by the Conference of the States Parties pursuant to Part IX, paragraph 22, of the Verification Annex.
7. Not later than 30 days after this Convention enters into force for it, each State Party shall make an initial declaration on relevant chemicals and facilities in accordance with the Verification Annex.
8. Each State Party shall make annual declarations regarding the relevant chemicals and facilities in accordance with the Verification Annex.

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9. For the purpose of on-site verification, each State Party shall grant to the inspectors access to facilities as required in the Verification Annex.
10. In conducting verification activities, the Technical Secretariat shall avoid undue intrusion into the State Party's chemical activities for purposes not prohibited under this Convention and, in particular, abide by the provisions set forth in the Annex on the Protection of Confidential Information (hereinafter referred to as "Confidentiality Annex").
11. The provisions of this Article shall be implemented in a manner which avoids hampering the economic or technological development of States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention.

## ARTICLE VII

## NATIONAL IMPLEMENTATION MEASURES

General undertakings

1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

- (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;
- (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and
- (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.
2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.
3. Each State Party, during the implementation of its obligations under this Convention, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other States Parties in this regard.

Relations between the State Party and the Organization

4. In order to fulfil its obligations under this Convention, each State Party shall designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization and other States Parties. Each State Party shall notify the Organization of its National Authority at the time that this Convention enters into force for it.
5. Each State Party shall inform the Organization of the legislative and administrative measures taken to implement this Convention.
6. Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Convention. It shall treat such information and data exclusively in connection with its rights and obligations under this Convention and in accordance with the provisions set forth in the Confidentiality Annex.
7. Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical Secretariat.

## ARTICLE VIII

## THE ORGANIZATION

## A. GENERAL PROVISIONS

1. The States Parties to this Convention hereby establish the Organization for the Prohibition of Chemical Weapons to achieve the

object and purpose of this Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.

2. All States Parties to this Convention shall be members of the Organization. A State Party shall not be deprived of its membership in the Organization.
3. The seat of the Headquarters of the Organization shall be The Hague, Kingdom of the Netherlands.
4. There are hereby established as the organs of the Organization: the Conference of the States Parties, the Executive Council, and the Technical Secretariat.
5. The Organization shall conduct its verification activities provided for under this Convention in the least intrusive manner possible consistent with the timely and efficient accomplishment of their objectives. It shall request only the information and data necessary to fulfill its responsibilities under this Convention. It shall take every precaution to protect the confidentiality of information on civil and military activities and facilities coming to its knowledge in the implementation of this Convention and, in particular, shall abide by the provisions set forth in the Confidentiality Annex.

6. In undertaking its verification activities the Organization shall consider measures to make use of advances in science and technology.

7. The costs of the Organization's activities shall be paid by States Parties in accordance with the United Nations scale of assessment adjusted to take into account differences in membership between the United Nations and this Organization, and subject to the provisions of Articles IV and V. Financial contributions of States Parties to the Preparatory Commission shall be deducted in an appropriate way from their contributions to the regular budget. The budget of the Organization shall comprise two separate chapters, one relating to administrative and other costs, and one relating to verification costs.

8. A member of the Organization which is in arrears in the payment of its financial contribution to the Organization shall have no vote in the Organization if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding two full years. The Conference of the States Parties may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

#### B. THE CONFERENCE OF THE STATES PARTIES

##### Composition, procedures and decision-making

9. The Conference of the States Parties (hereinafter referred to as "the Conference") shall be composed of all members of this

Organization. Each member shall have one representative in the Conference, who may be accompanied by alternates and advisers.

10. The first session of the Conference shall be convened by the depositary not later than 30 days after the entry into force of this Convention.
11. The Conference shall meet in regular sessions which shall be held annually unless it decides otherwise.
12. Special sessions of the Conference shall be convened:
  - (a) When decided by the Conference;
  - (b) When requested by the Executive Council;
  - (c) When requested by any member and supported by one third of the members; or
  - (d) In accordance with paragraph 22 to undertake reviews of the operation of this Convention.

Except in the case of subparagraph (d), the special session shall be convened not later than 30 days after receipt of the request by the Director-General of the Technical Secretariat, unless specified otherwise in the request.

13. The Conference shall also be convened in the form of an Amendment Conference in accordance with Article XV, paragraph 2.

14. Sessions of the Conference shall take place at the seat of the Organization unless the Conference decides otherwise.

15. The Conference shall adopt its rules of procedure. At the beginning of each regular session, it shall elect its Chairman and such other officers as may be required. They shall hold office until a new Chairman and other officers are elected at the next regular session.

16. A majority of the members of the Organization shall constitute a quorum for the Conference.

17. Each member of the Organization shall have one vote in the Conference.

18. The Conference shall take decisions on questions of procedure by a simple majority of the members present and voting. Decisions on matters of substance should be taken as far as possible by consensus. If consensus is not attainable when an issue comes up for decision, the Chairman shall defer any vote for 24 hours and during this period of deferment shall make every effort to facilitate achievement of consensus, and shall report to the Conference before the end of this period. If consensus is not possible at the end of 24 hours, the Conference shall take the decision by a two-thirds majority of members present and voting unless specified otherwise in this Convention. When

the issue arises as to whether the question is one of substance or not, that question shall be treated as a matter of substance unless otherwise decided by the Conference by the majority required for decisions on matters of substance.

Powers and functions

19. The Conference shall be the principal organ of the Organization. It shall consider any questions, matters or issues within the scope of this Convention, including those relating to the powers and functions of the Executive Council and the Technical Secretariat. It may make recommendations and take decisions on any questions, matters or issues related to this Convention raised by a State Party or brought to its attention by the Executive Council.

20. The Conference shall oversee the implementation of this Convention, and act in order to promote its object and purpose. The Conference shall review compliance with this Convention. It shall also oversee the activities of the Executive Council and the Technical Secretariat and may issue guidelines in accordance with this Convention to either of them in the exercise of their functions.

21. The Conference shall:

- (a) Consider and adopt at its regular sessions the report, programme and budget of the Organization, submitted by the Executive Council, as well as consider other reports;
- (b) Decide on the scale of financial contributions to be paid by States Parties in accordance with paragraph 7;
- (c) Elect the members of the Executive Council;
- (d) Appoint the Director-General of the Technical Secretariat (hereinafter referred to as "the Director-General");
- (e) Approve the rules of procedure of the Executive Council submitted by the latter;
- (f) Establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Convention;
- (g) Foster international cooperation for peaceful purposes in the field of chemical activities;
- (h) Review scientific and technological developments that could affect the operation of this Convention and, in this context, direct the Director-General to establish a Scientific Advisory Board to enable him, in the performance of his functions, to render specialized advice in areas of science and technology relevant to this Convention, to the Conference, the Executive Council or States Parties. The Scientific Advisory Board shall be composed of independent experts appointed in accordance with terms of reference adopted by the Conference;

(i) Consider and approve at its first session any draft agreements, provisions and guidelines developed by the Preparatory Commission;

(j) Establish at its first session the voluntary fund for assistance in accordance with Article X;

(k) Take the necessary measures to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention, in accordance with Article XII.

22. The Conference shall not later than one year after the expiry of the fifth and the tenth year after the entry into force of this Convention, and at such other times within that time period as may be decided upon, convene in special sessions to undertake reviews of the operation of this Convention. Such reviews shall take into account any relevant scientific and technological developments. At intervals of five years thereafter, unless otherwise decided upon, further sessions of the Conference shall be convened with the same objective.

C. THE EXECUTIVE COUNCIL

Composition, procedure and decision-making

23. The Executive Council shall consist of 41 members. Each State Party shall have the right, in accordance with the principle of rotation, to serve on the Executive Council. The members of the Executive Council shall be elected by the Conference for a term of two years. In order to ensure the effective functioning of this Convention, due regard being specially paid to equitable geographical distribution, to the importance of chemical industry, as well as to political and security interests, the Executive Council shall be composed as follows:

- (a) Nine States Parties from Africa to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these nine States Parties, three members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these three members;
- (b) Nine States Parties from Asia to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these nine States Parties, four members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these four members;
- (c) Five States Parties from Eastern Europe to be designated by States Parties located in this region. As a basis for this designation

it is understood that, out of these five States Parties, one member shall, as a rule, be the State Party with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating this one member;

(d) Seven States Parties from Latin America and the Caribbean to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these seven States Parties, three members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these three members;

(e) Ten States Parties from among Western European and other States to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these 10 States Parties, 5 members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these five members;

(f) One further State Party to be designated consecutively by States Parties located in the regions of Asia and Latin America and the Caribbean. As a basis for this designation it is understood that this State Party shall be a rotating member from these regions.

24. For the first election of the Executive Council 20 members shall be elected for a term of one year, due regard being paid to the established numerical proportions as described in paragraph 23.

25. After the full implementation of Articles IV and V the Conference may, upon the request of a majority of the members of the Executive Council, review the composition of the Executive Council taking into account developments related to the principles specified in paragraph 23 that are governing its composition.

26. The Executive Council shall elaborate its rules of procedure and submit them to the Conference for approval.

27. The Executive Council shall elect its Chairman from among its members.

28. The Executive Council shall meet for regular sessions. Between regular sessions it shall meet as often as may be required for the fulfilment of its powers and functions.

29. Each member of the Executive Council shall have one vote. Unless otherwise specified in this Convention, the Executive Council shall take decisions on matters of substance by a two-thirds majority of all its members. The Executive Council shall take decisions on questions of

procedure by a simple majority of all its members. When the issue arises as to whether the question is one of substance or not, that question shall be treated as a matter of substance unless otherwise decided by the Executive Council by the majority required for decisions on matters of substance.

#### Powers and functions

30. The Executive Council shall be the executive organ of the Organisation. It shall be responsible to the Conference. The Executive Council shall carry out the powers and functions entrusted to it under this Convention, as well as those functions delegated to it by the Conference. In so doing, it shall act in conformity with the recommendations, decisions and guidelines of the Conference and assure their proper and continuous implementation.

31. The Executive Council shall promote the effective implementation of, and compliance with, this Convention. It shall supervise the activities of the Technical Secretariat, cooperate with the National Authority of each State Party and facilitate consultations and cooperation among States Parties at their request.

32. The Executive Council shall:

(a) Consider and submit to the Conference the draft programme and budget of the Organisation;

(b) Consider and submit to the Conference the draft report of the Organisation on the implementation of this Convention, the report on the performance of its own activities and such special reports as it deems necessary or which the Conference may request;

(c) Make arrangements for the sessions of the Conference including the preparation of the draft agenda.

33. The Executive Council may request the convening of a special session of the Conference.

34. The Executive Council shall:

(a) Conclude agreements or arrangements with States and international organizations on behalf of the Organisation, subject to prior approval by the Conference;

(b) Conclude agreements with States Parties on behalf of the Organisation in connection with Article X and supervise the voluntary fund referred to in Article X;

(c) Approve agreements or arrangements relating to the implementation of verification activities, negotiated by the Technical Secretariat with States Parties.

35. The Executive Council shall consider any issue or matter within its competence affecting this Convention and its implementation, including

concerns regarding compliance, and cases of non-compliance, and, as appropriate, inform States Parties and bring the issue or matter to the attention of the Conference.

36. In its consideration of doubts or concerns regarding compliance and cases of non-compliance, including, *inter alia*, abuse of the rights provided for under this Convention, the Executive Council shall consult with the States Parties involved and, as appropriate, request the State Party to take measures to redress the situation within a specified time. To the extent that the Executive Council considers further action to be necessary, it shall take, *inter alia*, one or more of the following measures:

- (a) Inform all States Parties of the issue or matter;
- (b) Bring the issue or matter to the attention of the Conference;
- (c) Make recommendations to the Conference regarding measures to redress the situation and to ensure compliance.

The Executive Council shall, in cases of particular gravity and urgency, bring the issue or matter, including relevant information and conclusions, directly to the attention of the United Nations General Assembly and the United Nations Security Council. It shall at the same time inform all States Parties of this step.

#### D. THE TECHNICAL SECRETARIAT

37. The Technical Secretariat shall assist the Conference and the Executive Council in the performance of their functions. The Technical Secretariat shall carry out the verification measures provided for in this Convention. It shall carry out the other functions entrusted to it under this Convention as well as those functions delegated to it by the Conference and the Executive Council.

38. The Technical Secretariat shall:

- (a) Prepare and submit to the Executive Council the draft programme and budget of the Organization;
- (b) Prepare and submit to the Executive Council the draft report of the Organization on the implementation of this Convention and such other reports as the Conference or the Executive Council may request;
- (c) Provide administrative and technical support to the Conference, the Executive Council and subsidiary organs;
- (d) Address and receive communications on behalf of the Organization to and from States Parties on matters pertaining to the implementation of this Convention;
- (e) Provide technical assistance and technical evaluation to States Parties in the implementation of the provisions of this Convention, including evaluation of scheduled and unscheduled chemicals.

39. The Technical Secretariat shall:

(a) Negotiate agreements or arrangements relating to the implementation of verification activities with States Parties, subject to approval by the Executive Council;

(b) Not later than 180 days after entry into force of this Convention, coordinate the establishment and maintenance of permanent stockpiles of emergency and humanitarian assistance by States Parties in accordance with Article X, paragraphs 7 (b) and (c). The Technical Secretariat may inspect the items maintained for serviceability. Lists of items to be stockpiled shall be considered and approved by the Conference pursuant to paragraph 21 (i) above;

(c) Administer the voluntary fund referred to in Article X, compile declarations made by the States Parties and register, when requested, bilateral agreements concluded between States Parties or between a State Party and the Organization for the purposes of Article X.

40. The Technical Secretariat shall inform the Executive Council of any problem that has arisen with regard to the discharge of its functions, including doubts, ambiguities or uncertainties about compliance with this Convention that have come to its notice in the performance of its verification activities and that it has been unable to resolve or clarify through its consultations with the State Party concerned.

41. The Technical Secretariat shall comprise a Director-General, who shall be its head and chief administrative officer, inspectors and such scientific, technical and other personnel as may be required.

42. The Inspectorate shall be a unit of the Technical Secretariat and shall act under the supervision of the Director-General.

43. The Director-General shall be appointed by the Conference upon the recommendation of the Executive Council for a term of four years, renewable for one further term, but not thereafter.

44. The Director-General shall be responsible to the Conference and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Only citizens of States Parties shall serve as the Director-General, as inspectors or as other members of the professional and clerical staff. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. Recruitment shall be guided by the principle that the staff shall be kept to a minimum necessary for the proper discharge of the responsibilities of the Technical Secretariat.

45. The Director-General shall be responsible for the organization and functioning of the Scientific Advisory Board referred to in paragraph 21 (h). The Director-General shall, in consultation with States Parties, appoint members of the Scientific Advisory Board, who

shall serve in their individual capacity. The members of the Board shall be appointed on the basis of their expertise in the particular scientific fields relevant to the implementation of this Convention. The Director-General may also, as appropriate, in consultation with members of the Board, establish temporary working groups of scientific experts to provide recommendations on specific issues. In regard to the above, States Parties may submit lists of experts to the Director-General.

46. In the performance of their duties, the Director-General, the inspectors and the other members of the staff shall not seek or receive instructions from any Government or from any other source external to the Organization. They shall refrain from any action that might reflect on their positions as international officers responsible only to the Conference and the Executive Council.

47. Each State Party shall respect the exclusively international character of the responsibilities of the Director-General, the inspectors and the other members of the staff and not seek to influence them in the discharge of their responsibilities.

#### E. PRIVILEGES AND IMMUNITIES

48. The Organization shall enjoy on the territory and in any other place under the jurisdiction or control of a State Party such legal capacity and such privileges and immunities as are necessary for the exercise of its functions.

49. Delegates of States Parties, together with their alternates and advisers, representatives appointed to the Executive Council together with their alternates and advisers, the Director-General and the staff of the Organization shall enjoy such privileges and immunities as are necessary in the independent exercise of their functions in connection with the Organization.

50. The legal capacity, privileges, and immunities referred to in this Article shall be defined in agreements between the Organization and the States Parties as well as in an agreement between the Organization and the State in which the headquarters of the Organization is seated. These agreements shall be considered and approved by the Conference pursuant to paragraph 21 (i).

51. Notwithstanding paragraphs 48 and 49, the privileges and immunities enjoyed by the Director-General and the staff of the Technical Secretariat during the conduct of verification activities shall be those set forth in Part II, Section B, of the Verification Annex.

#### ARTICLE IX

##### CONSULTATIONS, COOPERATION AND FACT-FINDING

1. States Parties shall consult and cooperate, directly among themselves, or through the Organization or other appropriate

international procedures, including procedures within the framework of the United Nations and in accordance with its Charter, on any matter which may be raised relating to the object and purpose, or the implementation of the provisions, of this Convention.

2. Without prejudice to the right of any State Party to request a challenge inspection, States Parties should, whenever possible, first make every effort to clarify and resolve, through exchange of information and consultations among themselves, any matter which may cause doubt about compliance with this Convention, or which gives rise to concerns about a related matter which may be considered ambiguous. A State Party which receives a request from another State Party for clarification of any matter which the requesting State Party believes causes such a doubt or concern shall provide the requesting State Party as soon as possible, but in any case not later than 10 days after the request, with information sufficient to answer the doubt or concern raised along with an explanation of how the information provided resolves the matter. Nothing in this Convention shall affect the right of any two or more States Parties to arrange by mutual consent for inspections or any other procedures among themselves to clarify and resolve any matter which may cause doubt about compliance or gives rise to a concern about a related matter which may be considered ambiguous. Such arrangements shall not affect the rights and obligations of any State Party under other provisions of this Convention.

#### Procedure for requesting clarification

3. A State Party shall have the right to request the Executive Council to assist in clarifying any situation which may be considered ambiguous or which gives rise to a concern about the possible non-compliance of another State Party with this Convention. The Executive Council shall provide appropriate information in its possession relevant to such a concern.

4. A State Party shall have the right to request the Executive Council to obtain clarification from another State Party on any situation which may be considered ambiguous or which gives rise to a concern about its possible non-compliance with this Convention. In such a case, the following shall apply:

(a) The Executive Council shall forward the request for clarification to the State Party concerned through the Director-General not later than 24 hours after its receipt;

(b) The requested State Party shall provide the clarification to the Executive Council as soon as possible, but in any case not later than 10 days after the receipt of the request;

(c) The Executive Council shall take note of the clarification and forward it to the requesting State Party not later than 24 hours after its receipt;

(d) If the requesting State Party deems the clarification to be inadequate, it shall have the right to request the Executive Council to obtain from the requested State Party further clarification;

(e) For the purpose of obtaining further clarification requested under subparagraph (d), the Executive Council may call on the Director-General to establish a group of experts from the Technical Secretariat, or if appropriate staff are not available in the Technical Secretariat, from elsewhere, to examine all available information and data relevant to the situation causing the concern. The group of experts shall submit a factual report to the Executive Council on its findings;

(f) If the requesting State Party considers the clarification obtained under subparagraphs (d) and (e) to be unsatisfactory, it shall have the right to request a special session of the Executive Council in which States Parties involved that are not members of the Executive Council shall be entitled to take part. In such a special session, the Executive Council shall consider the matter and may recommend any measure it deems appropriate to resolve the situation.

5. A State Party shall also have the right to request the Executive Council to clarify any situation which has been considered ambiguous or has given rise to a concern about its possible non-compliance with this Convention. The Executive Council shall respond by providing such assistance as appropriate.

6. The Executive Council shall inform the States Parties about any request for clarification provided in this Article.

7. If the doubt or concern of a State Party about a possible non-compliance has not been resolved within 60 days after the submission of the request for clarification to the Executive Council, or it believes its doubts warrant urgent consideration, notwithstanding its right to request a challenge inspection, it may request a special session of the Conference in accordance with Article VIII, paragraph 12 (c). At such a special session, the Conference shall consider the matter and may recommend any measure it deems appropriate to resolve the situation.

#### Procedures for challenge inspections

8. Each State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this Convention, and to have this inspection conducted anywhere without delay by an inspection team designated by the Director-General and in accordance with the Verification Annex.

9. Each State Party is under the obligation to keep the inspection request within the scope of this Convention and to provide in the inspection request all appropriate information on the basis of which a concern has arisen regarding possible non-compliance with this Convention as specified in the Verification Annex. Each State Party shall refrain from unfounded inspection requests, care being taken to avoid abuse. The challenge inspection shall be carried out for the sole purpose of determining facts relating to the possible non-compliance.

10. For the purpose of verifying compliance with the provisions of this Convention, each State Party shall permit the Technical Secretariat to conduct the on-site challenge inspection pursuant to paragraph 8.

11. Pursuant to a request for a challenge inspection of a facility or location, and in accordance with the procedures provided for in the Verification Annex, the inspected State Party shall have:

(a) The right and the obligation to make every reasonable effort to demonstrate its compliance with this Convention and, to this end, to enable the inspection team to fulfil its mandate;

(b) The obligation to provide access within the requested site for the sole purpose of establishing facts relevant to the concern regarding possible non-compliance; and

(c) The right to take measures to protect sensitive installations, and to prevent disclosure of confidential information and data, not related to this Convention.

12. With regard to an observer, the following shall apply:

(a) The requesting State Party may, subject to the agreement of the inspected State Party, send a representative who may be a national either of the requesting State Party or of a third State Party, to observe the conduct of the challenge inspection.

(b) The inspected State Party shall then grant access to the observer in accordance with the Verification Annex.

(c) The inspected State Party shall, as a rule, accept the proposed observer, but if the inspected State Party exercises a refusal, that fact shall be recorded in the final report.

13. The requesting State Party shall present an inspection request for an on-site challenge inspection to the Executive Council and at the same time to the Director-General for immediate processing.

14. The Director-General shall immediately ascertain that the inspection request meets the requirements specified in Part X, paragraph 4, of the Verification Annex, and, if necessary, assist the requesting State Party in filing the inspection request accordingly. When the inspection request fulfills the requirements, preparations for the challenge inspection shall begin.

15. The Director-General shall transmit the inspection request to the inspected State Party not less than 12 hours before the planned arrival of the inspection team at the point of entry.

16. After having received the inspection request, the Executive Council shall take cognizance of the Director-General's actions on the request and shall keep the case under its consideration throughout the inspection procedure. However, its deliberations shall not delay the inspection process.

17. The Executive Council may, not later than 12 hours after having received the inspection request, decide by a three-quarter majority of all its members against carrying out the challenge inspection, if it considers the inspection request to be frivolous, abusive or clearly beyond the scope of this Convention as described in paragraph 8. Neither the requesting nor the inspected State Party shall participate in such a decision. If the Executive Council decides against the challenge inspection, preparations shall be stopped, no further action on the inspection request shall be taken, and the States Parties concerned shall be informed accordingly.
18. The Director-General shall issue an inspection mandate for the conduct of the challenge inspection. The inspection mandate shall be operational terms, and shall conform with the inspection request.
19. The challenge inspection shall be conducted in accordance with Part X or, in the case of alleged use, in accordance with Part XI of the Verification Annex. The inspection team shall be guided by the principle of conducting the challenge inspection in the least intrusive manner possible, consistent with the effective and timely accomplishment of its mission.
20. The inspected State Party shall assist the inspection team throughout the challenge inspection and facilitate its task. If the inspected State Party proposes, pursuant to Part X, Section C, of the Verification Annex, arrangements to demonstrate compliance with this Convention, alternative to full and comprehensive access, it shall make every reasonable effort, through consultations with the inspection team, to reach agreement on the modalities for establishing the facts with the aim of demonstrating its compliance.
21. The final report shall contain the factual findings as well as an assessment by the inspection team of the degree and nature of access and cooperation granted for the satisfactory implementation of the challenge inspection. The Director-General shall promptly transmit the final report of the inspection team to the requesting State Party, to the inspected State Party, to the Executive Council and to all other States Parties. The Director-General shall further transmit promptly to the Executive Council the assessments of the requesting and of the inspected States Parties, as well as the views of other States Parties which may be conveyed to the Director-General for that purpose, and then provide them to all States Parties.
22. The Executive Council shall, in accordance with its powers and functions, review the final report of the inspection team as soon as it is presented, and address any concerns as to:
- (a) Whether any non-compliance has occurred;
  - (b) Whether the request had been within the scope of this Convention; and

- (c) Whether the right to request a challenge inspection had been abused.
23. If the Executive Council reaches the conclusion, in keeping with its powers and functions, that further action may be necessary with regard to paragraph 22, it shall take the appropriate measures to redress the situation and to ensure compliance with this Convention, including specific recommendations to the Conference. In the case of abuse, the Executive Council shall examine whether the requesting State Party should bear any of the financial implications of the challenge inspection.
24. The requesting State Party and the inspected State Party shall have the right to participate in the review process. The Executive Council shall inform the States Parties and the next session of the Conference of the outcome of the process.
25. If the Executive Council has made specific recommendations to the Conference, the Conference shall consider action in accordance with Article XII.

## ARTICLE X

## ASSISTANCE AND PROTECTION AGAINST CHEMICAL WEAPONS

1. For the purposes of this Article, "Assistance" means the coordination and delivery to States Parties of protection against chemical weapons, including, *inter alia*, the following: detection equipment and alarm systems; protective equipment; decontamination equipment and decontaminants; medical antidotes and treatments; and advice on any of these protective measures.
2. Nothing in this Convention shall be interpreted as impeding the right of any State Party to conduct research into, develop, produce, acquire, transfer or use means of protection against chemical weapons, for purposes not prohibited under this Convention.
3. Each State Party undertakes to facilitate, and shall have the right to participate in, the fullest possible exchange of equipment, material and scientific and technological information concerning means of protection against chemical weapons.
4. For the purposes of increasing the transparency of national programmes related to protective purposes, each State Party shall provide annually to the Technical Secretariat information on its programme, in accordance with procedures to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).
5. The Technical Secretariat shall establish, not later than 180 days after entry into force of this Convention and maintain, for the use of any requesting State Party, a data bank containing freely available information concerning various means of protection against chemical weapons as well as such information as may be provided by States Parties.

The Technical Secretariat shall also, within the resources available to it, and at the request of a State Party, provide expert advice and assist the State Party in identifying how its programmes for the development and improvement of a protective capacity against chemical weapons could be implemented.

6. Nothing in this Convention shall be interpreted as impeding the right of States Parties to request and provide assistance bilaterally and to conclude individual agreements with other States Parties concerning the emergency procurement of assistance.

7. Each State Party undertakes to provide assistance through the Organization and to this end to elect to take one or more of the following measures:

- (a) To contribute to the voluntary fund for assistance to be established by the Conference at its first session;
- (b) To conclude, if possible not later than 180 days after this Convention enters into force for it, agreements with the Organization concerning the procurement, upon demand, of assistance;
- (c) To declare, not later than 180 days after this Convention enters into force for it, the kind of assistance it might provide in response to an appeal by the Organization. If, however, a State Party subsequently is unable to provide the assistance envisaged in its declaration, it is still under the obligation to provide assistance in accordance with this paragraph.

8. Each State Party has the right to request and, subject to the procedures set forth in paragraphs 9, 10 and 11, to receive assistance and protection against the use or threat of use of chemical weapons if it considers that:

- (a) Chemical weapons have been used against it;
- (b) Riot control agents have been used against it as a method of warfare; or
- (c) It is threatened by actions or activities of any State that are prohibited for States Parties by Article I.

9. The request, substantiated by relevant information, shall be submitted to the Director-General, who shall transmit it immediately to the Executive Council and to all States Parties. The Director-General shall immediately forward the request to States Parties which have volunteered, in accordance with paragraphs 7 (b) and (c), to dispatch emergency assistance in case of use of chemical weapons or use of riot control agents as a method of warfare, or humanitarian assistance in case of serious threat of use of chemical weapons or serious threat of use of riot control agents as a method of warfare to the State Party concerned not later than 12 hours after receipt of the request. The Director-General shall initiate, not later than 24 hours after receipt of the request, an investigation in order to provide foundation for

further action. He shall complete the investigation within 72 hours and forward a report to the Executive Council. If additional time is required for completion of the investigation, an interim report shall be submitted within the same time-frame. The additional time required for investigation shall not exceed 72 hours. It may, however, be further extended by similar periods. Reports at the end of each additional period shall be submitted to the Executive Council. The investigation shall, as appropriate and in conformity with the request and the information accompanying the request, establish relevant facts related to the request as well as the type and scope of supplementary assistance and protection needed.

10. The Executive Council shall meet not later than 24 hours after receiving an investigation report to consider the situation and shall take a decision by simple majority within the following 24 hours on whether to instruct the Technical Secretariat to provide supplementary assistance. The Technical Secretariat shall immediately transmit to all States Parties and relevant international organizations the investigation report and the decision taken by the Executive Council. When so decided by the Executive Council, the Director-General shall provide assistance immediately. For this purpose, the Director-General may cooperate with the requesting State Party, other States Parties and relevant international organizations. The States Parties shall make the fullest possible efforts to provide assistance.

11. If the information available from the ongoing investigation or other reliable sources would give sufficient proof that there are victims of use of chemical weapons and immediate action is indispensable, the Director-General shall notify all States Parties and shall take emergency measures of assistance, using the resources the Conference has placed at his disposal for such contingencies. The Director-General shall keep the Executive Council informed of actions undertaken pursuant to this paragraph.

#### ARTICLE XI

#### ECONOMIC AND TECHNOLOGICAL DEVELOPMENT

1. The provisions of this Convention shall be implemented in a manner which avoids hampering the economic or technological development of States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention.

2. Subject to the provisions of this Convention and without prejudice to the principles and applicable rules of international law, the States Parties shall:

- (a) Have the right, individually or collectively, to conduct research with, to develop, produce, acquire, retain, transfer, and use chemicals;

(b) Undertake to facilitate, and have the right to participate in, the fullest possible exchange of chemicals, equipment and scientific and technical information relating to the development and application of chemistry for purposes not prohibited under this Convention;

(c) Not maintain among themselves any restrictions, including those in any international agreements, incompatible with the obligations undertaken under this Convention, which would restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(d) Not use this Convention as grounds for applying any measures other than those provided for, or permitted, under this Convention nor use any other international agreement for pursuing an objective inconsistent with this Convention;

(e) Undertake to review their existing national regulations in the field of trade in chemicals in order to render them consistent with the object and purpose of this Convention.

#### ARTICLE XII

##### MEASURES TO REDRESS A SITUATION AND TO ENSURE COMPLIANCE, INCLUDING SANCTIONS

1. The Conference shall take the necessary measures, as set forth in paragraphs 2, 3 and 4, to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention. In considering action pursuant to this paragraph, the Conference shall take into account all information and recommendations on the issues submitted by the Executive Council.

2. In cases where a State Party has been requested by the Executive Council to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfil the request within the specified time, the Conference may, *inter alia*, upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under this Convention until it undertakes the necessary action to conform with its obligations under this Convention.

3. In cases where serious damage to the object and purpose of this Convention may result from activities prohibited under this Convention, in particular by Article I, the Conference may recommend collective measures to States Parties in conformity with international law.

4. The Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council.

#### ARTICLE XIII

##### RELATION TO OTHER INTERNATIONAL AGREEMENTS

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and under the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, signed at London, Moscow and Washington on 10 April 1972.

#### ARTICLE XIV

##### SETTLEMENT OF DISPUTES

1. Disputes that may arise concerning the application or the interpretation of this Convention shall be settled in accordance with the relevant provisions of this Convention and in conformity with the provisions of the Charter of the United Nations.

2. When a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the interpretation or application of this Convention, the parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of the parties' choice, including recourse to appropriate organs of this Convention and, by mutual consent, referral to the International Court of Justice in conformity with the Statute of the Court. The States Parties involved shall keep the Executive Council informed of actions being taken.

3. The Executive Council may contribute to the settlement of a dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to start the settlement process of their choice and recommending a time-limit for any agreed procedure.

4. The Conference shall consider questions related to disputes raised by States Parties or brought to its attention by the Executive Council. The Conference shall, as it finds necessary, establish or entrust organs with tasks related to the settlement of these disputes in conformity with Article VIII, paragraph 21 (f).

5. The Conference and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Organization and the United Nations shall be concluded for this purpose in accordance with Article VIII, paragraph 34 (a).

6. This Article is without prejudice to Article IX or to the provisions on measures to redress a situation and to ensure compliance, including sanctions.

## ARTICLE XV

## AMENDMENTS

1. Any State Party may propose amendments to this Convention. Any State Party may also propose changes, as specified in paragraph 4, to the Annexes of this Convention. Proposals for amendments shall be subject to the procedures in paragraphs 2 and 3. Proposals for changes, as specified in paragraph 4, shall be subject to the procedures in paragraph 5.
2. The text of a proposed amendment shall be submitted to the Director-General for circulation to all States Parties and to the Depository. The proposed amendment shall be considered only by an Amendment Conference. Such an Amendment Conference shall be convened if one third or more of the States Parties notify the Director-General not later than 30 days after its circulation that they support further consideration of the proposal. The Amendment Conference shall be held immediately following a regular session of the Conference unless the requesting States Parties ask for an earlier meeting. In no case shall an Amendment Conference be held less than 60 days after the circulation of the proposed amendment.
3. Amendments shall enter into force for all States Parties 30 days after deposit of the instruments of ratification or acceptance by all the States Parties referred to under subparagraph (b) below:
  - (a) When adopted by the Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative vote; and
  - (b) Ratified or accepted by all those States Parties casting a positive vote at the Amendment Conference.

4. In order to ensure the viability and the effectiveness of this Convention, provisions in the Annexes shall be subject to changes in accordance with paragraph 5, if proposed changes are related only to matters of an administrative or technical nature. All changes to the Annex on Chemicals shall be made in accordance with paragraph 5. Sections A and C of the Confidentiality Annex, Part X of the Verification Annex, and those definitions in Part I of the Verification Annex which relate exclusively to challenge inspections, shall not be subject to changes in accordance with paragraph 5.

5. Proposed changes referred to in paragraph 4 shall be made in accordance with the following procedures:

- (a) The text of the proposed changes shall be transmitted together with the necessary information to the Director-General. Additional information for the evaluation of the proposal may be provided by any

State Party and the Director-General. The Director-General shall promptly communicate any such proposals and information to all States Parties, the Executive Council and the Depository;

(b) Not later than 60 days after its receipt, the Director-General shall evaluate the proposal to determine all its possible consequences for the provisions of this Convention and its implementation and shall communicate any such information to all States Parties and the Executive Council;

(c) The Executive Council shall examine the proposal in the light of all information available to it, including whether the proposal fulfils the requirements of paragraph 4. Not later than 90 days after its receipt, the Executive Council shall notify its recommendation, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;

(d) If the Executive Council recommends to all States Parties that the proposal be adopted, it shall be considered approved if no State Party objects to it within 90 days after receipt of the recommendation. If the Executive Council recommends that the proposal be rejected, it shall be considered rejected if no State Party objects to the rejection within 90 days after receipt of the recommendation;

(e) If a recommendation of the Executive Council does not meet with the acceptance required under subparagraph (d), a decision on the proposal, including whether it fulfils the requirements of paragraph 4, shall be taken as a matter of substance by the Conference at its next session;

(f) The Director-General shall notify all States Parties and the Depository of any decision under this paragraph;

(g) Changes approved under this procedure shall enter into force for all States Parties 180 days after the date of notification by the Director-General of their approval unless another time period is recommended by the Executive Council or decided by the Conference.

## ARTICLE XVI

## DURATION AND WITHDRAWAL

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal 90 days in advance to all other States Parties, the Executive Council, the Depository and the United Nations Security Council. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

3. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law, particularly the Geneva Protocol of 1925.

ARTICLE XVII

STATUS OF THE ANNEXES

The Annexes form an integral part of this Convention. Any reference to this Convention includes the Annexes.

ARTICLE XVIII

SIGNATURE

This Convention shall be open for signature for all States before its entry into force.

ARTICLE XIX

RATIFICATION

This Convention shall be subject to ratification by States Signatories according to their respective constitutional processes.

ARTICLE XX

ACCESSION

Any State which does not sign this Convention before its entry into force may accede to it at any time thereafter.

ARTICLE XXI

ENTRY INTO FORCE

1. This Convention shall enter into force 180 days after the date of the deposit of the 65th instrument of ratification, but in no case earlier than two years after its opening for signature.
2. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the 30th day following the date of deposit of their instrument of ratification or accession.

ARTICLE XXII

RESERVATIONS

The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose.

ARTICLE XXIII

DEPOSITARY

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention and shall, inter alia:

- (a) Promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession and the date of the entry into force of this Convention, and of the receipt of other notices;
- (b) Transmit duly certified copies of this Convention to the Governments of all signatory and acceding States; and
- (c) Register this Convention pursuant to Article 102 of the Charter of the United Nations.

ARTICLE XXIV

AUTHENTIC TEXTS

This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

Done at Paris on the thirteenth day of January, one thousand nine hundred and ninety-three.

[For the signatures, see p. 422 of volume 1975.]

ANNEX ON CHEMICALS

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A. GUIDELINES FOR SCHEDULES OF CHEMICALS

Guidelines for Schedule 1

1. The following criteria shall be taken into account in considering whether a toxic chemical or precursor should be included in Schedule 1:

(a) It has been developed, produced, stockpiled or used as a chemical weapon as defined in Article II;

(b) It poses otherwise a high risk to the object and purpose of this Convention by virtue of its high potential for use in activities prohibited under this Convention because one or more of the following conditions are met:

- (i) It possesses a chemical structure closely related to that of other toxic chemicals listed in Schedule 1, and has, or can be expected to have, comparable properties;
  - (ii) It possesses such lethal or incapacitating toxicity as well as other properties that would enable it to be used as a chemical weapon;
  - (iii) It may be used as a precursor in the final single technological stage of production of a toxic chemical listed in Schedule 1, regardless of whether this stage takes place in facilities, in munitions or elsewhere;
- (c) It has little or no use for purposes not prohibited under this Convention.

Guidelines for Schedule 2

2. The following criteria shall be taken into account in considering whether a toxic chemical not listed in Schedule 1 or a precursor to a Schedule 1 chemical or to a chemical listed in Schedule 2, part A, should be included in Schedule 2:

(a) It poses a significant risk to the object and purpose of this Convention because it possesses such lethal or incapacitating toxicity as well as other properties that could enable it to be used as a chemical weapon;

(b) It may be used as a precursor in one of the chemical reactions at the final stage of formation of a chemical listed in Schedule 1 or Schedule 2, part A;

(c) It poses a significant risk to the object and purpose of this Convention by virtue of its importance in the production of a chemical listed in Schedule 1 or Schedule 2, part A;

(d) It is not produced in large commercial quantities for purposes not prohibited under this Convention.

Guidelines for Schedule 3

3. The following criteria shall be taken into account in considering whether a toxic chemical or precursor, not listed in other Schedules, should be included in Schedule 3:

- (a) It has been produced, stockpiled or used as a chemical weapon;
- (b) It poses otherwise a risk to the object and purpose of this Convention because it possesses such lethal or incapacitating toxicity as well as other properties that might enable it to be used as a chemical weapon;
- (c) It poses a risk to the object and purpose of this Convention by virtue of its importance in the production of one or more chemicals listed in Schedule 1 or Schedule 2, part B;
- (d) It may be produced in large commercial quantities for purposes not prohibited under this Convention.

B. SCHEDULES OF CHEMICALS

The following Schedules list toxic chemicals and their precursors. For the purpose of implementing this Convention, these Schedules identify chemicals for the application of verification measures according to the provisions of the Verification Annex. Pursuant to Article II, subparagraph 1 (a), these Schedules do not constitute a definition of chemical weapons.

(Whenever reference is made to groups of dialkylated chemicals, followed by a list of alkyl groups in parentheses, all chemicals possible by all possible combinations of alkyl groups listed in the parentheses are considered as listed in the respective Schedule as long as they are not explicitly exempted. A chemical marked "\*" on Schedule 2, part A, is subject to special thresholds for declaration and verification, as specified in Part VII of the Verification Annex.)

Schedule 1

A. Toxic chemicals:  
(CAS registry number)

- (1) O-Alkyl (C<sub>10</sub>, incl. cycloalkyl) alkyl  
(Me, Et, n-Pr or i-Pr)-phosphonofluoridates  
e.g. Sarin: O-Isopropyl methylphosphonofluoridate (107-44-8)  
Soman: O-Pinacolyl methylphosphonofluoridate (96-64-0)
- (2) O-Alkyl (C<sub>10</sub>, incl. cycloalkyl) N,N-dialkyl  
(Me, Et, n-Pr or i-Pr) phosphoramidocyanidates  
e.g. Tabun: O-Ethyl N,N-dimethyl phosphoramidocyanidate (77-81-6)

- (3) O-Alkyl (H or C<sub>10</sub>, incl. cycloalkyl) S-2-dialkyl  
(Me, Et, n-Pr or i-Pr)-aminoethyl alkyl  
(Me, Et, n-Pr or i-Pr) phosphonothiolates and  
corresponding alkylated or protonated salts

e.g. VX: O-Ethyl S-2-diisopropylaminoethyl  
methyl phosphonothiolate (50782-69-9)

- (4) Sulfur mustards:

2-Chloroethylchloromethylsulfide (2625-76-5)  
Mustard gas: Bis(2-chloroethyl)sulfide (505-60-2)  
Bis(2-chloroethylthio)methane (63869-13-6)  
Sesquimustard: 1,2-Bis(2-chloroethylthio)ethane (3563-36-8)  
1,3-Bis(2-chloroethylthio)-n-propane (63905-10-2)  
1,4-Bis(2-chloroethylthio)-n-butane (142868-93-7)  
1,5-Bis(2-chloroethylthio)-n-pentane (142868-94-8)  
Bis(2-chloroethylthiomethyl)ether (63918-90-1)  
O-Mustard: Bis(2-chloroethylthioethyl)ether (63918-89-8)

- (5) Lewisites:

Lewisite 1: 2-Chlorovinylchloroarsine (541-25-3)  
Lewisite 2: Bis(2-chlorovinyl)chloroarsine (40334-69-8)  
Lewisite 3: Tris(2-chlorovinyl)arsine (40334-70-1)

- (6) Nitrogen mustards:

HN1: Bis(2-chloroethyl)ethylamine (538-07-8)  
HN2: Bis(2-chloroethyl)methylamine (51-75-2)  
HN3: Tris(2-chloroethyl)amine (555-77-1)

- (7) Saxitoxin (35523-89-8)

- (8) Ricin (9009-86-3)

## B. Precursors:

- (9) Alkyl (Me, Et, n-Pr or i-Pr) phosphonyldifluorides  
e.g. DF: Methylphosphonyldifluoride (676-99-3)

- (10) O-Alkyl (H or C<sub>10</sub>, incl. cycloalkyl) O-2-dialkyl  
(Me, Et, n-Pr or i-Pr)-aminoethyl alkyl  
(Me, Et, n-Pr or i-Pr) phosphonites  
and corresponding alkylated or protonated salts

e.g. QL: O-Ethyl O-2-diisopropylaminoethyl  
methylphosphonite (57856-11-8)

- (11) Chlorosarin: O-Isopropyl methylphosphonochloridate (1445-76-7)

- (12) Chlorosoman: O-Pinacolyl methylphosphonochloridate (7040-57-5)

Schedule 2

## A. Toxic chemicals:

- (1) Amiton: O,O-Diethyl S-[2-(diethylamino)ethyl] phosphorothiolate and corresponding alkylated or protonated salts (78-53-5)
- (2) PFIB: 1,1,3,3-Pentafluoro-2-(trifluoromethyl)-1-propene (382-21-8)
- (3) BZ: 3-Quinuclidinyl benzilate (\*) (6581-06-2)

## B. Precursors:

- (4) Chemicals, except for those listed in Schedule 1, containing a phosphorus atom to which is bonded one methyl, ethyl or propyl (normal or iso) group but not further carbon atoms,

e.g. Methylphosphonyl dichloride  
Dimethyl methylphosphonate

Exemption: Fonofos: O-Ethyl S-phenyl ethylphosphonothiothionate

- (5) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides (7784-34-1)
- (6) Dialkyl (Me, Et, n-Pr or i-Pr) N,N-dialkyl (Me, Et, n-Pr or i-Pr)-phosphoramidates (76-93-7)
- (7) Arsenic trichloride (1619-34-7)
- (8) 2,2-Diphenyl-2-hydroxyacetic acid
- (9) Quinuclidine-3-ol
- (10) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethyl-2-chlorides and corresponding protonated salts
- (11) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-ols and corresponding protonated salts
- Exemptions: N,N-Dimethylaminoethanol and corresponding protonated salts  
N,N-Diethylaminoethanol and corresponding protonated salts
- (12) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-thiols and corresponding protonated salts
- (13) Thioglycol: Bis(2-hydroxyethyl)sulfide (111-48-8)
- (14) Pinacolyl alcohol: 3,3-Dimethylbutane-2-ol (464-07-3)

Schedule 3

## A. Toxic chemicals:

- (1) Phosgene: Carbonyl dichloride (75-44-5)
- (2) Cyanogen chloride (506-77-4)
- (3) Hydrogen cyanide (74-90-8)
- (4) Chloropicrin: Trichloronitromethane (76-06-2)
- B. Precursors:
- (5) Phosphorus oxychloride (10025-87-3)
- (6) Phosphorus trichloride (7719-12-2)
- (7) Phosphorus pentachloride (10026-13-8)
- (8) Trimethyl phosphite (121-45-9)
- (9) Triethyl phosphite (122-52-1)
- (10) Dimethyl phosphite (868-85-9)
- (11) Diethyl phosphite (762-04-9)
- (12) Sulfur monochloride (10025-67-9)
- (13) Sulfur dichloride (10545-99-0)
- (14) Thionyl chloride (7719-09-7)
- (15) Ethyldiethanolamine (139-87-7)
- (16) Methyldiethanolamine (105-59-9)
- (17) Triethanolamine (102-71-6)

ANNEX ON IMPLEMENTATION AND VERIFICATION  
("VERIFICATION ANNEX")

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PART I

DEFINITIONS

1. "Approved Equipment" means the devices and instruments necessary for the performance of the inspection team's duties that have been certified by the Technical Secretariat in accordance with regulations prepared by the Technical Secretariat pursuant to Part II, paragraph 27 of this Annex. Such equipment may also refer to the administrative supplies or recording materials that would be used by the inspection team.
2. "Building" as referred to in the definition of chemical weapons production facility in Article II comprises specialized buildings and standard buildings.
  - (a) "Specialized Building" means:
    - (i) Any building, including underground structures, containing specialized equipment in a production or filling configuration;
    - (ii) Any building, including underground structures, which has distinctive features which distinguish it from buildings normally used for chemical production or filling activities not prohibited under this Convention.
  - (b) "Standard Building" means any building, including underground structures, constructed to prevailing industry standards for facilities not producing any chemical specified in Article II, paragraph 8 (a) (i), or corrosive chemicals.
3. "Challenge Inspection" means the inspection of any facility or location in the territory or in any other place under the jurisdiction or control of a State Party requested by another State Party pursuant to Article IX, paragraphs 8 to 25.
4. "Discrete Organic Chemical" means any chemical belonging to the class of chemical compounds consisting of all compounds of carbon except for its oxides, sulfides and metal carbonates, identifiable by chemical name, by structural formula, if known, and by Chemical Abstracts Service registry number, if assigned.
5. "Equipment" as referred to in the definition of chemical weapons production facility in Article II comprises specialized equipment and standard equipment.
  - (a) "Specialized Equipment" means:
    - (i) The main production train, including any reactor or equipment for product synthesis, separation or purification, any equipment used directly for heat transfer in the final technological stage, such as in reactors or in product separation, as well as any other equipment which has been in contact with any chemical

specified in Article II, paragraph 8 (a) (i), or would be in contact with such a chemical if the facility were operated;

- (ii) Any chemical weapon filling machines;
- (iii) Any other equipment specially designed, built or installed for the operation of the facility as a chemical weapons production facility, as distinct from a facility constructed according to prevailing commercial industry standards for facilities not producing any chemical specified in Article II, paragraph 8 (a) (i), or corrosive chemicals, such as: equipment made of high-nickel alloys or other special corrosion-resistant material; special equipment for waste control, waste treatment, air filtering, or solvent recovery; special containment enclosures and safety shields; non-standard laboratory equipment used to analyse toxic chemicals for chemical weapons purposes; custom-designed process control panels; or dedicated spares for specialized equipment.

(b) "Standard Equipment" means:

- (i) Production equipment which is generally used in the chemical industry and is not included in the types of specialized equipment;
- (ii) Other equipment commonly used in the chemical industry, such as: fire-fighting equipment; guard and security/safety surveillance equipment; medical facilities, laboratory facilities; or communications equipment.

6. "Facility" in the context of Article VI means any of the industrial sites as defined below ("plant site", "plant" and "unit").

(a) "Plant Site" (Works, Factory) means the local integration of one or more plants, with any intermediate administrative levels, which are under one operational control, and includes common infrastructure, such as:

- (i) Administration and other offices;
- (ii) Repair and maintenance shops;
- (iii) Medical centre;
- (iv) Utilities;
- (v) Central analytical laboratory;
- (vi) Research and development laboratories;

- (vii) Central effluent and waste treatment area; and
- (viii) Warehouse storage.

(b) "Plant" (Production facility, Workshop) means a relatively self-contained area, structure or building containing one or more units with auxiliary and associated infrastructure, such as:

- (i) Small administrative section;
- (ii) Storage/handling areas for feedstock and products;
- (iii) Effluent/waste handling/treatment area;
- (iv) Control/analytical laboratory;
- (v) First aid service/related medical section; and
- (vi) Records associated with the movement into, around and from the site, of declared chemicals and their feedstock or product chemicals formed from them, as appropriate.

(c) "Unit" (Production unit, Process unit) means the combination of those items of equipment, including vessels and vessel set up, necessary for the production, processing or consumption of a chemical.

7. "Facility Agreement" means an agreement or arrangement between a State Party and the Organization relating to a specific facility subject to on-site verification pursuant to Articles IV, V and VI.

8. "Host State" means the State on whose territory lie facilities or areas of another State, Party to this Convention, which are subject to inspection under this Convention.

9. "In-Country Escort" means individuals specified by the inspected State Party and, if appropriate, by the Host State, if they so wish, to accompany and assist the inspection team during the in-country period.

10. "In-Country Period" means the period from the arrival of the inspection team at a point of entry until its departure from the State at a point of entry.

11. "Initial Inspection" means the first on-site inspection of facilities to verify declarations submitted pursuant to Articles III, IV, V and VI and this Annex.

12. "Inspected State Party" means the State Party on whose territory or in any other place under its jurisdiction or control an inspection pursuant to this Convention takes place, or the State Party whose facility or area on the territory of a Host State is subject to such an inspection; it does not, however, include the State Party specified in Part II, paragraph 21 of this Annex.

13. "Inspection Assistant" means an individual designated by the Technical Secretariat as set forth in Part II, Section A, of this Annex to assist inspectors in an inspection or visit, such as medical, security and administrative personnel and interpreters.
14. "Inspection Mandate" means the instructions issued by the Director-General to the inspection team for the conduct of a particular inspection.
15. "Inspection Manual" means the compilation of additional procedures for the conduct of inspections developed by the Technical Secretariat.
16. "Inspection Site" means any facility or area at which an inspection is carried out and which is specifically defined in the respective facility agreement or inspection request or mandate or inspection request as expanded by the alternative or final perimeter.
17. "Inspection Team" means the group of inspectors and inspection assistants assigned by the Director-General to conduct a particular inspection.
18. "Inspector" means an individual designated by the Technical Secretariat according to the procedures as set forth in Part II, Section A, of this Annex, to carry out an inspection or visit in accordance with this Convention.
19. "Model Agreement" means a document specifying the general form and content for an agreement concluded between a State Party and the Organization for fulfilling the verification provisions specified in this Annex.
20. "Observer" means a representative of a requesting State Party or a third State Party to observe a challenge inspection.
21. "Perimeter" in case of challenge inspection means the external boundary of the inspection site, defined by either geographic coordinates or description on a map.
- (a) "Requested Perimeter" means the inspection site perimeter as specified in conformity with Part X, paragraph 8, of this Annex;
- (b) "Alternative Perimeter" means the inspection site perimeter as specified, alternatively to the requested perimeter, by the inspected State Party; it shall conform to the requirements specified in Part X, paragraph 17, of this Annex;
- (c) "Final Perimeter" means the final inspection site perimeter as agreed in negotiations between the inspection team and the inspected State Party, in accordance with Part X, paragraphs 16 to 21, of this Annex;
- (d) "Declared Perimeter" means the external boundary of the facility declared pursuant to Articles III, IV, V and VI.

22. "Period of Inspection", for the purposes of Article IX, means the period of time from provision of access to the inspection team to the inspection site until its departure from the inspection site, exclusive of time spent on briefings before and after the verification activities.
23. "Period of Inspection", for the purposes of Articles IV, V and VI, means the period of time from arrival of the inspection team at the inspection site until its departure from the inspection site, exclusive of time spent on briefings before and after the verification activities.
24. "Point of Entry"/"Point of Exit" means a location designated for the in-country arrival of inspection teams for inspections pursuant to this Convention or for their departure after completion of their mission.
25. "Requesting State Party" means a State Party which has requested a challenge inspection pursuant to Article IX.
26. "Tonne" means metric ton, i.e. 1,000 kg.

## PART II

## GENERAL RULES OF VERIFICATION

## A. DESIGNATION OF INSPECTORS AND INSPECTION ASSISTANTS

1. Not later than 30 days after entry into force of this Convention the Technical Secretariat shall communicate, in writing, to all States Parties the names, nationalities and ranks of the inspectors and inspection assistants proposed for designation, as well as a description of their qualifications and professional experiences.
2. Each State Party shall immediately acknowledge receipt of the list of inspectors and inspection assistants, proposed for designation communicated to it. The State Party shall inform the Technical Secretariat in writing of its acceptance of each inspector and inspection assistant, not later than 30 days after acknowledgement of receipt of the list. Any inspector and inspection assistant included in this list shall be regarded as designated unless a State Party, not later than 30 days after acknowledgement of receipt of the list, declares its non-acceptance in writing. The State Party may include the reason for the objection.
- In the case of non-acceptance, the proposed inspector or inspection assistant shall not undertake or participate in verification activities on the territory or in any other place under the jurisdiction or control of the State Party which has declared its non-acceptance. The Technical Secretariat shall, as necessary, submit further proposals in addition to the original list.
3. Verification activities under this Convention shall only be performed by designated inspectors and inspection assistants.

4. Subject to the provisions of paragraph 5, a State Party has the right at any time to object to an inspector or inspection assistant who has already been designated. It shall notify the Technical Secretariat of its objection in writing and may include the reason for the objection. Such objection shall come into effect 30 days after receipt by the Technical Secretariat. The Technical Secretariat shall immediately inform the State Party concerned of the withdrawal of the designation of the inspector or inspection assistant.

5. A State Party that has been notified of an inspection shall not seek to have removed from the inspection team for that inspection any of the designated inspectors or inspection assistants named in the inspection team list.

6. The number of inspectors or inspection assistants accepted by and designated to a State Party must be sufficient to allow for availability and rotation of appropriate numbers of inspectors and inspection assistants.

7. If, in the opinion of the Director-General, the non-acceptance of proposed inspectors or inspection assistants impedes the designation of a sufficient number of inspectors or inspection assistants or otherwise hampers the effective fulfilment of the tasks of the Technical Secretariat, the Director-General shall refer the issue to the Executive Council.

8. Whenever amendments to the above-mentioned lists of inspectors and inspection assistants are necessary or requested, replacement inspectors and inspection assistants shall be designated in the same manner as set forth with respect to the initial list.

9. The members of the inspection team carrying out an inspection of a facility of a State Party located on the territory of another State Party shall be designated in accordance with the procedures set forth in this Annex as applied both to the inspected State Party and the Host State Party.

#### B. PRIVILEGES AND IMMUNITIES

10. Each State Party shall, not later than 30 days after acknowledgement of receipt of the list of inspectors and inspection assistants or of changes thereto, provide multiple entry/exit and/or transit visas and other such documents to enable each inspector or inspection assistant to enter and to remain on the territory of that State Party for the purpose of carrying out inspection activities. These documents shall be valid for at least two years after their provision to the Technical Secretariat.

11. To exercise their functions effectively, inspectors and inspection assistants shall be accorded privileges and immunities as set forth in subparagraphs (a) to (i). Privileges and immunities shall be granted to members of the inspection team for the sake of this Convention and not for the personal benefit of the individuals themselves. Such privileges and immunities shall be accorded to them for the entire period between

arrival on and departure from the territory of the inspected State Party or Host State, and thereafter with respect to acts previously performed in the exercise of their official functions.

(a) The members of the inspection team shall be accorded the inviolability enjoyed by diplomatic agents pursuant to Article 29 of the Vienna Convention on Diplomatic Relations of 18 April 1961.

(b) The living quarters and office premises occupied by the inspection team carrying out inspection activities pursuant to this Convention shall be accorded the inviolability and protection accorded to the premises of diplomatic agents pursuant to Article 30, paragraph 1, of the Vienna Convention on Diplomatic Relations.

(c) The papers and correspondence, including records, of the inspection team shall enjoy the inviolability accorded to all papers and correspondence of diplomatic agents pursuant to Article 30, paragraph 2, of the Vienna Convention on Diplomatic Relations. The inspection team shall have the right to use codes for their communications with the Technical Secretariat.

(d) Samples and approved equipment carried by members of the inspection team shall be inviolable subject to provisions contained in this Convention and exempt from all customs duties. Hazardous samples shall be transported in accordance with relevant regulations.

(e) The members of the inspection team shall be accorded the immunities accorded to diplomatic agents pursuant to Article 31, paragraphs 1, 2 and 3, of the Vienna Convention on Diplomatic Relations.

(f) The members of the inspection team carrying out prescribed activities pursuant to this Convention shall be accorded the exemption from dues and taxes accorded to diplomatic agents pursuant to Article 34 of the Vienna Convention on Diplomatic Relations.

(g) The members of the inspection team shall be permitted to bring into the territory of the inspected State Party or Host State Party, without payment of any customs duties or related charges, articles for personal use, with the exception of articles the import or export of which is prohibited by law or controlled by quarantine regulations.

(h) The members of the inspection team shall be accorded the same currency and exchange facilities as are accorded to representatives of foreign Governments on temporary official missions.

(i) The members of the inspection team shall not engage in any professional or commercial activity for personal profit on the territory of the inspected State Party or the Host State.

12. When transiting the territory of non-inspected States Parties, the members of the inspection team shall be accorded the privileges and immunities enjoyed by diplomatic agents pursuant to Article 40, paragraph 1, of the Vienna Convention on Diplomatic Relations. Papers and correspondence, including records, and samples and approved

equipment, carried by them, shall be accorded the privileges and immunities set forth in paragraph 11 (c) and (d).

13. Without prejudice to their privileges and immunities the members of the inspection team shall be obliged to respect the laws and regulations of the inspected State Party or Host State and, to the extent that is consistent with the inspection mandate, shall be obliged not to interfere in the internal affairs of that State. If the inspected State Party or Host State Party considers that there has been an abuse of privileges and immunities specified in this Annex, consultations shall be held between the State Party and the Director-General to determine whether such an abuse has occurred and, if so determined, to prevent a repetition of such an abuse.

14. The immunity from jurisdiction of members of the inspection team may be waived by the Director-General in those cases when the Director-General is of the opinion that immunity would impede the course of justice and that it can be waived without prejudice to the implementation of the provisions of this Convention. Waiver must always be express.

15. Observers shall be accorded the same privileges and immunities accorded to inspectors pursuant to this section, except for those accorded pursuant to paragraph 11 (d).

#### C. STANDING ARRANGEMENTS

##### Points of entry

16. Each State Party shall designate the points of entry and shall supply the required information to the Technical Secretariat not later than 30 days after this Convention enters into force for it. These points of entry shall be such that the inspection team can reach any inspection site from at least one point of entry within 12 hours. Locations of points of entry shall be provided to all States Parties by the Technical Secretariat.

17. Each State Party may change the points of entry by giving notice of such change to the Technical Secretariat. Changes shall become effective 30 days after the Technical Secretariat receives such notification to allow appropriate notification to all States Parties.

18. If the Technical Secretariat considers that there are insufficient points of entry for the timely conduct of inspections or that changes to the points of entry proposed by a State Party would hamper such timely conduct of inspections, it shall enter into consultations with the State Party concerned to resolve the problem.

19. In cases where facilities or areas of an inspected State Party are located on the territory of a Host State Party or where the access from the point of entry to the facilities or areas subject to inspection requires transit through the territory of another State Party, the inspected State Party shall exercise the rights and fulfil the obligations concerning such inspections in accordance with this Annex.

The Host State Party shall facilitate the inspection of those facilities or areas and shall provide for the necessary support to enable the inspection team to carry out its tasks in a timely and effective manner. States Parties through whose territory transit is required to inspect facilities or areas of an inspected State Party shall facilitate such transit.

20. In cases where facilities or areas of an inspected State Party are located on the territory of a State not Party to this Convention, the inspected State Party shall take all necessary measures to ensure that inspections of those facilities or areas can be carried out in accordance with the provisions of this Annex. A State Party that has one or more facilities or areas on the territory of a State not Party to this Convention shall take all necessary measures to ensure acceptance by the Host State of inspectors and inspection assistants designated to that State Party. If an inspected State Party is unable to ensure access, it shall demonstrate that it took all necessary measures to ensure access.

21. In cases where the facilities or areas sought to be inspected are located on the territory of a State Party, but in a place under the jurisdiction or control of a State not Party to this Convention, the State Party shall take all necessary measures as would be required of an inspected State Party and a Host State Party to ensure that inspections of such facilities or areas can be carried out in accordance with the provisions of this Annex. If the State Party is unable to ensure access to those facilities or areas, it shall demonstrate that it took all necessary measures to ensure access. This paragraph shall not apply where the facilities or areas sought to be inspected are those of the State Party.

##### Arrangements for use of non-scheduled aircraft

22. For inspections pursuant to Article IX and for other inspections where timely travel is not feasible using scheduled commercial transport, an inspection team may need to utilize aircraft owned or chartered by the Technical Secretariat. Not later than 30 days after this Convention enters into force for it, each State Party shall inform the Technical Secretariat of the standing diplomatic clearance number for non-scheduled aircraft transporting inspection teams and equipment necessary for inspection into and out of the territory in which an inspection site is located. Aircraft routings to and from the designated point of entry shall be along established international airways that are agreed upon between the States Parties and the Technical Secretariat as the basis for such diplomatic clearance.

23. When a non-scheduled aircraft is used, the Technical Secretariat shall provide the inspected State Party with a flight plan, through the National Authority, for the aircraft's flight from the last airfield prior to entering the airspace of the State in which the inspection site is located to the point of entry, not less than six hours before the scheduled departure time from that airfield. Such a plan shall be filed in accordance with the procedures of the International Civil Aviation Organization applicable to civil aircraft. For its owned or chartered

flights, the Technical Secretariat shall include in the remarks section of each flight plan the standing diplomatic clearance number and the appropriate notation identifying the aircraft as an inspection aircraft.

24. Not less than three hours before the scheduled departure of the inspection team from the last airfield prior to entering the airspace of the State in which the inspection is to take place, the inspected State Party or Host State Party shall ensure that the flight plan filed in accordance with paragraph 23 is approved so that the inspection team may arrive at the point of entry by the estimated arrival time.

25. The inspected State Party shall provide parking, security protection, servicing and fuel as required by the Technical Secretariat for the aircraft of the inspection team at the point of entry when such aircraft is owned or chartered by the Technical Secretariat. Such aircraft shall not be liable for landing fees, departure tax, and similar charges. The Technical Secretariat shall bear the cost of such fuel, security protection and servicing.

#### Administrative arrangements

26. The inspected State Party shall provide or arrange for the amenities necessary for the inspection team such as communication means, interpretation services to the extent necessary for the performance of interviewing and other tasks, transportation, working space, lodging, meals and medical care. In this regard, the inspected State Party shall be reimbursed by the Organization for such costs incurred by the inspection team.

#### Approved equipment

27. Subject to paragraph 29, there shall be no restriction by the inspected State Party on the inspection team bringing onto the inspection site such equipment, approved in accordance with paragraph 28, which the Technical Secretariat has determined to be necessary to fulfil the inspection requirements. The Technical Secretariat shall prepare and, as appropriate, update a list of approved equipment, which may be needed for the purposes described above, and regulations governing such equipment which shall be in accordance with this Annex. In establishing the list of approved equipment and these regulations, the Technical Secretariat shall ensure that safety considerations for all the types of facilities at which such equipment is likely to be used, are taken fully into account. A list of approved equipment shall be considered and approved by the Conference pursuant to Article VII, paragraph 21 (i).

28. The equipment shall be in the custody of the Technical Secretariat and be designated, calibrated and approved by the Technical Secretariat. The Technical Secretariat shall, to the extent possible, select that equipment which is specifically designed for the specific kind of inspection required. Designated and approved equipment shall be specifically protected against unauthorized alteration.

29. The inspected State Party shall have the right, without prejudice to the prescribed time-frames, to inspect the equipment in the presence of inspection team members at the point of entry, i.e., to check the identity of the equipment brought in or removed from the territory of the inspected State Party or the Host State. To facilitate such identification, the Technical Secretariat shall attach documents and devices to authenticate its designation and approval of the equipment. The inspection of the equipment shall also ascertain to the satisfaction of the inspected State Party that the equipment meets the description of the approved equipment for the particular type of inspection. The inspected State Party may exclude equipment not meeting that description or equipment without the above-mentioned authentication documents and devices. Procedures for the inspection of equipment shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

30. In cases where the inspection team finds it necessary to use equipment available on site not belonging to the Technical Secretariat and requests the inspected State Party to enable the team to use such equipment, the inspected State Party shall comply with the request to the extent it can.

#### D. PRE-INSPECTION ACTIVITIES

##### Notification

31. The Director-General shall notify the State Party before the planned arrival of the inspection team at the point of entry and within the prescribed time-frames, where specified, of its intention to carry out an inspection.

32. Notifications made by the Director-General shall include the following information:

- (a) The type of inspection;
- (b) The point of entry;
- (c) The date and estimated time of arrival at the point of entry;
- (d) The means of arrival at the point of entry;
- (e) The site to be inspected;
- (f) The names of inspectors and inspection assistants;
- (g) If appropriate, aircraft clearance for special flights.

33. The inspected State Party shall acknowledge the receipt of a notification by the Technical Secretariat of an intention to conduct an inspection, not later than one hour after receipt of such notification.

34. In the case of an inspection of a facility of a State Party located on the territory of another State Party, both States Parties shall be simultaneously notified in accordance with paragraphs 31 and 32.

Entry into the territory of the inspected State Party or Host State and transfer to the inspection site

35. The inspected State Party or Host State Party which has been notified of the arrival of an inspection team, shall ensure its immediate entry into the territory and shall through an in-country escort or by other means do everything in its power to ensure the safe conduct of the inspection team and its equipment and supplies, from its point of entry to the inspection site(s) and to a point of exit.

36. The inspected State Party or Host State Party shall, as necessary, assist the inspection team in reaching the inspection site not later than 12 hours after the arrival at the point of entry.

Pre-inspection briefing

37. Upon arrival at the inspection site and before the commencement of the inspection, the inspection team shall be briefed by facility representatives, with the aid of maps and other documentation as appropriate, on the facility, the activities carried out there, safety measures and administrative and logistic arrangements necessary for the inspection. The time spent for the briefing shall be limited to the minimum necessary and in any event not exceed three hours.

E. CONDUCT OF INSPECTIONS

General rules

38. The members of the inspection team shall discharge their functions in accordance with the provisions of this Convention, as well as rules established by the Director-General and facility agreements concluded between States Parties and the Organization.

39. The inspection team shall strictly observe the inspection mandate issued by the Director-General. It shall refrain from activities going beyond this mandate.

40. The activities of the inspection team shall be so arranged as to ensure the timely and effective discharge of its functions and the least possible inconvenience to the inspected State Party or Host State and disturbance to the facility or area inspected. The inspection team shall avoid unnecessarily naming or delaying the operation of a facility and avoid affecting its safety. In particular, the inspection team shall not operate any facility. If inspectors consider that, to fulfil their mandate, particular operations should be carried out in a facility, they shall request the designated representative of the inspected facility to have them performed. The representative shall carry out the request to the extent possible.

41. In the performance of their duties on the territory of an inspected State Party or Host State, the members of the inspection team shall, if the inspected State Party so requests, be accompanied by representatives of the inspected State Party, but the inspection team must not thereby be delayed or otherwise hindered in the exercise of its functions.

42. Detailed procedures for the conduct of inspections shall be developed for inclusion in the inspection manual by the Technical Secretariat, taking into account guidelines to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

Safety

43. In carrying out their activities, inspectors and inspection assistants shall observe safety regulations established at the inspection site, including those for the protection of controlled environments within a facility and for personal safety. In order to implement these requirements, appropriate detailed procedures shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

Communications

44. Inspectors shall have the right throughout the in-country period to communicate with the Headquarters of the Technical Secretariat. For this purpose they may use their own, duly certified, approved equipment and may request that the inspected State Party or Host State Party provide them with access to other telecommunications. The inspection team shall have the right to use its own two-way system of radio communications between personnel patrolling the perimeter and other members of the inspection team.

Inspection team and inspected State Party rights

45. The inspection team shall, in accordance with the relevant Articles and Annexes of this Convention as well as with facility agreements and procedures set forth in the inspection manual, have the right to unimpeded access to the inspection site. The items to be inspected will be chosen by the inspectors.

46. Inspectors shall have the right to interview any facility personnel in the presence of representatives of the inspected State Party with the purpose of establishing relevant facts. Inspectors shall only request information and data which are necessary for the conduct of the inspection, and the inspected State Party shall furnish such information upon request. The inspected State Party shall have the right to object to questions posed to the facility personnel if those questions are deemed not relevant to the inspection. If the head of the inspection team objects and states their relevance, the questions shall be provided in writing to the inspected State Party for reply. The inspection team may note any refusal to permit interviews or to allow questions to be answered and any explanations given, in that part of the inspection report that deals with the cooperation of the inspected State Party.

47. Inspectors shall have the right to inspect documentation and records they deem relevant to the conduct of their mission.

48. Inspectors shall have the right to have photographs taken at their request by representatives of the inspected State Party or of the inspected facility. The capability to take instant development

photographic prints shall be available. The inspection team shall determine whether photographs conform to those requested and, if not, repeat photographs shall be taken. The inspection team and the inspected State Party shall each retain one copy of every photograph.

49. The representatives of the inspected State Party shall have the right to observe all verification activities carried out by the inspection team.

50. The inspected State Party shall receive copies, at its request, of the information and data gathered about its facility(ies) by the Technical Secretariat.

51. Inspectors shall have the right to request clarifications in connection with ambiguities that arise during an inspection. Such requests shall be made promptly through the representative of the inspected State Party. The representative of the inspected State Party shall provide the inspection team, during the inspection, with such clarification as may be necessary to remove the ambiguity. If questions relating to an object or a building located within the inspection site are not resolved, the object or building shall, if requested, be photographed for the purpose of clarifying its nature and function. If the ambiguity cannot be removed during the inspection, the inspectors shall notify the Technical Secretariat immediately. The inspectors shall include in the inspection report any such unresolved question, relevant clarifications, and a copy of any photographs taken.

#### Collection, handling and analysis of samples

52. Representatives of the inspected State Party or of the inspected facility shall take samples at the request of the inspection team in the presence of inspectors. If so agreed in advance with the representatives of the inspected State Party or of the inspected facility, the inspection team may take samples itself.

53. Where possible, the analysis of samples shall be performed on-site. The inspection team shall have the right to perform on-site analysis of samples using approved equipment brought by it. At the request of the inspection team, the inspected State Party shall, in accordance with agreed procedures, provide assistance for the analysis of samples on-site. Alternatively, the inspection team may request that appropriate analysis on-site be performed in its presence.

54. The inspected State Party has the right to retain portions of all samples taken or take duplicate samples and be present when samples are analysed on-site.

55. The inspection team shall, if it deems it necessary, transfer samples for analysis off-site at laboratories designated by the Organization.

56. The Director-General shall have the primary responsibility for the security, integrity and preservation of samples and for ensuring that the confidentiality of samples transferred for analysis off-site is

protected. The Director-General shall do so in accordance with procedures, to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (d), for inclusion in the inspection manual. He shall:

- (a) Establish a stringent regime governing the collection, handling, transport and analysis of samples;
- (b) Certify the laboratories designated to perform different types of analysis;
- (c) Oversee the standardization of equipment and procedures at these designated laboratories, mobile analytical equipment and procedures, and monitor quality control and overall standards in relation to the certification of these laboratories, mobile equipment and procedures; and
- (d) Select from among the designated laboratories those which shall perform analytical or other functions in relation to specific investigations.

57. When off-site analysis is to be performed, samples shall be analysed in at least two designated laboratories. The Technical Secretariat shall ensure the expeditious processing of the analysis. The samples shall be accounted for by the Technical Secretariat and any unused samples or portions thereof shall be returned to the Technical Secretariat.

58. The Technical Secretariat shall compile the results of the laboratory analysis of samples relevant to compliance with this Convention and include them in the final inspection report. The Technical Secretariat shall include in the report detailed information concerning the equipment and methodology employed by the designated laboratories.

#### Extension of inspection duration

59. Periods of inspection may be extended by agreement with the representative of the inspected State Party.

#### Debriefing

60. Upon completion of an inspection the inspection team shall meet with representatives of the inspected State Party and the personnel responsible for the inspection site to review the preliminary findings of the inspection team and to clarify any ambiguities. The inspection team shall provide to the representatives of the inspected State Party its preliminary findings in written form according to a standardized format, together with a list of any samples and copies of written information and data gathered and other material to be taken off-site. The document shall be signed by the head of the inspection team. In order to indicate that he has taken notice of the contents of the document, the representative of the inspected State Party shall countersign the document. This meeting shall be completed not later than 24 hours after the completion of the inspection.

## F. DEPARTURE

61. Upon completion of the post-inspection procedures, the inspection team shall leave, as soon as possible, the territory of the inspected State Party or the Host State.

## G. REPORTS

62. Not later than 10 days after the inspection, the inspectors shall prepare a factual, final report on the activities conducted by them and on their findings. It shall only contain facts relevant to compliance with this Convention, as provided for under the inspection mandate. The report shall also provide information as to the manner in which the State Party inspected cooperated with the inspection team. Differing observations made by inspectors may be attached to the report. The report shall be kept confidential.

63. The final report shall immediately be submitted to the inspected State Party. Any written comments, which the inspected State Party may immediately make on its findings shall be annexed to it. The final report together with annexed comments made by the inspected State Party shall be submitted to the Director-General not later than 30 days after the inspection.

64. Should the report contain uncertainties, or should cooperation between the National Authority and the inspectors not measure up to the standards required, the Director-General shall approach the State Party for clarification.

65. If the uncertainties cannot be removed or the facts established are of a nature to suggest that obligations undertaken under this Convention have not been met, the Director-General shall inform the Executive Council without delay.

## H. APPLICATION OF GENERAL PROVISIONS

66. The provisions of this Part shall apply to all inspections conducted pursuant to this Convention, except where the provisions of this Part differ from the provisions set forth for specific types of inspections in Parts III to XI of this Annex, in which case the latter provisions shall take precedence.

## PART III

## GENERAL PROVISIONS FOR VERIFICATION MEASURES PURSUANT TO ARTICLES IV, V AND VI, PARAGRAPH 3

## A. INITIAL INSPECTIONS AND FACILITY AGREEMENTS

1. Each declared facility subject to on-site inspection pursuant to Articles IV, V, and VI, paragraph 3, shall receive an initial inspection promptly after the facility is declared. The purpose of this inspection of the facility shall be to verify information provided and to obtain any additional information needed for planning future verification

activities at the facility, including on-site inspections and continuous monitoring with on-site instruments, and to work on the facility agreements.

2. States Parties shall ensure that the verification of declarations and the initiation of the systematic verification measures can be accomplished by the Technical Secretariat at all facilities within the established time-frames after this Convention enters into force for them.

3. Each State Party shall conclude a facility agreement with the Organization for each facility declared and subject to on-site inspection pursuant to Articles IV, V, and VI, paragraph 3.

4. Facility agreements shall be completed not later than 180 days after this Convention enters into force for the State Party or after the facility has been declared for the first time, except for a chemical weapons destruction facility to which paragraphs 5 to 7 shall apply.

5. In the case of a chemical weapons destruction facility that begins operations more than one year after this Convention enters into force for the State Party, the facility agreement shall be completed not less than 180 days before the facility begins operation.

6. In the case of a chemical weapons destruction facility that is in operation when this Convention enters into force for the State Party, or begins operation not later than one year thereafter, the facility agreement shall be completed not later than 210 days after this Convention enters into force for the State Party, except that the Executive Council may decide that transitional verification arrangements, approved in accordance with Part IV (A), paragraph 51, of this Annex and including a transitional facility agreement, provisions for verification through on-site inspection and monitoring with on-site instruments, and the time-frame for application of the arrangements, are sufficient.

7. In the case of a facility, referred to in paragraph 6, that will cease operations not later than two years after this Convention enters into force for the State Party, the Executive Council may decide that transitional verification arrangements, approved in accordance with Part IV (A), paragraph 51, of this Annex and including a transitional facility agreement, provisions for verification through on-site inspection and monitoring with on-site instruments, and the time-frame for application of the arrangements, are sufficient.

8. Facility agreements shall be based on models for such agreements and provide for detailed arrangements which shall govern inspections at each facility. The model agreements shall include provisions to take into account future technological developments and shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (1).

9. The Technical Secretariat may retain at each site a sealed container for photographs, plans and other information that it may wish to refer to in the course of subsequent inspections.

#### B. STANDING ARRANGEMENTS

10. Where applicable, the Technical Secretariat shall have the right to have continuous monitoring instruments and systems and seals installed and to use them, in conformity with the relevant provisions in this Convention and the facility agreements between States Parties and the Organization.
11. The inspected State Party shall, in accordance with agreed procedures, have the right to inspect any instrument used or installed by the inspection team and to have it tested in the presence of representatives of the inspected State Party. The inspection team shall have the right to use the instruments that were installed by the inspected State Party for its own monitoring of the technological process of the destruction of chemical weapons. To this end, the inspection team shall have the right to inspect those instruments that it intends to use for purposes of verification of the destruction of chemical weapons and to have them tested in its presence.
12. The inspected State Party shall provide the necessary preparation and support for the establishment of continuous monitoring instruments and systems.
13. In order to implement paragraphs 11 and 12, appropriate detailed procedures shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).
14. The inspected State Party shall immediately notify the Technical Secretariat if an event occurs or may occur at a facility where monitoring instruments are installed, which may have an impact on the monitoring system. The inspected State Party shall coordinate subsequent actions with the Technical Secretariat with a view to restoring the operation of the monitoring system and establishing interim measures, if necessary, as soon as possible.
15. The inspection team shall verify during each inspection that the monitoring system functions correctly and that replaced seals have not been tampered with. In addition, visits to service the monitoring system may be required to perform any necessary maintenance or replacement of equipment, or to adjust the coverage of the monitoring system as required.
16. If the monitoring system indicates any anomaly, the Technical Secretariat shall immediately take action to determine whether this resulted from equipment malfunction or activities at the facility. If, after this examination, the problem remains unresolved, the Technical Secretariat shall immediately ascertain the actual situation, including through immediate on-site inspection of, or visit to, the facility if necessary. The Technical Secretariat shall report any such problem immediately after its detection to the inspected State Party which shall assist in its resolution.

#### C. PRE-INSPECTION ACTIVITIES

17. The inspected State Party shall, except as specified in paragraph 18, be notified of inspections not less than 24 hours in advance of the planned arrival of the inspection team at the point of entry.
18. The inspected State Party shall be notified of initial inspections not less than 72 hours in advance of the estimated time of arrival of the inspection team at the point of entry.

#### PART IV (A)

#### DESTRUCTION OF CHEMICAL WEAPONS AND ITS VERIFICATION PURSUANT TO ARTICLE IV

#### A. DECLARATIONS

##### Chemical weapons

1. The declaration of chemical weapons by a State Party pursuant to Article III, paragraph 1 (a) (ii), shall include the following:
- (a) The aggregate quantity of each chemical declared;
  - (b) The precise location of each chemical weapons storage facility, expressed by:
    - (i) Name;
    - (ii) Geographical coordinates; and
    - (iii) A detailed site diagram, including a boundary map and the location of bunkers/storage areas within the facility.
  - (c) The detailed inventory for each chemical weapons storage facility including:
    - (i) Chemicals defined as chemical weapons in accordance with Article II;
    - (ii) Unfilled munitions, sub-munitions, devices and equipment defined as chemical weapons;
    - (iii) Equipment specially designed for use directly in connection with the employment of munitions, sub-munitions, devices or equipment specified in sub-paragraph (ii);
    - (iv) Chemicals specifically designed for use directly in connection with the employment of munitions, sub-munitions, devices or equipment specified in sub-paragraph (ii).

2. For the declaration of chemicals referred to in paragraph 1 (c) (i) the following shall apply:

- (a) Chemicals shall be declared in accordance with the Schedules specified in the Annex on Chemicals;
- (b) For a chemical not listed in the Schedules in the Annex on Chemicals the information required for possible assignment of the chemical to the appropriate Schedule shall be provided, including the toxicity of the pure compound. For a precursor, the toxicity and identity of the principal final reaction product(s) shall be provided;
- (c) Chemicals shall be identified by chemical name in accordance with current International Union of Pure and Applied Chemistry (IUPAC) nomenclature, structural formula and Chemical Abstracts Service registry number, if assigned. For a precursor, the toxicity and identity of the principal final reaction product(s) shall be provided;
- (d) In cases involving mixtures of two or more chemicals, each chemical shall be identified and the percentage of each shall be provided, and the mixture shall be declared under the category of the most toxic chemical. If a component of a binary chemical weapon consists of a mixture of two or more chemicals, each chemical shall be identified and the percentage of each provided;
- (e) Binary chemical weapons shall be declared under the relevant end product within the framework of the categories of chemical weapons referred to in paragraph 16. The following supplementary information shall be provided for each type of binary chemical munition/device:
  - (i) The chemical name of the toxic end-product;
  - (ii) The chemical composition and quantity of each component;
  - (iii) The actual weight ratio between the components;
  - (iv) Which component is considered the key component;
  - (v) The projected quantity of the toxic end-product calculated on a stoichiometric basis from the key component, assuming 100 per cent yield. A declared quantity (in tonnes) of the key component intended for a specific toxic end-product shall be considered equivalent to the quantity (in tonnes) of this toxic end-product calculated on a stoichiometric basis assuming 100 per cent yield.
- (f) For multicomponent chemical weapons, the declaration shall be analogous to that envisaged for binary chemical weapons;
- (g) For each chemical the form of storage, i.e. munitions, sub-munitions, devices, equipment or bulk containers and other containers shall be declared. For each form of storage the following shall be listed:

- (i) Type;
  - (ii) Size or calibre;
  - (iii) Number of items; and
  - (iv) Nominal weight of chemical fill per item.
- (h) For each chemical the total weight present at the storage facility shall be declared;

(i) In addition, for chemicals stored in bulk, the percentage purity shall be declared, if known.

3. For each type of unfilled munitions, sub-munitions, devices or equipment, referred to in paragraph 1 (c) (ii), the information shall include:

- (a) The number of items;
- (b) The nominal fill volume per item;
- (c) The intended chemical fill.

Declarations of chemical weapons pursuant to Article III, paragraph 1 (a) (iii)

4. The declaration of chemical weapons pursuant to Article III, paragraph 1 (a) (iii), shall contain all information specified in paragraphs 1 to 3 above. It is the responsibility of the State Party on whose territory the chemical weapons are located to make appropriate arrangements with the other State to ensure that the declarations are made. If the State Party on whose territory the chemical weapons are located is not able to fulfil its obligations under this paragraph, it shall state the reasons therefor.

Declarations of past transfers and receipts

5. A State Party that has transferred or received chemical weapons since 1 January 1946 shall declare these transfers or receipts pursuant to Article III, paragraph 1 (a) (iv), provided the amount transferred or received exceeded 1 tonne per chemical per year in bulk and/or munition form. This declaration shall be made according to the inventory format specified in paragraphs 1 and 2. This declaration shall also indicate the supplier and recipient countries, the dates of the transfers or receipts and, as precisely as possible, the current location of the transferred items. When not all the specified information is available for transfers or receipts of chemical weapons for the period between 1 January 1946 and 1 January 1970, the State Party shall declare whatever information is still available to it and provide an explanation as to why it cannot submit a full declaration.

Submission of the general plan for destruction of chemical weapons

6. The general plan for destruction of chemical weapons submitted pursuant to Article III, paragraph 1 (a) (v), shall provide an overview of the entire national chemical weapons destruction programme of the State Party and information on the efforts of the State Party to fulfil the destruction requirements contained in this Convention. The plan shall specify:

- (a) A general schedule for destruction, giving types and approximate quantities of chemical weapons planned to be destroyed in each annual destruction period for each existing chemical weapons destruction facility and, if possible, for each planned chemical weapons destruction facility;
- (b) The number of chemical weapons destruction facilities existing or planned to be operated over the destruction period;
- (c) For each existing or planned chemical weapons destruction facility:

- (i) Name and location; and
- (ii) The types and approximate quantities of chemical weapons, and the type (for example, nerve agent or blister agent) and approximate quantity of chemical fill, to be destroyed;
- (d) The plans and programmes for training personnel for the operation of destruction facilities;
- (e) The national standards for safety and emissions that the destruction facilities must satisfy;
- (f) Information on the development of new methods for destruction of chemical weapons and on the improvement of existing methods;
- (g) The cost estimates for destroying the chemical weapons; and
- (h) Any issues which could adversely impact on the national destruction programme.

**B. MEASURES TO SECURE THE STORAGE FACILITY AND STORAGE FACILITY PREPARATION**

7. Not later than when submitting its declaration of chemical weapons, a State Party shall take such measures as it considers appropriate to secure its storage facilities and shall prevent any movement of its chemical weapons out of the facilities, except their removal for destruction.

8. A State Party shall ensure that chemical weapons at its storage facilities are configured to allow ready access for verification in accordance with paragraphs 37 to 49.

9. While a storage facility remains closed for any movement of chemical weapons out of the facility other than their removal for destruction, a State Party may continue at the facility standard maintenance activities, including standard maintenance of chemical weapons; safety monitoring and physical security activities; and preparation of chemical weapons for destruction.

10. Maintenance activities of chemical weapons shall not include:

- (a) Replacement of agent or of munition bodies;
- (b) Modification of the original characteristics of munitions, or parts or components thereof.

11. All maintenance activities shall be subject to monitoring by the Technical Secretariat.

**C. DESTRUCTION**

Principles and methods for destruction of chemical weapons

12. "Destruction of chemical weapons" means a process by which chemicals are converted in an essentially irreversible way to a form unsuitable for production of chemical weapons, and which in an irreversible manner renders munitions and other devices unusable as such.

13. Each State Party shall determine how it shall destroy chemical weapons, except that the following processes may not be used: dumping in any body of water, land burial or open-pit burning. It shall destroy chemical weapons only at specifically designated and appropriately designed and equipped facilities.

14. Each State Party shall ensure that its chemical weapons destruction facilities are constructed and operated in a manner to ensure the destruction of the chemical weapons; and that the destruction process can be verified under the provisions of this Convention.

Order of destruction

15. The order of destruction of chemical weapons is based on the obligations specified in Article I and the other Articles, including obligations regarding systematic on-site verification. It takes into account interests of States Parties for undiminished security during the destruction period; confidence-building in the early part of the destruction stage; gradual acquisition of experience in the course of destroying chemical weapons; and applicability irrespective of the actual composition of the stockpiles and the methods chosen for the destruction of the chemical weapons. The order of destruction is based on the principle of levelling out.

16. For the purpose of destruction, chemical weapons declared by each State Party shall be divided into three categories:

- Category 1: Chemical weapons on the basis of Schedule 1  
chemicals and their parts and components;

Category 2: Chemical weapons on the basis of all other chemicals and their parts and components;

Category 3: Unfilled munitions and devices, and equipment specifically designed for use directly in connection with employment of chemical weapons.

17. A State Party shall start:

(a) The destruction of Category 1 chemical weapons not later than two years after this Convention enters into force for it, and shall complete the destruction not later than 10 years after entry into force of this Convention. A State Party shall destroy chemical weapons in accordance with the following destruction deadlines:

(i) Phase 1: Not later than two years after entry into force of this Convention, testing of its first destruction facility shall be completed. Not less than 1 per cent of the Category 1 chemical weapons shall be destroyed not later than three years after the entry into force of this Convention;

(ii) Phase 2: Not less than 20 per cent of the Category 1 chemical weapons shall be destroyed not later than five years after the entry into force of this Convention;

(iii) Phase 3: Not less than 45 per cent of the Category 1 chemical weapons shall be destroyed not later than seven years after the entry into force of this Convention;

(iv) Phase 4: All Category 1 chemical weapons shall be destroyed not later than 10 years after the entry into force of this Convention.

(b) The destruction of Category 2 chemical weapons not later than one year after this Convention enters into force for it and shall complete the destruction not later than five years after the entry into force of this Convention. Category 2 chemical weapons shall be destroyed in equal annual increments throughout the destruction period. The comparison factor for such weapons is the weight of the chemicals within Category 2; and

(c) The destruction of Category 3 chemical weapons not later than one year after this Convention enters into force for it, and shall complete the destruction not later than five years after the entry into force of this Convention. Category 3 chemical weapons shall be destroyed in equal annual increments throughout the destruction period. The comparison factor for unfilled munitions and devices is expressed in nominal fill volume (m<sup>3</sup>) and for equipment in number of items.

18. For the destruction of binary chemical weapons the following shall apply:

(a) For the purposes of the order of destruction, a declared quantity (in tonnes) of the key component intended for a specific toxic

end-product shall be considered equivalent to the quantity (in tonnes) of this toxic end-product calculated on a stoichiometric basis assuming 100 per cent yield.

(b) A requirement to destroy a given quantity of the key component shall entail a requirement to destroy a corresponding quantity of the other component, calculated from the actual weight ratio of the components in the relevant type of binary chemical munition/device.

(c) If more of the other component is declared than is needed, based on the actual weight ratio between components, the excess shall be destroyed over the first two years after destruction operations begin.

(d) At the end of each subsequent operational year a State Party may retain an amount of the other declared component that is determined on the basis of the actual weight ratio of the components in the relevant type of binary chemical munition/device.

19. For multicomponent chemical weapons the order of destruction shall be analogous to that envisaged for binary chemical weapons.

#### Modification of intermediate destruction deadlines

20. The Executive Council shall review the general plans for destruction of chemical weapons, submitted pursuant to Article III, paragraph 1 (a) (v), and in accordance with paragraph 6, *inter alia*, to assess their conformity with the order of destruction set forth in paragraphs 15 to 19. The Executive Council shall consult with any State Party whose plan does not conform, with the objective of bringing the plan into conformity.

21. If a State Party, due to exceptional circumstances beyond its control, believes that it cannot achieve the level of destruction specified for Phase 1, Phase 2 or Phase 3 of the order of destruction of Category 1 chemical weapons, it may propose changes in those levels. Such a proposal must be made not later than 120 days after the entry into force of this Convention and shall contain a detailed explanation of the reasons for the proposal.

22. Each State Party shall take all necessary measures to ensure destruction of Category 1 chemical weapons in accordance with the destruction deadlines set forth in paragraph 17 (a) as changed pursuant to paragraph 21. However, if a State Party believes that it will be unable to ensure the destruction of the percentage of Category 1 chemical weapons required by an intermediate destruction deadline, it may request the Executive Council to recommend to the Conference to grant an extension of its obligation to meet that deadline. Such a request must be made not less than 180 days before the intermediate destruction deadline and shall contain a detailed explanation of the reasons for the request and the plans of the State Party for ensuring that it will be able to fulfil its obligation to meet the next intermediate destruction deadline.

23. If an extension is granted, the State Party shall still be under the obligation to meet the cumulative destruction requirements set forth for the next destruction deadline. Extensions granted pursuant to this Section shall not, in any way, modify the obligation of the State Party to destroy all Category 1 chemical weapons not later than 10 years after the entry into force of this Convention.

Extension of the deadline for completion of destruction

24. If a State Party believes that it will be unable to ensure the destruction of all Category 1 chemical weapons not later than 10 years after the entry into force of this Convention, it may submit a request to the Executive Council for an extension of the deadline for completing the destruction of such chemical weapons. Such a request must be made not later than nine years after the entry into force of this Convention.

25. The request shall contain:

- (a) The duration of the proposed extension;
- (b) A detailed explanation of the reasons for the proposed extension; and
- (c) A detailed plan for destruction during the proposed extension and the remaining portion of the original 10-year period for destruction.

26. A decision on the request shall be taken by the Conference at its next session, on the recommendation of the Executive Council. Any extension shall be the minimum necessary, but in no case shall the deadline for a State Party to complete its destruction of all chemical weapons be extended beyond 15 years after the entry into force of this Convention. The Executive Council shall set conditions for the granting of the extension, including the specific verification measures deemed necessary as well as specific actions to be taken by the State Party to overcome problems in its destruction programme. Costs of verification during the extension period shall be allocated in accordance with Article IV, paragraph 16.

27. If an extension is granted, the State Party shall take appropriate measures to meet all subsequent deadlines.

28. The State Party shall continue to submit detailed annual plans for destruction in accordance with paragraph 29 and annual reports on the destruction of Category 1 chemical weapons in accordance with paragraph 36, until all Category 1 chemical weapons are destroyed. In addition, not later than at the end of each 90 days of the extension period, the State Party shall report to the Executive Council on its destruction activity. The Executive Council shall review progress towards completion of destruction and take the necessary measures to document this progress. All information concerning the destruction activities during the extension period shall be provided by the Executive Council to States Parties, upon request.

Detailed annual plans for destruction

29. The detailed annual plans for destruction shall be submitted to the Technical Secretariat not less than 60 days before each annual destruction period begins pursuant to Article IV, paragraph 7 (a), and shall specify:

- (a) The quantity of each specific type of chemical weapon to be destroyed at each destruction facility and the inclusive dates when the destruction of each specific type of chemical weapon will be accomplished;
  - (b) The detailed site diagram for each chemical weapons destruction facility and any changes to previously submitted diagrams; and
  - (c) The detailed schedule of activities for each chemical weapons destruction facility for the upcoming year, identifying time required for design, construction or modification of the facility, installation of equipment, equipment check-out and operator training, destruction operations for each specific type of chemical weapon, and scheduled periods of inactivity.
30. A State Party shall provide, for each of its chemical weapons destruction facilities, detailed facility information to assist the Technical Secretariat in developing preliminary inspection procedures for use at the facility.
31. The detailed facility information for each destruction facility shall include the following information:
- (a) Name, address and location;
  - (b) Detailed, annotated facility drawings;
  - (c) Facility design drawings, process drawings, and piping and instrumentation design drawings;
  - (d) Detailed technical descriptions, including design drawings and instrument specifications, for the equipment required for: removing the chemical fill from the munitions, devices, and containers; temporarily storing the drained chemical fill; destroying the chemical agent; and destroying the munitions, devices, and containers;
  - (e) Detailed technical descriptions of the destruction process, including material flow rates, temperatures and pressures, and designed destruction efficiency;
  - (f) Design capacity for each specific type of chemical weapon;
  - (g) A detailed description of the products of destruction and the method of their ultimate disposal;

(h) A detailed technical description of measures to facilitate inspections in accordance with this Convention;

(i) A detailed description of any temporary holding area at the destruction facility that will be used to provide chemical weapons directly to the destruction facility, including site and facility drawings and information on the storage capacity for each specific type of chemical weapon to be destroyed at the facility;

(j) A detailed description of the safety and medical measures in force at the facility;

(k) A detailed description of the living quarters and working premises for the inspectors; and

(l) Suggested measures for international verification.

32. A State Party shall provide, for each of its chemical weapons destruction facilities, the plant operations manuals, the safety and medical plans, the laboratory operations and quality assurance and control manuals, and the environmental permits that have been obtained, except that this shall not include material previously provided.

33. A State Party shall promptly notify the Technical Secretariat of any developments that could affect inspection activities at its destruction facilities.

34. Deadlines for submission of the information specified in paragraphs 30 to 32 shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

35. After a review of the detailed facility information for each destruction facility, the Technical Secretariat, if the need arises, shall enter into consultation with the State Party concerned in order to ensure that its chemical weapons destruction facilities are designed to assure the destruction of chemical weapons, to allow advanced planning on how verification measures may be applied and to ensure that the application of verification measures is consistent with proper facility operation, and that the facility operation allows appropriate verification.

#### Annual reports on destruction

36. Information regarding the implementation of plans for destruction of chemical weapons shall be submitted to the Technical Secretariat pursuant to Article IV, paragraph 7 (b), not later than 60 days after the end of each annual destruction period and shall specify the actual amounts of chemical weapons which were destroyed during the previous year at each destruction facility. If appropriate, reasons for not meeting destruction goals should be stated.

#### D. VERIFICATION

##### Verification of declarations of chemical weapons through on-site inspection

37. The purpose of the verification of declarations of chemical weapons shall be to confirm through on-site inspection the accuracy of the relevant declarations made pursuant to Article III.

38. The inspectors shall conduct this verification promptly after a declaration is submitted. They shall, inter alia, verify the quantity and identity of chemicals, types and number of munitions, devices and other equipment.

39. The inspectors shall employ, as appropriate, agreed seals, markers or other inventory control procedures to facilitate an accurate inventory of the chemical weapons at each storage facility.

40. As the inventory progresses, inspectors shall install such agreed seals as may be necessary to clearly indicate if any stocks are removed, and to ensure the securing of the storage facility during the inventory. After completion of the inventory, such seals will be removed unless otherwise agreed.

##### Systematic verification of storage facilities

41. The purpose of the systematic verification of storage facilities shall be to ensure that no undetected removal of chemical weapons from such facilities takes place.

42. The systematic verification shall be initiated as soon as possible after the declaration of chemical weapons is submitted and shall continue until all chemical weapons have been removed from the storage facility. It shall be in accordance with the facility agreement, combine on-site inspection and monitoring with on-site instruments.

43. When all chemical weapons have been removed from the storage facility, the Technical Secretariat shall confirm the declaration of the State Party to that effect. After this confirmation, the Technical Secretariat shall terminate the systematic verification of the storage facility and shall promptly remove any monitoring instruments installed by the inspectors.

##### Inspections and visits

44. The particular storage facility to be inspected shall be chosen by the Technical Secretariat in such a way as to preclude the prediction of precisely when the facility is to be inspected. The guidelines for determining the frequency of systematic on-site inspections shall be elaborated by the Technical Secretariat, taking into account the recommendations to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (1).

45. The Technical Secretariat shall notify the inspected State Party of its decision to inspect or visit the storage facility 48 hours before the planned arrival of the inspection team at the facility for systematic inspections or visits. In cases of inspections or visits to resolve urgent problems, this period may be shortened. The Technical Secretariat shall specify the purpose of the inspection or visit.

46. The inspected State Party shall make any necessary preparations for the arrival of the inspectors and shall ensure their expeditious transportation from their point of entry to the storage facility. The facility agreement will specify administrative arrangements for inspectors.

47. The inspected State Party shall provide the inspection team upon its arrival at the chemical weapons storage facility to carry out an inspection, with the following data on the facility:

- (a) The number of storage buildings and storage locations;
- (b) For each storage building and storage location, the type and the identification number or designation, shown on the site diagram; and
- (c) For each storage building and storage location at the facility, the number of items of each specific type of chemical weapon, and, for containers that are not part of binary munitions, the actual quantity of chemical fill in each container.

48. In carrying out an inventory, within the time available, inspectors shall have the right:

- (a) To use any of the following inspection techniques:
  - (i) inventory all the chemical weapons stored at the facility;
  - (ii) inventory all the chemical weapons stored in specific buildings or locations at the facility, as chosen by the inspectors; or
  - (iii) inventory all the chemical weapons of one or more specific types stored at the facility, as chosen by the inspectors; and
- (b) To check all items inventoried against agreed records.

49. Inspectors shall, in accordance with facility agreements:

- (a) Have unimpeded access to all parts of the storage facilities including any munitions, devices, bulk containers, or other containers therein. While conducting their activity, inspectors shall comply with the safety regulations at the facility. The items to be inspected will be chosen by the inspectors; and
- (b) Have the right, during the first and any subsequent inspection of each chemical weapons storage facility, to designate munitions,

devices, and containers from which samples are to be taken, and to affix to such munitions, devices, and containers a unique tag that will indicate an attempt to remove or alter the tag. A sample shall be taken from a tagged item at a chemical weapons storage facility or a chemical weapons destruction facility as soon as it is practically possible in accordance with the corresponding destruction programmes, and, in any case, not later than by the end of the destruction operations.

Systematic verification of the destruction of chemical weapons

50. The purpose of verification of destruction of chemical weapons shall be:

- (a) To confirm the identity and quantity of the chemical weapons stocks to be destroyed; and
- (b) To confirm that these stocks have been destroyed.

51. Chemical weapons destruction operations during the first 390 days after the entry into force of this Convention shall be governed by transitional verification arrangements. Such arrangements, including a transitional facility agreement, provisions for verification through on-site inspection and monitoring with on-site instruments, and the time-frame for application of the arrangements, shall be agreed between the Organization and the inspected State Party. These arrangements shall be approved by the Executive Council not later than 60 days after this Convention enters into force for the State Party, taking into account the recommendations of the Technical Secretariat, which shall be based on an evaluation of the detailed facility information provided in accordance with paragraph 31 and a visit to the facility. The Executive Council shall, at its first session, establish the guidelines for such transitional verification arrangements, based on recommendations to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i). The transitional verification arrangements shall be designed to verify, throughout the entire transitional period, the destruction of chemical weapons in accordance with the purposes set forth in paragraph 50, and to avoid hampering ongoing destruction operations.

52. The provisions of paragraphs 53 to 61 shall apply to chemical weapons destruction operations that are to begin not earlier than 390 days after the entry into force of this Convention.

53. On the basis of this Convention and the detailed destruction facility information, and as the case may be, on experience from previous inspections, the Technical Secretariat shall prepare a draft plan for inspecting the destruction of chemical weapons at each destruction facility. The plan shall be completed and provided to the inspected State Party for comment not less than 270 days before the facility begins destruction operations pursuant to this Convention. Any differences between the Technical Secretariat and the inspected State Party should be resolved through consultations. Any unresolved matter shall be forwarded to the Executive Council for appropriate action with a view to facilitating the full implementation of this Convention.

54. The Technical Secretariat shall conduct an initial visit to each chemical weapons destruction facility of the inspected State Party not less than 240 days before each facility begins destruction operations pursuant to this Convention, to allow it to familiarize itself with the facility and assess the adequacy of the inspection plan.

55. In the case of an existing facility where chemical weapons destruction operations have already been initiated, the inspected State Party shall not be required to decontaminate the facility before the Technical Secretariat conducts an initial visit. The duration of the visit shall not exceed five days and the number of visiting personnel shall not exceed 15.

56. The agreed detailed plans for verification, with an appropriate recommendation by the Technical Secretariat, shall be forwarded to the Executive Council for review. The Executive Council shall review the plans with a view to approving them, consistent with verification objectives and obligations under this Convention. It should also confirm that verification schemes for destruction are consistent with verification aims and are efficient and practical. This review should be completed not less than 180 days before the destruction period begins.

57. Each member of the Executive Council may consult with the Technical Secretariat on any issues regarding the adequacy of the plan for verification. If there are no objections by any member of the Executive Council, the plan shall be put into action.

58. If there are any difficulties, the Executive Council shall enter into consultations with the State Party to reconcile them. If any difficulties remain unresolved they shall be referred to the Conference.

59. The detailed facility agreements for chemical weapons destruction facilities shall specify, taking into account the specific characteristics of the destruction facility and its mode of operation:

- (a) Detailed on-site inspection procedures; and
- (b) Provisions for verification through continuous monitoring with on-site instruments and physical presence of inspectors.

60. Inspectors shall be granted access to each chemical weapons destruction facility not less than 60 days before the commencement of the destruction, pursuant to this Convention, at the facility. Such access shall be for the purpose of supervising the installation of the inspection equipment, inspecting this equipment and testing its operation, as well as for the purpose of carrying out a final engineering review of the facility. In the case of an existing facility where chemical weapons destruction operations have already been initiated, destruction operations shall be stopped for the minimum amount of time required, not to exceed 60 days, for installation and testing of the inspection equipment. Depending on the results of the testing and review, the State Party and the Technical Secretariat may agree on additions or changes to the detailed facility agreement for the facility.

61. The inspected State Party shall notify, in writing, the inspection team leader at a chemical weapons destruction facility not less than four hours before the departure of each shipment of chemical weapons from a chemical weapons storage facility to that destruction facility. This notification shall specify the name of the storage facility, the estimated times of departure and arrival, the specific types and quantities of chemical weapons being transported, whether any tagged items are being moved, and the method of transportation. This notification may include notification of more than one shipment. The inspection team leader shall be promptly notified, in writing, of any changes in this information.

#### Chemical weapons storage facilities at chemical weapons destruction facilities

62. The inspectors shall verify the arrival of the chemical weapons at the destruction facility and the storing of these chemical weapons. The inspectors shall verify the inventory of each shipment, using agreed procedures consistent with facility safety regulations, prior to the destruction of the chemical weapons. They shall employ, as appropriate, agreed seals, markers or other inventory control procedures to facilitate an accurate inventory of the chemical weapons prior to destruction.

63. As soon and as long as chemical weapons are stored at chemical weapons storage facilities located at chemical weapons destruction facilities, these storage facilities shall be subject to systematic verification in conformity with the relevant facility agreements.

64. At the end of an active destruction phase, inspectors shall make an inventory of the chemical weapons, that have been removed from the storage facility, to be destroyed. They shall verify the accuracy of the inventory of the chemical weapons remaining, employing inventory control procedures as referred to in paragraph 62.

#### Systematic on-site verification measures at chemical weapons destruction facilities

65. The inspectors shall be granted access to conduct their activities at the chemical weapons destruction facilities and the chemical weapons storage facilities located at such facilities during the entire active phase of destruction.

66. At each chemical weapons destruction facility, to provide assurance that no chemical weapons are diverted and that the destruction process has been completed, inspectors shall have the right to verify through their physical presence and monitoring with on-site instruments:

- (a) The receipt of chemical weapons at the facility;
- (b) The temporary holding area for chemical weapons and the specific type and quantity of chemical weapons stored in that area;

- (c) The specific type and quantity of chemical weapons being destroyed;
- (d) The process of destruction;
- (e) The end-product of destruction;
- (f) The mutilation of metal parts; and
- (g) The integrity of the destruction process and of the facility as a whole.

67. Inspectors shall have the right to tag, for sampling, munitions, devices, or containers located in the temporary holding areas at the chemical weapons destruction facilities.

68. To the extent that it meets inspection requirements, information from routine facility operations, with appropriate data authentication, shall be used for inspection purposes.

69. After the completion of each period of destruction, the Technical Secretariat shall confirm the declaration of the State Party, reporting the completion of destruction of the designated quantity of chemical weapons.

70. Inspectors shall, in accordance with facility agreements:

- (a) Have unimpeded access to all parts of the chemical weapons destruction facilities and the chemical weapons storage facilities located at such facilities, including any munitions, devices, bulk containers, or other containers, therein. The items to be inspected shall be chosen by the inspectors in accordance with the verification plan that has been agreed to by the inspected State Party and approved by the Executive Council;
- (b) Monitor the systematic on-site analysis of samples during the destruction process; and
- (c) Receive, if necessary, samples taken at their request from any devices, bulk containers and other containers at the destruction facility or the storage facility thereof.

#### PART IV (B)

#### OLD CHEMICAL WEAPONS AND ABANDONED CHEMICAL WEAPONS

##### A. GENERAL

1. Old chemical weapons shall be destroyed as provided for in Section B.
2. Abandoned chemical weapons, including those which also meet the definition of Article II, paragraph 5 (b), shall be destroyed as provided for in Section C.

##### B. REGIME FOR OLD CHEMICAL WEAPONS

3. A State Party which has on its territory old chemical weapons as defined in Article II, paragraph 5 (a), shall, not later than 30 days after this Convention enters into force for it, submit to the Technical Secretariat all available relevant information, including, to the extent possible, the location, type, quantity and the present condition of these old chemical weapons.

In the case of old chemical weapons as defined in Article II, paragraph 5 (b), the State Party shall submit to the Technical Secretariat a declaration pursuant to Article III, paragraph 1 (b) (i), including, to the extent possible, the information specified in Part IV (A), paragraphs 1 to 3, of this Annex.

4. A State Party which discovers old chemical weapons after this Convention enters into force for it shall submit to the Technical Secretariat the information specified in paragraph 3 not later than 180 days after the discovery of the old chemical weapons.

5. The Technical Secretariat shall conduct an initial inspection, and any further inspections as may be necessary, in order to verify the information submitted pursuant to paragraphs 3 and 4 and in particular to determine whether the chemical weapons meet the definition of old chemical weapons as specified in Article II, paragraph 5. Guidelines to determine the usability of chemical weapons produced between 1925 and 1946 shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

6. A State Party shall treat old chemical weapons that have been confirmed by the Technical Secretariat as meeting the definition in Article II, paragraph 5 (a), as toxic waste. It shall inform the Technical Secretariat of the steps being taken to destroy or otherwise dispose of such old chemical weapons as toxic waste in accordance with its national legislation.

7. Subject to paragraphs 3 to 5, a State Party shall destroy old chemical weapons that have been confirmed by the Technical Secretariat as meeting the definition in Article II, paragraph 5 (b), in accordance with Article IV and Part IV (A) of this Annex. Upon request of a State Party, the Executive Council may, however, modify the provisions on time-limit and order of destruction of these old chemical weapons, if it determines that doing so would not pose a risk to the object and purpose of this Convention. The request shall contain specific proposals for modification of the provisions and a detailed explanation of the reasons for the proposed modification.

##### C. REGIME FOR ABANDONED CHEMICAL WEAPONS

8. A State Party on whose territory there are abandoned chemical weapons (hereinafter referred to as the "Territorial State Party") shall, not later than 30 days after this Convention enters into force for it, submit to the Technical Secretariat all available relevant information concerning the abandoned chemical weapons. This information

shall include, to the extent possible, the location, type, quantity and the present condition of the abandoned chemical weapons as well as information on the abandonment.

9. A State Party which discovers abandoned chemical weapons after this Convention enters into force for it shall, not later than 180 days after the discovery, submit to the Technical Secretariat all available relevant information concerning the discovered abandoned chemical weapons. This information shall include, to the extent possible, the location, type, quantity and the present condition of the abandoned chemical weapons as well as information on the abandonment.

10. A State Party which has abandoned chemical weapons on the territory of another State Party (hereinafter referred to as the "Abandoning State Party") shall, not later than 30 days after this Convention enters into force for it, submit to the Technical Secretariat all available relevant information concerning the abandoned chemical weapons. This information shall include, to the extent possible, the location, type, quantity as well as information on the abandonment, and the condition of the abandoned chemical weapons.

11. The Technical Secretariat shall conduct an initial inspection, and any further inspections as may be necessary, in order to verify all available relevant information submitted pursuant to paragraphs 8 to 10 and determine whether systematic verification in accordance with Part IV (A), paragraphs 41 to 43, of this Annex is required. It shall, if necessary, verify the origin of the abandoned chemical weapons and establish evidence concerning the abandonment and the identity of the Abandoning State.

12. The report of the Technical Secretariat shall be submitted to the Executive Council, the Territorial State Party, and to the Abandoning State Party or the State Party declared by the Territorial State Party or identified by the Technical Secretariat as having abandoned the chemical weapons. If one of the States Parties directly concerned is not satisfied with the report it shall have the right to settle the matter in accordance with provisions of this Convention or bring the issue to the Executive Council with a view to settling the matter expeditiously.

13. Pursuant to Article I, paragraph 3, the Territorial State Party shall have the right to request the State Party which has been established as the Abandoning State Party pursuant to paragraphs 8 to 12 to enter into consultations for the purpose of destroying the abandoned chemical weapons in cooperation with the Territorial State Party. It shall immediately inform the Technical Secretariat of this request.

14. Consultations between the Territorial State Party and the Abandoning State Party with a view to establishing a mutually agreed plan for destruction shall begin not later than 30 days after the Technical Secretariat has been informed of the request referred to in paragraph 13. The mutually agreed plan for destruction shall be transmitted to the Technical Secretariat not later than 180 days after the Technical Secretariat has been informed of the request referred to in paragraph 13. Upon the request of the Abandoning State Party and the

Territorial State Party, the Executive Council may extend the time-limit for transmission of the mutually agreed plan for destruction.

15. For the purpose of destroying abandoned chemical weapons, the Abandoning State Party shall provide all necessary financial, technical, expert, facility as well as other resources. The Territorial State Party shall provide appropriate cooperation.

16. If the Abandoning State cannot be identified or is not a State Party, the Territorial State Party, in order to ensure the destruction of these abandoned chemical weapons, may request the Organization and other States Parties to provide assistance in the destruction of these abandoned chemical weapons.

17. Subject to paragraphs 8 to 16, Article IV and Part IV (A) of this Annex shall also apply to the destruction of abandoned chemical weapons. In the case of abandoned chemical weapons which also meet the definition of old chemical weapons in Article II, paragraph 5 (b), the Executive Council, upon the request of the Territorial State Party, may individually or together with the Abandoning State Party, in exceptional cases suspend the application of provisions on destruction, if it determines that doing so would not pose a risk to the object and purpose of this Convention. In the case of abandoned chemical weapons which do not meet the definition of old chemical weapons in Article II, paragraph 5 (b), the Executive Council, upon the request of the Territorial State Party, individually or together with the Abandoning State Party, may in exceptional circumstances modify the provisions on the time-limit and the order of destruction, if it determines that doing so would not pose a risk to the object and purpose of this Convention. Any request as referred to in this paragraph shall contain specific proposals for modification of the provisions and a detailed explanation of the reasons for the proposed modification.

18. States Parties may conclude between themselves agreements or arrangements concerning the destruction of abandoned chemical weapons. The Executive Council may, upon request of the Territorial State Party, individually or together with the Abandoning State Party, decide that selected provisions of such agreements or arrangements take precedence over provisions of this Section, if it determines that the agreement or arrangement ensures the destruction of the abandoned chemical weapons in accordance with paragraph 17.

#### PART V

#### DESTRUCTION OF CHEMICAL WEAPONS PURSUANT TO ARTICLE V AND ITS VERIFICATION PURSUANT TO ARTICLE V

#### A. DECLARATIONS

#### Declarations of chemical weapons production facilities

1. The declaration of chemical weapons production facilities by a State Party pursuant to Article III, paragraph 1 (c) (ii), shall contain for each facility:

- (a) The name of the facility, the names of the owners, and the names of the companies or enterprises operating the facility since 1 January 1946;
- (b) The precise location of the facility, including the address, location of the complex, location of the facility within the complex including the specific building and structure number, if any;
- (c) A statement whether it is a facility for the manufacture of chemicals that are defined as chemical weapons or whether it is a facility for the filling of chemical weapons, or both;
- (d) The date when the construction of the facility was completed and the periods during which any modifications to the facility were made, including the installation of new or modified equipment, that significantly changed the production process characteristics of the facility;
- (e) Information on the chemicals defined as chemical weapons that were manufactured at the facility; the munitions, devices, and containers that were filled at the facility; and the dates of the beginning and cessation of such manufacture or filling:
- (i) For chemicals defined as chemical weapons that were manufactured at the facility, such information shall be expressed in terms of the specific types of chemicals manufactured, indicating the chemical name in accordance with the current International Union of Pure and Applied Chemistry (IUPAC) nomenclature, structural formula, and the Chemical Abstracts Service registry number, if assigned, and in terms of the amount of each chemical expressed by weight of chemical in tonnes;
- (ii) For munitions, devices and containers that were filled at the facility, such information shall be expressed in terms of the specific type of chemical weapons filled and the weight of the chemical fill per unit;
- (f) The production capacity of the chemical weapons production facility:
- (i) For a facility where chemical weapons were manufactured, production capacity shall be expressed in terms of the annual quantitative potential for manufacturing a specific substance on the basis of the technological process actually used or, in the case of processes not actually used, planned to be used at the facility;
- (ii) For a facility where chemical weapons were filled, production capacity shall be expressed in terms of the quantity of chemical that the facility can fill into each specific type of chemical weapon a year;

- (g) For each chemical weapons production facility that has not been destroyed, a description of the facility including:
- (i) A site diagram;
- (ii) A process flow diagram of the facility; and
- (iii) An inventory of buildings at the facility, and specialized equipment at the facility and of any spare parts for such equipment;
- (h) The present status of the facility, stating:
- (i) The date when chemical weapons were last produced at the facility;
- (ii) Whether the facility has been destroyed, including the date and manner of its destruction; and
- (iii) Whether the facility has been used or modified before entry into force of this Convention for an activity not related to the production of chemical weapons, and if so, information on what modifications have been made, the date such non-chemical weapons related activity began and the nature of such activity, indicating, if applicable, the kind of product;
- (i) A specification of the measures that have been taken by the State Party for closure of, and a description of the measures that have been or will be taken by the State Party to inactivate the facility;
- (j) A description of the normal pattern of activity for safety and security at the inactivated facility; and
- (k) A statement as to whether the facility will be converted for the destruction of chemical weapons and, if so, the dates for such conversions.

Declarations of chemical weapons production facilities pursuant to Article III, paragraph 1 (c) (iii)

2. The declaration of chemical weapons production facilities pursuant to Article III, paragraph 1 (c) (iii), shall contain all information specified in paragraph 1 above. It is the responsibility of the State Party on whose territory the facility is or has been located to make appropriate arrangements with the other State to ensure that the declarations are made. If the State Party on whose territory the facility is or has been located is not able to fulfil this obligation, it shall state the reasons therefor.

Declarations of past transfers and receipts

3. A State Party that has transferred or received chemical weapons production equipment since 1 January 1946 shall declare these transfers

and receipts pursuant to Article III, paragraph 1 (c) (iv), and in accordance with paragraph 5 below. When not all the specified information is available for transfer and receipt of such equipment for the period between 1 January 1946 and 1 January 1970, the State Party shall declare whatever information is still available to it and provide an explanation as to why it cannot submit a full declaration.

4. Chemical weapons production equipment referred to in paragraph 3 means:

- (a) Specialized equipment;
  - (b) Equipment for the production of equipment specifically designed for use directly in connection with chemical weapons employment; and
  - (c) Equipment designed or used exclusively for producing non-chemical parts for chemical munitions.
5. The declaration concerning transfer and receipt of chemical weapons production equipment shall specify:
- (a) Who received/transferred the chemical weapons production equipment;
  - (b) The identity of such equipment;
  - (c) The date of transfer or receipt;
  - (d) Whether the equipment was destroyed, if known; and
  - (e) Current disposition, if known.

Submission of general plans for destruction

6. For each chemical weapons production facility, a State Party shall supply the following information:

- (a) Envisaged time-frame for measures to be taken; and
  - (b) Methods of destruction.
7. For each chemical weapons production facility that a State Party intends to convert temporarily into a chemical weapons destruction facility, the State Party shall supply the following information:

- (a) Envisaged time-frame for conversion into a destruction facility;
- (b) Envisaged time-frame for utilizing the facility as a chemical weapons destruction facility;
- (c) Description of the new facility;

- (d) Method of destruction of special equipment;
- (e) Time-frame for destruction of the converted facility after it has been utilized to destroy chemical weapons; and
- (f) Method of destruction of the converted facility.

Submission of annual plans for destruction and annual reports on destruction

8. The State Party shall submit an annual plan for destruction not less than 90 days before the beginning of the coming destruction year. The annual plan shall specify:

- (a) Capacity to be destroyed;
- (b) Name and location of the facilities where destruction will take place;
- (c) List of buildings and equipment that will be destroyed at each facility; and
- (d) Planned method(s) of destruction.

9. A State Party shall submit an annual report on destruction not later than 90 days after the end of the previous destruction year. The annual report shall specify:

- (a) Capacity destroyed;
- (b) Name and location of each facility where destruction took place;
- (c) List of buildings and equipment that were destroyed at each facility;
- (d) Methods of destruction.

10. For a chemical weapons production facility declared pursuant to Article III, paragraph 1 (c) (iii), it is the responsibility of the State Party on whose territory the facility is or has been located to make appropriate arrangements to ensure that the declarations specified in paragraphs 6 to 9 above are made. If the State Party on whose territory the facility is or has been located is not able to fulfil this obligation, it shall state the reasons therefor.

B. DESTRUCTION

General principles for destruction of chemical weapons production facilities

11. Each State Party shall decide on methods to be applied for the destruction of chemical weapons production facilities, according to the principles laid down in Article V and in this Part.

Principles and methods for closure of a chemical weapons production facility

12. The purpose of the closure of a chemical weapons production facility is to render it inactive.
13. Agreed measures for closure shall be taken by a State Party with due regard to the specific characteristics of each facility. Such measures shall include, *inter alia*:
- (a) Prohibition of occupation of the specialized buildings and standard buildings of the facility except for agreed activities;
  - (b) Disconnection of equipment directly related to the production of chemical weapons, including, *inter alia*, process control equipment and utilities;
  - (c) Decommissioning of protective installations and equipment used exclusively for the safety of operations of the chemical weapons production facility;
  - (d) Installation of blind flanges and other devices to prevent the addition of chemicals to, or the removal of chemicals from, any specialized process equipment for synthesis, separation or purification of chemicals defined as a chemical weapon, any storage tank, or any machine for filling chemical weapons, the heating, cooling, or supply of electrical or other forms of power to such equipment, storage tanks, or machines; and
  - (e) Interruption of rail, road and other access routes for heavy transport to the chemical weapons production facility except those required for agreed activities.

14. While the chemical weapons production facility remains closed, a State Party may continue safety and physical security activities at the facility.

Technical maintenance of chemical weapons production facilities prior to their destruction

15. A State Party may carry out standard maintenance activities at chemical weapons production facilities only for safety reasons, including visual inspection, preventive maintenance, and routine repairs.
16. All planned maintenance activities shall be specified in the general and detailed plans for destruction. Maintenance activities shall not include:
- (a) Replacement of any process equipment;
  - (b) Modification of the characteristics of the chemical process equipment;
  - (c) Production of chemicals of any type.

17. All maintenance activities shall be subject to monitoring by the Technical Secretariat.

Principles and methods for temporary conversion of chemical weapons production facilities into chemical weapons destruction facilities

18. Measures pertaining to the temporary conversion of chemical weapons production facilities into chemical weapons destruction facilities shall ensure that the regime for the temporarily converted facilities is at least as stringent as the regime for chemical weapons production facilities that have not been converted.
19. Chemical weapons production facilities converted into chemical weapons destruction facilities before entry into force of this Convention shall be declared under the category of chemical weapons production facilities.

They shall be subject to an initial visit by inspectors, who shall confirm the correctness of the information about these facilities. Verification that the conversion of these facilities was performed in such a manner as to render them inoperable as chemical weapons production facilities shall also be required, and shall fall within the framework of measures provided for the facilities that are to be rendered inoperable not later than 90 days after entry into force of this Convention.

20. A State Party that intends to carry out a conversion of chemical weapons production facilities shall submit to the Technical Secretariat, not later than 30 days after this Convention enters into force for it, or not later than 30 days after a decision has been taken for temporary conversion, a general facility conversion plan, and subsequently shall submit annual plans.

21. Should a State Party have the need to convert to a chemical weapons destruction facility an additional chemical weapons production facility that had been closed after this Convention entered into force for it, it shall inform the Technical Secretariat thereof not less than 150 days before conversion. The Technical Secretariat, in conjunction with the State Party, shall make sure that the necessary measures are taken to render that facility, after its conversion, inoperable as a chemical weapons production facility.

22. A facility converted for the destruction of chemical weapons shall not be more fit for resuming chemical weapons production than a chemical weapons production facility which has been closed and is under maintenance. Its reactivation shall require no less time than that required for a chemical weapons production facility that has been closed and is under maintenance.

23. Converted chemical weapons production facilities shall be destroyed not later than 10 years after entry into force of this Convention.

24. Any measures for the conversion of any given chemical weapons production facility shall be facility-specific and shall depend upon its individual characteristics.

25. The set of measures carried out for the purpose of converting a chemical weapons production facility into a chemical weapons destruction facility shall not be less than that which is provided for the disabling of other chemical weapons production facilities to be carried out not later than 90 days after this Convention enters into force for the State Party.

Principles and methods related to destruction of a chemical weapons production facility

26. A State Party shall destroy equipment and buildings covered by the definition of a chemical weapons production facility as follows:

- (a) All specialized equipment and standard equipment shall be physically destroyed;
- (b) All specialized buildings and standard buildings shall be physically destroyed.

27. A State Party shall destroy facilities for producing unfilled chemical munitions and equipment for chemical weapons employment as follows:

- (a) Facilities used exclusively for production of non-chemical parts for chemical munitions or equipment specifically designed for use directly in connection with chemical weapons employment, shall be declared and destroyed. The destruction process and its verification shall be conducted according to the provisions of Article V and this Part of this Annex that govern destruction of chemical weapons production facilities;
- (b) All equipment designed or used exclusively for producing non-chemical parts for chemical munitions shall be physically destroyed. Such equipment, which includes specially designed moulds and metal-forming dies, may be brought to a special location for destruction;
- (c) All buildings and standard equipment used for such production activities shall be destroyed or converted for purposes not prohibited under this Convention, with confirmation, as necessary, through consultations and inspections as provided for under Article IX;
- (d) Activities for purposes not prohibited under this Convention may continue while destruction or conversion proceeds.

Order of destruction

28. The order of destruction of chemical weapons production facilities is based on the obligations specified in Article I and the other Articles of this Convention, including obligations regarding systematic on-site verification. It takes into account interests of States Parties for undiminished security during the destruction period; confidence-building in the early part of the destruction stage; gradual acquisition of experience in the course of destroying chemical weapons production facilities; and applicability irrespective of the actual characteristics

of the facilities and the methods chosen for their destruction. The order of destruction is based on the principle of levelling out.

29. A State Party shall, for each destruction period, determine which chemical weapons production facilities are to be destroyed and carry out the destruction in such a way that not more than what is specified in paragraphs 30 and 31 remains at the end of each destruction period. A State Party is not precluded from destroying its facilities at a faster pace.

30. The following provisions shall apply to chemical weapons production facilities that produce Schedule 1 chemicals:

- (a) A State Party shall start the destruction of such facilities not later than one year after this Convention enters into force for it, and shall complete it not later than 10 years after entry into force of this Convention. For a State which is a Party at the entry into force of this Convention, this overall period shall be divided into three separate destruction periods, namely, years 2-5, years 6-8, and years 9-10. For States which become a Party after entry into force of this Convention, the destruction periods shall be adapted, taking into account paragraphs 28 and 29;
- (b) Production capacity shall be used as the comparison factor for such facilities. It shall be expressed in agent tonnes, taking into account the rules specified for binary chemical weapons;
- (c) Appropriate agreed levels of production capacity shall be established for the end of the eighth year after entry into force of this Convention. Production capacity that exceeds the relevant level shall be destroyed in equal increments during the first two destruction periods;
- (d) A requirement to destroy a given amount of capacity shall entail a requirement to destroy any other chemical weapons production facility that supplied the Schedule 1 facility or filled the Schedule 1 chemical produced there into munitions or devices;
- (e) Chemical weapons production facilities that have been converted temporarily for destruction of chemical weapons shall continue to be subject to the obligation to destroy capacity according to the provisions of this paragraph.

31. A State Party shall start the destruction of chemical weapons production facilities not covered in paragraph 30 not later than one year after this Convention enters into force for it, and complete it not later than five years after entry into force of this Convention.

Detailed plans for destruction

32. Not less than 180 days before the destruction of a chemical weapons production facility starts, a State Party shall provide to the Technical Secretariat the detailed plans for destruction of the facility,

including proposed measures for verification of destruction referred to in paragraph 33 (f), with respect to, inter alia:

- (a) Timing of the presence of the inspectors at the facility to be destroyed; and
  - (b) Procedures for verification of measures to be applied to each item on the declared inventory.
33. The detailed plans for destruction of each chemical weapons production facility shall contain:
- (a) Detailed time schedule of the destruction process;
  - (b) Layout of the facility;
  - (c) Process flow diagram;
  - (d) Detailed inventory of equipment, buildings and other items to be destroyed;
  - (e) Measures to be applied to each item on the inventory;
  - (f) Proposed measures for verification;
  - (g) Security/safety measures to be observed during the destruction of the facility; and
  - (h) Working and living conditions to be provided for inspectors.
34. If a State Party intends to convert temporarily a chemical weapons production facility into a chemical weapons destruction facility, it shall notify the Technical Secretariat not less than 150 days before undertaking any conversion activities. The notification shall:
- (a) Specify the name, address, and location of the facility;
  - (b) Provide a site diagram indicating all structures and areas that will be involved in the destruction of chemical weapons and also identify all structures of the chemical weapons production facility that are to be temporarily converted;
  - (c) Specify the types of chemical weapons, and the type and quantity of chemical fill to be destroyed;
  - (d) Specify the destruction method;
  - (e) Provide a process flow diagram, indicating which portions of the production process and specialized equipment will be converted for the destruction of chemical weapons;
  - (f) Specify the seals and inspection equipment potentially affected by the conversion, if applicable; and

(g) Provide a schedule identifying: The time allocated to design, temporary conversion of the facility, installation of equipment, equipment check-out, destruction operations, and closure.

35. In relation to the destruction of a facility that was temporarily converted for destruction of chemical weapons, information shall be provided in accordance with paragraphs 32 and 33.

#### Review of detailed plans

36. On the basis of the detailed plan for destruction and proposed measures for verification submitted by the State Party, and on experience from previous inspections, the Technical Secretariat shall prepare a plan for verifying the destruction of the facility, consulting closely with the State Party. Any differences between the Technical Secretariat and the State Party concerning appropriate measures should be resolved through consultations. Any unresolved matters shall be forwarded to the Executive Council for appropriate action with a view to facilitating the full implementation of this Convention.
37. To ensure that the provisions of Article V and this Part are fulfilled, the combined plans for destruction and verification shall be agreed upon between the Executive Council and the State Party. This agreement should be completed, not less than 60 days before the planned initiation of destruction.
38. Each member of the Executive Council may consult with the Technical Secretariat on any issues regarding the adequacy of the combined plan for destruction and verification. If there are no objections by any member of the Executive Council, the plan shall be put into action.
39. If there are any difficulties, the Executive Council shall enter into consultations with the State Party to reconcile them. If any difficulties remain unresolved they shall be referred to the Conference. The resolution of any differences over methods of destruction shall not delay the execution of other parts of the destruction plan that are acceptable.
40. If agreement is not reached with the Executive Council on aspects of verification, or if the approved verification plan cannot be put into action, verification of destruction shall proceed through continuous monitoring with on-site instruments and physical presence of inspectors.
41. Destruction and verification shall proceed according to the agreed plan. The verification shall not unduly interfere with the destruction process and shall be conducted through the presence of inspectors on-site to witness the destruction.
42. If required verification or destruction actions are not taken as planned, all States Parties shall be so informed.

## C. VERIFICATION

Verification of declarations of chemical weapons production facilities through on-site inspection

43. The Technical Secretariat shall conduct an initial inspection of each chemical weapons production facility in the period between 90 and 120 days after this Convention enters into force for the State Party.
44. The purposes of the initial inspection shall be:
- (a) To confirm that the production of chemical weapons has ceased and that the facility has been inactivated in accordance with this Convention;
  - (b) To permit the Technical Secretariat to familiarize itself with the measures that have been taken to cease production of chemical weapons at the facility;
  - (c) To permit the inspectors to install temporary seals;
  - (d) To permit the inspectors to confirm the inventory of buildings and specialized equipment;
  - (e) To obtain information necessary for planning inspection activities at the facility, including use of tamper-indicating seals and other agreed equipment, which shall be installed pursuant to the detailed facility agreement for the facility; and
  - (f) To conduct preliminary discussions regarding a detailed agreement on inspection procedures at the facility.
45. Inspectors shall employ, as appropriate, agreed seals, markers or other inventory control procedures to facilitate an accurate inventory of the declared items at each chemical weapons production facility.
46. Inspectors shall install such agreed devices as may be necessary to indicate if any resumption of production of chemical weapons occurs or if any declared item is removed. They shall take the necessary precaution not to hinder closure activities by the inspected State Party. Inspectors may return to maintain and verify the integrity of the devices.
47. If, on the basis of the initial inspection, the Director-General believes that additional measures are necessary to inactivate the facility in accordance with this Convention, the Director-General may request, not later than 135 days after this Convention enters into force for a State Party, that such measures be implemented by the inspected State Party not later than 180 days after this Convention enters into force for it. At its discretion, the inspected State Party may satisfy the request. If it does not satisfy the request, the inspected State Party and the Director-General shall consult to resolve the matter.

Systematic verification of chemical weapons production facilities and cessation of their activities

48. The purpose of the systematic verification of a chemical weapons production facility shall be to ensure that any resumption of production of chemical weapons or removal of declared items will be detected at this facility.
49. The detailed facility agreement for each chemical weapons production facility shall specify:
- (a) Detailed on-site inspection procedures, which may include:
    - (i) Visual examinations;
    - (ii) Checking and servicing of seals and other agreed devices; and
    - (iii) Obtaining and analysing samples;
  - (b) Procedures for using tamper-indicating seals and other agreed equipment to prevent the undetected reactivation of the facility, which shall specify:
    - (i) The type, placement, and arrangements for installation; and
    - (ii) The maintenance of such seals and equipment; and
  - (c) Other agreed measures.
50. The seals or other approved equipment provided for in a detailed agreement on inspection measures for that facility shall be placed not later than 240 days after this Convention enters into force for a State Party. Inspectors shall be permitted to visit each chemical weapons production facility for the installation of such seals or equipment.
51. During each calendar year, the Technical Secretariat shall be permitted to conduct up to four inspections of each chemical weapons production facility.
52. The Director-General shall notify the inspected State Party of his decision to inspect or visit a chemical weapons production facility 48 hours before the planned arrival of the inspection team at the facility for systematic inspections or visits. In the case of inspections or visits to resolve urgent problems, this period may be shortened. The Director-General shall specify the purpose of the inspection or visit.
53. Inspectors shall, in accordance with the facility agreements, have unimpeded access to all parts of the chemical weapons production facilities. The items on the declared inventory to be inspected shall be chosen by the inspectors.

54. The guidelines for determining the frequency of systematic on-site inspections shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i). The particular production facility to be inspected shall be chosen by the Technical Secretariat in such a way as to preclude the prediction of precisely when the facility is to be inspected.

Verification of destruction of chemical weapons production facilities

55. The purpose of systematic verification of the destruction of chemical weapons production facilities shall be to confirm that the facility is destroyed in accordance with the obligations under this Convention and that each item on the declared inventory is destroyed in accordance with the agreed detailed plan for destruction.

56. When all items on the declared inventory have been destroyed, the Technical Secretariat shall confirm the declaration of the State Party to that effect. After this confirmation, the Technical Secretariat shall terminate the systematic verification of the chemical weapons production facility and shall promptly remove all devices and monitoring instruments installed by the inspectors.

57. After this confirmation, the State Party shall make the declaration that the facility has been destroyed.

Verification of temporary conversion of a chemical weapons production facility into a chemical weapons destruction facility

58. Not later than 90 days after receiving the initial notification of the intent to convert temporarily a production facility, the inspectors shall have the right to visit the facility to familiarize themselves with the proposed temporary conversion and to study possible inspection measures that will be required during the conversion.

59. Not later than 60 days after such a visit, the Technical Secretariat and the inspected State Party shall conclude a transition agreement containing additional inspection measures for the temporary conversion period. The transition agreement shall specify inspection procedures, including the use of seals, monitoring equipment, and inspections, that will provide confidence that no chemical weapons production takes place during the conversion process. This agreement shall remain in force from the beginning of the temporary conversion activity until the facility begins operation as a chemical weapons destruction facility.

60. The inspected State Party shall not remove or convert any portion of the facility, or remove or modify any seal or other agreed inspection equipment that may have been installed pursuant to this Convention until the transition agreement has been concluded.

61. Once the facility begins operation as a chemical weapons destruction facility, it shall be subject to the provisions of Part IV (A) of this Annex applicable to chemical weapons destruction

facilities. Arrangements for the pre-operation period shall be governed by the transition agreement.

62. During destruction operations the inspectors shall have access to all portions of the temporarily converted chemical weapons production facilities, including those that are not directly involved with the destruction of chemical weapons.

63. Before the commencement of work at the facility to convert it temporarily for chemical weapons destruction purposes and after it facility has ceased to function as a facility for chemical weapons destruction, the facility shall be subject to the provisions of this Part applicable to chemical weapons production facilities.

D. CONVERSION OF CHEMICAL WEAPONS PRODUCTION FACILITIES TO PURPOSES NOT PROHIBITED UNDER THIS CONVENTION

Procedures for requesting conversion

64. A request to use a chemical weapons production facility for purposes not prohibited under this Convention may be made for any facility that a State Party is already using for such purposes before this Convention enters into force for it, or that it plans to use for such purposes.

65. For a chemical weapons production facility that is being used for purposes not prohibited under this Convention when this Convention enters into force for the State Party, the request shall be submitted to the Director-General not later than 30 days after this Convention enters into force for the State Party. The request shall contain, in addition to data submitted in accordance with paragraph 1 (h) (iii), the following information:

- (a) A detailed justification for the request;
- (b) A general facility conversion plan that specifies:
  - (i) The nature of the activity to be conducted at the facility;
  - (ii) If the planned activity involves production, processing, or consumption of chemicals: the name of each of the chemicals, the flow diagram of the facility, and the quantities planned to be produced, processed, or consumed annually;
  - (iii) Which buildings or structures are proposed to be used and what modifications are proposed, if any;
  - (iv) Which buildings or structures have been destroyed or are proposed to be destroyed and the plans for destruction;
  - (v) What equipment is to be used in the facility;

- (vi) What equipment has been removed and destroyed and what equipment is proposed to be removed and destroyed and the plans for its destruction;
- (vii) The proposed schedule for conversion, if applicable; and
- (viii) The nature of the activity of each other facility operating at the site; and
- (c) A detailed explanation of how measures set forth in subparagraph (b), as well as any other measures proposed by the State Party, will ensure the prevention of standby chemical weapons production capability at the facility.
66. For a chemical weapons production facility that is not being used for purposes not prohibited under this Convention when this Convention enters into force for the State Party, the request shall be submitted to the Director-General not later than 30 days after the decision to convert, but in no case later than four years after this Convention enters into force for the State Party. The request shall contain the following information:
- (a) A detailed justification for the request, including its economic needs;
- (b) A general facility conversion plan that specifies:
- (i) The nature of the activity planned to be conducted at the facility;
- (ii) If the planned activity involves production, processing, or consumption of chemicals: the name of each of the chemicals, the flow diagram of the facility, and the quantities planned to be produced, processed, or consumed annually;
- (iii) Which buildings or structures are proposed to be retained and what modifications are proposed, if any;
- (iv) Which buildings or structures have been destroyed or are proposed to be destroyed and the plans for destruction;
- (v) What equipment is proposed for use in the facility;
- (vi) What equipment is proposed to be removed and destroyed and the plans for its destruction;
- (vii) The proposed schedule for conversion; and
- (viii) The nature of the activity of each other facility operating at the site; and
- (c) A detailed explanation of how the measures set forth in subparagraph (b), as well as any other measures proposed by the State

Party, will ensure the prevention of standby chemical weapons production capability at the facility.

67. The State Party may propose in its request any other measures it deems appropriate to build confidence.

Actions pending a decision

68. Pending a decision of the Conference, a State Party may continue to use for purposes not prohibited under this Convention a facility that was being used for such purposes before this Convention enters into force for it, but only if the State Party certifies in its request that no specialized equipment and no specialized buildings are being used and that the specialized equipment and specialized buildings have been rendered inactive using the methods specified in paragraph 13.

69. If the facility, for which the request was made, was not being used for purposes not prohibited under this Convention before this Convention enters into force for the State Party, or if the certification required in paragraph 68 is not made, the State Party shall cease immediately all activity pursuant to Article V, paragraph 4. The State Party shall close the facility in accordance with paragraph 13 not later than 90 days after this Convention enters into force for it.

Conditions for conversion

70. As a condition for conversion of a chemical weapons production facility for purposes not prohibited under this Convention, all specialized equipment at the facility must be destroyed and all special features of buildings and structures that distinguish them from buildings and structures normally used for purposes not prohibited under this Convention and not involving Schedule 1 chemicals must be eliminated.

71. A converted facility shall not be used:

- (a) For any activity involving production, processing, or consumption of a Schedule 1 chemical or a Schedule 2 chemical; or
- (b) For the production of any highly toxic chemical, including any highly toxic organophosphorus chemical, or for any other activity that would require special equipment for handling highly toxic or highly corrosive chemicals, unless the Executive Council decides that such production or activity would pose no risk to the object and purpose of this Convention, taking into account criteria for toxicity, corrosiveness and, if applicable, other technical factors, to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).
72. Conversion of a chemical weapons production facility shall be completed not later than six years after entry into force of this Convention.

Decisions by the Executive Council and the Conference

73. Not later than 90 days after receipt of the request by the Director-General, an initial inspection of the facility shall be conducted by the Technical Secretariat. The purpose of this inspection shall be to determine the accuracy of the information provided in the request, to obtain information on the technical characteristics of the proposed converted facility, and to assess the conditions under which use for purposes not prohibited under this Convention may be permitted. The Director-General shall promptly submit a report to the Executive Council, the Conference, and all States Parties containing his recommendations on the measures necessary to convert the facility to purposes not prohibited under this Convention and to provide assurance that the converted facility will be used only for purposes not prohibited under this Convention.

74. If the facility has been used for purposes not prohibited under this Convention before this Convention enters into force for the State Party, and is continuing to be in operation, but the measures required to be certified under paragraph 68 have not been taken, the Director-General shall immediately inform the Executive Council, which may require implementation of measures it deems appropriate, inter alia, shut-down of the facility and removal of specialized equipment and modification of buildings or structures. The Executive Council shall stipulate the deadline for implementation of these measures and shall suspend consideration of the request pending their satisfactory completion. The facility shall be inspected promptly after the expiration of the deadline to determine whether the measures have been implemented. If not, the State Party shall be required to shut down completely all facility operations.

75. As soon as possible after receiving the report of the Director-General, the Conference, upon recommendation of the Executive Council, shall decide, taking into account the report and any views expressed by States Parties, whether to approve the request, and shall establish the conditions upon which approval is contingent. If any State Party objects to approval of the request and the associated conditions, consultations shall be undertaken among interested States Parties for up to 90 days to seek a mutually acceptable solution. A decision on the request and associated conditions, along with any proposed modifications thereto, shall be taken, as a matter of substance, as soon as possible after the end of the consultation period.

76. If the request is approved, a facility agreement shall be completed not later than 90 days after such a decision is taken. The facility agreement shall contain the conditions under which the conversion and use of the facility is permitted, including measures for verification. Conversion shall not begin before the facility agreement is concluded.

Detailed plans for conversion

77. Not less than 180 days before conversion of a chemical weapons production facility is planned to begin, the State Party shall provide the Technical Secretariat with the detailed plans for conversion of the

facility, including proposed measures for verification of conversion, with respect to, inter alia:

(a) Timing of the presence of the inspectors at the facility to be converted; and

(b) Procedures for verification of measures to be applied to each item on the declared inventory.

78. The detailed plan for conversion of each chemical weapons production facility shall contain:

- (a) Detailed time schedule of the conversion process;
- (b) Layout of the facility before and after conversion;
- (c) Process flow diagram of the facility before, and as appropriate, after the conversion;
- (d) Detailed inventory of equipment, buildings and structures and other items to be destroyed and of the buildings and structures to be modified;
- (e) Measures to be applied to each item on the inventory, if any;
- (f) Proposed measures for verification;
- (g) Security/safety measures to be observed during the conversion of the facility; and
- (h) Working and living conditions to be provided for inspectors.

Review of detailed plans

79. On the basis of the detailed plan for conversion and proposed measures for verification submitted by the State Party, and on experience from previous inspections, the Technical Secretariat shall prepare a plan for verifying the conversion of the facility, consulting closely with the State Party. Any differences between the Technical Secretariat and the State Party concerning appropriate measures shall be resolved through consultations. Any unresolved matters shall be forwarded to the Executive Council for appropriate action with a view to facilitate the full implementation of this Convention.

80. To ensure that the provisions of Article V and this Part are fulfilled, the combined plans for conversion and verification shall be agreed upon between the Executive Council and the State Party. This agreement shall be completed not less than 60 days before conversion is planned to begin.

81. Each member of the Executive Council may consult with the Technical Secretariat on any issue regarding the adequacy of the combined plan for conversion and verification. If there are no objections by any member of the Executive Council, the plan shall be put into action.

82. If there are any difficulties, the Executive Council should enter into consultations with the State Party to reconcile them. If any difficulties remain unresolved, they should be referred to the Conference. The resolution of any differences over methods of conversion should not delay the execution of other parts of the conversion plan that are acceptable.
83. If agreement is not reached with the Executive Council on aspects of verification, or if the approved verification plan cannot be put into action, verification of conversion shall proceed through continuous monitoring with on-site instruments and physical presence of inspectors.
84. Conversion and verification shall proceed according to the agreed plan. The verification shall not unduly interfere with the conversion process and shall be conducted through the presence of inspectors to confirm the conversion.
85. For the 10 years after the Director-General certifies that conversion is complete, the State Party shall provide to inspectors unimpeded access to the facility at any time. The inspectors shall have the right to observe all areas, all activities, and all items of equipment at the facility. The inspectors shall have the right to verify that the activities at the facility are consistent with any conditions established under this Section, by the Executive Council and the Conference. The inspectors shall also have the right, in accordance with provisions of Part II, Section E, of this Annex to receive samples from any area of the facility and to analyse them to verify the absence of Schedule 1 chemicals, their stable by-products and decomposition products and of Schedule 2 chemicals and to verify that the activities at the facility are consistent with any other conditions on chemical activities established under this Section, by the Executive Council and the Conference. The inspectors shall also have the right to managed access, in accordance with Part X, Section C, of this Annex, to the plant site at which the facility is located. During the 10-year period, the State Party shall report annually on the activities at the converted facility. Upon completion of the 10-year period, the Executive Council, taking into account recommendations of the Technical Secretariat, shall decide on the nature of continued verification measures.
86. Costs of verification of the converted facility shall be allocated in accordance with Article V, paragraph 19.

## PART VI

ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION  
IN ACCORDANCE WITH ARTICLE VIREGIME FOR SCHEDULE 1 CHEMICALS AND FACILITIES  
RELATED TO SUCH CHEMICALS

## A. GENERAL PROVISIONS

1. A State Party shall not produce, acquire, retain or use Schedule 1 chemicals outside the territories of States Parties and shall not

transfer such chemicals outside its territory except to another State Party.

2. A State Party shall not produce, acquire, retain, transfer or use Schedule 1 chemicals unless:

- (a) The chemicals are applied to research, medical, pharmaceutical or protective purposes; and
- (b) The types and quantities of chemicals are strictly limited to those which can be justified for such purposes; and
- (c) The aggregate amount of such chemicals at any given time for such purposes is equal to or less than 1 tonne; and
- (d) The aggregate amount for such purposes acquired by a State Party in any year through production, withdrawal from chemical weapons stocks and transfer is equal to or less than 1 tonne.

## B. TRANSFERS

3. A State Party may transfer Schedule 1 chemicals outside its territory only to another State Party and only for research, medical, pharmaceutical or protective purposes in accordance with paragraph 2.
4. Chemicals transferred shall not be retransferred to a third State.
5. Not less than 30 days before any transfer to another State Party both States Parties shall notify the Technical Secretariat of the transfer.
6. Each State Party shall make a detailed annual declaration regarding transfers during the previous year. The declaration shall be submitted not later than 90 days after the end of that year and shall for each Schedule 1 chemical that has been transferred include the following information:

- (a) The chemical name, structural formula and Chemical Abstracts Service registry number, if assigned;
- (b) The quantity acquired from other States or transferred to other States Parties. For each transfer the quantity, recipient and purpose shall be included.

## C. PRODUCTION

General principles for production

7. Each State Party, during production under paragraphs 8 to 12, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall conduct such production in accordance with its national standards for safety and emissions.

Single small-scale facility

8. Each State Party that produces Schedule 1 chemicals for research, medical, pharmaceutical or protective purposes shall carry out the production at a single small-scale facility approved by the State Party, except as set forth in paragraphs 10, 11 and 12.

9. The production at a single small-scale facility shall be carried out in reaction vessels in production lines not configured for continuous operation. The volume of such a reaction vessel shall not exceed 100 litres, and the total volume of all reaction vessels with a volume exceeding 5 litres shall not be more than 500 litres.

Other facilities

10. Production of Schedule 1 chemicals in aggregate quantities not exceeding 10 kg per year may be carried out for protective purposes at one facility outside a single small-scale facility. This facility shall be approved by the State Party.

11. Production of Schedule 1 chemicals in quantities of more than 100 g per year may be carried out for research, medical or pharmaceutical purposes outside a single small-scale facility in aggregate quantities not exceeding 10 kg per year per facility. These facilities shall be approved by the State Party.

12. Synthesis of Schedule 1 chemicals for research, medical or pharmaceutical purposes, but not for protective purposes, may be carried out at laboratories in aggregate quantities less than 100 g per year per facility. These facilities shall not be subject to any obligation relating to declaration and verification as specified in Sections D and E.

## D. DECLARATIONS

Single small-scale facility

13. Each State Party that plans to operate a single small-scale facility shall provide the Technical Secretariat with the precise location and a detailed technical description of the facility, including an inventory of equipment and detailed diagrams. For existing facilities, this initial declaration shall be provided not later than 30 days after this Convention enters into force for the State Party. Initial declarations on new facilities shall be provided not less than 180 days before operations are to begin.

14. Each State Party shall give advance notification to the Technical Secretariat of planned changes related to the initial declaration. The notification shall be submitted not less than 180 days before the changes are to take place.

15. A State Party producing Schedule 1 chemicals at a single small-scale facility shall make a detailed annual declaration regarding the activities of the facility for the previous year. The declaration

shall be submitted not later than 90 days after the end of that year and shall include:

(a) Identification of the facility;

(b) For each Schedule 1 chemical produced, acquired, consumed or stored at the facility, the following information:

(i) The chemical name, structural formula and Chemical Abstracts Service registry number, if assigned;

(ii) The methods employed and quantity produced;

(iii) The name and quantity of precursors listed in Schedules 1, 2, or 3 used for production of Schedule 1 chemicals;

(iv) The quantity consumed at the facility and the purpose(s) of the consumption;

(v) The quantity received from or shipped to other facilities in the State Party. For each shipment the quantity, recipient and purpose should be included;

(vi) The maximum quantity stored at any time during the year; and

(vii) The quantity stored at the end of the year; and

(c) Information on any changes at the facility during the year compared to previously submitted detailed technical descriptions of the facility including inventories of equipment and detailed diagrams.

16. Each State Party producing Schedule 1 chemicals at a single small-scale facility shall make a detailed annual declaration regarding the projected activities and the anticipated production at the facility for the coming year. The declaration shall be submitted not less than 90 days before the beginning of that year and shall include:

(a) Identification of the facility;

(b) For each Schedule 1 chemical anticipated to be produced, consumed or stored at the facility, the following information:

(i) The chemical name, structural formula and Chemical Abstracts Service registry number, if assigned;

(ii) The quantity anticipated to be produced and the purpose of the production; and

(c) Information on any anticipated changes at the facility during the year compared to previously submitted detailed technical descriptions of the facility including inventories of equipment and detailed diagrams.

Other facilities referred to in paragraphs 10 and 11

17. For each facility, a State Party shall provide the Technical Secretariat with the name, location and a detailed technical description of the facility or its relevant part(s) as requested by the Technical Secretariat. The facility producing Schedule 1 chemicals for protective purposes shall be specifically identified. For existing facilities, this initial declaration shall be provided not later than 30 days after this Convention enters into force for the State Party. Initial declarations on new facilities shall be provided not less than 180 days before operations are to begin.
18. Each State Party shall give advance notification to the Technical Secretariat of planned changes related to the initial declaration. The notification shall be submitted not less than 180 days before the changes are to take place.
19. Each State Party shall, for each facility, make a detailed annual declaration regarding the activities of the facility for the previous year. The declaration shall be submitted not later than 90 days after the end of that year and shall include:
- (a) Identification of the facility;
  - (b) For each Schedule 1 chemical the following information:
    - (i) The chemical name, structural formula and Chemical Abstracts Service registry number, if assigned;
    - (ii) The quantity produced and, in case of production for protective purposes, methods employed;
    - (iii) The name and quantity of precursors listed in Schedules 1, 2, or 3, used for production of Schedule 1 chemicals;
    - (iv) The quantity consumed at the facility and the purpose of the consumption;
    - (v) The quantity transferred to other facilities within the State Party. For each transfer the quantity, recipient and purpose should be included;
    - (vi) The maximum quantity stored at any time during the year; and
    - (vii) The quantity stored at the end of the year; and
  - (c) Information on any changes at the facility or its relevant parts during the year compared to previously submitted detailed technical description of the facility.
20. Each State Party shall, for each facility, make a detailed annual declaration regarding the projected activities and the anticipated

production at the facility for the coming year. The declaration shall be submitted not less than 90 days before the beginning of that year and shall include:

- (a) Identification of the facility;
- (b) For each Schedule 1 chemical the following information:
  - (i) The chemical name, structural formula and Chemical Abstracts Service registry number, if assigned; and
  - (ii) The quantity anticipated to be produced, the time periods when the production is anticipated to take place and the purposes of the production; and
- (c) Information on any anticipated changes at the facility or its relevant parts, during the year compared to previously submitted detailed technical descriptions of the facility.

## E. VERIFICATION

Single small-scale facility

21. The aim of verification activities at the single small-scale facility shall be to verify that the quantities of Schedule 1 chemicals produced are correctly declared and, in particular, that their aggregate amount does not exceed 1 tonne.
22. The facility shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments.
23. The number, intensity, duration, timing and mode of inspections for a particular facility shall be based on the risk to the object and purpose of this Convention posed by the relevant chemicals, the characteristics of the facility and the nature of the activities carried out there. Appropriate guidelines shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).
24. The purpose of the initial inspection shall be to verify information provided concerning the facility, including verification of the limits on reaction vessels set forth in paragraph 9.
25. Not later than 180 days after this Convention enters into force for a State Party, it shall conclude a facility agreement, based on a model agreement, with the Organization, covering detailed inspection procedures for the facility.
26. Each State Party planning to establish a single small-scale facility after this Convention enters into force for it shall conclude a facility agreement, based on a model agreement, with the Organization, covering detailed inspection procedures for the facility before it begins operation or is used.

27. A model for agreements shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

Other facilities referred to in paragraphs 10 and 11

28. The aim of verification activities at any facility referred to in paragraphs 10 and 11 shall be to verify that:

- (a) The facility is not used to produce any Schedule 1 chemical, except for the declared chemicals;
  - (b) The quantities of Schedule 1 chemicals produced, processed or consumed are correctly declared and consistent with needs for the declared purpose; and
  - (c) The Schedule 1 chemical is not diverted or used for other purposes.
29. The facility shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments.
30. The number, intensity, duration, timing and mode of inspections for a particular facility shall be based on the risk to the object and purpose of this Convention posed by the quantities of chemicals produced, the characteristics of the facility and the nature of the activities carried out there. Appropriate guidelines shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

31. Not later than 180 days after this Convention enters into force for a State Party, it shall conclude facility agreements with the Organization, based on a model agreement covering detailed inspection procedures for each facility.

32. Each State Party planning to establish such a facility after entry into force of this Convention shall conclude a facility agreement with the Organization before the facility begins operation or is used.

PART VII

ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION  
IN ACCORDANCE WITH ARTICLE VI

REGIME FOR SCHEDULE 2 CHEMICALS AND FACILITIES  
RELATED TO SUCH CHEMICALS

A. DECLARATIONS

Declarations of aggregate national data

1. The initial and annual declarations to be provided by each State Party pursuant to Article VI, paragraphs 7 and 8, shall include aggregate national data for the previous calendar year on the quantities

produced, processed, consumed, imported and exported of each Schedule 2 chemical, as well as a quantitative specification of import and export for each country involved.

2. Each State Party shall submit:

- (a) Initial declarations pursuant to paragraph 1 not later than 30 days after this Convention enters into force for it; and, starting in the following calendar year,
- (b) Annual declarations not later than 90 days after the end of the previous calendar year.

Declarations of plant sites producing, processing or consuming Schedule 2 chemicals

3. Initial and annual declarations are required for all plant sites that comprise one or more plant(s) which produced, processed or consumed during any of the previous three calendar years or is anticipated to produce, process or consume in the next calendar year more than:

- (a) 1 kg of a chemical designated "\*" in Schedule 2, part A;
- (b) 100 kg of any other chemical listed in Schedule 2, part A; or
- (c) 1 tonne of a chemical listed in Schedule 2, part B.

4. Each State Party shall submit:

(a) Initial declarations pursuant to paragraph 3 not later than 30 days after this Convention enters into force for it; and, starting in the following calendar year;

(b) Annual declarations on past activities not later than 90 days after the end of the previous calendar year;

(c) Annual declarations on anticipated activities not later than 60 days before the beginning of the following calendar year. Any such activity additionally planned after the annual declaration has been submitted shall be declared not later than five days before this activity begins.

5. Declarations pursuant to paragraph 3 are generally not required for mixtures containing a low concentration of a Schedule 2 chemical. They are only required, in accordance with guidelines, in cases where the ease of recovery from the mixture of the Schedule 2 chemical and its total weight are deemed to pose a risk to the object and purpose of this Convention. These guidelines shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

6. Declarations of a plant site pursuant to paragraph 3 shall include:

- (a) The name of the plant site and the name of the owner, company, or enterprise operating it;

(b) Its precise location including the address; and  
 (c) The number of plants within the plant site which are declared pursuant to Part VIII of this Annex.

7. Declarations of a plant site pursuant to paragraph 3 shall also include, for each plant which is located within the plant site and which falls under the specifications set forth in paragraph 3, the following information:

- (a) The name of the plant and the name of the owner, company, or enterprise operating it;
- (b) Its precise location within the plant site including the specific building or structure number, if any;
- (c) Its main activities;
- (d) Whether the plant:
  - (i) Produces, processes, or consumes the declared Schedule 2 chemical(s);
  - (ii) Is dedicated to such activities or multi-purpose; and
  - (iii) Performs other activities with regard to the declared Schedule 2 chemical(s), including a specification of that other activity (e.g. storage); and
- (e) The production capacity of the plant for each declared Schedule 2 chemical.

8. Declarations of a plant site pursuant to paragraph 3 shall also include the following information on each Schedule 2 chemical above the declaration threshold:

- (a) The chemical name, common or trade name used by the facility, structural formula, and Chemical Abstracts Service registry number, if assigned;
- (b) In the case of the initial declaration: the total amount produced, processed, consumed, imported and exported by the plant site in each of the three previous calendar years;
- (c) In the case of the annual declaration on past activities: the total amount produced, processed, consumed, imported and exported by the plant site in the previous calendar year;
- (d) In the case of the annual declaration on anticipated activities: the total amount anticipated to be produced, processed or consumed by the plant site in the following calendar year, including the anticipated time periods for production, processing or consumption; and

(e) The purposes for which the chemical was or will be produced, processed or consumed:

- (i) Processing and consumption on site with a specification of the product types;
- (ii) Sale or transfer within the territory or to any other place under the jurisdiction or control of the State Party, with a specification whether to other industry, trader or other destination and, if possible, of final product types;
- (iii) Direct export, with a specification of the States involved; or
- (iv) Other, including a specification of these other purposes.

Declarations on past production of Schedule 2 chemicals for chemical weapons purposes

9. Each State Party shall, not later than 30 days after this Convention enters into force for it, declare all plant sites comprising plants that produced at any time since 1 January 1946 a Schedule 2 chemical for chemical weapons purposes.

10. Declarations of a plant site pursuant to paragraph 9 shall include:

- (a) The name of the plant site and the name of the owner, company, or enterprise operating it;
- (b) Its precise location including the address;

(c) For each plant which is located within the plant site, and which falls under the specifications set forth in paragraph 9, the same information as required under paragraph 7, subparagraphs (a) to (e); and

(d) For each Schedule 2 chemical produced for chemical weapons purposes:

- (i) The chemical name, common or trade name used by the plant site for chemical weapons production purposes, structural formula, and Chemical Abstracts Service registry number, if assigned;
- (ii) The dates when the chemical was produced and the quantity produced; and
- (iii) The location to which the chemical was delivered and the final product produced there, if known.

Information to States Parties

11. A list of plant sites declared under this Section together with the information provided under paragraphs 6, 7 (a), 7 (c), 7 (d) (i),

7 (d) (iii), 8 (a) and 10 shall be transmitted by the Technical Secretariat to States Parties upon request.

#### B. VERIFICATION

##### General

12. Verification provided for in Article VI, paragraph 4, shall be carried out through on-site inspection at those of the declared plant sites that comprise one or more plants which produced, processed or consumed during any of the previous three calendar years or are anticipated to produce, process or consume in the next calendar year more than:

- (a) 10 kg of a chemical designated "a" in Schedule 2, part A;
- (b) 1 tonne of any other chemical listed in Schedule 2, part A; or
- (c) 10 tonnes of a chemical listed in Schedule 2, part B.

13. The programme and budget of the Organization to be adopted by the Conference pursuant to Article VIII, paragraph 21 (a) shall contain, as a separate item, a programme and budget for verification under this Section. In the allocation of resources made available for verification under Article VI, the Technical Secretariat shall, during the first three years after the entry into force of this Convention, give priority to the initial inspections of plant sites declared under Section A. The allocation shall thereafter be reviewed on the basis of the experience gained.

14. The Technical Secretariat shall conduct initial inspections and subsequent inspections in accordance with paragraphs 15 to 22.

##### Inspection aims

15. The general aim of inspections shall be to verify that activities are in accordance with obligations under this Convention and consistent with the information to be provided in declarations. Particular aims of inspections at plant sites declared under Section A shall include verification of:

- (a) The absence of any Schedule 1 chemical, especially its production, except if in accordance with Part VI of this Annex;
- (b) Consistency with declarations of levels of production, processing or consumption of Schedule 2 chemicals; and
- (c) Non-diversion of Schedule 2 chemicals for activities prohibited under this Convention.

##### Initial inspections

16. Each plant site to be inspected pursuant to paragraph 12 shall receive an initial inspection as soon as possible but preferably not

later than three years after entry into force of this Convention. Plant sites declared after this period shall receive an initial inspection not later than one year after production, processing or consumption is first declared. Selection of plant sites for initial inspections shall be made by the Technical Secretariat in such a way as to preclude the prediction of precisely when the plant site is to be inspected.

17. During the initial inspection, a draft facility agreement for the plant site shall be prepared unless the inspected State Party and the Technical Secretariat agree that it is not needed.

18. With regard to frequency and intensity of subsequent inspections, inspectors shall during the initial inspection assess the risk to the object and purpose of this Convention posed by the relevant chemicals, the characteristics of the plant site and the nature of the activities carried out there, taking into account, *inter alia*, the following criteria:

- (a) The toxicity of the scheduled chemicals and of the end-products produced with it, if any;
- (b) The quantity of the scheduled chemicals typically stored at the inspected site;
- (c) The quantity of feedstock chemicals for the scheduled chemicals typically stored at the inspected site;
- (d) The production capacity of the Schedule 2 plants; and
- (e) The capability and convertibility for initiating production, storage and filling of toxic chemicals at the inspected site.

##### Inspections

19. Having received the initial inspection, each plant site to be inspected pursuant to paragraph 12 shall be subject to subsequent inspections.

20. In selecting particular plant sites for inspection and in deciding on the frequency and intensity of inspections, the Technical Secretariat shall give due consideration to the risk to the object and purpose of this Convention posed by the relevant chemical, the characteristics of the plant site and the nature of the activities carried out there, taking into account the respective facility agreement as well as the results of the initial inspections and subsequent inspections.

21. The Technical Secretariat shall choose a particular plant site to be inspected in such a way as to preclude the prediction of exactly when it will be inspected.

22. No plant site shall receive more than two inspections per calendar year under the provisions of this Section. This, however, shall not limit inspections pursuant to Article IX.

(h) Equipment and areas for disposition of chemicals not up to specification.

29. The period of inspection shall not last more than 96 hours; however, extensions may be agreed between the inspection team and the inspected State Party.

#### Notification of inspection

30. A State Party shall be notified by the Technical Secretariat of the inspection not less than 48 hours before the arrival of the inspection team at the plant site to be inspected.

#### C. TRANSFERS TO STATES NOT PARTY TO THIS CONVENTION

31. Schedule 2 chemicals shall only be transferred to or received from States Parties. This obligation shall take effect three years after entry into force of this Convention.

32. During this interim three-year period, each State Party shall require an end-use certificate, as specified below, for transfers of Schedule 2 chemicals to States not Party to this Convention. For such transfers, each State Party shall adopt the necessary measures to ensure that the transferred chemicals shall only be used for purposes not prohibited under this Convention. *Inter alia*, the State Party shall require from the recipient State a certificate stating, in relation to the transferred chemicals:

- (a) That they will only be used for purposes not prohibited under this Convention;
- (b) That they will not be re-transferred;
- (c) Their types and quantities;
- (d) Their end-use(s); and
- (e) The name(s) and address(es) of the end-user(s).

#### PART VIII

#### ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION IN ACCORDANCE WITH ARTICLE VI

#### REGIME FOR SCHEDULE 3 CHEMICALS AND FACILITIES RELATED TO SUCH CHEMICALS

#### A. DECLARATIONS

#### Declarations of aggregate national data

1. The initial and annual declarations to be provided by a State Party pursuant to Article VI, paragraphs 7 and 8, shall include aggregate

#### Inspection procedures

23. In addition to agreed guidelines, other relevant provisions of this Annex and the Confidentiality Annex, paragraphs 24 to 30 below shall apply.

24. A facility agreement for the declared plant site shall be concluded not later than 90 days after completion of the initial inspection between the inspected State Party and the Organization unless the inspected State Party and the Technical Secretariat agree that it is not needed. It shall be based on a model agreement and govern the conduct of inspections at the declared plant site. The agreement shall specify the frequency and intensity of inspections as well as detailed inspection procedures, consistent with paragraphs 25 to 29.

25. The focus of the inspection shall be the declared Schedule 2 plant(s) within the declared plant site. If the inspection team requests access to other parts of the plant site, access to these areas shall be granted in accordance with the obligation to provide clarification pursuant to Part II, paragraph 51, of this Annex and in accordance with the facility agreement, or, in the absence of a facility agreement, in accordance with the rules of managed access as specified in Part X, Section C, of this Annex.

26. Access to records shall be provided, as appropriate, to provide assurance that there has been no diversion of the declared chemical and that production has been consistent with declarations.

27. Sampling and analysis shall be undertaken to check for the absence of undeclared scheduled chemicals.

28. Areas to be inspected may include:

- (a) Areas where feed chemicals (reactants) are delivered or stored;
- (b) Areas where manipulative processes are performed upon the reactants prior to addition to the reaction vessels;
- (c) Feed lines as appropriate from the areas referred to in subparagraph (a) or subparagraph (b) to the reaction vessels together with any associated valves, flow meters, etc.;

(d) The external aspect of the reaction vessels and ancillary equipment;

(e) Lines from the reaction vessels leading to long- or short-term storage or to equipment further processing the declared Schedule 2 chemicals;

(f) Control equipment associated with any of the items under subparagraphs (a) to (e);

(g) Equipment and areas for waste and effluent handling;

7. Declarations of a plant site pursuant to paragraph 3 shall also include, for each plant which is located within the plant site and which falls under the specifications set forth in paragraph 3, the following information:

- (a) The name of the plant and the name of the owner, company, or enterprise operating it;
- (b) Its precise location within the plant site, including the specific building or structure number, if any;
- (c) Its main activities.

8. Declarations of a plant site pursuant to paragraph 3 shall also include the following information on each Schedule 3 chemical above the declaration threshold:

- (a) The chemical name, common or trade name used by the facility, structural formula, and Chemical Abstracts Service registry number, if assigned;
- (b) The approximate amount of production of the chemical in the previous calendar year, or, in case of declarations on anticipated activities, anticipated for the next calendar year, expressed in the ranges: 30 to 200 tonnes, 200 to 1,000 tonnes, 1,000 to 10,000 tonnes, 10,000 to 100,000 tonnes, and above 100,000 tonnes; and
- (c) The purposes for which the chemical was or will be produced.

Declarations on past production of Schedule 3 chemicals for chemical weapons purposes

9. Each State Party shall, not later than 30 days after this Convention enters into force for it, declare all plant sites comprising plants that produced at any time since 1 January 1946 a Schedule 3 chemical for chemical weapons purposes.

10. Declarations of a plant site pursuant to paragraph 9 shall include:

- (a) The name of the plant site and the name of the owner, company, or enterprise operating it;
- (b) Its precise location including the address;
- (c) For each plant which is located within the plant site, and which falls under the specifications set forth in paragraph 9, the same information as required under paragraph 7, subparagraphs (a) to (c); and
- (d) For each Schedule 3 chemical produced for chemical weapons purposes:

- (i) The chemical name, common or trade name used by the plant site for chemical weapons production purposes, structural formula, and Chemical Abstracts Service registry number, if assigned;

national data for the previous calendar year on the quantities produced, imported and exported of each Schedule 3 chemical, as well as a quantitative specification of import and export for each country involved.

2. Each State Party shall submit:

- (a) Initial declarations pursuant to paragraph 1 not later than 30 days after this Convention enters into force for it; and, starting in the following calendar year,
- (b) Annual declarations not later than 90 days after the end of the previous calendar year.

Declarations of plant sites producing Schedule 3 chemicals

3. Initial and annual declarations are required for all plant sites that comprise one or more plants which produced during the previous calendar year or are anticipated to produce in the next calendar year more than 30 tonnes of a Schedule 3 chemical.

4. Each State Party shall submit:

- (a) Initial declarations pursuant to paragraph 3 not later than 30 days after this Convention enters into force for it; and, starting in the following calendar year;
- (b) Annual declarations on past activities not later than 90 days after the end of the previous calendar year;

(c) Annual declarations on anticipated activities not later than 60 days before the beginning of the following calendar year. Any such activity additionally planned after the annual declaration has been submitted shall be declared not later than five days before this activity begins.

5. Declarations pursuant to paragraph 3 are generally not required for mixtures containing a low concentration of a Schedule 3 chemical. They are only required, in accordance with guidelines, in such cases where the ease of recovery from the mixture of the Schedule 3 chemical and its total weight are deemed to pose a risk to the object and purpose of this Convention. These guidelines shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

6. Declarations of a plant site pursuant to paragraph 3 shall include:

- (a) The name of the plant site and the name of the owner, company, or enterprise operating it;
- (b) Its precise location including the address; and
- (c) The number of plants within the plant site which are declared pursuant to Part VII of this Annex.

- (ii) The dates when the chemical was produced and the quantity produced; and
- (iii) The location to which the chemical was delivered and the final product produced there, if known.

#### Information to States Parties

11. A list of plant sites declared under this Section together with the information provided under paragraphs 6, 7 (a), 7 (c), 8 (a) and 10 shall be transmitted by the Technical Secretariat to States Parties upon request.

#### B. VERIFICATION

##### General

12. Verification provided for in paragraph 5 of Article VI shall be carried out through on-site inspections at those declared plant sites which produced during the previous calendar year or are anticipated to produce in the next calendar year in excess of 200 tonnes aggregate of any Schedule 3 chemical above the declaration threshold of 30 tonnes.

13. The programme and budget of the Organization to be adopted by the Conference pursuant to Article VIII, paragraph 21 (a), shall contain, as a separate item, a programme and budget for verification under this Section taking into account Part VII, paragraph 13, of this Annex.

14. Under this Section, the Technical Secretariat shall randomly select plant sites for inspection through appropriate mechanisms, such as the use of specially designed computer software, on the basis of the following weighting factors:

- (a) Equitable geographical distribution of inspections; and
- (b) The information on the declared plant sites available to the Technical Secretariat, related to the relevant chemical, the characteristics of the plant site and the nature of the activities carried out there.

15. No plant site shall receive more than two inspections per year under the provisions of this Section. This, however, shall not limit inspections pursuant to Article IX.

16. In selecting plant sites for inspection under this Section, the Technical Secretariat shall observe the following limitation for the combined number of inspections to be received by a State Party per calendar year under this Part and Part IX of this Annex: the combined number of inspections shall not exceed three plus 5 per cent of the total number of plant sites declared by a State Party under both this Part and Part IX of this Annex, or 20 inspections, whichever of these two figures is lower.

#### Inspection aims

17. At plant sites declared under Section A, the general aim of inspections shall be to verify that activities are consistent with the information to be provided in declarations. The particular aim of inspections shall be the verification of the absence of any Schedule 1 chemical, especially its production, except if in accordance with Part VI of this Annex.

#### Inspection procedures

18. In addition to agreed guidelines, other relevant provisions of this Annex and the Confidentiality Annex, paragraphs 19 to 25 below shall apply.

19. There shall be no facility agreement, unless requested by the inspected State Party.

20. The focus of the inspections shall be the declared Schedule 3 plant(s) within the declared plant site. If the inspection team, in accordance with Part II, paragraph 51, of this Annex, requests access to other parts of the plant site for clarification of ambiguities, the extent of such access shall be agreed between the inspection team and the inspected State Party.

21. The inspection team may have access to records in situations in which the inspection team and the inspected State Party agree that such access will assist in achieving the objectives of the inspection.

22. Sampling and on-site analysis may be undertaken to check for the absence of undeclared scheduled chemicals. In case of unresolved ambiguities, samples may be analysed in a designated off-site laboratory, subject to the inspected State Party's agreement.

23. Areas to be inspected may include:

- (a) Areas where feed chemicals (reactants) are delivered or stored;
- (b) Areas where manipulative processes are performed upon the reactants prior to addition to the reaction vessel;
- (c) Feed lines as appropriate from the areas referred to in subparagraph (a) or subparagraph (b) to the reaction vessel together with any associated valves, flow meters, etc.;
- (d) The external aspect of the reaction vessels and ancillary equipment;
- (e) Lines from the reaction vessels leading to long- or short-term storage or to equipment further processing the declared Schedule 3 chemicals;
- (f) Control equipment associated with any of the items under subparagraphs (a) to (e);

- (g) Equipment and areas for waste and effluent handling;
- (h) Equipment and areas for disposition of chemicals not up to specification.
24. The period of inspection shall not last more than 24 hours; however, extensions may be agreed between the inspection team and the inspected State Party.

Notification of inspection

25. A State Party shall be notified by the Technical Secretariat of the inspection not less than 120 hours before the arrival of the inspection team at the plant site to be inspected.

C. TRANSFERS TO STATES NOT PARTY TO THIS CONVENTION

26. When transferring Schedule 3 chemicals to States not Party to this Convention, each State Party shall adopt the necessary measures to ensure that the transferred chemicals shall only be used for purposes not prohibited under this Convention. Inter alia, the State Party shall require from the recipient State a certificate stating, in relation to the transferred chemicals:

- (a) That they will only be used for purposes not prohibited under this Convention;
- (b) That they will not be re-transferred;
- (c) Their types and quantities;
- (d) Their end-use(s); and
- (e) The name(s) and address(es) of the end-user(s).

27. Five years after entry into force of this Convention, the Conference shall consider the need to establish other measures regarding transfers of Schedule 3 chemicals to States not Party to this Convention.

PART IX

ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION  
IN ACCORDANCE WITH ARTICLE VI

REGIME FOR OTHER CHEMICAL PRODUCTION FACILITIES

A. DECLARATIONS

List of other chemical production facilities

1. The initial declaration to be provided by each State Party pursuant to Article VI, paragraph 7, shall include a list of all plant sites that:

- (a) Produced by synthesis during the previous calendar year more than 200 tonnes of unscheduled discrete organic chemicals; or
  - (b) Comprise one or more plants which produced by synthesis during the previous calendar year more than 30 tonnes of an unscheduled discrete organic chemical containing the elements phosphorus, sulfur or fluorine (hereinafter referred to as "PSF-plants" and "PSF-chemical").
2. The list of other chemical production facilities to be submitted pursuant to paragraph 1 shall not include plant sites that exclusively produced explosives or hydrocarbons.
3. Each State Party shall submit its list of other chemical production facilities pursuant to paragraph 1 as part of its initial declaration not later than 30 days after this Convention enters into force for it. Each State Party shall, not later than 90 days after the beginning of each following calendar year, provide annually the information necessary to update the list.

4. The list of other chemical production facilities to be submitted pursuant to paragraph 1 shall include the following information on each plant site:

- (a) The name of the plant site and the name of the owner, company, or enterprise operating it;
- (b) The precise location of the plant site including its address;
- (c) Its main activities; and
- (d) The approximate number of plants producing the chemicals specified in paragraph 1 in the plant site.

5. With regard to plant sites listed pursuant to paragraph 1 (a), the list shall also include information on the approximate aggregate amount of production of the unscheduled discrete organic chemicals in the previous calendar year expressed in the ranges: under 1,000 tonnes, 1,000 to 10,000 tonnes and above 10,000 tonnes.

6. With regard to plant sites listed pursuant to paragraph 1 (b), the list shall also specify the number of PSF-plants within the plant site and include information on the approximate aggregate amount of production of PSF-chemicals produced by each PSF-plant in the previous calendar year expressed in the ranges: under 200 tonnes, 200 to 1,000 tonnes, 1,000 to 10,000 tonnes and above 10,000 tonnes.

Assistance by the Technical Secretariat

7. If a State Party, for administrative reasons, deems it necessary to ask for assistance in compiling its list of chemical production facilities pursuant to paragraph 1, it may request the Technical Secretariat to provide such assistance. Questions as to the completeness of the list shall then be resolved through consultations between the State Party and the Technical Secretariat.

Information to States Parties

8. The lists of other chemical production facilities submitted pursuant to paragraph 1, including the information provided under paragraph 4, shall be transmitted by the Technical Secretariat to States Parties upon request.

B. VERIFICATIONGeneral

9. Subject to the provisions of Section C, verification as provided for in Article VI, paragraph 6, shall be carried out through on-site inspection at:

- (a) Plant sites listed pursuant to paragraph 1 (a); and
  - (b) Plant sites listed pursuant to paragraph 1 (b) that comprise one or more PSF-plants which produced during the previous calendar year more than 200 tonnes of a PSF-chemical.
10. The programme and budget of the Organization to be adopted by the Conference pursuant to Article VIII, paragraph 21 (a), shall contain, as a separate item, a programme and budget for verification under this Section after its implementation has started.

11. Under this Section, the Technical Secretariat shall randomly select plant sites for inspection through appropriate mechanisms, such as the use of specially designed computer software, on the basis of the following weighting factors:

- (a) Equitable geographical distribution of inspections;
  - (b) The information on the listed plant sites available to the Technical Secretariat, related to the characteristics of the plant site and the activities carried out there; and
  - (c) Proposals by States Parties on a basis to be agreed upon in accordance with paragraph 25.
12. No plant site shall receive more than two inspections per year under the provisions of this Section. This, however, shall not limit inspections pursuant to Article IX.
13. In selecting plant sites for inspection under this Section, the Technical Secretariat shall observe the following limitation for the combined number of inspections to be received by a State Party per calendar year under this Part and Part VIII of this Annex: the combined number of inspections shall not exceed three plus 5 per cent of the total number of plant sites declared by a State Party under both this Part and Part VIII of this Annex, or 20 inspections, whichever of these two figures is lower.

Inspection aims

14. At plant sites listed under Section A, the general aim of inspections shall be to verify that activities are consistent with the information to be provided in declarations. The particular aim of inspections shall be the verification of the absence of any Schedule 1 chemical, especially its production, except if in accordance with Part VI of this Annex.

Inspection procedures

15. In addition to agreed guidelines, other relevant provisions of this Annex and the Confidentiality Annex, paragraphs 16 to 20 below shall apply.

16. There shall be no facility agreement, unless requested by the inspected State Party.

17. The focus of inspection at a plant site selected for inspection shall be the plant(s) producing the chemicals specified in paragraph 1, in particular the PSF-plants listed pursuant to paragraph 1 (b). The inspected State Party shall have the right to manage access to these plants in accordance with the rules of managed access as specified in Part X, Section C, of this Annex. If the inspection team, in accordance with Part II, paragraph 51, of this Annex, requests access to other parts of the plant site for clarification of ambiguities, the extent of such access shall be agreed between the inspection team and the inspected State Party.

18. The inspection team may have access to records in situations in which the inspection team and the inspected State Party agree that such access will assist in achieving the objectives of the inspection.

19. Sampling and on-site analysis may be undertaken to check for the absence of undeclared scheduled chemicals. In cases of unresolved ambiguities, samples may be analysed in a designated off-site laboratory, subject to the inspected State Party's agreement.

20. The period of inspection shall not last more than 24 hours; however, extensions may be agreed between the inspection team and the inspected State Party.

Notification of inspection

21. A State Party shall be notified by the Technical Secretariat of the inspection not less than 120 hours before the arrival of the inspection team at the plant site to be inspected.

C. IMPLEMENTATION AND REVIEW OF SECTION BImplementation

22. The implementation of Section B shall start at the beginning of the fourth year after entry into force of this Convention unless the

Conference, at its regular session in the third year after entry into force of this Convention, decides otherwise.

23. The Director-General shall, for the regular session of the Conference in the third year after entry into force of this Convention, prepare a report which outlines the experience of the Technical Secretariat in implementing the provisions of Parts VII and VIII of this Annex as well as of Section A of this Part.

24. At its regular session in the third year after entry into force of this Convention, the Conference, on the basis of a report of the Director-General, may also decide on the distribution of resources available for verification under Section B between "PSF-plants" and other chemical production facilities. Otherwise, this distribution shall be left to the expertise of the Technical Secretariat and be added to the weighting factors in paragraph 11.

25. At its regular session in the third year after entry into force of this Convention, the Conference, upon advice of the Executive Council, shall decide on which basis (e.g. regional) proposals by States Parties for inspections should be presented to be taken into account as a weighting factor in the selection process specified in paragraph 11.

#### Review

26. At the first special session of the Conference convened pursuant to Article VIII, paragraph 22, the provisions of this Part of the Verification Annex shall be re-examined in the light of a comprehensive review of the overall verification regime for the chemical industry (Article VI, Parts VII to IX of this Annex) on the basis of the experience gained. The Conference shall then make recommendations so as to improve the effectiveness of the verification regime.

#### PART X

##### CHALLENGE INSPECTIONS PURSUANT TO ARTICLE IX

#### A. DESIGNATION AND SELECTION OF INSPECTORS AND INSPECTION ASSISTANTS

1. Challenge inspections pursuant to Article IX shall only be performed by inspectors and inspection assistants especially designated for this function. In order to designate inspectors and inspection assistants for challenge inspections pursuant to Article IX, the Director-General shall, by selecting inspectors and inspection assistants from among the inspectors and inspection assistants for routine inspection activities, establish a list of proposed inspectors and inspection assistants. It shall comprise a sufficiently large number of inspectors and inspection assistants having the necessary qualification, experience, skill and training, to allow for flexibility in the selection of the inspectors, taking into account their availability, and the need for rotation. Due regard shall be paid also to the importance of selecting inspectors and inspection assistants on as wide a geographical basis as possible. The designation of inspectors

and inspection assistants shall follow the procedures provided for under Part II, Section A, of this Annex.

2. The Director-General shall determine the size of the inspection team and select its members taking into account the circumstances of a particular request. The size of the inspection team shall be kept to a minimum necessary for the proper fulfilment of the inspection mandate. No national of the requesting State Party or the inspected State Party shall be a member of the inspection team.

#### B. PRE-INSPECTION ACTIVITIES

3. Before submitting the inspection request for a challenge inspection, the State Party may seek confirmation from the Director-General that the Technical Secretariat is in a position to take immediate action on the request. If the Director-General cannot provide such confirmation immediately, he shall do so at the earliest opportunity, in keeping with the order of requests for confirmation. He shall also keep the State Party informed of when it is likely that immediate action can be taken. Should the Director-General reach the conclusion that timely action on requests can no longer be taken, he may ask the Executive Council to take appropriate action to improve the situation in the future.

#### Notification

4. The inspection request for a challenge inspection to be submitted to the Executive Council and the Director-General shall contain at least the following information:

- (a) The State Party to be inspected and, if applicable, the Host State;
- (b) The point of entry to be used;
- (c) The size and type of the inspection site;
- (d) The concern regarding possible non-compliance with this Convention including a specification of the relevant provisions of this Convention about which the concern has arisen, and of the nature and circumstances of the possible non-compliance as well as all appropriate information on the basis of which the concern has arisen; and
- (e) The name of the observer of the requesting State Party.

The requesting State Party may submit any additional information it deems necessary.

5. The Director-General shall within one hour acknowledge to the requesting State Party receipt of its request.

6. The requesting State Party shall notify the Director-General of the location of the inspection site in due time for the Director-General to be able to provide this information to the inspected State Party not

transport the inspection team to the final perimeter of the inspection site. If the inspected State Party deems it necessary, such transportation may begin up to 12 hours before the expiry of the time period specified in this paragraph for the designation of the final perimeter. Transportation shall, in any case, be completed not later than 36 hours after the arrival of the inspection team at the point of entry.

15. For all declared facilities, the procedures in subparagraphs (a) and (b) shall apply. (For the purposes of this Part, "declared facility" means all facilities declared pursuant to Articles III, IV, and V. With regard to Article VI, "declared facility" means only facilities declared pursuant to Part VI of this Annex, as well as declared plants specified by declarations pursuant to Part VII, paragraphs 7 and 10 (c), and Part VIII, paragraphs 7 and 10 (c), of this Annex.)

(a) If the requested perimeter is contained within or conforms with the declared perimeter, the declared perimeter shall be considered the final perimeter. The final perimeter may, however, if agreed by the inspected State Party, be made smaller in order to conform with the perimeter requested by the requesting State Party.

(b) The inspected State Party shall transport the inspection team to the final perimeter as soon as practicable, but in any case shall ensure their arrival at the perimeter not later than 24 hours after the arrival of the inspection team at the point of entry.

Alternative determination of final perimeter

16. At the point of entry, if the inspected State Party cannot accept the requested perimeter, it shall propose an alternative perimeter as soon as possible, but in any case not later than 24 hours after the arrival of the inspection team at the point of entry. In case of differences of opinion, the inspected State Party and the inspection team shall engage in negotiations with the aim of reaching agreement on a final perimeter.

17. The alternative perimeter should be designated as specifically as possible in accordance with paragraph 8. It shall include the whole of the requested perimeter and should, as a rule, bear a close relationship to the latter, taking into account natural terrain features and man-made boundaries. It should normally run close to the surrounding security barrier if such a barrier exists. The inspected State Party should seek to establish such a relationship between the perimeters by a combination of at least two of the following means:

(a) An alternative perimeter that does not extend to an area significantly greater than that of the requested perimeter;

(b) An alternative perimeter that is a short, uniform distance from the requested perimeter;

less than 12 hours before the planned arrival of the inspection team at the point of entry.

7. The inspection site shall be designated by the requesting State Party as specifically as possible by providing a site diagram related to a reference point with geographic coordinates, specified to the nearest second if possible. If possible, the requesting State Party shall also provide a map with a general indication of the inspection site and a diagram specifying as precisely as possible the requested perimeter of the site to be inspected.

8. The requested perimeter shall:

(a) Run at least a 10 metre distance outside any buildings or other structures;

(b) Not cut through existing security enclosures; and

(c) Run at least a 10 metre distance outside any existing security enclosures that the requesting State Party intends to include within the requested perimeter.

9. If the requested perimeter does not conform with the specifications of paragraph 8, it shall be redrawn by the inspection team so as to conform with that provision.

10. The Director-General shall, not less than 12 hours before the planned arrival of the inspection team at the point of entry, inform the Executive Council about the location of the inspection site as specified in paragraph 7.

11. Contemporaneously with informing the Executive Council according to paragraph 10, the Director-General shall transmit the inspection request to the inspected State Party including the location of the inspection site as specified in paragraph 7. This notification shall also include the information specified in Part II, paragraph 32, of this Annex.

12. Upon arrival of the inspection team at the point of entry, the inspected State Party shall be informed by the inspection team of the inspection mandate.

Entry into the territory of the inspected State Party or the Host State

13. The Director-General shall, in accordance with Article IX, paragraphs 13 to 18, dispatch an inspection team as soon as possible after an inspection request has been received. The inspection team shall arrive at the point of entry specified in the request in the minimum time possible, consistent with the provisions of paragraphs 10 and 11.

14. If the requested perimeter is acceptable to the inspected State Party, it shall be designated as the final perimeter as early as possible, but in no case later than 24 hours after the arrival of the inspection team at the point of entry. The inspected State Party shall

(c) At least part of the requested perimeter is visible from the alternative perimeter.

18. If the alternative perimeter is acceptable to the inspection team, it shall become the final perimeter and the inspection team shall be transported from the point of entry to that perimeter. If the inspected State Party deems it necessary, such transportation may begin up to 12 hours before the expiry of the time period specified in paragraph 16 for proposing an alternative perimeter. Transportation shall, in any case, be completed not later than 36 hours after the arrival of the inspection team at the point of entry.

19. If a final perimeter is not agreed, the perimeter negotiations shall be concluded as early as possible, but in no case shall they continue more than 24 hours after the arrival of the inspection team at the point of entry. If no agreement is reached, the inspected State Party shall transport the inspection team to a location at the alternative perimeter. If the inspected State Party deems it necessary, such transportation may begin up to 12 hours before the expiry of the time period specified in paragraph 16 for proposing an alternative perimeter. Transportation shall, in any case, be completed not later than 36 hours after the arrival of the inspection team at the point of entry.

20. Once at the location, the inspected State Party shall provide the inspection team with prompt access to the alternative perimeter to facilitate negotiations and agreement on the final perimeter and access within the final perimeter.

21. If no agreement is reached within 72 hours after the arrival of the inspection team at the location, the alternative perimeter shall be designated the final perimeter.

#### Verification of location

22. To help establish that the inspection site to which the inspection team has been transported corresponds to the inspection site specified by the requesting State Party, the inspection team shall have the right to use approved location-finding equipment and have such equipment installed according to its directions. The inspection team may verify its location by reference to local landmarks identified from maps. The inspected State Party shall assist the inspection team in this task.

#### Securing the site, exit monitoring

23. Not later than 12 hours after the arrival of the inspection team at the point of entry, the inspected State Party shall begin collecting factual information of all vehicular exit activity from all exit points for all land, air, and water vehicles of the requested perimeter. It shall provide this information to the inspection team upon its arrival at the alternative or final perimeter, whichever occurs first.

24. This obligation may be met by collecting factual information in the form of traffic logs, photographs, video recordings, or data from

chemical evidence equipment provided by the inspection team to monitor such exit activity. Alternatively, the inspected State Party may also meet this obligation by allowing one or more members of the inspection team independently to maintain traffic logs, take photographs, make video recordings of exit traffic, or use chemical evidence equipment, and conduct other activities as may be agreed between the inspected State Party and the inspection team.

25. Upon the inspection team's arrival at the alternative perimeter or final perimeter, whichever occurs first, securing the site, which means exit monitoring procedures by the inspection team, shall begin.

26. Such procedures shall include: the identification of vehicular exits, the making of traffic logs, the taking of photographs, and the making of video recordings by the inspection team of exits and exit traffic. The inspection team has the right to go, under escort, to any other part of the perimeter to check that there is no other exit activity.

27. Additional procedures for exit monitoring activities as agreed upon by the inspection team and the inspected State Party may include, inter alia:

- (a) Use of sensors;
- (b) Random selective access;
- (c) Sample analysis.

28. All activities for securing the site and exit monitoring shall take place within a band around the outside of the perimeter, not exceeding 50 metres in width, measured outward.

29. The inspection team has the right to inspect on a managed access basis vehicular traffic exiting the site. The inspected State Party shall make every reasonable effort to demonstrate to the inspection team that any vehicle, subject to inspection, to which the inspection team is not granted full access, is not being used for purposes related to the possible non-compliance concerns raised in the inspection request.

30. Personnel and vehicles entering and personnel and personal passenger vehicles exiting the site are not subject to inspection.

31. The application of the above procedures may continue for the duration of the inspection, but may not unreasonably hamper or delay the normal operation of the facility.

#### Pre-inspection briefing and inspection plan

32. To facilitate development of an inspection plan, the inspected State Party shall provide a safety and logistical briefing to the inspection team prior to access.

33. The pre-inspection briefing shall be held in accordance with Part II, paragraph 37, of this Annex. In the course of the pre-inspection briefing, the inspected State Party may indicate to the inspection team the equipment, documentation, or areas it considers sensitive and not related to the purpose of the challenge inspection. In addition, personnel responsible for the site shall brief the inspection team on the physical layout and other relevant characteristics of the site. The inspection team shall be provided with a map or sketch drawn to scale showing all structures and significant geographic features at the site. The inspection team shall also be briefed on the availability of facility personnel and records.

34. After the pre-inspection briefing, the inspection team shall prepare, on the basis of the information available and appropriate to it, an initial inspection plan which specifies the activities to be carried out by the inspection team, including the specific areas of the site to which access is desired. The inspection plan shall also specify whether the inspection team will be divided into subgroups. The inspection plan shall be made available to the representatives of the inspected State Party and the inspection site. Its implementation shall be consistent with the provisions of Section C, including those related to access and activities.

#### Perimeter activities

35. Upon the inspection team's arrival at the final or alternative perimeter, whichever occurs first, the team shall have the right to commence immediately perimeter activities in accordance with the procedures set forth under this Section, and to continue these activities until the completion of the challenge inspection.

36. In conducting the perimeter activities, the inspection team shall have the right to:

- (a) Use monitoring instruments in accordance with Part II, paragraphs 27 to 30, of this Annex;
- (b) Take wipes, air, soil or effluent samples; and
- (c) Conduct any additional activities which may be agreed between the inspection team and the inspected State Party.

37. The perimeter activities of the inspection team may be conducted within a band around the outside of the perimeter up to 50 metres in width measured outward from the perimeter. If the inspected State Party agrees, the inspection team may also have access to any building or structure within the perimeter band. All directional monitoring shall be oriented inward. For declared facilities, at the discretion of the inspected State Party, the band could run inside, outside, or on both sides of the declared perimeter.

### C. CONDUCT OF INSPECTIONS

#### General rules

38. The inspected State Party shall provide access within the requested perimeter as well as, if different, the final perimeter. The extent and nature of access to a particular place or places within these perimeters shall be negotiated between the inspection team and the inspected State Party on a managed access basis.

39. The inspected State Party shall provide access within the requested perimeter as soon as possible, but in any case not later than 108 hours after the arrival of the inspection team at the point of entry in order to clarify the concern regarding possible non-compliance with this Convention raised in the inspection request.

40. Upon the request of the inspection team, the inspected State Party may provide aerial access to the inspection site.

41. In meeting the requirement to provide access as specified in paragraph 38, the inspected State Party shall be under the obligation to allow the greatest degree of access taking into account any constitutional obligations it may have with regard to proprietary rights or searches and seizures. The inspected State Party has the right under managed access to take such measures as are necessary to protect national security. The provisions in this paragraph may not be invoked by the inspected State Party to conceal evasion of its obligations not to engage in activities prohibited under this Convention.

42. If the inspected State Party provides less than full access to places, activities, or information, it shall be under the obligation to make every reasonable effort to provide alternative means to clarify the possible non-compliance concern that generated the challenge inspection.

43. Upon arrival at the final perimeter of facilities declared pursuant to Articles IV, V and VI, access shall be granted following the pre-inspection briefing and discussion of the inspection plan which shall be limited to the minimum necessary and in any event shall not exceed three hours. For facilities declared pursuant to Article III, paragraph 1 (d), negotiations shall be conducted and managed access commenced not later than 12 hours after arrival at the final perimeter.

44. In carrying out the challenge inspection in accordance with the inspection request, the inspection team shall use only those methods necessary to provide sufficient relevant facts to clarify the concern about possible non-compliance with the provisions of this Convention, and shall refrain from activities not relevant thereto. It shall collect and document such facts as are related to the possible non-compliance with this Convention by the inspected State Party, but shall neither seek nor document information which is clearly not related thereto, unless the inspected State Party expressly requests it to do so. Any material collected and subsequently found not to be relevant shall not be retained.

45. The inspection team shall be guided by the principle of conducting the challenge inspection in the least intrusive manner possible, consistent with the effective and timely accomplishment of its mission. Wherever possible, it shall begin with the least intrusive procedures it deems acceptable and proceed to more intrusive procedures only as it deems necessary.

#### Managed access

46. The inspection team shall take into consideration suggested modifications of the inspection plan and proposals which may be made by the inspected State Party, at whatever stage of the inspection including the pre-inspection briefing, to ensure that sensitive equipment, information or areas, not related to chemical weapons, are protected.

47. The inspected State Party shall designate the perimeter entry/exit points to be used for access. The inspection team and the inspected State Party shall negotiate: the extent of access to any particular place or places within the final and requested perimeters as provided in paragraph 48; the particular inspection activities, including sampling, to be conducted by the inspection team; and the performance of particular activities by the inspected State Party; and the provision of particular information by the inspected State Party.

48. In conformity with the relevant provisions in the Confidentiality Annex the inspected State Party shall have the right to take measures to protect sensitive installations and prevent disclosure of confidential information and data not related to chemical weapons. Such measures may include, inter alia:

- (a) Removal of sensitive papers from office spaces;
  - (b) Shrouding of sensitive displays, stores, and equipment;
  - (c) Shrouding of sensitive pieces of equipment, such as computer or electronic systems;
  - (d) Logging off of computer systems and turning off of data indicating devices;
  - (e) Restriction of sample analysis to presence or absence of chemicals listed in Schedules 1, 2 and 3 or appropriate degradation products;
  - (f) Using random selective access techniques whereby the inspectors are requested to select a given percentage or number of buildings of their choice to inspect; the same principle can apply to the interior and content of sensitive buildings;
  - (g) In exceptional cases, giving only individual inspectors access to certain parts of the inspection site.
49. The inspected State Party shall make every reasonable effort to demonstrate to the inspection team that any object, building, structure,

container or vehicle to which the inspection team has not had full access, or which has been protected in accordance with paragraph 48, is not used for purposes related to the possible non-compliance concerns raised in the inspection request.

50. This may be accomplished by means of, inter alia, the partial removal of a shroud or environmental protection cover, at the discretion of the inspected State Party, by means of a visual inspection of the interior of an enclosed space from its entrance, or by other methods.

51. In the case of facilities declared pursuant to Articles IV, V and VI, the following shall apply:

(a) For facilities with facility agreements, access and activities within the final perimeter shall be unimpeded within the boundaries established by the agreements;

(b) For facilities without facility agreements, negotiation of access and activities shall be governed by the applicable general inspection guidelines established under this Convention;

(c) Access beyond that granted for inspections under Articles IV, V and VI shall be managed in accordance with procedures of this section.

52. In the case of facilities declared pursuant to Article III, paragraph 1 (d), the following shall apply: if the inspected State Party, using procedures of paragraphs 47 and 48, has not granted full access to areas or structures not related to chemical weapons, it shall make every reasonable effort to demonstrate to the inspection team that such areas or structures are not used for purposes related to the possible non-compliance concerns raised in the inspection request.

#### Observer

53. In accordance with the provisions of Article IX, paragraph 12, on the participation of an observer in the challenge inspection, the requesting State Party shall liaise with the Technical Secretariat to coordinate the arrival of the observer at the same point of entry as the inspection team within a reasonable period of the inspection team's arrival.

54. The observer shall have the right throughout the period of inspection to be in communication with the embassy of the requesting State Party located in the inspected State Party or in the Host State or, in the case of absence of an embassy, with the requesting State Party itself. The inspected State Party shall provide means of communication to the observer.

55. The observer shall have the right to arrive at the alternative or final perimeter of the inspection site, wherever the inspection team arrives first, and to have access to the inspection site as granted by the inspected State Party. The observer shall have the right to make recommendations to the inspection team, which the team shall take into account to the extent it deems appropriate. Throughout the inspection,

the inspection team shall keep the observer informed about the conduct of the inspection and the findings.

56. Throughout the in-country period, the inspected State Party shall provide or arrange for the amenities necessary for the observer such as communication means, interpretation services, transportation, working space, lodging, meals and medical care. All the costs in connection with the stay of the observer on the territory of the inspected State Party or the Host State shall be borne by the requesting State Party.

#### Duration of inspection

57. The period of inspection shall not exceed 84 hours, unless extended by agreement with the inspected State Party.

#### D. POST-INSPECTION ACTIVITIES

##### Departure

58. Upon completion of the post-inspection procedures at the inspection site, the inspection team and the observer of the requesting State Party shall proceed promptly to a point of entry and shall then leave the territory of the inspected State Party in the minimum time possible.

##### Reports

59. The inspection report shall summarize in a general way the activities conducted by the inspection team and the factual findings of the inspection team, particularly with regard to the concerns regarding possible non-compliance with this Convention cited in the request for the challenge inspection, and shall be limited to information directly related to this Convention. It shall also include an assessment by the inspection team of the degree and nature of access and cooperation granted to the inspectors and the extent to which this enabled them to fulfil the inspection mandate. Detailed information relating to the concerns regarding possible non-compliance with this Convention cited in the request for the challenge inspection shall be submitted as an Appendix to the final report and be retained within the Technical Secretariat under appropriate safeguards to protect sensitive information.

60. The inspection team shall, not later than 72 hours after its return to its primary work location, submit a preliminary inspection report, having taken into account, *inter alia*, paragraph 17 of the Confidentiality Annex, to the Director-General. The Director-General shall promptly transmit the preliminary inspection report to the requesting State Party, the inspected State Party and to the Executive Council.

61. A draft final inspection report shall be made available to the inspected State Party not later than 20 days after the completion of the challenge inspection. The inspected State Party has the right to identify any information and data not related to chemical weapons which

should, in its view, due to its confidential character, not be circulated outside the Technical Secretariat. The Technical Secretariat shall consider proposals for changes to the draft final inspection report made by the inspected State Party and, using its own discretion, wherever possible, adopt them. The final report shall then be submitted not later than 30 days after the completion of the challenge inspection to the Director-General for further distribution and consideration in accordance with Article IX, paragraphs 21 to 25.

#### PART XI

#### INVESTIGATIONS IN CASES OF ALLEGED USE OF CHEMICAL WEAPONS

##### A. GENERAL

1. Investigations of alleged use of chemical weapons, or of alleged use of riot control agents as a method of warfare, initiated pursuant to Articles IX or X, shall be conducted in accordance with this Annex and detailed procedures to be established by the Director-General.

2. The following additional provisions address specific procedures required in cases of alleged use of chemical weapons.

##### B. PRE-INSPECTION ACTIVITIES

###### Request for an investigation

3. The request for an investigation of an alleged use of chemical weapons to be submitted to the Director-General, to the extent possible, should include the following information:

- (a) The State Party on whose territory use of chemical weapons is alleged to have taken place;
  - (b) The point of entry or other suggested safe routes of access;
  - (c) Location and characteristics of the areas where chemical weapons are alleged to have been used;
  - (d) When chemical weapons are alleged to have been used;
  - (e) Types of chemical weapons believed to have been used;
  - (f) Extent of alleged use;
  - (g) Characteristics of the possible toxic chemicals;
  - (h) Effects on humans, animals and vegetation;
  - (i) Request for specific assistance, if applicable.
4. The State Party which has requested an investigation may submit at any time any additional information it deems necessary.

Notification

5. The Director-General shall immediately acknowledge receipt to the requesting State Party of its request and inform the Executive Council and all States Parties.
6. If applicable, the Director-General shall notify the State Party on whose territory an investigation has been requested. The Director-General shall also notify other States Parties if access to their territories might be required during the investigation.

Assignment of inspection team

7. The Director-General shall prepare a list of qualified experts whose particular field of expertise could be required in an investigation of alleged use of chemical weapons and constantly keep this list updated. This list shall be communicated, in writing, to each State Party not later than 30 days after entry into force of this Convention and after each change to the list. Any qualified expert included in this list shall be regarded as designated unless a State Party, not later than 30 days after its receipt of the list, declares its non-acceptance in writing.

8. The Director-General shall select the leader and members of an inspection team from the inspectors and inspection assistants already designated for challenge inspections taking into account the circumstances and specific nature of a particular request. In addition, members of the inspection team may be selected from the list of qualified experts when, in the view of the Director-General, expertise not available among inspectors already designated is required for the proper conduct of a particular investigation.

9. When briefing the inspection team, the Director-General shall include any additional information provided by the requesting State Party, or any other sources, to ensure that the inspection can be carried out in the most effective and expedient manner.

Dispatch of inspection team

10. Immediately upon the receipt of a request for an investigation of alleged use of chemical weapons the Director-General shall, through contacts with the relevant States Parties, request and confirm arrangements for the safe reception of the team.
11. The Director-General shall dispatch the team at the earliest opportunity, taking into account the safety of the team.
12. If the inspection team has not been dispatched within 24 hours from the receipt of the request, the Director-General shall inform the Executive Council and the States Parties concerned about the reasons for the delay.

Briefings

13. The inspection team shall have the right to be briefed by representatives of the inspected State Party upon arrival and at any time during the inspection.
14. Before the commencement of the inspection the inspection team shall prepare an inspection plan to serve, *inter alia*, as a basis for logistic and safety arrangements. The inspection plan shall be updated as need arises.

## C. CONDUCT OF INSPECTIONS

Access

15. The inspection team shall have the right of access to any and all areas which could be affected by the alleged use of chemical weapons. It shall also have the right of access to hospitals, refugee camps and other locations it deems relevant to the effective investigation of the alleged use of chemical weapons. For such access, the inspection team shall consult with the inspected State Party.

Sampling

16. The inspection team shall have the right to collect samples of types, and in quantities it considers necessary. If the inspection team deems it necessary, and if so requested by it, the inspected State Party shall assist in the collection of samples under the supervision of inspectors or inspection assistants. The inspected State Party shall also permit and cooperate in the collection of appropriate control samples from areas neighbouring the site of the alleged use and from other areas as requested by the inspection team.

17. Samples of importance in the investigation of alleged use include toxic chemicals, munitions and devices, remnants of munitions and devices, environmental samples (air, soil, vegetation, water, snow, etc.) and biomedical samples from human or animal sources (blood, urine, excreta, tissue etc.).

18. If duplicate samples cannot be taken and the analysis is performed at off-site laboratories, any remaining sample shall, if so requested, be returned to the inspected State Party after the completion of the analysis.

Extension of inspection site

19. If the inspection team during an inspection deems it necessary to extend the investigation into a neighbouring State Party, the Director-General shall notify that State Party about the need for access to its territory and request and confirm arrangements for the safe reception of the team.

Extension of inspection duration

20. If the inspection team deems that safe access to a specific area relevant to the investigation is not possible, the requesting State Party shall be informed immediately. If necessary, the period of inspection shall be extended until safe access can be provided and the inspection team will have concluded its mission.

Interviews

21. The inspection team shall have the right to interview and examine persons who may have been affected by the alleged use of chemical weapons. It shall also have the right to interview eyewitnesses of the alleged use of chemical weapons and medical personnel, and other persons who have treated or have come into contact with persons who may have been affected by the alleged use of chemical weapons. The inspection team shall have access to medical histories, if available, and be permitted to participate in autopsies, as appropriate, of persons who may have been affected by the alleged use of chemical weapons.

D. REPORTSProcedures

22. The inspection team shall, not later than 24 hours after its arrival on the territory of the inspected State Party, send a situation report to the Director-General. It shall further throughout the investigation send progress reports as necessary.

23. The inspection team shall, not later than 72 hours after its return to its primary work location, submit a preliminary report to the Director-General. The final report shall be submitted to the Director-General not later than 30 days after its return to its primary work location. The Director-General shall promptly transmit the preliminary and final reports to the Executive Council and to all States Parties.

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24. The situation report shall indicate any urgent need for assistance and any other relevant information. The progress reports shall indicate any further need for assistance that might be identified during the course of the investigation.

25. The final report shall summarize the factual findings of the inspection, particularly with regard to the alleged use cited in the request. In addition, a report of an investigation of an alleged use shall include a description of the investigation process, tracing its various stages, with special reference to:

- (a) The locations and time of sampling and on-site analyses; and
- (b) Supporting evidence, such as the records of interviews, the results of medical examinations and scientific analyses, and the documents examined by the inspection team.

26. If the inspection team collects through, inter alia, identification of any impurities or other substances during laboratory analysis of samples taken, any information in the course of its investigation that might serve to identify the origin of any chemical weapons used, that information shall be included in the report.

E. STATES NOT PARTY TO THIS CONVENTION

27. In the case of alleged use of chemical weapons involving a State not Party to this Convention or in territory not controlled by a State Party, the Organization shall closely cooperate with the Secretary-General of the United Nations. If so requested, the Organization shall put its resources at the disposal of the Secretary-General of the United Nations.

ANNEX ON THE PROTECTION OF CONFIDENTIAL INFORMATION ("CONFIDENTIALITY ANNEX")

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A. GENERAL PRINCIPLES FOR THE HANDLING OF CONFIDENTIAL INFORMATION

1. The obligation to protect confidential information shall pertain to the verification of both civil and military activities and facilities. Pursuant to the general obligations set forth in Article VIII, the Organization shall:

- (a) Require only the minimum amount of information and data necessary for the timely and efficient carrying out of its responsibilities under this Convention;
- (b) Take the necessary measures to ensure that inspectors and other staff members of the Technical Secretariat meet the highest standards of efficiency, competence, and integrity;
- (c) Develop agreements and regulations to implement the provisions of this Convention and shall specify as precisely as possible the information to which the Organization shall be given access by a State Party.

2. The Director-General shall have the primary responsibility for ensuring the protection of confidential information. The Director-General shall establish a stringent regime governing the handling of confidential information by the Technical Secretariat, and in doing so, shall observe the following guidelines:

- (a) Information shall be considered confidential if:
  - (i) It is so designated by the State Party from which the information was obtained and to which the information refers; or
  - (ii) In the judgement of the Director-General, its unauthorized disclosure could reasonably be expected to cause damage to the State Party to which it refers or to the mechanisms for implementation of this Convention;
- (b) All data and documents obtained by the Technical Secretariat shall be evaluated by the appropriate unit of the Technical Secretariat in order to establish whether they contain confidential information. Data required by States Parties to be assured of the continued compliance with this Convention by other States Parties shall be routinely provided to them. Such data shall encompass:
  - (i) The initial and annual reports and declarations provided by States Parties under Articles III, IV, V and VI, in accordance with the provisions set forth in the Verification Annex;
  - (ii) General reports on the results and effectiveness of verification activities; and
  - (iii) Information to be supplied to all States Parties in accordance with the provisions of this Convention;

(c) NO information obtained by the Organization in connection with the implementation of this Convention shall be published or otherwise released, except, as follows:

- (i) General information on the implementation of this Convention may be compiled and released publicly in accordance with the decisions of the Conference or the Executive Council;
- (ii) Any information may be released with the express consent of the State Party to which the information refers;
- (iii) Information classified as confidential shall be released by the Organization only through procedures which ensure that the release of information only occurs in strict conformity with the needs of this Convention. Such procedures shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i);
- (d) The level of sensitivity of confidential data or documents shall be established, based on criteria to be applied uniformly in order to ensure their appropriate handling and protection. For this purpose, a classification system shall be introduced, which by taking account of relevant work undertaken in the preparation of this Convention shall provide for clear criteria ensuring the inclusion of information into appropriate categories of confidentiality and the justified durability of the confidential nature of information. While providing for the necessary flexibility in its implementation the classification system shall protect the rights of States Parties providing confidential information. A classification system shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (l);

(e) Confidential information shall be stored securely at the premises of the Organization. Some data or documents may also be stored with the National Authority of a State Party. Sensitive information, including, *inter alia*, photographs, plans and other documents required only for the inspection of a specific facility may be kept under lock and key at this facility;

(f) To the greatest extent consistent with the effective implementation of the verification provisions of this Convention, information shall be handled and stored by the Technical Secretariat in a form that precludes direct identification of the facility to which it pertains;

(g) The amount of confidential information removed from a facility shall be kept to the minimum necessary for the timely and effective implementation of the verification provisions of this Convention; and

(h) Access to confidential information shall be regulated in accordance with its classification. The dissemination of confidential information within the Organization shall be strictly on a need-to-know basis.

3. The Director-General shall report annually to the Conference on the implementation of the regime governing the handling of confidential information by the Technical Secretariat.

4. Each State Party shall treat information which it receives from the Organization in accordance with the level of confidentiality established for that information. Upon request, a State Party shall provide details on the handling of information provided to it by the Organization.

#### B. EMPLOYMENT AND CONDUCT OF PERSONNEL IN THE TECHNICAL SECRETARIAT

5. Conditions of staff employment shall be such as to ensure that access to and handling of confidential information shall be in conformity with the procedures established by the Director-General in accordance with Section A.

6. Each position in the Technical Secretariat shall be governed by a formal position description that specifies the scope of access to confidential information, if any, needed in that position.

7. The Director-General, the inspectors and the other members of the staff shall not disclose even after termination of their functions to any unauthorized persons any confidential information coming to their knowledge in the performance of their official duties. They shall not communicate to any State, organization or person outside the Technical Secretariat any information to which they have access in connection with their activities in relation to any State Party.

8. In the discharge of their functions inspectors shall only request the information and data which are necessary to fulfil their mandate. They shall not make any records of information collected incidentally and not related to verification of compliance with this Convention.

9. The staff shall enter into individual secrecy agreements with the Technical Secretariat covering their period of employment and a period of five years after it is terminated.

10. In order to avoid improper disclosures, inspectors and staff members shall be appropriately advised and reminded about security considerations and of the possible penalties that they would incur in the event of improper disclosure.

11. Not less than 30 days before an employee is given clearance for access to confidential information that refers to activities on the territory or in any other place under the jurisdiction or control of a State Party, the State Party concerned shall be notified of the proposed clearance. For inspectors the notification of a proposed designation shall fulfil this requirement.

12. In evaluating the performance of inspectors and any other employees of the Technical Secretariat, specific attention shall be given to the employee's record regarding protection of confidential information.

C. MEASURES TO PROTECT SENSITIVE INSTALLATIONS AND PREVENT DISCLOSURE OF CONFIDENTIAL DATA IN THE COURSE OF ON-SITE VERIFICATION ACTIVITIES

13. States Parties may take such measures as they deem necessary to protect confidentiality, provided that they fulfil their obligations to demonstrate compliance in accordance with the relevant Articles and the Verification Annex. When receiving an inspection, the State Party may indicate to the inspection team the equipment, documentation or areas that it considers sensitive and not related to the purpose of the inspection.
14. Inspection teams shall be guided by the principle of conducting on-site inspections in the least intrusive manner possible consistent with the effective and timely accomplishment of their mission. They shall take into consideration proposals which may be made by the State Party receiving the inspection, at whatever stage of the inspection, to ensure that sensitive equipment or information, not related to chemical weapons, is protected.
15. Inspection teams shall strictly abide by the provisions set forth in the relevant Articles and Annexes governing the conduct of inspections. They shall fully respect the procedures designed to protect sensitive installations and to prevent the disclosure of confidential data.
16. In the elaboration of arrangements and facility agreements, due regard shall be paid to the requirement of protecting confidential information. Agreements on inspection procedures for individual facilities shall also include specific and detailed arrangements with regard to the determination of those areas of the facility to which inspectors are granted access, the storage of confidential information on-site, the scope of the inspection effort in agreed areas, the taking of samples and their analysis, the access to records and the use of instruments and continuous monitoring equipment.
17. The report to be prepared after each inspection shall only contain facts relevant to compliance with this Convention. The report shall be handled in accordance with the regulations established by the Organization governing the handling of confidential information. If necessary, the information contained in the report shall be processed into less sensitive forms before it is transmitted outside the Technical Secretariat and the inspected State Party.

D. PROCEDURES IN CASE OF BREACHES OR ALLEGED BREACHES OF CONFIDENTIALITY

18. The Director-General shall establish necessary procedures to be followed in case of breaches or alleged breaches of confidentiality, taking into account recommendations to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

19. The Director-General shall oversee the implementation of individual secrecy agreements. The Director-General shall promptly initiate an investigation if, in his judgement, there is sufficient indication that obligations concerning the protection of confidential information have been violated. The Director-General shall also promptly initiate an investigation if an allegation concerning a breach of confidentiality is made by a State Party.
20. The Director-General shall impose appropriate punitive and disciplinary measures on staff members who have violated their obligations to protect confidential information. In cases of serious breaches, the immunity from jurisdiction may be waived by the Director-General.
21. States Parties shall, to the extent possible, cooperate and support the Director-General in investigating any breach or alleged breach of confidentiality and in taking appropriate action in case a breach has been established.
22. The Organization shall not be held liable for any breach of confidentiality committed by members of the Technical Secretariat.
23. For breaches involving both a State Party and the Organization, a "Commission for the settlement of disputes related to confidentiality", set up as a subsidiary organ of the Conference, shall consider the case. This Commission shall be appointed by the Conference. Rules governing its composition and operating procedures shall be adopted by the Conference at its first session.

**Convention on the Prohibition of the Use, Stockpiling,  
Production and Transfer of Anti-Personnel Mines and on their  
Destruction, 1997**



No. 35597

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**Multilateral**

***Treaty Series***

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Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. Oslo, 18 September 1997

Entry into force: 1 March 1999, in accordance with article 17 (1) (see following page)

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***Traités et accords internationaux  
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au Secrétariat de l'Organisation des Nations Unies***

Convention sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction. Oslo, 18 septembre 1997

Entrée en vigueur : 1<sup>er</sup> mars 1999, conformément au paragraphe 1 de l'article 17 (voir la page suivante)

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Enregistrement auprès du Secrétariat des Nations Unies : d'office, 1<sup>er</sup> mars 1999

[ ENGLISH TEXT — TEXTE ANGLAIS ]

## CONVENTION ON THE PROHIBITION OF THE USE, STOCKPILING, PRODUCTION AND TRANSFER OF ANTI-PERSONNEL MINES AND ON THEIR DESTRUCTION

### *Preamble*

The States Parties,

Determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement,

Believing it necessary to do their utmost to contribute in an efficient and coordinated manner to face the challenge of removing anti-personnel mines placed throughout the world, and to assure their destruction,

Wishing to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration of mine victims,

Recognizing that a total ban of anti-personnel mines would also be an important confidence-building measure,

Welcoming the adoption of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional

Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and calling for the early ratification of this Protocol by all States which have not yet done so,

Welcoming also United Nations General Assembly Resolution 51/45 S of 10 December 1996 urging all States to pursue vigorously an effective, legally-binding international agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines,

Welcoming furthermore the measures taken over the past years, both unilaterally and multilaterally, aiming at prohibiting, restricting or suspending the use, stockpiling, production and transfer of anti-personnel mines,

Stressing the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organizations around the world,

Recalling the Ottawa Declaration of 5 October 1996 and the Brussels Declaration of 27 June 1997 urging the international community to negotiate an international and legally binding agreement prohibiting the use, stockpiling, production and transfer of anti-personnel mines,

Emphasizing the desirability of attracting the adherence of all States to this Convention, and determined to work strenuously towards the promotion of its universalization in all relevant fora including, *inter alia*, the United Nations, the Conference on Disarmament, regional organizations, and groupings, and review conferences of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects,

Basing themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants,

Have agreed as follows:

### *Article 1. General Obligations*

1. Each State Party undertakes never under any circumstances:
  - (a) To use anti-personnel mines;
  - (b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
  - (c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.

### *Article 2. Definitions*

1. "Anti-personnel mine" means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.
2. "Mine" means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle.
3. "Anti-handling device" means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.
4. "Transfer" involves, in addition to the physical movement of anti-personnel mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced anti-personnel mines.
5. "Mined area" means an area which is dangerous due to the presence or suspected presence of mines.

### Article 3. Exceptions

1. Notwithstanding the general obligations under Article 1, the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques is permitted. The amount of such mines shall not exceed the minimum number absolutely necessary for the above-mentioned purposes.
2. The transfer of anti-personnel mines for the purpose of destruction is permitted.

### Article 4. Destruction of Stockpiled Anti-Personnel Mines

Except as provided for in Article 3, each State Party undertakes to destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control, as soon as possible but not later than four years after the entry into force of this Convention for that State Party.

### Article 5. Destruction of Anti-Personnel Mines in Mined Areas

1. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.
2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be emplaced and shall ensure as soon as possible that all anti-personnel mines in mined areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians, until all anti-personnel mines contained therein have been destroyed. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.
3. If a State Party believes that it will be unable to destroy or ensure the destruction of all anti-personnel mines referred to in paragraph 1 within that time period, it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such anti-personnel mines, for a period of up to ten years.

4. Each request shall contain:
  - (a) The duration of the proposed extension;
  - (b) A detailed explanation of the reasons for the proposed extension, including:
    - (i) The preparation and status of work conducted under national demining programs;
    - (ii) The financial and technical means available to the State Party for the destruction of all the anti-personnel mines; and

- (iii) Circumstances which impede the ability of the State Party to destroy all the anti-personnel mines in mined areas;
- (c) The humanitarian, social, economic, and environmental implications of the extension; and
- (d) Any other information relevant to the request for the proposed extension.

5. The Meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.

6. Such an extension may be renewed upon the submission of a new request in accordance with paragraphs 3, 4 and 5 of this Article. In requesting a further extension period a State Party shall submit relevant additional information on what has been undertaken in the previous extension period pursuant to this Article.

### Article 6. International Cooperation and Assistance

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance, where feasible, from other States Parties to the extent possible.
2. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.
3. Each State Party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programmes. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organizations, or on a bilateral basis.
4. Each State Party in a position to do so shall provide assistance for mine clearance and related activities. Such assistance may be provided, *inter alia*, through the United Nations system, international or regional organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis, or by contributing to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance, or other regional funds that deal with demining.
5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled anti-personnel mines.
6. Each State Party undertakes to provide information to the database on mine clearance established within the United Nations system, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.

7. States Parties may request the United Nations, regional organizations, other States Parties or other competent intergovernmental or non-governmental fora to assist its authorities in the elaboration of a national demining program to determine, inter alia:

- (a) The extent and scope of the anti-personnel mine problem;
- (b) The financial, technological and human resources that are required for the implementation of the programme;
- (c) The estimated number of years necessary to destroy all anti-personnel mines in mined areas under the jurisdiction or control of the concerned State Party;
- (d) Mine awareness activities to reduce the incidence of mine-related injuries or deaths;
- (e) Assistance to mine victims;
- (f) The relationship between the Government of the concerned State Party and the relevant governmental, intergovernmental or non-governmental entities that will work in the implementation of the program.

8. Each State Party giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programs.

#### *Article 7. Transparency Measures*

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party on:

- (a) The national implementation measures referred to in Article 9;
- (b) The total of all stockpiled anti-personnel mines owned or possessed by it, or under its jurisdiction or control, to include a breakdown of the type, quantity and, if possible, lot numbers of each type of anti-personnel mine stockpiled;
- (c) To the extent possible, the location of all mined areas that contain, or are suspected to contain, anti-personnel mines under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of anti-personnel mine in each mined area and when they were employed;
- (d) The types, quantities and, if possible, lot numbers of all anti-personnel mines retained or transferred for the development of and training in mine detection, mine clearance or mine destruction techniques, or transferred for the purpose of destruction, as well as the institutions authorized by a State Party to retain or transfer anti-personnel mines, in accordance with Article 3;
- (e) The status of programmes for the conversion or de-commissioning of anti-personnel mine production facilities;
- (f) The status of programmes for the destruction of anti-personnel mines in accordance with Articles 4 and 5, including details of the methods which will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;

(g) The types and quantities of all anti-personnel mines destroyed after the entry into force of this Convention for that State Party, to include a breakdown of the quantity of each type of anti-personnel mine destroyed, in accordance with Articles 4 and 5, respectively, along with, if possible, the lot numbers of each type of anti-personnel mine in the case of destruction in accordance with Article 4;

(h) The technical characteristics of each type of anti-personnel mine produced, to the extent known, and those currently owned or possessed by a State Party, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of anti-personnel mines; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information which may facilitate mine clearance; and

(i) The measures taken to provide an immediate and effective warning to the population in relation to all areas identified under paragraph 2 of Article 5.

2. The information provided in accordance with this Article shall be updated by the States Parties annually, covering the last calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.

3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

#### *Article 8. Facilitation and Clarification of Compliance*

1. The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention, and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.

2. If one or more States Parties wish to clarify and seek to resolve questions relating to compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information which would assist in clarifying this matter.

3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of the States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.

4. Pending the convening of any meeting of the States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.

5. The requesting State Party may propose through the Secretary-General of the United Nations the convening of a Special Meeting of the States Parties to consider the matter. The Secretary-General of the United Nations shall thereupon communicate this proposal and all information submitted by the States Parties concerned, to all States Parties with a request that they indicate whether they favour a Special Meeting of the States Parties, for the purpose of considering the matter. In the event that within 14 days from the date of such communication, at least one-third of the States Parties favours such a Special Meeting, the Secretary-General of the United Nations shall convene this Special Meeting of the States Parties within a further 14 days. A quorum for this Meeting shall consist of a majority of States Parties.

6. The Meeting of the States Parties or the Special Meeting of the States Parties, as the case may be, shall first determine whether to consider the matter further, taking into account all information submitted by the States Parties concerned. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach a decision by consensus. If despite all efforts to that end no agreement has been reached, it shall take this decision by a majority of States Parties present and voting.

7. All States Parties shall cooperate fully with the Meeting of the States Parties or the Special Meeting of the States Parties in the fulfilment of its review of the matter, including any fact-finding missions that are authorized in accordance with paragraph 8.

8. If further clarification is required, the Meeting of the States Parties or the Special Meeting of the States Parties shall authorize a fact-finding mission and decide on its mandate by a majority of States Parties present and voting. At any time the requested State Party may invite a fact-finding mission to its territory. Such a mission shall take place without a decision by a Meeting of the States Parties or a Special Meeting of the States Parties to authorize such a mission. The mission, consisting of up to 9 experts, designated and approved in accordance with paragraphs 9 and 10, may collect additional information on the spot or in other places directly related to the alleged compliance issue under the jurisdiction or control of the requested State Party.

9. The Secretary-General of the United Nations shall prepare and update a list of the names, nationalities and other relevant data of qualified experts provided by States Parties and communicate it to all States Parties. Any expert included on this list shall be regarded as designated for all fact-finding missions unless a State Party declares its non-acceptance in writing. In the event of non-acceptance, the expert shall not participate in fact-finding missions on the territory or any other place under the jurisdiction or control of the objecting State Party, if the non-acceptance was declared prior to the appointment of the expert to such missions.

10. Upon receiving a request from the Meeting of the States Parties or a Special Meeting of the States Parties, the Secretary-General of the United Nations shall, after consultations with the requested State Party, appoint the members of the mission, including its leader. Nationals of States Parties requesting the fact-finding mission or directly affected by it shall not be appointed to the mission. The members of the fact-finding mission shall enjoy privileges and immunities under Article VI of the Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946.

11. Upon at least 72 hours notice, the members of the fact-finding mission shall arrive in the territory of the requested State Party at the earliest opportunity. The requested State Party shall take the necessary administrative measures to receive, transport and accommodate the mission, and shall be responsible for ensuring the security of the mission to the maximum extent possible while they are on territory under its control.

12. Without prejudice to the sovereignty of the requested State Party, the fact-finding mission may bring into the territory of the requested State Party the necessary equipment which shall be used exclusively for gathering information on the alleged compliance issue. Prior to its arrival, the mission will advise the requested State Party of the equipment that it intends to utilize in the course of its fact-finding mission.

13. The requested State Party shall make all efforts to ensure that the fact-finding mission is given the opportunity to speak with all relevant persons who may be able to provide information related to the alleged compliance issue.

14. The requested State Party shall grant access for the fact-finding mission to all areas and installations under its control where facts relevant to the compliance issue could be expected to be collected. This shall be subject to any arrangements that the requested State Party considers necessary for:

- (a) The protection of sensitive equipment, information and areas;
- (b) The protection of any constitutional obligations the requested State Party may have with regard to proprietary rights, searches and seizures, or other constitutional rights; or
- (c) The physical protection and safety of the members of the fact-finding mission.

In the event that the requested State Party makes such arrangements, it shall make every reasonable effort to demonstrate through alternative means its compliance with this Convention.

15. The fact-finding mission may remain in the territory of the State Party concerned for no more than 14 days, and at any particular site no more than 7 days, unless otherwise agreed.

16. All information provided in confidence and not related to the subject matter of the fact-finding mission shall be treated on a confidential basis.

17. The fact-finding mission shall report, through the Secretary-General of the United Nations, to the Meeting of the States Parties or the Special Meeting of the States Parties the results of its findings.

18. The Meeting of the States Parties or the Special Meeting of the States Parties shall consider all relevant information, including the report submitted by the fact-finding mission, and may request the requested State Party to take measures to address the compliance issue within a specified period of time. The requested State Party shall report on all measures taken in response to this request.

19. The Meeting of the States Parties or the Special Meeting of the States Parties may suggest to the States Parties concerned ways and means to further clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of the States

Parties or the Special Meeting of the States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6.

20. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach its decisions referred to in paragraphs 18 and 19 by consensus, otherwise by a two-thirds majority of States Parties present and voting.

#### *Article 9. National Implementation Measures*

Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

#### *Article 10. Settlement of Disputes*

1. The States Parties shall consult and cooperate with each other to settle any dispute that may arise with regard to the application or the interpretation of this Convention. Each State Party may bring any such dispute before the Meeting of the States Parties.

2. The Meeting of the States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

3. This Article is without prejudice to the provisions of this Convention on facilitation and clarification of compliance.

#### *Article 11. Meetings of the States Parties*

1. The States Parties shall meet regularly in order to consider any matter with regard to the application or implementation of this Convention, including:

- (a) The operation and status of this Convention;
- (b) Matters arising from the reports submitted under the provisions of this Convention;
- (c) International cooperation and assistance in accordance with Article 6;
- (d) The development of technologies to clear anti-personnel mines;
- (e) Submissions of States Parties under Article 8; and
- (f) Decisions relating to submissions of States Parties as provided for in Article 5.

2. The First Meeting of the States Parties shall be convened by the Secretary-General of the United Nations within one year after the entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.

3. Under the conditions set out in Article 8, the Secretary-General of the United Nations shall convene a Special Meeting of the States Parties.

4. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend these meetings as observers in accordance with the agreed Rules of Procedure.

#### *Article 12. Review Conferences*

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.

2. The purpose of the Review Conference shall be:

- (a) To review the operation and status of this Convention;
- (b) To consider the need for and the interval between further Meetings of the States Parties referred to in paragraph 2 of Article 11;
- (c) To take decisions on submissions of States Parties as provided for in Article 5; and
- (d) To adopt, if necessary, in its final report conclusions related to the implementation of this Convention.

3. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Review Conference as observers in accordance with the agreed Rules of Procedure.

#### *Article 13. Amendments*

1. At any time after the entry into force of this Convention any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Depositary, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Depositary no later than 30 days after its circulation that they support further consideration of the proposal, the Depositary shall convene an Amendment Conference to which all States Parties shall be invited.

2. States not parties to this Convention, as well as the United Nations, other relevant international

organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Amendment Conference as observers in accordance with the agreed Rules of Procedure.

3. The Amendment Conference shall be held immediately following a Meeting of the States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.

4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to the States Parties.

5. An amendment to this Convention shall enter into force for all States Parties to this Convention which have accepted it, upon the deposit with the Depositary of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

#### *Article 14. Costs*

1. The costs of the Meetings of the States Parties, the Special Meetings of the States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not parties to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.

2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 and the costs of any fact-finding mission shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

#### *Article 15. Signature*

This Convention, done at Oslo, Norway, on 18 September 1997, shall be open for signature at Ottawa, Canada, by all States from 3 December 1997 until 4 December 1997, and at the United Nations Headquarters in New York from 5 December 1997 until its entry into force.

#### *Article 16. Ratification, Acceptance, Approval or Accession*

1. This Convention is subject to ratification, acceptance or approval of the Signatories.
2. It shall be open for accession by any State which has not signed the Convention.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

#### *Article 17. Entry into Force*

1. This Convention shall enter into force on the first day of the sixth month after the month in which the 40th instrument of ratification, acceptance, approval or accession has been deposited.
2. For any State which deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the 40th instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

#### *Article 18. Provisional Application*

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.

#### *Article 19. Reservations*

The Articles of this Convention shall not be subject to reservations.

#### *Article 20. Duration and Withdrawal*

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal.
3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.
4. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law.

#### *Article 21. Depositary*

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

#### *Article 22. Authentic Texts*

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

**Convention on Cluster Munitions, 2008**

# DIPLOMATIC CONFERENCE FOR THE ADOPTION OF A CONVENTION ON CLUSTER MUNITIONS

CCM/77

30 May 2008

Original: ENGLISH  
FRENCH  
SPANISH

DUBLIN 19 – 30 MAY 2008

## Convention on Cluster Munitions

The States Parties to this Convention,

*Deeply concerned* that civilian populations and individual civilians continue to bear the brunt of armed conflict,

*Determined* to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned,

*Concerned* that cluster munition remnants kill or maim civilians, including women and children, obstruct economic and social development, including through the loss of livelihood, impede post-conflict rehabilitation and reconstruction, delay or prevent the return of refugees and internally displaced persons, can negatively impact on national and international peace-building and humanitarian assistance efforts, and have other severe consequences that can persist for many years after use,

*Deeply concerned* also at the dangers presented by the large national stockpiles of cluster munitions retained for operational use and *determined* to ensure their rapid destruction,

*Believing* it necessary to contribute effectively in an efficient, coordinated manner to resolving the challenge of removing cluster munition remnants located throughout the world, and to ensure their destruction,

*Determined* also to ensure the full realisation of the rights of all cluster munition victims and *recognising* their inherent dignity,

*Resolved* to do their utmost in providing assistance to cluster munition victims, including medical care, rehabilitation and psychological support, as well as providing for their social and economic inclusion,

*Recognising* the need to provide age- and gender-sensitive assistance to cluster munition victims and to address the special needs of vulnerable groups,

*Bearing in mind* the Convention on the Rights of Persons with Disabilities which, *inter alia*, requires that States Parties to that Convention undertake to ensure and promote the full realisation of all human rights and fundamental freedoms of all persons with disabilities without discrimination of any kind on the basis of disability,

*Mindful* of the need to coordinate adequately efforts undertaken in various fora to address the rights and needs of victims of various types of weapons, and *resolved* to avoid discrimination among victims of various types of weapons,

*Reaffirming* that in cases not covered by this Convention or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience,

*Resolved* also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention,

*Welcoming* the very broad international support for the international norm prohibiting anti-personnel mines, enshrined in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction,

*Welcoming* also the adoption of the Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, and its entry into force on 12 November 2006, and *wishing* to enhance the protection of civilians from the effects of cluster munition remnants in post-conflict environments,

*Bearing in mind* also United Nations Security Council Resolution 1325 on women, peace and security and United Nations Security Council Resolution 1612 on children in armed conflict,

*Welcoming* further the steps taken nationally, regionally and globally in recent years aimed at prohibiting, restricting or suspending the use, stockpiling, production and transfer of cluster munitions,

*Stressing* the role of public conscience in furthering the principles of humanity as evidenced by the global call for an end to civilian suffering caused by cluster munitions and *recognising* the efforts to that end undertaken by the United Nations, the International Committee of the Red Cross, the Cluster Munition Coalition and numerous other non-governmental organisations around the world,

*Reaffirming* the Declaration of the Oslo Conference on Cluster Munitions, by which, *inter alia*, States recognised the grave consequences caused by the use of cluster munitions and committed themselves to conclude by 2008 a legally binding instrument that would prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, and would establish a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation for victims, clearance of contaminated areas, risk reduction education and destruction of stockpiles,

*Emphasising* the desirability of attracting the adherence of all States to this Convention, and *determined* to work strenuously towards the promotion of its universalisation and its full implementation,

*Basing* themselves on the principles and rules of international humanitarian law, in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, and the rules that the parties to a conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations against military objectives only, that in the conduct of military operations constant care shall be taken to spare the civilian population, civilians and civilian objects and that the civilian population and individual civilians enjoy general protection against dangers arising from military operations,

**HAVE AGREED** as follows:

#### Article 1

##### *General obligations and scope of application*

1. Each State Party undertakes never under any circumstances to:
  - (a) Use cluster munitions;
  - (b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;
  - (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.
2. Paragraph 1 of this Article applies, *mutatis mutandis*, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft.
3. This Convention does not apply to mines.

#### Article 2

##### *Definitions*

For the purposes of this Convention:

1. **“Cluster munition victims”** means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities;
2. **“Cluster munition”** means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:
  - (a) A munition or submunition designed to disperse flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;

- (b) A munition or submunition designed to produce electrical or electronic effects;
- (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
  - (i) Each munition contains fewer than ten explosive submunitions;
  - (ii) Each explosive submunition weighs more than four kilograms;
  - (iii) Each explosive submunition is designed to detect and engage a single target object;
  - (iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;
  - (v) Each explosive submunition is equipped with an electronic self-deactivating feature;

3. **“Explosive submunition”** means a conventional munition that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating an explosive charge prior to, on or after impact;
4. **“Failed cluster munition”** means a cluster munition that has been fired, dropped, launched, projected or otherwise delivered and which should have dispersed or released its explosive submunitions but failed to do so;
5. **“Unexploded submunition”** means an explosive submunition that has been dispersed or released by, or otherwise separated from, a cluster munition and has failed to explode as intended;
6. **“Abandoned cluster munitions”** means cluster munitions or explosive submunitions that have not been used and that have been left behind or dumped, and that are no longer under the control of the party that left them behind or dumped them. They may or may not have been prepared for use;
7. **“Cluster munition remnants”** means failed cluster munitions, abandoned cluster munitions, unexploded submunitions and unexploded bomblets;
8. **“Transfer”** involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants;
9. **“Self-destruction mechanism”** means an incorporated automatically-functioning mechanism which is in addition to the primary initiating mechanism of the munition and which secures the destruction of the munition into which it is incorporated;
10. **“Self-deactivating”** means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example a battery, that is essential to the operation of the munition;
11. **“Cluster munition contaminated area”** means an area known or suspected to contain cluster munition remnants;

12. “**Mine**” means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle;

13. “**Explosive bomblet**” means a conventional munition, weighing less than 20 kilograms, which is not self-propelled and which, in order to perform its task, is dispersed or released by a dispenser, and is designed to function by detonating an explosive charge prior to, on or after impact;

14. “**Dispenser**” means a container that is designed to disperse or release explosive bomblets and which is affixed to an aircraft at the time of dispersal or release;

15. “**Unexploded bomblet**” means an explosive bomblet that has been dispersed, released or otherwise separated from a dispenser and has failed to explode as intended.

#### Article 3

##### *Storage and stockpile destruction*

1. Each State Party shall, in accordance with national regulations, separate all cluster munitions under its jurisdiction and control from munitions retained for operational use and mark them for the purpose of destruction.

2. Each State Party undertakes to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article as soon as possible but not later than eight years after the entry into force of this Convention for that State Party. Each State Party undertakes to ensure that destruction methods comply with applicable international standards for protecting public health and the environment.

3. If a State Party believes that it will be unable to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article within eight years of entry into force of this Convention for that State Party it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the destruction of such cluster munitions by a period of up to four years. A State Party may, in exceptional circumstances, request additional extensions of up to four years. The requested extensions shall not exceed the number of years strictly necessary for that State Party to complete its obligations under paragraph 2 of this Article.

4. Each request for an extension shall set out:

- (a) The duration of the proposed extension;
- (b) A detailed explanation of the proposed extension, including the financial and technical means available to or required by the State Party for the destruction of all cluster munitions referred to in paragraph 1 of this Article and, where applicable, the exceptional circumstances justifying it;
- (c) A plan for how and when stockpile destruction will be completed;

(d)

The quantity and type of cluster munitions and explosive submunitions held at the entry into force of this Convention for that State Party and any additional cluster munitions or explosive submunitions discovered after such entry into force;

(e)

The quantity and type of cluster munitions and explosive submunitions destroyed during the period referred to in paragraph 2 of this Article; and

(f)

The quantity and type of cluster munitions and explosive submunitions remaining to be destroyed during the proposed extension and the annual destruction rate expected to be achieved.

5. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors referred to in paragraph 4 of this Article, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension. The States Parties may decide to grant a shorter extension than that requested and may propose benchmarks for the extension, as appropriate. A request for an extension shall be submitted a minimum of nine months prior to the Meeting of States Parties or the Review Conference at which it is to be considered.

6. Notwithstanding the provisions of Article 1 of this Convention, the retention or acquisition of a limited number of cluster munitions and explosive submunitions for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures, is permitted. The amount of explosive submunitions retained or acquired shall not exceed the minimum number absolutely necessary for these purposes.

7. Notwithstanding the provisions of Article 1 of this Convention, the transfer of cluster munitions to another State Party for the purpose of destruction, as well as for the purposes described in paragraph 6 of this Article, is permitted.

8. States Parties retaining, acquiring or transferring cluster munitions or explosive submunitions for the purposes described in paragraphs 6 and 7 of this Article shall submit a detailed report on the planned and actual use of these cluster munitions and explosive submunitions and their type, quantity and lot numbers. If cluster munitions or explosive submunitions are transferred to another State Party for these purposes, the report shall include reference to the receiving party. Such a report shall be prepared for each year during which a State Party retained, acquired or transferred cluster munitions or explosive submunitions and shall be submitted to the Secretary-General of the United Nations no later than 30 April of the following year.

#### Article 4

##### *Clearance and destruction of cluster munition remnants and risk reduction education*

1. Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control, as follows:

- (a) Where cluster munition remnants are located in areas under its jurisdiction or control at the date of entry into force of this Convention

- for that State Party, such clearance and destruction shall be completed as soon as possible but not later than ten years from that date;
- Where, after entry into force of this Convention for that State Party, cluster munitions have become cluster munition remnants located in areas under its jurisdiction or control, such clearance and destruction must be completed as soon as possible but not later than ten years after the end of the active hostilities during which such cluster munitions became cluster munition remnants; and
- Upon fulfilling either of its obligations set out in sub-paragraphs (a) and (b) of this paragraph, that State Party shall make a declaration of compliance to the next Meeting of States Parties.
2. In fulfilling its obligations under paragraph 1 of this Article, each State Party shall take the following measures as soon as possible, taking into consideration the provisions of Article 6 of this Convention regarding international cooperation and assistance:
- (a) Survey, assess and record the threat posed by cluster munition remnants, making every effort to identify all cluster munition contaminated areas under its jurisdiction or control;
  - (b) Assess and prioritise needs in terms of marking, protection of civilians, clearance and destruction, and take steps to mobilise resources and develop a national plan to carry out these activities, building, where appropriate, upon existing structures, experiences and methodologies;
  - (c) Take all feasible steps to ensure that all cluster munition contaminated areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means to ensure the effective exclusion of civilians. Warning signs based on methods of marking readily recognisable by the affected community should be utilised in the marking of suspected hazardous areas. Signs and other hazardous area boundary markers should, as far as possible, be visible, legible, durable and resistant to environmental effects and should clearly identify which side of the marked boundary is considered to be within the cluster munition contaminated areas and which side is considered to be safe;
  - (d) Clear and destroy all cluster munition remnants located in areas under its jurisdiction or control; and
  - (e) Conduct risk reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by such remnants.
3. In conducting the activities referred to in paragraph 2 of this Article, each State Party shall take into account international standards, including the International Mine Action Standards (IMAS).
4. This paragraph shall apply in cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of this Convention for that State Party and have become cluster munition remnants that are located in areas under the jurisdiction or control of another State Party at the time of entry into force of this Convention for the latter.

- (a) In such cases, upon entry into force of this Convention for both States Parties, the former State Party is strongly encouraged to provide, *inter alia*, technical, financial, material or human resources assistance to the latter State Party, either bilaterally or through a mutually agreed third party, including through the United Nations system or other relevant organisations, to facilitate the marking, clearance and destruction of such cluster munition remnants.
  - (b) Such assistance shall include, where available, information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located.
5. If a State Party believes that it will be unable to clear and destroy or ensure the clearance and destruction of all cluster munition remnants referred to in paragraph 1 of this Article within ten years of the entry into force of this Convention for that State Party, it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the clearance and destruction of such cluster munition remnants by a period of up to five years. The requested extension shall not exceed the number of years strictly necessary for that State Party to complete its obligations under paragraph 1 of this Article.
6. A request for an extension shall be submitted to a Meeting of States Parties or a Review Conference prior to the expiry of the time period referred to in paragraph 1 of this Article for that State Party. Each request shall be submitted a minimum of nine months prior to the Meeting of States Parties or Review Conference at which it is to be considered. Each request shall set out:
- (a) The duration of the proposed extension;
  - (b) A detailed explanation of the reasons for the proposed extension, including the financial and technical means available to and required by the State Party for the clearance and destruction of all cluster munition remnants during the proposed extension;
  - (c) The preparation of future work and the status of work already conducted under national clearance and demining programmes during the initial ten year period referred to in paragraph 1 of this Article and any subsequent extensions;
  - (d) The total area containing cluster munition remnants at the time of entry into force of this Convention for that State Party and any additional areas containing cluster munition remnants discovered after such entry into force;
  - (e) The total area containing cluster munition remnants cleared since entry into force of this Convention;
  - (f) The total area containing cluster munition remnants remaining to be cleared during the proposed extension;
  - (g) The circumstances that have impeded the ability of the State Party to destroy all cluster munition remnants located in areas under its jurisdiction or control during the initial ten year period referred to in paragraph 1 of this Article, and those that may impede this ability during the proposed extension;
  - (h) The humanitarian, social, economic and environmental implications of the proposed extension; and

- (i) Any other information relevant to the request for the proposed extension.

7. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors referred to in paragraph 6 of this Article, including, *inter alia*, the quantities of cluster munition remnants reported, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension. The States Parties may decide to grant a shorter extension than that requested and may propose benchmarks for the extension, as appropriate.

8. Such an extension may be renewed by a period of up to five years upon the submission of a new request, in accordance with paragraphs 5, 6 and 7 of this Article. In requesting a further extension a State Party shall submit relevant additional information on what has been undertaken during the previous extension granted pursuant to this Article.

#### Article 5

##### *Victim assistance*

1. Each State Party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. Each State Party shall make every effort to collect reliable relevant data with respect to cluster munition victims.

2. In fulfilling its obligations under paragraph 1 of this Article each State Party shall:

- (a) Assess the needs of cluster munition victims;
- (b) Develop, implement and enforce any necessary national laws and policies;
- (c) Develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating them within the existing national disability, development and human rights frameworks and mechanisms, while respecting the specific role and contribution of relevant actors;
- (d) Take steps to mobilise national and international resources;
- (e) Not discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes; differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs;
- (f) Closely consult with and actively involve cluster munition victims and their representative organisations;
- (g) Designate a focal point within the government for coordination of matters relating to the implementation of this Article; and
- (h) Strive to incorporate relevant guidelines and good practices including in the areas of medical care, rehabilitation and psychological support, as well as social and economic inclusion.

#### Article 6

##### *International cooperation and assistance*

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance.

2. Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by cluster munitions, aimed at the implementation of the obligations of this Convention. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organisations or institutions, non-governmental organisations or institutions, or on a bilateral basis.

3. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision and receipt of clearance and other such equipment and related technological information for humanitarian purposes.

4. In addition to any obligations it may have pursuant to paragraph 4 of Article 4 of this Convention, each State Party in a position to do so shall provide assistance for clearance and destruction of cluster munition remnants and information concerning various means and technologies related to clearance of cluster munitions, as well as lists of experts, expert agencies or national points of contact on clearance and destruction of cluster munition remnants and related activities.

5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled cluster munitions, and shall also provide assistance to identify, assess and prioritise needs and practical measures in terms of marking, risk reduction education, protection of civilians and clearance and destruction as provided in Article 4 of this Convention.

6. Where, after entry into force of this Convention, cluster munitions have become cluster munition remnants located in areas under the jurisdiction or control of a State Party, each State Party in a position to do so shall urgently provide emergency assistance to the affected State Party.

7. Each State Party in a position to do so shall provide assistance for the implementation of the obligations referred to in Article 5 of this Convention to adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for social and economic inclusion of cluster munition victims. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent Societies and their International Federation, non-governmental organisations or on a bilateral basis.

8. Each State Party in a position to do so shall provide assistance to contribute to the economic and social recovery needed as a result of cluster munition use in affected States Parties.

9. Each State Party in a position to do so may contribute to relevant trust funds in order to facilitate the provision of assistance under this Article.

10. Each State Party that seeks and receives assistance shall take all appropriate measures in order to facilitate the timely and effective implementation of this Convention, including facilitation of the entry and exit of personnel, materiel and equipment, in a manner consistent with national laws and regulations, taking into consideration international best practices.

11. Each State Party may, with the purpose of developing a national action plan, request the United Nations system, regional organisations, other States Parties or other competent intergovernmental or non-governmental institutions to assist its authorities to determine, *inter alia*:

- (a) The nature and extent of cluster munition remnants located in areas under its jurisdiction or control;
- (b) The financial, technological and human resources required for the implementation of the plan;
- (c) The time estimated as necessary to clear and destroy all cluster munition remnants located in areas under its jurisdiction or control;
- (d) Risk reduction education programmes and awareness activities to reduce the incidence of injuries or deaths caused by cluster munition remnants;
- (e) Assistance to cluster munition victims; and
- (f) The coordination relationship between the government of the State Party concerned and the relevant governmental, intergovernmental or non-governmental entities that will work in the implementation of the plan.

12. States Parties giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programmes.

#### Article 7 *Transparency measures*

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party, on:

- (a) The national implementation measures referred to in Article 9 of this Convention;
- (b) The total of all cluster munitions, including explosive submunitions, referred to in paragraph 1 of Article 3 of this Convention, to include a breakdown of their type, quantity and, if possible, lot numbers of each type;
- (c) The technical characteristics of each type of cluster munition produced by that State Party prior to entry into force of this Convention for it, to the extent known, and those currently owned or possessed by it, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of cluster munitions; at a

minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information that may facilitate the clearance of cluster munition remnants;

(d) The status and progress of programmes for the conversion or decommissioning of production facilities for cluster munitions;

(e) The status and progress of programmes for the destruction, in accordance with Article 3 of this Convention, of cluster munitions, including explosive submunitions, with details of the methods that will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;

(f) The types and quantities of cluster munitions, including explosive submunitions, destroyed in accordance with Article 3 of this Convention, including details of the methods of destruction used, the location of the destruction sites and the applicable safety and environmental standards observed;

(g) Stockpiles of cluster munitions, including explosive submunitions, discovered after reported completion of the programme referred to in sub-paragraph (e) of this paragraph, and plans for their destruction in accordance with Article 3 of this Convention;

(h) To the extent possible, the size and location of all cluster munition contaminated areas under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of cluster munition remnant in each such area and when they were used;

(i) The status and progress of programmes for the clearance and destruction of all types and quantities of cluster munition remnants cleared and destroyed in accordance with Article 4 of this Convention, to include the size and location of the cluster munition contaminated area cleared and a breakdown of the quantity of each type of cluster munition remnant cleared and destroyed;

(j) The measures taken to provide risk reduction education and, in particular, an immediate and effective warning to civilians living in cluster munition contaminated areas under its jurisdiction or control;

(k) The status and progress of implementation of its obligations under Article 5 of this Convention to adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for social and economic inclusion of cluster munition victims and to collect reliable relevant data with respect to cluster munition victims;

(l) The name and contact details of the institutions mandated to provide information and to carry out the measures described in this paragraph;

(m) The amount of national resources, including financial, materiel or in kind, allocated to the implementation of Articles 3, 4 and 5 of this Convention; and

(n) The amounts, types and destinations of international cooperation and assistance provided under Article 6 of this Convention.

2. The information provided in accordance with paragraph 1 of this Article shall be updated by the States Parties annually, covering the previous calendar year, and

reported to the Secretary-General of the United Nations not later than 30 April of each year.

3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

#### Article 8

##### *Facilitation and clarification of compliance*

1. The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.

2. If one or more States Parties wish to clarify and seek to resolve questions relating to a matter of compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information that would assist in clarifying the matter.

3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.

4. Pending the convening of any Meeting of States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.

5. Where a matter has been submitted to it pursuant to paragraph 3 of this Article, the Meeting of States Parties shall first determine whether to consider that matter further, taking into account all information submitted by the States Parties concerned. If it does so determine, the Meeting of States Parties may suggest to the States Parties concerned ways and means further to clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6 of this Convention.

6. In addition to the procedures provided for in paragraphs 2 to 5 of this Article, the Meeting of States Parties may decide to adopt such other general procedures or

specific mechanisms for clarification of compliance, including facts, and resolution of instances of non-compliance with the provisions of this Convention as it deems appropriate.

#### Article 9

##### *National implementation measures*

Each State Party shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

#### Article 10

##### *Settlement of disputes*

1. When a dispute arises between two or more States Parties relating to the interpretation or application of this Convention, the States Parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of their choice, including recourse to the Meeting of States Parties and referral to the International Court of Justice in conformity with the Statute of the Court.

2. The Meeting of States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties concerned to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

#### Article 11

##### *Meetings of States Parties*

1. The States Parties shall meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the application or implementation of this Convention, including:

- (a) The operation and status of this Convention;
- (b) Matters arising from the reports submitted under the provisions of this Convention;
- (c) International cooperation and assistance in accordance with Article 6 of this Convention;
- (d) The development of technologies to clear cluster munition remnants;
- (e) Submissions of States Parties under Articles 8 and 10 of this Convention; and
- (f) Submissions of States Parties as provided for in Articles 3 and 4 of this Convention.

2. The first Meeting of States Parties shall be convened by the Secretary-General of the United Nations within one year of entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.

3. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend these meetings as observers in accordance with the agreed rules of procedure.

#### Article 12

##### *Review Conferences*

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.

2. The purpose of the Review Conference shall be:

- (a) To review the operation and status of this Convention;
- (b) To consider the need for and the interval between further Meetings of States Parties referred to in paragraph 2 of Article 11 of this Convention; and
- (c) To take decisions on submissions of States Parties as provided for in Articles 3 and 4 of this Convention.

3. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend each Review Conference as observers in accordance with the agreed rules of procedure.

#### Article 13

##### *Amendments*

1. At any time after its entry into force any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Secretary-General of the United Nations, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Secretary-General of the United Nations no later than 90 days after its circulation that they support further consideration of the proposal, the Secretary-General of the United Nations shall convene an Amendment Conference to which all States Parties shall be invited.

2. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend each Amendment Conference as observers in accordance with the agreed rules of procedure.

3. The Amendment Conference shall be held immediately following a Meeting of States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.

4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to all States.

5. An amendment to this Convention shall enter into force for States Parties that have accepted the amendment on the date of deposit of acceptances by a majority of the States which were Parties at the date of adoption of the amendment. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

#### Article 14

##### *Costs and administrative tasks*

1. The costs of the Meetings of States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not party to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.

2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 of this Convention shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

3. The performance by the Secretary-General of the United Nations of administrative tasks assigned to him or her under this Convention is subject to an appropriate United Nations mandate.

#### Article 15

##### *Signature*

This Convention, done at Dublin on 30 May 2008, shall be open for signature at Oslo by all States on 3 December 2008 and thereafter at United Nations Headquarters in New York until its entry into force.

#### Article 16

##### *Ratification, acceptance, approval or accession*

1. This Convention is subject to ratification, acceptance or approval by the Signatories.

2. It shall be open for accession by any State that has not signed the Convention.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

Article 17  
*Entry into force*

1. This Convention shall enter into force on the first day of the sixth month after the month in which the thirtieth instrument of ratification, acceptance, approval or accession has been deposited.
2. For any State that deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

Article 18  
*Provisional application*

Any State may, at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 1 of this Convention pending its entry into force for that State.

Article 19  
*Reservations*

The Articles of this Convention shall not be subject to reservations.

Article 20  
*Duration and withdrawal*

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating withdrawal.
3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

Article 21  
*Relations with States not party to this Convention*

1. Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.
2. Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this

Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.

3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.
4. Nothing in paragraph 3 of this Article shall authorise a State Party:
  - (a) To develop, produce or otherwise acquire cluster munitions;
  - (b) To itself stockpile or transfer cluster munitions;
  - (c) To itself use cluster munitions; or
  - (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

Article 22  
*Depositary*

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

Article 23  
*Authentic texts*

The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention shall be equally authentic.

**Guiding Principles on Internal Displacement, 1998  
(E/CN.4/1998/53/Add.2)**



**Economic and Social  
Council**

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GENERAL

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COMMISSION ON HUMAN RIGHTS  
Fifty-fourth session  
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FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS AND  
FUNDAMENTAL FREEDOMS, INCLUDING THE QUESTION OF THE  
PROGRAMME AND METHODS OF WORK OF THE COMMISSION  
HUMAN RIGHTS, MASS EXODUSES AND DISPLACED PERSONS

Report of the Representative of the Secretary-General,  
Mr. Francis M. Deng, submitted pursuant to Commission  
Resolution 1997/39

Addendum

Guiding Principles on Internal Displacement

Introductory note to the Guiding Principles

1. Internal displacement, affecting some 25 million people worldwide, has become increasingly recognized as one of the most tragic phenomena of the contemporary world. Often the consequence of traumatic experiences with violent conflicts, gross violations of human rights and related causes in which discrimination features significantly, displacement nearly always generates conditions of severe hardship and suffering for the affected populations. It breaks up families, cuts social and cultural ties, terminates dependable employment relationships, disrupts educational opportunities, denies access to such vital necessities as food, shelter and medicine, and exposes innocent persons to such acts of violence as attacks on camps, disappearances and rape. Whether they cluster in camps, escape into the countryside to hide from potential sources of persecution and violence or submerge into the community of the equally poor and dispossessed, the internally displaced are among the most vulnerable populations, desperately in need of protection and assistance.
2. In recent years, the international community has become increasingly aware of the plight of the internally displaced and is taking steps to address their needs. In 1992, at the request of the Commission on Human Rights, the Secretary-General of the United Nations appointed a Representative on internally displaced persons to study the causes and consequences of internal displacement, the status of the internally displaced in international law, the extent of the coverage accorded them within existing international institutional arrangements and ways in which their protection and assistance could be improved, including through dialogue with Governments and other pertinent actors.
3. Accordingly, the Representative of the Secretary-General has focused the activities of his mandate on developing appropriate normative and institutional frameworks for the protection and assistance of the internally displaced, undertaking country missions in an ongoing dialogue with Governments and others concerned, and promoting a systemic international response to the plight of internally displaced populations.
4. Since the United Nations initially drew international attention to the crisis of internal displacement, many organizations, intergovernmental and non-governmental, have broadened their mandates or scope of activities to address more effectively the needs of the internally displaced. Governments have become more responsive by acknowledging their primary responsibility of protecting and assisting affected populations under their control, and when they cannot discharge that responsibility for lack of capacity, they are becoming less reticent to seek assistance from the international community. On the other hand, it is fair to say that the international community is more inclined than it is prepared, both normatively and institutionally, to respond effectively to the phenomenon of internal displacement.
5. One area in which the mandate of the Secretary-General's Representative has made significant progress has been in the development of a normative framework relating to all aspects of internal displacement. Working in close collaboration with a team of international legal experts, the Representative prepared a "Compilation and Analysis of Legal Norms" relevant to the needs and

rights of the internally displaced and to the corresponding duties and obligations of States and the international community for their protection and assistance. The Compilation and Analysis was submitted to the Commission on Human Rights by the Representative of the Secretary-General in 1996 (E/CN.4/1996/52/Add.2).

6. It is important to note that the Office of the United Nations High Commissioner for Refugees (UNHCR) has developed a manual, based on the Compilation and Analysis, for the practical use of its staff, especially in field operations. There are also indications that other organizations and agencies will follow the example of UNHCR in making use of the document.

7. The Compilation and Analysis examines international human rights law, humanitarian law, and refugee law by analogy, and concludes that while existing law provides substantial coverage for the internally displaced, there are significant areas in which it fails to provide an adequate basis for their protection and assistance. Besides, the provisions of existing law are dispersed in a wide variety of international instruments which make them too diffused and unfocused to be effective in providing adequate protection and assistance for the internally displaced.

8. In response to the Compilation and Analysis and to remedy the deficiencies in existing law, the Commission on Human Rights and the General Assembly requested the Representative of the Secretary-General to prepare an appropriate framework for the protection and assistance of the internally displaced (see resolutions 50/195 of 22 December 1995 and 1996/52 of 19 April 1996, respectively). Accordingly, and in continued collaboration with the team of experts that had prepared the Compilation and Analysis, the drafting of guiding principles was undertaken. The Commission on Human Rights, at its fifty-third session in April 1997, adopted resolution 1997/39 in which it took note of the preparations for guiding principles and requested the Representative to report thereon to the Commission at its fifty-fourth session. The Guiding Principles on Internal Displacement, completed in 1998, are annexed to the present document.

9. The purpose of the Guiding Principles is to address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection. The Principles reflect and are consistent with international human rights law and international humanitarian law. They restate the relevant principles applicable to the internally displaced, which are now widely spread out in existing instruments, clarify any grey areas that might exist, and address the gaps identified in the Compilation and Analysis. They apply to the different phases of displacement, providing protection against arbitrary displacement, access to protection and assistance during displacement and guarantees during return or alternative settlement and reintegration.

10. The Principles are intended to provide guidance to the Representative in carrying out his mandate; to States when faced with the phenomenon of displacement; to all other authorities, groups and persons in their relations with internally displaced persons; and to intergovernmental and non-governmental organizations when addressing internal displacement.

11. The Guiding Principles will enable the Representative to monitor more effectively situations of displacement and to dialogue with Governments and all pertinent actors on behalf of the internally displaced; to invite States to apply the Principles in providing protection, assistance, reintegration and development support for them; and to mobilize response by international agencies, regional intergovernmental and non-governmental organizations on the basis of the Principles. The Guiding Principles are therefore intended to be a persuasive statement that should provide not only practical guidance, but also an instrument for public policy education and consciousness-raising. By the same token, they have the potential to perform a preventive function in the urgently needed response to the global crisis of internal displacement.

12. The preparation of the Guiding Principles has benefited from the work, experience and support of many institutions and individuals. In addition to the legal team cited above, many experts from international humanitarian and development organizations, the Office of the United Nations High Commissioner for Human Rights, regional bodies, scholarly institutions, non-governmental organizations and the legal community have made valuable contributions. Appreciation in particular is owed to the Centre for Human Rights and Humanitarian Law of the Washington College of Law of American University, and also to the American Society of International Law, the Faculty of Law of the University of Bern, the Ludwig Boltzmann Institute of Human Rights of the University of Vienna and the International Human Rights Law Group.

13. Support for the development of the Principles was gratefully received from The Ford Foundation, the Jacob Blaustein Institute for the Advancement of Human Rights, the European Human Rights Foundation, the Hauser Foundation, and the John D. and Catherine T. MacArthur Foundation.

14. The development of the Principles also benefited from the Brookings Institution-Refugee Policy Group Project on Internal Displacement, which received generous support from many sources, including the Governments of the Netherlands, Norway and Sweden, and the McKnight Foundation.

15. The Government of Austria hosted an expert consultation in Vienna in January 1998, for the purpose of finalizing the Guiding Principles, which is most gratefully acknowledged.

Annex

GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

INTRODUCTION: SCOPE AND PURPOSE

1. These Guiding Principles address the specific needs of internally displaced persons worldwide. They identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration.
2. For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.
3. These Principles reflect and are consistent with international human rights law and international humanitarian law. They provide guidance to:
  - (a) The Representative of the Secretary-General on internally displaced persons in carrying out his mandate;
  - (b) States when faced with the phenomenon of internal displacement;
  - (c) All other authorities, groups and persons in their relations with internally displaced persons; and
  - (d) Intergovernmental and non-governmental organizations when addressing internal displacement.
4. These Guiding Principles should be disseminated and applied as widely as possible.

SECTION I - GENERAL PRINCIPLES

Principle 1

1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.
2. These Principles are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.

Principle 2

1. These Principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction. The observance of these Principles shall not affect the legal status of any authorities, groups or persons involved.
  2. These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. In particular, these Principles are without prejudice to the right to seek and enjoy asylum in other countries.
- Principle 3
1. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.
  2. Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request.
- Principle 4
1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.
  2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.

SECTION II - PRINCIPLES RELATING TO PROTECTION FROM DISPLACEMENT

Principle 5

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

Principle 6

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
2. The prohibition of arbitrary displacement includes displacement:

(a) When it is based on policies of apartheid, "ethnic cleansing" or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;

(b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;

(c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;

(d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and

(e) When it is used as a collective punishment.

3. Displacement shall last no longer than required by the circumstances.

Principle 7

1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.

2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.

3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:

(a) A specific decision shall be taken by a State authority empowered by law to order such measures;

(b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;

(c) The free and informed consent of those to be displaced shall be sought;

(d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation;

(e) Law enforcement measures, where required, shall be carried out by competent legal authorities; and

(f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

Principle 8

Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.

Principle 9

States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

SECTION III - PRINCIPLES RELATING TO PROTECTION DURING DISPLACEMENT

Principle 10

1. Every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life. Internally displaced persons shall be protected in particular against:

(a) Genocide;

(b) Murder;

(c) Summary or arbitrary executions; and

(d) Enforced disappearances, including abduction or unacknowledged detention, threatening or resulting in death.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:

(a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted;

(b) Starvation as a method of combat;

(c) Their use to shield military objectives from attack or to shield, favour or impede military operations;

(d) Attacks against their camps or settlements; and

(e) The use of anti-personnel landmines.

Principle 11

1. Every human being has the right to dignity and physical, mental and moral integrity.

2. Internally displaced persons, whether or not their liberty has been restricted, shall be protected in particular against:

- (a) Rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault;
- (b) Slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labour of children; and
- (c) Acts of violence intended to spread terror among internally displaced persons.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

Principle 12

1. Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.
2. To give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp. If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.
3. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement.
4. In no case shall internally displaced persons be taken hostage.

Principle 13

1. In no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities.
2. Internally displaced persons shall be protected against discriminatory practices of recruitment into any armed forces or groups as a result of their displacement. In particular any cruel, inhuman or degrading practices that compel compliance or punish non-compliance with recruitment are prohibited in all circumstances.

Principle 14

1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.
2. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.

Principle 15

Internally displaced persons have:

- (a) The right to seek safety in another part of the country;
- (b) The right to leave their country;
- (c) The right to seek asylum in another country; and
- (d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

Principle 16

1. All internally displaced persons have the right to know the fate and whereabouts of missing relatives.
2. The authorities concerned shall endeavour to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organizations engaged in this task. They shall inform the next of kin on the progress of the investigation and notify them of any result.
3. The authorities concerned shall endeavour to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation, and facilitate the return of those remains to the next of kin or dispose of them respectfully.
4. Grave sites of internally displaced persons should be protected and respected in all circumstances. Internally displaced persons should have the right of access to the grave sites of their deceased relatives.

Principle 17

1. Every human being has the right to respect of his or her family life.
2. To give effect to this right for internally displaced persons, family members who wish to remain together shall be allowed to do so.
3. Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.
4. Members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together.

Principle 18

1. All internally displaced persons have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:
  - (a) Essential food and potable water;
  - (b) Basic shelter and housing;
  - (c) Appropriate clothing; and
  - (d) Essential medical services and sanitation.
3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

Principle 19

1. All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.
2. Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual and other abuses.
3. Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

Principle 20

1. Every human being has the right to recognition everywhere as a person before the law.
2. To give effect to this right for internally displaced persons, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.
3. Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names.

Principle 21

1. No one shall be arbitrarily deprived of property and possessions.
2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
  - (a) Pillage;
  - (b) Direct or indiscriminate attacks or other acts of violence;
  - (c) Being used to shield military operations or objectives;
  - (d) Being made the object of reprisal; and
  - (e) Being destroyed or appropriated as a form of collective punishment.
3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

Principle 22

1. Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights:
  - (a) The rights to freedom of thought, conscience, religion or belief, opinion and expression;
  - (b) The right to seek freely opportunities for employment and to participate in economic activities;
  - (c) The right to associate freely and participate equally in community affairs;

Principle 23

- (d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right; and
  - (e) The right to communicate in a language they understand.
1. Every human being has the right to education.
  2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.

3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.
4. Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.

SECTION IV - PRINCIPLES RELATING TO HUMANITARIAN ASSISTANCE

Principle 24

1. All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination.
2. Humanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons.

Principle 25

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

Principle 26

Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected. They shall not be the object of attack or other acts of violence.

Principle 27

1. International humanitarian organizations and other appropriate actors when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. In so doing, these organizations and actors should respect relevant international standards and codes of conduct.
2. The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by States.

SECTION V - PRINCIPLES RELATING TO RETURN, RESETTLEMENT AND REINTEGRATION

Principle 28

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.
2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

Principle 29

1. Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.
2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

Principle 30

All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.

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**International Convention for the Protection of All Persons  
from Enforced Disappearance, 2007**

## **International Convention for the Protection of All Persons from Enforced Disappearance**

### **Preamble**

*The States Parties to this Convention,*

*Considering* the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,

*Having regard* to the Universal Declaration of Human Rights,

*Recalling* the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the other relevant international instruments in the fields of human rights, humanitarian law and international criminal law,

*Also recalling* the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992,

*Aware* of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity,

*Determined* to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance,

*Considering* the right of any person not to be subjected to enforced disappearance, the right of victims to justice and to reparation,

*Affirming* the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end,

*Have agreed* on the following articles:

### **Part I**

#### *Article 1*

1. No one shall be subjected to enforced disappearance.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

#### *Article 2*

For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

#### *Article 3*

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without

the authorization, support or acquiescence of the State and to bring those responsible to justice.

#### *Article 4*

Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

#### *Article 5*

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

#### *Article 6*

1. Each State Party shall take the necessary measures to hold criminally responsible at least:

(a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;

(b) A superior who:

(i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;

(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and

(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

#### *Article 7*

1. Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish:

(a) Mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;

(b) Without prejudice to other criminal procedures, aggravating circumstances, in particular in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant

women, minors, persons with disabilities or other particularly vulnerable persons.

#### *Article 8*

Without prejudice to article 5,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

(a) Is of long duration and is proportionate to the extreme seriousness of this offence;

(b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.

2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation.

#### *Article 9*

1. Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance:

(a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is one of its nationals;

(c) When the disappeared person is one of its nationals and the State Party considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.

#### *Article 10*

1. Upon being satisfied, after an examination of the information available to it, that the circumstances so warrant, any State Party in whose territory a person suspected of having committed an offence of enforced disappearance is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be maintained only for such time as is necessary to ensure the person's presence at criminal, surrender or extradition proceedings.

2. A State Party which has taken the measures referred to in paragraph 1 of this article shall immediately carry out a preliminary inquiry or investigations to establish the facts. It shall notify the States Parties referred to in article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances

warranting detention, and of the findings of its preliminary inquiry or its investigations, indicating whether it intends to exercise its jurisdiction.

3. Any person in custody pursuant to paragraph 1 of this article may communicate immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

#### *Article 11*

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.

3. Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.

#### *Article 12*

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 of this article shall undertake an investigation, even if there has been no formal complaint.

3. Each State Party shall ensure that the authorities referred to in paragraph 1 of this article:

(a) Have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation;

(b) Have access, if necessary with the prior authorization of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present.

4. Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation. It shall ensure in particular that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.

#### Article 13

1. For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

2. The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of this Convention.

3. States Parties undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance.

5. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between themselves.

6. Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, in particular, conditions relating to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.

7. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons.

#### Article 14

1. States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.

2. Such mutual legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, in particular, the conditions in

relation to the grounds upon which the requested State Party may refuse to grant mutual legal assistance or may make it subject to conditions.

#### Article 15

States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.

#### Article 16

1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

#### Article 17

1. No one shall be held in secret detention.

2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:

(a) Establish the conditions under which orders of deprivation of liberty may be given;

(b) Indicate those authorities authorized to order the deprivation of liberty;

(c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;

(d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;

(e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority;

(f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.

3. Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of

liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:

- (a) The identity of the person deprived of liberty;
- (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
- (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
- (d) The authority responsible for supervising the deprivation of liberty;
- (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
- (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

#### Article 18

1. Subject to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:

- (a) The authority that ordered the deprivation of liberty;
  - (b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;
  - (c) The authority responsible for supervising the deprivation of liberty;
  - (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
  - (e) The date, time and place of release;
  - (f) Elements relating to the state of health of the person deprived of liberty;
  - (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.
2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1 of this article, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

#### Article 19

1. Personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.

2. The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.

#### Article 20

1. Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.

2. Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.

#### Article 21

Each State Party shall take the necessary measures to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released. Each State Party shall also take the necessary measures to assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release, without prejudice to any obligations to which such persons may be subject under national law.

#### Article 22

Without prejudice to article 6, each State Party shall take the necessary measures to prevent and impose sanctions for the following conduct:

- (a) Delaying or obstructing the remedies referred to in article 17, paragraph 2 (f), and article 20, paragraph 2;
- (b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate;

(c) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.

#### *Article 23*

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to:

- (a) Prevent the involvement of such officials in enforced disappearances;
  - (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances;
  - (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized.
2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished.

3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy.

#### *Article 24*

1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:

- (a) Restitution;
- (b) Rehabilitation;
- (c) Satisfaction, including restoration of dignity and reputation;
- (d) Guarantees of non-repetition.

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

#### *Article 25*

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

(a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

(b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a) above.

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) of this article and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.

3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (a) of this article.

4. Given the need to protect the best interests of the children referred to in paragraph 1 (a) of this article and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance.

5. In all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

#### **Part II**

#### *Article 26*

1. A Committee on Enforced Disappearances (hereinafter referred to as "the Committee") shall be established to carry out the functions provided for under this Convention. The Committee shall consist of ten experts of high moral character and recognized competence in the field of human rights, who shall serve in their personal capacity and be independent and impartial. The members of the Committee shall be elected by the States Parties according to an equitable geographical distribution. Due account shall be taken of the

usefulness of the participation in the work of the Committee of persons having relevant legal experience and of balanced gender representation.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties from among their nationals, at biennial meetings of the States Parties convened by the Secretary-General of the United Nations for this purpose. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

3. The initial election shall be held no later than six months after the date of entry into force of this Convention. Four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the State Party which nominated each candidate, and shall submit this list to all States Parties.

4. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 2 of this article.

5. If a member of the Committee dies or resigns or for any other reason can no longer perform his or her Committee duties, the State Party which nominated him or her shall, in accordance with the criteria set out in paragraph 1 of this article, appoint another candidate from among its nationals to serve out his or her term, subject to the approval of the majority of the States Parties. Such approval shall be considered to have been obtained unless half or more of the States Parties respond negatively within six weeks of having been informed by the Secretary-General of the United Nations of the proposed appointment.

6. The Committee shall establish its own rules of procedure.

7. The Secretary-General of the United Nations shall provide the Committee with the necessary means, staff and facilities for the effective performance of its functions. The Secretary-General of the United Nations shall convene the initial meeting of the Committee.

8. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations, as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

9. Each State Party shall cooperate with the Committee and assist its members in the fulfillment of their mandate, to the extent of the Committee's functions that the State Party has accepted.

#### *Article 27*

A Conference of the States Parties will take place at the earliest four years and at the latest six years following the entry into force of this Convention to evaluate the functioning of the Committee and to decide, in accordance with

the procedure described in article 44, paragraph 2, whether it is appropriate to transfer to another body — without excluding any possibility — the monitoring of this Convention, in accordance with the functions defined in articles 28 to 36.

#### *Article 28*

1. In the framework of the competencies granted by this Convention, the Committee shall cooperate with all relevant organs, offices and specialized agencies and funds of the United Nations, with the treaty bodies instituted by international instruments, with the special procedures of the United Nations and with the relevant regional intergovernmental organizations or bodies, as well as with all relevant State institutions, agencies or offices working towards the protection of all persons against enforced disappearances.

2. As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations.

#### *Article 29*

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its obligations under this Convention, within two years after the entry into force of this Convention for the State Party concerned.

2. The Secretary-General of the United Nations shall make this report available to all States Parties.

3. Each report shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate. The comments, observations or recommendations shall be communicated to the State Party concerned, which may respond to them, on its own initiative or at the request of the Committee.

4. The Committee may also request States Parties to provide additional information on the implementation of this Convention.

#### *Article 30*

1. A request that a disappeared person should be sought and found may be submitted to the Committee, as a matter of urgency, by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any other person having a legitimate interest.

2. If the Committee considers that a request for urgent action submitted in pursuance of paragraph 1 of this article:

(a) Is not manifestly unfounded;

(b) Does not constitute an abuse of the right of submission of such requests;

(c) Has already been duly presented to the competent bodies of the State Party concerned, such as those authorized to undertake investigations, where such a possibility exists;

(d) Is not incompatible with the provisions of this Convention; and

(e) The same matter is not being examined under another procedure of international investigation or settlement of the same nature; it shall request the State Party concerned to provide it with information on the situation of the persons sought, within a time limit set by the Committee.

3. In the light of the information provided by the State Party concerned in accordance with paragraph 2 of this article, the Committee may transmit recommendations to the State Party, including a request that the State Party should take all the necessary measures, including interim measures, to locate and protect the person concerned in accordance with this Convention and to inform the Committee, within a specified period of time, of measures taken, taking into account the urgency of the situation. The Committee shall inform the person submitting the urgent action request of its recommendations and of the information provided to it by the State as it becomes available.

4. The Committee shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved. The person presenting the request shall be kept informed.

#### Article 31

1. A State Party may at the time of ratification of this Convention or at any time afterwards declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of provisions of this Convention. The Committee shall not admit any communication concerning a State Party which has not made such a declaration.

2. The Committee shall consider a communication inadmissible where:

- (a) The communication is anonymous;
- (b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;
- (c) The same matter is being examined under another procedure of international investigation or settlement of the same nature; or where
- (d) All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged.

3. If the Committee considers that the communication meets the requirements set out in paragraph 2 of this article, it shall transmit the communication to the State Party concerned, requesting it to provide observations and comments within a time limit set by the Committee.

4. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party will take such interim measures as may be necessary to avoid possible irreparable damage to the victims of the alleged violation. Where the Committee exercises its discretion, this does not imply a determination on admissibility or on the merits of the communication.

5. The Committee shall hold closed meetings when examining communications under the present article. It shall inform the author of a communication of the responses provided by the State Party concerned. When

the Committee decides to finalize the procedure, it shall communicate its views to the State Party and to the author of the communication.

#### Article 32

A State Party to this Convention may at any time declare that it recognizes the competence of the Committee to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under this Convention. The Committee shall not receive communications concerning a State Party which has not made such a declaration, nor communications from a State Party which has not made such a declaration.

#### Article 33

1. If the Committee receives reliable information indicating that a State Party is seriously violating the provisions of this Convention, it may, after consultation with the State Party concerned, request one or more of its members to undertake a visit and report back to it without delay.

2. The Committee shall notify the State Party concerned, in writing, of its intention to organize a visit, indicating the composition of the delegation and the purpose of the visit. The State Party shall answer the Committee within a reasonable time.

3. Upon a substantiated request by the State Party, the Committee may decide to postpone or cancel its visit.

4. If the State Party agrees to the visit, the Committee and the State Party concerned shall work together to define the modalities of the visit and the State Party shall provide the Committee with all the facilities needed for the successful completion of the visit.

5. Following its visit, the Committee shall communicate to the State Party concerned its observations and recommendations.

#### Article 34

If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State Party, it may, after seeking from the State Party concerned all relevant information on the situation, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations.

#### Article 35

1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.

2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.

**Article 36**

1. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.
2. Before an observation on a State Party is published in the annual report, the State Party concerned shall be informed in advance and shall be given reasonable time to answer. This State Party may request the publication of its comments or observations in the report.

**Part III**

**Article 37**

Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in:

- (a) The law of a State Party;
- (b) International law in force for that State.

**Article 38**

1. This Convention is open for signature by all Member States of the United Nations.
2. This Convention is subject to ratification by all Member States of the United Nations. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. This Convention is open to accession by all Member States of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General.

**Article 39**

1. This Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the twentieth instrument of ratification or accession, this Convention shall enter into force on the thirtieth day after the date of the deposit of that State's instrument of ratification or accession.

**Article 40**

The Secretary-General of the United Nations shall notify all States Members of the United Nations and all States which have signed or acceded to this Convention of the following:

- (a) Signatures, ratifications and accessions under article 38;
- (b) The date of entry into force of this Convention under article 39.

**Article 41**

The provisions of this Convention shall apply to all parts of federal States without any limitations or exceptions.

**Article 42**

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation or by the procedures expressly provided for in this Convention shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. A State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a declaration.
3. Any State Party having made a declaration in accordance with the provisions of paragraph 2 of this article may at any time withdraw this declaration by notification to the Secretary-General of the United Nations.

**Article 43**

This Convention is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the two Additional Protocols thereto of 8 June 1977, or to the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

**Article 44**

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.
2. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all the States Parties for acceptance.
3. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have accepted it in accordance with their respective constitutional processes.
4. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted.

*Article 45*

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States referred to in article 38.

**International Court of Justice**

**Military and Paramilitary Activities in and against Nicaragua  
(Nicaragua v. United States of America),  
Jurisdiction of the Court and Admissibility of the Application  
Judgment**

*I.C.J. Reports 1984*

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

**CASE CONCERNING MILITARY AND  
PARAMILITARY ACTIVITIES IN AND  
AGAINST NICARAGUA**

(NICARAGUA v. UNITED STATES OF AMERICA)

JURISDICTION OF THE COURT AND  
ADMISSIBILITY OF THE APPLICATION

**JUDGMENT OF 26 NOVEMBER 1984**

**1984**

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COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,  
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ET CONTRE CELUI-CI**

(NICARAGUA c. ÉTATS-UNIS D'AMÉRIQUE)

COMPÉTENCE DE LA COUR  
ET RECEVABILITÉ DE LA REQUÊTE

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## INTERNATIONAL COURT OF JUSTICE

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CASE CONCERNING MILITARY AND  
PARAMILITARY ACTIVITIES IN AND  
AGAINST NICARAGUA

(NICARAGUA v. UNITED STATES OF AMERICA)

JURISDICTION OF THE COURT AND  
ADMISSIBILITY OF THE APPLICATION

*Jurisdiction of the Court* — Article 36, paragraphs 2 and 5, of the Statute — Declaration under Article 36 of Permanent Court Statute by State which did not ratify Protocol of Signature of that Statute — Declaration valid but not binding — Effect of Article 36, paragraph 5, of International Court of Justice Statute — Significance of travaux préparatoires — Conduct of States concerned — Significance of publications of the Court and of the United Nations.

*Claim of estoppel barring invocation of jurisdiction under Article 36, paragraph 2, of the Statute.*

*Nature and effect of Optional-Clause declarations* — Modification or termination of Optional-Clause declarations containing proviso for six months' notice of termination — Effect of reciprocity on declarations containing differing provisions for termination — Declaration made without limit of time — Reasonable notice of termination required.

*Reservation attached to Optional-Clause declaration excluding disputes arising under multilateral treaty unless "all parties to the treaty affected by the decision are before the Court"* — Meaning — Impossibility of identification of States "affected" at jurisdictional phase — Application of Article 79, paragraph 7, of Rules of Court.

*Bilateral treaty conferring jurisdiction over "dispute not satisfactorily settled by diplomacy"* — Reliance on compromissory clause not necessarily preceded by negotiations.

*Admissibility of application* — Alleged requirement that all "indispensable parties" must be before the Court — Claim alleged to be one of unlawful use of armed force — Competence of United Nations Security Council — Right of individual or

*collective self-defence* — Pursuance of proceedings before the Court and Security Council *pari passu* — Judicial function claimed to be unable to deal with situations involving ongoing conflict — Proof of facts and possibility of implementation of Judgment — Prior exhaustion of negotiating processes not a precondition for seising the Court.

## JUDGMENT

*Present*: President ELIAS; *Vice-President* SETTE-CAMARA; *Judges* LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO, EL-KHANI, SCHWEBEL, Sir Robert JENNINGS, DE LACHARRIÈRE, MBAYE, BEDJAOUTI; *Judge ad hoc* COLLARD; *Registrar* TORRES BERNÁRDEZ.

In the case concerning military and paramilitary activities in and against Nicaragua,  
*between*  
the Republic of Nicaragua,  
represented by

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

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

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

Mr. Alain Pellet, Professor at the University of Paris-Nord and the *Institut d'Etudes Politiques de Paris*,

Mr. Paul S. Reichler, Reichler and Appelbaum, Washington, D.C.; Member of the Bar of the United States Supreme Court; Member of the Bar of the District of Columbia,

as Counsel and Advocates,

Mr. Augusto Zamora Rodriguez, Legal Adviser to the Foreign Ministry of the Republic of Nicaragua,

Miss Judith C. Appelbaum, Reichler and Appelbaum, Washington, D.C.; Member of the Bars of the District of Columbia and the State of California,

Mr. Paul W. Khan, Reichler and Appelbaum, Washington, D.C., Member of the Bar of the District of Columbia

as Counsel

and

the United States of America,  
represented by

Hon. Davis R. Robinson, Legal Adviser, United States Department of State,

as Agent and Counsel,

Mr. Daniel W. McGovern, Principal Deputy Legal Adviser, United States Department of State,

Mr. Patrick M. Norton, Assistant Legal Adviser, United States Department of State,

as Deputy-Agents and Counsel,

Mr. Ted A. Borek, Assistant Legal Adviser, United States Department of State,

Mr. Myres S. McDougal, Sterling Professor of Law Emeritus, Yale University, Yale Law School, New Haven, Connecticut ; Distinguished Visiting Professor of Law, New York Law School, New York, New York,

Mr. John Norton Moore, Walter L. Brown Professor of Law, University of Virginia School of Law, Charlottesville, Virginia,

Mr. Fred L. Morrison, Professor of Law, the Law School of the University of Minnesota, Minneapolis, Minnesota,  
Mr. Stefan A. Riesenfeld, Professor of Law, University of California, School of Law, Berkeley, California, and Hastings College of the Law, San Francisco, California,

Mr. Louis B. Sohn, Woodruff Professor of International Law, University of Georgia School of Law, Athens, Georgia ; Bemis Professor of International Law Emeritus, Harvard Law School, Cambridge, Massachusetts,

as Counsel,

Ms. Frances A. Armstrong, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Mr. Michael J. Danaher, Member of the Bar of the State of California,

Ms. Joan E. Donoghue, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Ms. Mary W. Ennis, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Mr. Peter M. Olson, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Mr. Jonathan B. Schwartz, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Ms. Jamison M. Selby, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Mr. George Taft, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

Ms. Gayle R. Teicher, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,

as Attorney-Advisers.

THE COURT,

composed as above,

delivers the following Judgment :

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

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of the United States of America. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. At the same time as the Application was filed, the Republic of Nicaragua also filed a request for the indication of provisional measures under Article 41 of the Statute. By a letter from the United States Ambassador at The Hague to the Registrar dated 13 April 1984, and in the course of the oral proceedings held on the request by Nicaragua for the indication of provisional measures, the United States of America contended (*inter alia*) that the Court was without jurisdiction to deal with the Application, and requested that the proceedings be terminated by the removal of the case from the list. By an Order dated 10 May 1984, the Court rejected the request of the United States for removal of the case from the list, indicated, pending its final decision in the proceedings, certain provisional measures, and decided that, until the Court delivers its final judgment in the case, it would keep the matters covered by the Order continuously under review.

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

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

6. On 15 August 1984, prior to the closure of the written proceedings on the questions of jurisdiction and admissibility, the Republic of El Salvador filed a Declaration of Intervention in the case under Article 63 of the Statute. In a letter from the Agent of El Salvador dated 10 September 1984, which El Salvador requested should be considered as a part of its Declaration of Intervention, El Salvador stated that, if the Court were to find that it has jurisdiction and that the Application is admissible, it reserved the right "in a later substantive phase of the case to address the interpretation and application of the conventions to which it is a party relevant to that phase". Having been supplied with the written obser-

vations of the Parties on the Declaration pursuant to Article 83 of the Rules of Court, the Court, by an Order dated 4 October 1984, decided not to hold a hearing on the Declaration of Intervention, and decided that that Declaration was inadmissible inasmuch as it related to the current phase of the proceedings.

7. On 8-10 and 15-18 October 1984 the Court held public sittings at which it was addressed by the following representatives of the Parties :

*For Nicaragua :*

H.E. Mr. Carlos Argüello Gómez,  
Hon. Abram Chayes,  
Mr. Ian Brownlie,  
Mr. Paul S. Reichler,  
Mr. Alain Pellet.

*For the United States of America :*

Hon. Davis R. Robinson,  
Mr. Patrick M. Norton,  
Mr. Myres McDougal,  
Mr. Louis B. Sohn,  
Mr. John Norton Moore.

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

*On behalf of Nicaragua,*

at the end of the Memorial :

"Nicaragua submits that:

A. The jurisdiction of the Court to entertain the dispute presented in the Application is established by the terms of the declaration of Nicaragua of 24 September 1929 under Article 36 (5) and the declaration of the United States of 14 August 1946 under Article 36 (2) of the Statute of the International Court of Justice.

B. Nicaragua's declaration of 24 September 1929 is in force as a valid and binding acceptance of the compulsory jurisdiction of the Court.

C. The attempt by the United States to modify or terminate the terms of its declaration of 14 August 1946 by a letter dated 6 April 1984 from Secretary of State George Shultz to the Secretary-General of the United Nations was ineffective to accomplish either result.

D. The Court has jurisdiction under Article XXIV (2) of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 24 May 1958 over claims presented by this Application falling within the scope of the Treaty.

E. The Court is not precluded from adjudicating the legal dispute presented in the Application by any considerations of admissibility and the Application is admissible."

*On behalf of the United States of America,*

at the end of the Counter-Memorial :

"May it please the Court, on behalf of the United States of America, to adjudge and declare, for each and all of the foregoing reasons, that the

claims set forth in Nicaragua's Application of 9 April 1984 (1) are not within the jurisdiction of this Court and (2) are inadmissible."

9. In the course of the oral proceedings the following Submissions were presented by the Parties :

*On behalf of Nicaragua*

(hearing of 10 October 1984) :

"Maintaining the arguments and submissions contained in the Memorial presented on 30 June 1984 and also the arguments advanced in the oral hearings on behalf of Nicaragua :

The Government of Nicaragua requests the Court to declare that jurisdiction exists in respect of the Application of Nicaragua filed on 9 April 1984, and that the subject-matter of the Application is admissible in its entirety."

*On behalf of the United States of America,*

(hearing of 16 October 1984) :

"May it please the Court, on behalf of the United States of America, to adjudge and declare, for each and all of the reasons presented in the oral argument of the United States and in the Counter-Memorial of the United States of 17 August 1984, that the claims set forth in Nicaragua's Application of 9 April 1984, (1) are not within the jurisdiction of the Court and (2) are inadmissible."

10. In accordance with Article 60, paragraph 2, of the Rules of Court, the two Parties communicated to the Court the written text of their final submissions as set out above.

\* \* \*

11. The present case concerns a dispute between the Government of the Republic of Nicaragua and the Government of the United States of America occasioned, Nicaragua contends, by certain military and paramilitary activities conducted in Nicaragua and in the waters off its coasts, responsibility for which is attributed by Nicaragua to the United States. In the present phase the case concerns the jurisdiction of the Court to entertain and pronounce upon this dispute, and the admissibility of the Application by which it was brought before the Court. The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudice or appear to prejudice any eventual decision on the merits.

12. To found the jurisdiction of the Court in the present proceedings, Nicaragua in its Application relied on Article 36 of the Statute of the Court and the declarations, described below, made by the Parties accepting compulsory jurisdiction pursuant to that Article. In its Memorial, Nicaragua, relying on a reservation contained in its Application (para. 26) of the right to "supplement or to amend this Application", also contended that

the Court has jurisdiction under Article XXIV, paragraph 2, of a Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956.

13. Article 36, paragraph 2, of the Statute of the Court provides that :

“The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning :

- (a) the interpretation of a treaty ;
- (b) any question of international law ;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation ;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.”

The United States made a declaration, pursuant to this provision, on 14 August 1946, containing certain reservations, to be examined below, and expressed to

“remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration”.

On 6 April 1984 the Government of the United States of America deposited with the Secretary-General of the United Nations a notification, signed by the United States Secretary of State, Mr. George Shultz, referring to the Declaration deposited on 26 August 1946, and stating that :

“the aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America.”

This notification will be referred to, for convenience, as the “1984 notification”.

14. In order to be able to rely upon the United States Declaration of 1946 to found jurisdiction in the present case, Nicaragua has to show that it is a “State accepting the same obligation” within the meaning of Article 36, paragraph 2, of the Statute. For this purpose, Nicaragua relies on a

Declaration made by it on 24 September 1929 pursuant to Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice. That Article provided that :

“The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court”

in any of the same categories of dispute as listed in paragraph 2 of Article 36 of the Statute of the postwar Court, set out above. Nicaragua relies further on paragraph 5 of Article 36 of the Statute of the present Court, which provides that :

“Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.”

15. The circumstances of Nicaragua's Declaration of 1929 were as follows. The Members of the League of Nations (and the States mentioned in the Annex to the League of Nations Covenant) were entitled to sign the Protocol of Signature of the Statute of the Permanent Court of International Justice, which was drawn up at Geneva on 16 December 1920. That Protocol provided that it was subject to ratification, and that instruments of ratification were to be sent to the Secretary-General of the League of Nations. On 24 September 1929, Nicaragua, as a Member of the League, signed this Protocol and made a declaration under Article 36, paragraph 2, of the Statute of the Permanent Court which read :

[*Translation from the French*]

“On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.

Geneva, 24 September 1929.

(Signed) T. F. MEDINA.”

16. According to the documents produced by both Parties before the Court, on 4 December 1934, a proposal for the ratification of (*inter alia*) the Statute of the Permanent Court of International Justice and of the Protocol of Signature of 16 December 1920 was approved by the “Ejecutivo” (executive power) of Nicaragua. On 14 February 1935, the Senate of Nicaragua decided to ratify these instruments, its decision being published in *La Gaceta*, the Nicaraguan official journal, on 12 June 1935, and on 11 July 1935 the Chamber of Deputies of Nicaragua adopted a similar deci-

sion, similarly published on 18 September 1935. On 29 November 1939, the Ministry of External Relations of Nicaragua sent the following telegram to the Secretary-General of the League of Nations :

“ESTATUTO Y PROTOCOLO CORTE PERMANENTE JUSTICIA INTERNACIONAL LA HAYA YA FUERON RATIFICADOS PUNTO ENVIARSELE OPOR-TUNAMENTE INSTRUMENTO RATIFICACION-RELACIONES.”

[*Translation*]

(Statute and Protocol Permanent Court International Justice The Hague have already been ratified. Will send you in due course Instrument Ratification. Relations.)

The files of the League of Nations however contain no record of an instrument of ratification ever having been received. No evidence has been adduced before the Court to show that such an instrument of ratification was ever despatched to Geneva. On 16 December 1942, the Acting Legal Adviser of the Secretariat of the League of Nations wrote to the Foreign Minister of Nicaragua to point out that he had not received the instrument of ratification “dont le dépôt est nécessaire pour faire naître effectivement l'obligation” (the deposit of which is necessary to cause the obligation to come into effective existence). In the Nicaraguan Memorial, it was stated that “Nicaragua never completed ratification of the old Protocol of Signature”; at the hearings, the Agent of Nicaragua explained that the records are very scanty, and he was therefore unable to certify the facts one way or the other. He added however that if instruments of ratification were sent, they would most likely have been sent by sea, and, the Second World War being then in progress, the attacks on commercial shipping may explain why the instruments appear never to have arrived. After the war, Nicaragua took part in the United Nations Conference on International Organization at San Francisco and became an original Member of the United Nations, having ratified the Charter on 6 September 1945 ; on 24 October 1945 the Statute of the International Court of Justice, which is an integral part of the Charter, came into force.

17. On the basis of these facts, the United States contends, first, that Nicaragua never became a party to the Statute of the Permanent Court of International Justice, and that accordingly it could not and did not make an effective acceptance of the compulsory jurisdiction of the Permanent Court ; the 1929 acceptance was therefore not “still in force” within the meaning of the English version of Article 36, paragraph 5, of the Statute of the present Court. In the contention of the United States, the expression in the French version of the Statute corresponding to “still in force” in the English text, namely “pour une durée qui n'est pas encore expirée”, also requires that a declaration be binding under the Statute of the Permanent Court in order to be deemed an acceptance of the jurisdiction of the present Court under Article 36, paragraph 5, of its Statute.

18. Nicaragua does not contend that its 1929 Declaration was in itself

sufficient to establish a binding acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, for which it would have been necessary that Nicaragua complete the ratification of the Protocol of Signature of the Statute of that Court. It rejects however the interpretation of Article 36, paragraph 5, of the Statute of the present Court advanced by the United States : Nicaragua argues that the phrase “which are still in force” or “pour une durée qui n'est pas encore expirée” was designed to exclude from the operation of the Article only declarations that had already expired, and has no bearing whatever on a declaration, like Nicaragua's, that had not expired, but which, for some reason or another, had not been perfected. Consistently with the intention of the provision, which in Nicaragua's view was to continue the pre-existing situation as regards declarations of acceptance of compulsory jurisdiction, Nicaragua was in exactly the same situation under the new Statute as it was under the old. In either case, ratification of the Statute of the Court would perfect its Declaration of 1929. Nicaragua contends that the fact that this is the correct interpretation of the Statute is borne out by the way in which the Nicaraguan declaration was handled in the publications of the Court and of the United Nations Secretariat ; by the conduct of the Parties to the present case, and of the Government of Honduras, in relation to the dispute in 1957-1960 between Honduras and Nicaragua in connection with the arbitral award made by the King of Spain in 1906, which dispute was eventually determined by the Court ; by the opinions of publicists ; and by the practice of the United States itself.

19. With regard to Nicaragua's reliance on the publications of the Court, it may first be noted that in the Sixteenth Report (the last) of the Permanent Court of International Justice, covering the period 15 June 1939 to 31 December 1945, Nicaragua was included in the “List of States having signed the Optional Clause” (p. 358), but it was recorded on another page (p. 50) that Nicaragua had not ratified the Protocol of Signature of the Statute, and Nicaragua was not included in the list of “States bound by the Clause” (i.e., the Optional Clause) on the same page. The first *Yearbook*, that for 1946-1947, of the present Court contained (p. 110) a list entitled “Members of the United Nations, other States parties to the Statute and States to which the Court is open. (An asterisk denotes a State bound by the compulsory jurisdiction clause)”, and Nicaragua was included in that list, with an asterisk against it, and with a footnote (common to several States listed) reading “Declaration made under Article 36 of the Statute of the Permanent Court and deemed to be still in force (Article 36, 5, of Statute of the present Court)”. On another page (p. 210), the text of Nicaragua's 1929 Declaration was reproduced, with the following footnote :

“According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice

(December 16th, 1920), and the instrument of ratification was to follow. Notification concerning the deposit of the said instrument has not, however, been received in the Registry.”

The *Yearbook 1946-1947* also includes a list (p. 221) entitled “List of States which have recognized the compulsory jurisdiction of the International Court of Justice or which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice (Article 36 of the Statute of the International Court of Justice)” and this list includes Nicaragua (with a footnote cross-reference to the page where its 1929 Declaration is reproduced).

20. Subsequent *Yearbooks* of the Court, up to and including *I.C.J. Yearbook 1954-1955*, list Nicaragua among the States with regard to which there were “in force” declarations of acceptance of the compulsory jurisdiction of the Court, made in accordance with the terms either of the Permanent Court of International Justice Statute or of the Statute of the present Court (see, e.g., *Yearbook 1954-1955*, p. 39); however, a reference was also given to the page of the *Yearbook 1946-1947* at which the text of Nicaragua’s 1929 Declaration was printed (*ibid.*, p. 187). Nicaragua also continued to be included in the list of States recognizing compulsory jurisdiction (*ibid.*, p. 195). In the *Yearbook 1955-1956*, the reference to Nicaragua in this list (p. 195) had a footnote appended to it reading as follows:

“According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. It does not appear, however, that the instrument of ratification was ever received by the League of Nations.”

A note to the same effect has been included in subsequent *Yearbooks* up to the present time.

21. In 1968 the Court began the practice, which has continued up to the present time, of transmitting a *Report* to the General Assembly of the United Nations for the past year. Each of these *Reports* has included a paragraph recording the number of States which recognize the jurisdiction of the Court as compulsory, and Nicaragua has been mentioned among these. For a number of years the paragraph referred to such States as having so recognized the Court’s jurisdiction “in accordance with declarations filed under Article 36, paragraph 2, of the Statute”. No reference has been made in these *Reports* to the issue of ratification of the Protocol of Signature of the Statute of the Permanent Court.

22. Nicaragua also places reliance on the references made to it in a number of publications issued by the Secretariat of the United Nations, all of which include it as a State whose declaration of acceptance of the jurisdiction of the Permanent Court has attracted the operation of Article 36, paragraph 5, of the Statute of the present Court. These publications are

the Second *Annual Report* of the Secretary-General to the General Assembly; the annual volume entitled *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary*; the *Yearbook* of the United Nations; and certain ancillary official publications.

23. The United States contention as to these publications is, as to those issued by the Registry of the Court, that the Registry took great care not to represent any of its listings as authoritative; the United States draws attention to the caveat in the Preface to the *I.C.J. Yearbook* that it “in no way involves the responsibility of the Court”, to the footnotes quoted in paragraphs 19 and 20 above, and to a disclaimer appearing for the first time in the *Yearbook 1956-1957* (p. 207) reading as follows:

“The texts of declarations set out in this Chapter are reproduced for convenience of reference only. The inclusion of a declaration made by any State should not be regarded as an indication of the view entertained by the Registry or, *a fortiori*, by the Court, regarding the nature, scope or validity of the instrument in question.”

It concludes that it is clear that successive Registrars and the *Yearbooks* of the Court never adopted, and indeed expressly rejected, Nicaragua’s contention as to the effect of Article 36, paragraph 5, of the Statute. So far as the United Nations publications are concerned, the United States points out that where they cite their source of information, they invariably refer to the *I.C.J. Yearbook*, and none of them purport to convey any authority.

\*

24. In order to determine whether the provisions of Article 36, paragraph 5, can have applied to Nicaragua’s Declaration of 1929, the Court must first establish the legal characteristics of that declaration and then compare them with the conditions laid down by the text of that paragraph.

25. So far as the characteristics of Nicaragua’s declaration are concerned, the Court notes that, at the time when the question of the applicability of the new Statute arose, that is, on its coming into force, that declaration was certainly valid, for under the system of the Permanent Court of International Justice a declaration was valid on condition that it had been made by a State “either when signing or ratifying” the Protocol of Signature of the Statute “or at a later moment”, whereas under the present Statute, declarations under Article 36, paragraph 2, can only be made by “States parties to the present Statute”. Since Nicaragua had signed that Protocol, its declaration concerning the compulsory jurisdiction of the Permanent Court, which was not subject to ratification, was undoubtedly

valid from the moment it was received by the Secretary-General of the League of Nations (cf. *Right of Passage over Indian Territory*, I.C.J. Reports 1957, p. 146). The Statute of the Permanent Court did not lay down any set form or procedure to be followed for the making of such declarations, and in practice a number of different methods were used by States. Nevertheless this declaration, though valid, had not become binding under the Statute of the Permanent Court. It may be granted that the necessary steps had been taken at national level for ratification of the Protocol of Signature of the Statute. But Nicaragua has not been able to prove that it accomplished the indispensable step of sending its instrument of ratification to the Secretary-General of the League of Nations. It did announce that the instrument would be sent ; but there is no evidence to show whether it was. Even after having been duly informed, by the Acting Legal Adviser of the League of Nations Secretariat, of the consequences that this might have upon its position vis-à-vis the jurisdiction of the Permanent Court, Nicaragua failed to take the one step that would have easily enabled it to be counted beyond question as one of the States that had recognized the compulsory jurisdiction of the Permanent Court of International Justice. Nicaragua has in effect admitted as much.

26. The Court therefore notes that Nicaragua, having failed to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court, was not a party to that treaty. Consequently the Declaration made by Nicaragua in 1929 had not acquired binding force prior to such effect as Article 36, paragraph 5, of the Statute of the International Court of Justice might produce.

27. However, while the declaration had not acquired binding force, it is not disputed that it could have done so, for example at the beginning of 1945, if Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court. The correspondence brought to the Court's attention by the Parties, between the Secretariat of the League of Nations and various Governments including the Government of Nicaragua, leaves no doubt as to the fact that, at any time between the making of Nicaragua's declaration and the day on which the new Court came into existence, if not later, ratification of the Protocol of Signature would have sufficed to transform the content of the 1929 Declaration into a binding commitment ; no one would have asked Nicaragua to make a new declaration. It follows that such a declaration as that made by Nicaragua had a certain potential effect which could be maintained indefinitely. This durability of potential effect flowed from a certain characteristic of Nicaragua's declaration : being made "unconditionally", it was valid for an unlimited period. Had it provided, for example, that it would apply for only five years to disputes arising after its signature, its potential effect would admittedly have disappeared as from 24 September 1934. In sum, Nicaragua's 1929 Declaration was valid at the moment when Nicaragua became a party to the Statute of the new Court ; it had retained its potential effect because Nicaragua, which could have limited the duration of that effect, had expressly refrained from doing so.

28. The characteristics of Nicaragua's declaration have now to be compared with the conditions of applicability of Article 36, paragraph 5, as laid down in that provision. The first condition concerns the relationship between the declarations and the Statute. Article 36, paragraph 5, refrains from stipulating that declarations must have been made by States parties to the Statute of the Permanent Court : it is sufficient for them to have been made "under" (in French, "en application de") Article 36 of that Statute. But those who framed the new text were aware that under that Article, a State could make such a declaration "either when signing or ratifying the Protocol . . . or at a later moment", i.e., that a State could make a declaration when it had not ratified the Protocol of Signature of the Statute, but only signed it. The chosen wording therefore does not exclude but, on the contrary, covers a declaration made in the circumstances of Nicaragua's declaration. Apart from this relationship with the Statute of the Permanent Court, the only condition which declarations have to fulfil is that they should be "still in force" (in English) or "faites pour une durée qui n'est pas encore expirée" (in French). The Parties have devoted much argument to this apparent discrepancy between the two versions, its real meaning and the interpretation which the Court should adopt as correct. Drawing opposite conclusions from the jurisprudence of the Court, as contained in particular in the case concerning the *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, they have expatiated on the respective arguments by which, they allege, it supports their own case.

29. The Court must in the first place observe that this is the first time that it has had to take a position on the question whether a declaration which did not have binding force at the time of the Permanent Court is or is not to be numbered among those to which Article 36, paragraph 5, of the Statute of the International Court of Justice applies. The case of the *Aerial Incident of 27 July 1955* featured quite a different issue – in a nutshell, whether the effect of a declaration that had unquestionably become binding at the time of the Permanent Court could be transposed to the International Court of Justice when the declaration in question had been made by a State which had not been represented at the San Francisco Conference and had not become a party to the Statute of the present Court until long after the extinction of the Permanent Court. In view of this difference in the issues, the Court does not consider that its decision in the *Aerial Incident* case, whatever may be its relevance in other respects, provides any pointers to precise conclusions on the limited point now in issue. The most that could be pointed out on the basis of the discussions surrounding the *Aerial Incident* case is that, at that time, the United States took a particularly broad view of the separability of an Optional-Clause declaration and its institutional foundation by contending that an Optional-Clause declaration (of a binding character) could have outlived by many years the court to which it related. But the present case also involves a problem of separability, since the question to be decided is the extent to which an Optional-Clause declaration (without binding force) can be separated

from the institutional foundation which it ought originally to have possessed, so as to be grafted onto a new institutional foundation.

30. Having thus stressed the novelty of the problem, the Court will refer to the following considerations in order to reach a solution. First, it does not appear possible to reconcile the two versions of Article 36, paragraph 5, by considering that both versions refer to binding declarations. According to this interpretation, upheld by the United States, Article 36, paragraph 5, should be read as if it mentioned "binding" declarations. The French text, in this view, would be the equivalent of the English text, for logically it would imply that declarations *dont la durée n'est pas encore expirée* are solely those which have acquired binding force. The Court, however, considers that it must interpret Article 36, paragraph 5, on the basis of the actual terms used, which do not include the word "binding". According to the *travaux préparatoires* the word "binding" was never suggested; and if it had been suggested for the English text, there is no doubt that the drafters would never have let the French text stand as finally worded. Furthermore, the Court does not consider the French text to imply that *la durée non expirée* (the unexpired period) is that of a commitment of a binding character. It may be granted that, for a period to continue or expire, it is necessary for some legal effect to have come into existence. But this effect does not necessarily have to be of a binding nature. A declaration validly made under Article 36 of the Statute of the Permanent Court had a certain validity which could be preserved or destroyed, and it is perfectly possible to read the French text as implying only this validity.

31. Secondly, the Court cannot but be struck by the fact that the French Delegation at the San Francisco Conference called for the expression "still in force" to be translated, not by "encore en vigueur" but by the term: "pour une durée qui n'est pas encore expirée". In view of the excellent equivalence of the expressions "encore en vigueur" and "still in force", the deliberate choice of the expression "pour une durée qui n'est pas encore expirée" seems to denote an intention to widen the scope of Article 36, paragraph 5, so as to cover declarations which have not acquired binding force. Other interpretations of this proposal are not excluded, but it may be noted that both "encore en vigueur" and "pour une durée qui n'est pas encore expirée" would exclude a declaration, like that of France, which had been binding but which had expired by lapse of time. It can only be said, on the other hand, that the English version does not require (any more than does the French version) that the declarations concerned should have been made by States parties to the Statute of the Permanent Court and does not mention the necessity of declarations having any binding character for the provision to be applicable to them. It is therefore the Court's opinion that the English version in no way expressly excludes a valid

declaration of unexpired duration, made by a State not party to the Protocol of Signature of the Statute of the Permanent Court, and therefore not of a binding character.

32. The Court will therefore, before deciding on its interpretation, have to examine to what extent the general considerations governing the transfer of the powers of the former Court to the new one, and thus serving to define the object and the purpose of the provisions adopted, throw light upon the correct interpretation of the paragraph in question. As the Court has already had occasion to state in the case of the *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, the primary concern of those who drafted the Statute of the present Court was to maintain the greatest possible continuity between it and its predecessor. As the Court then observed:

"the clear intention which inspired Article 36, paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances, to avoid that the creation of a new Court should frustrate progress already achieved" (*I.C.J. Reports 1959*, p. 145).

33. In the present case, the Parties, in their pleadings and in the course of the hearings, have drawn attention to certain statements bearing witness to this general preoccupation; for example the report to his Government of the Chairman of the New Zealand delegation to the San Francisco Conference, who stressed that the primary concern had been "to maintain so far as possible the progress towards compulsory jurisdiction". If, for a number of circumstantial reasons, it seemed necessary to abolish the former Court and to put the new one in its place, at least the delegates to the San Francisco Conference were determined to see that this operation should not result in a step backwards in relation to the progress accomplished towards adopting a system of compulsory jurisdiction. That being so, the question is whether this intention sheds any light upon the present problem of interpretation of Article 36, paragraph 5.

34. In this connection it is undeniable that a declaration by which a State recognizes the compulsory jurisdiction of the Court is "in existence", in the sense given above, and that each such declaration does constitute a certain progress towards extending to the world in general the system of compulsory judicial settlement of international disputes. Admittedly, this progress has not yet taken the concrete form of a commitment having binding force, but nonetheless, it is by no means negligible. There are no grounds for maintaining that those who drafted the Statute meant to go back on this progress and place it in a category in opposition to the progress achieved by declarations having binding force. No doubt their main aim was to safeguard these latter declarations, but the intention to wipe out the progress evidenced by a declaration such as that of Nicaragua would certainly not square well with their general concern. As the Court said in the very similar matter of the already existing field of conventional compulsory jurisdiction, it was "a natural element of this compromise"

(then accepted by comparison with the ideal of universal compulsory jurisdiction) “that the maximum, and not some merely quasi optimum preservation of this field should be aimed at” (*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1964*, p. 32). Furthermore, if the highly experienced drafters of the Statute had had a restrictive intention on this point, in contrast to their overall concern, they would certainly have translated it into a very different formula from the one which they in fact adopted.

35. On the other hand, the logic of a system substituting a new Court for the former one without the cause of compulsory jurisdiction in any way suffering in the process resulted in the ratification of the new Statute having exactly the same effects as the ratification of the Protocol of Signature of the former one would have had, that is to say, in the case of Nicaragua, the step from potential commitment to effective commitment. The general system of devolution from the old Court to the new thus lends support to the interpretation whereby Article 36, paragraph 5, even covers declarations that had not previously acquired binding force. In this connection, it should not be overlooked that Nicaragua was represented at the San Francisco Conference, and duly signed and ratified the Charter of the United Nations. At that time, the consent which it had given in 1929 to the jurisdiction of the Permanent Court had not become fully effective in the absence of ratification of the Protocol of Signature; but taking into account the interpretation given above, the Court may apply to Nicaragua what it stated in the case of the *Aerial Incident of 27 July 1955*:

“Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears.” (*I.C.J. Reports 1959*, p. 142.)

36. This finding as regards the interpretation of Article 36, paragraph 5, must, finally, be compared to the conduct of States and international organizations in regard to this interpretation. In that respect, particular weight must be ascribed to certain official publications, namely the *I.C.J. Yearbook* (since 1946-1947), the *Reports* of the Court to the General Assembly of the United Nations (since 1968) and the annually published collection of *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary*. The Court notes that, ever since they first appeared, all these publications have regularly placed Nicaragua on the list of those States that have recognized the compulsory jurisdiction of the Court by virtue of Article 36, paragraph 5, of the Statute. Even if the *I.C.J. Yearbook* has, in the issue for 1946-1947 and as from the issue for 1955-1956 onwards, contained a note recalling certain facts concerning Nicaragua's ratification of the Protocol of Signature of the Statute of the Permanent Court of International Justice, this publication has never modi-

fied the classification of Nicaragua or the binding character attributed to its 1929 Declaration — indeed the *Yearbooks* list Nicaragua among the States “still bound by” their declarations under Article 36 of the Statute of the Permanent Court (see paragraph 19, above). The same observation is valid for the Secretariat publication *Signatures, Ratifications, Acceptances, Accessions, etc.*, which derived its data, including footnotes, from the *I.C.J. Yearbook*. As for the reports of the Court, they are quite categorical in stating that Nicaragua had accepted compulsory jurisdiction, even if the distinction between acceptances made under Article 36, paragraph 2, and those “deemed” to be such acceptances, is not spelled out.

37. The Court has no intention of assigning these publications any role that would be contrary to their nature but will content itself with noting that they attest a certain interpretation of Article 36, paragraph 5 (whereby that provision would cover the declaration of Nicaragua), and the rejection of an opposite interpretation (which would refuse to classify Nicaragua among the States covered by that Article). Admittedly, this testimony concerns only the result and not the legal reasoning that leads to it. However, the inclusion of Nicaragua in the “List of States which have recognized the compulsory jurisdiction of the International Court of Justice, or which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice”, as from the appearance of the first *I.C.J. Yearbook* (1946-1947), contrasts with its exclusion from the list in the last Report of the Permanent Court of International Justice of “States bound by the [optional] clause”. It is therefore difficult to escape the conclusion that the basis of this innovation was to be found in the possibility that a declaration which, though not of binding character, was still valid, and was so for a period that had not yet expired, permitted the application of Article 36, paragraph 5, so long as the State in question, by ratifying the Statute of the International Court of Justice, provided it with the institutional foundation that it had hitherto lacked. From that moment on, Nicaragua would have become “bound” by its 1929 Declaration, and could, for practical purposes, appropriately be included in the same *Yearbook* list as the States which had been bound even prior to the coming into force of the post-war Statute.

38. The importance of this lies in the significance to be attached to the conduct of the States concerned, which is dependent on the testimony thus furnished by these publications. The point is not that the Court in its administrative capacity took a decision as to Nicaragua's status which would be binding upon it in its judicial capacity, since this clearly could not be so. It is that the listing found appropriate for Nicaragua amounted over the years to a series of attestations which were entirely official and public, and extremely numerous, and ranged over a period of nearly 40 years; and that hence the States concerned — first and foremost, Nicaragua — had every opportunity of accepting or rejecting the thus-proclaimed applicability of Article 36, paragraph 5, to the Nicaraguan Declaration of 1929.

39. Admittedly, Nicaragua itself, according to the information furnished to the Court, did not at any moment explicitly recognize that it was bound by its recognition of the Court's compulsory jurisdiction, but neither did it deny the existence of this undertaking. The Court notes that Nicaragua, even if its conduct in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* was not unambiguous, did not at any time declare that it was not bound by its 1929 Declaration. Having regard to the public and unchanging nature of the official statements concerning Nicaragua's commitment under the Optional-Clause system, the silence of its Government can only be interpreted as an acceptance of the classification thus assigned to it. It cannot be supposed that that Government could have believed that its silence could be tantamount to anything other than acquiescence. Besides, the Court would remark that if proceedings had been instituted against Nicaragua at any time in these recent years, and it had sought to deny that, by the operation of Article 36, paragraph 5, it had recognized the compulsory jurisdiction of the Court, the Court would probably have rejected that argument. But the Court's jurisdiction in regard to a particular State does not depend on whether that State is in the position of an Applicant or a Respondent in the proceedings. If the Court considers that it would have decided that Nicaragua would have been bound in a case in which it was the Respondent, it must conclude that its jurisdiction is identically established in a case where Nicaragua is the Applicant.

40. As for States other than Nicaragua, including those which could be supposed to have the closest interest in that State's legal situation in regard to the Court's jurisdiction, they have never challenged the interpretation to which the publications of the United Nations bear witness and whereby the case of Nicaragua is covered by Article 36, paragraph 5. Such States as themselves publish lists of States bound by the compulsory jurisdiction of the Court have placed Nicaragua on their lists. Of course, the Court is well aware that such national publications simply reproduce those of the United Nations where that particular point is concerned. Nevertheless, it would be difficult to interpret the fact of such reproduction as signifying an objection to the interpretation thus given; on the contrary, this reproduction contributes to the generality of the opinion which appears to have been cherished by States parties to the Statute as regards the applicability to Nicaragua of Article 36, paragraph 5.

41. Finally, what States believe regarding the legal situation of Nicaragua so far as the compulsory jurisdiction of the Court is concerned may emerge from the conclusions drawn by certain governments as regards the possibility of obliging Nicaragua to appear before the Court or of escaping any proceedings it may institute. The Court would therefore recall that in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* Honduras founded its application both on a special agreement, the Washington Agreement, and on Nicaragua's Optional-Clause declaration. It is also difficult for the Court not to consider that the United States letter of 6 April 1984 implies that at that date the United States, like

other States, believed that Nicaragua was bound by the Court's jurisdiction in accordance with the terms of its 1929 Declaration.

42. The Court thus finds that the interpretation whereby the provisions of Article 36, paragraph 5, cover the case of Nicaragua has been confirmed by the subsequent conduct of the parties to the treaty in question, the Statute of the Court. However, the conduct of States which has been considered has been in relation to publications of the Court and of the United Nations Secretariat which, as noted in paragraph 37 above, do not indicate the legal reasoning leading to the conclusion that Nicaragua fell within the category of States to whose declarations Article 36, paragraph 5, applied. The view might have been taken that that paragraph applied because the Nicaraguan telegram of 29 November 1929 in itself constituted ratification of the Protocol of Signature. It should therefore be observed that the conduct of Nicaragua in relation to the publications in question also supports a finding of jurisdiction under Article 36, paragraph 2, of the Statute independently of the interpretation and effect of paragraph 5 of that Article.

43. Nicaragua has in fact also contended that the validity of Nicaragua's recognition of the compulsory jurisdiction of the Court finds an independent basis in the conduct of the Parties. The argument is that Nicaragua's conduct over a period of 38 years unequivocally constitutes consent to be bound by the compulsory jurisdiction of the Court by way of a recognition of the application of Article 36, paragraph 5, of the Statute to the Nicaraguan Declaration of 1929. Likewise the conduct of the United States over a period of 38 years unequivocally constitutes its recognition of the essential validity of the Declaration of Nicaragua of 1929 as a result of the application of Article 36, paragraph 5, of the Statute. As a consequence it was recognized by both Parties that any formal defect in Nicaragua's ratification of the Protocol of Signature of the Statute of the Permanent Court did not in any way affect the essential validity of Nicaragua's consent to the compulsory jurisdiction. The essential validity of the Nicaraguan declaration as an acceptance of the compulsory jurisdiction is confirmed by the evidence of a long series of public documents, by the general opinion of States and by the general opinion of qualified publicists.

44. The United States however objects that this contention of Nicaragua is flatly inconsistent with the Statute of the Court, which provides only for consent to jurisdiction to be manifested in specified ways; an "independent title of jurisdiction, as Nicaragua calls it, is an impossibility". The Statute provides the sole bases on which the Court can exercise jurisdiction, under Articles 36 and 37. In the particular case of Article 36, paragraph 5, the Statutes of the two Courts provide a means for States to express their consent, and Nicaragua did not use them. The United States urges what it describes as policy considerations of fundamental importance: that compulsory jurisdiction, being a major obligation, must be based on the clearest manifestation of the State's intent to accept it; that

Nicaragua's thesis introduces intolerable uncertainty into the system ; and that that thesis entails the risk of consenting to compulsory jurisdiction through silence, with all the harmful consequences that would ensue. The United States also disputes the significance of the publications and conduct on which Nicaragua bases this contention.

45. The Court would first observe that, as regards the requirement of consent as a basis of its jurisdiction, and more particularly as regards the formalities required for that consent to be expressed in accordance with the provisions of Article 36, paragraph 2, of the Statute, the Court has already made known its view in, *inter alia*, the case concerning the *Temple of Preah Vihear*. On that occasion it stated : "The only formality required is the deposit of the acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute." (*I.C.J. Reports 1961*, p. 31.)

46. The Court must enquire whether Nicaragua's particular circumstances afford any reason for it to modify the conclusion it then reached. After all, the reality of Nicaragua's consent to be bound by its 1929 Declaration is, as pointed out above, attested by the absence of any protest against the legal situation ascribed to it by the publications of the Court, the Secretary-General of the United Nations and major States. The question is therefore whether, even if the consent of Nicaragua is real, the Court can decide that it has been given valid expression even on the hypothesis that the 1929 Declaration was without validity, and given that no other declaration has been deposited by Nicaragua since it became a party to the Statute of the International Court of Justice. In this connection the Court notes that Nicaragua's situation has been wholly unique, in that it was the publications of the Court itself (since 1947, the *I.C.J. Yearbook* ; since 1968, the *Reports* to the General Assembly of the United Nations), and those of the Secretary-General (as depository of the declarations under the Statute of the present Court) which affirmed (and still affirm today, for that matter) that Nicaragua had accomplished the formality in question. Hence, if the Court were to object that Nicaragua ought to have made a declaration under Article 36, paragraph 2, it would be penalizing Nicaragua for having attached undue weight to the information given on that point by the Court and the Secretary-General of the United Nations and, in sum, having (on account of the authority of their sponsors) regarded them as more reliable than they really were.

47. The Court therefore recognizes that, so far as the accomplishment of the formality of depositing an optional declaration is concerned, Nicaragua was placed in an exceptional position, since the international organs empowered to handle such declarations declared that the formality in question had been accomplished by Nicaragua. The Court finds that this exceptional situation cannot be without effect on the requirements obtaining as regards the formalities that are indispensable for the consent of a

State to its compulsory jurisdiction to have been validly given. It considers therefore that, having regard to the origin and generality of the statements to the effect that Nicaragua was bound by its 1929 Declaration, it is right to conclude that the constant acquiescence of that State in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and that accordingly Nicaragua is, *vis-à-vis* the United States, a State accepting "the same obligation" under that Article.

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48. The United States, however, further contends that even if Nicaragua is otherwise entitled to invoke against the United States the jurisdiction of the Court under Article 36, paragraphs 2 and 5, of the Statute, Nicaragua's conduct in relation to the United States over the course of many years estops Nicaragua from doing so. Having, it is argued, represented to the United States that it was not itself bound under the system of the Optional Clause, Nicaragua is estopped from invoking compulsory jurisdiction under that clause against the United States. The United States asserts that since 1943 Nicaragua has consistently represented to the United States of America that Nicaragua was not bound by the Optional Clause, and when the occasion arose that this was material to the United States diplomatic activities, the United States relied upon those Nicaraguan representations.

49. The representations by Nicaragua relied on by the United States were as follows. First, in 1943, the United States Ambassador to Nicaragua consulted the Nicaraguan Foreign Minister on the question whether the Protocol of Signature of the Statute of the Permanent Court had been ratified by Nicaragua. According to a despatch from the Ambassador to Washington, a decree of July 1935 signed by the President of Nicaragua, mentioning the approval of the ratification by the Senate and Chamber of Deputies, was traced, as was a copy of the telegram to the Secretariat of the League of Nations dated 29 November 1939 (see paragraph 16, above). The decree stated that it was to become effective on the date of its publication in *La Gaceta*. The Ambassador informed his Government that :

"The Foreign Minister informs me that the decree was never published in *La Gaceta*. He also declared that there is no record to the instrument of ratification having been transmitted to Geneva. It would appear that, while appropriate legislative action was taken in Nicaragua to approve adherence to the Protocol, Nicaragua is not legally bound thereby, in as much as it did not deposit its official document of ratification with the League of Nations."

According to the United States, the United States and Nicaragua could

only have understood at that point in time that Nicaragua was not bound by the Optional Clause, and that understanding never changed.

50. Secondly, in 1955-1958 there was diplomatic contact between Honduras, Nicaragua and the United States over the dispute which was eventually determined by the Court as the case of the *Arbitral Award Made by the King of Spain on 23 December 1906* (*I.C.J. Reports 1960*, p. 192). One of the questions then under examination was whether Honduras would be entitled to institute proceedings against Nicaragua in reliance upon the 1929 Declaration and Article 36, paragraph 5, of the Statute, and in this connection the Government of Honduras requested the good offices of the Government of the United States. In a conversation between the Nicaraguan Ambassador in Washington and United States officials on 21 December 1955, "reference was made to the fact that the matter had not been previously referred to the Court because Nicaragua had never agreed to submit to compulsory jurisdiction", and the Ambassador was recorded to have "indicated that an agreement between the two countries would have to be reached to overcome this difficulty". The United States interprets this as a statement of Nicaragua's understanding that it was not bound by the Optional Clause. Further, on 2 March 1956 the Ambassador is alleged to have observed that there was

"some doubt as to whether Nicaragua would be officially obligated to submit to the International Court because an instrument of ratification of the Court's jurisdiction was never sent".

It is contended that the United States relied on these representations by Nicaragua; the United States has produced documents to support the claims that the entire premise of United States diplomatic efforts was that Nicaragua was not a party to the Optional Clause, and observes that in the eventual proceedings before the Court between Nicaragua and Honduras, Nicaragua manifested its hostility to the compulsory jurisdiction of the Court. Nicaragua has made no direct reply to the United States argument of estoppel, which was only fully developed during the oral proceedings; however, the position of Nicaragua as to its own conduct is, as indicated above, that so far from having represented that it was not bound by the Optional Clause, on the contrary its conduct unequivocally constituted consent to be so bound.

51. For the same reason, the Court does not need to deal at length with the contention based on estoppel. The Court has found that the conduct of Nicaragua, having regard to the very particular circumstances in which it was placed, was such as to evince its consent to be bound in such a way as to constitute a valid mode of acceptance of jurisdiction (paragraph 47, above). It is thus evident that the Court cannot regard the information obtained by the United States in 1943, or the doubts expressed in diplomatic contacts in 1955, as sufficient to overturn that conclusion, let alone to support an estoppel. Nicaragua's contention that since 1946 it has consistently maintained that it is subject to the jurisdiction of the Court, is

supported by substantial evidence. Furthermore, as the Court pointed out in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 26), estoppel may be inferred from the conduct, declarations and the like made by a State which not only clearly and consistently evinced acceptance by that State of a particular régime, but also had caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some prejudice. The Court cannot regard Nicaragua's reliance on the optional clause as in any way contrary to good faith or equity: nor can Nicaragua be taken to come within the criterion of the *North Sea Continental Shelf* case, and the invocation of estoppel by the United States of America cannot be said to apply to it.

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52. The acceptance of jurisdiction by the United States which is relied on by Nicaragua is, as noted above, that dated 14 August 1946. The United States contends however that effect must also be given to the "1984 notification" — the declaration deposited with the Secretary-General of the United Nations on 6 April 1984. It is conceded by Nicaragua that if this declaration is effective as a modification or termination of the Declaration of 14 August 1946, and valid as against Nicaragua at the date of its filing of the Application instituting the present proceedings (9 April 1984), then the Court is without jurisdiction to entertain those proceedings, at least under Article 36, paragraphs 2 and 5, of the Statute. It is however contended by Nicaragua that the 1984 notification is ineffective because international law provides no basis for unilateral modification of declarations made under Article 36 of the Statute of the Court, unless a right to do so has been expressly reserved.

53. The United States insists that the effect of the 1984 notification was a modification and not a termination of its 1946 Declaration. It argues that, notwithstanding the fact that its 1946 Declaration did not expressly reserve a right of modification (as do the declarations made under Article 36 by a number of other States), the 1984 notification effected a valid modification of the 1946 Declaration temporarily suspending the consent of the United States to the adjudication of the claims of Nicaragua. For the United States, declarations under Article 36 are *sui generis*, are not treaties, and are not governed by the law of treaties, and States have the sovereign right to qualify an acceptance of the Court's compulsory jurisdiction, which is an inherent feature of the Optional-Clause system as reflected in, and developed by, State practice. It is suggested that the Court has recognized the existence of an inherent, extra-statutory, right to modify declarations in any manner not inconsistent with the Statute at any time until the date of filing of an Application. The United States also draws attention to the fact that its declaration dates from 1946, since when, it

asserts, fundamental changes have occurred in State practice under the Optional Clause, and argues that to deny a right of modification to a State which had, in such an older declaration, not expressly reserved such a right would be inequitable and unjustified in the light of those changes in State practice.

54. Nicaragua argues further, in the alternative, that the 1984 notification may be construed as a purported termination of the United States Declaration of 1946 and, in effect, the substitution of a new declaration, and that such an attempt at termination is likewise ineffective. As noted in paragraph 13 above, the 1946 Declaration was to remain in force "for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration". Accordingly, if the 1984 notification constituted a termination of the 1946 Declaration (whether or not accompanied in effect by the making of a revised declaration) it could only take effect on 6 October 1984, and was as yet ineffective when the Application of Nicaragua was filed on 9 April 1984. Both Parties apparently recognize that a modification of a declaration which only takes effect after the Court has been validly seized does not affect the Court's jurisdiction: as the Court found in the *Notrebohm* case,

"Once the Court has been regularly seized, the Court must exercise its powers, as these are defined in the Statute. After that, the expiry of the period fixed for one of the Declarations on which the Application was founded is an event which is unrelated to the exercise of the powers conferred on the Court by the Statute, which the Court must exercise whenever it has been regularly seized and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible" (*I.C.J. Reports 1953*, p. 122).

and the same reasoning applies to a supervening withdrawal or modification of a declaration.

55. The first answer given by the United States to this contention of Nicaragua is that the 1984 notification was, on its face, not a "termination", and the six months' notice proviso was accordingly inapplicable. However, in the view of the United States, even if it be assumed for the sake of argument that the six months' notice proviso was applicable to the 1984 notification, the modification made by that letter was effective vis-à-vis Nicaragua, even if not effective *erga omnes*. As already explained, one contention of the United States in relation to its own Declaration of 1946 is that States have a sovereign, inherent, extra-statutory right to modify at any time declarations made under Article 36 of the Statute in any manner not inconsistent with the Statute (paragraph 53, above). Similarly Nicaragua's 1929 Declaration, being indefinite in duration, not unlimited, is subject to a right of immediate termination, without previous notice by Nicaragua. The United States, on the other hand, while enjoying the inherent right of unilateral modification of its declaration, has bound itself

by the proviso in its 1946 Declaration to terminate that declaration only on six months' notice. On this basis, the United States argues that Nicaragua has not accepted "the same obligation" (for the purposes of Art. 36, para. 2, of the Statute) as the United States six months' notice proviso, and may not therefore oppose that proviso as against the United States. According to the United States contention, the principles of reciprocity, mutuality and equality of States before the Court permit the United States to exercise the right of termination with the immediate effect implicitly enjoyed by Nicaragua, regardless of the six months' notice proviso in the United States Declaration. The United States does not claim on this ground to exercise such a right of immediate termination *erga omnes*, but it does claim to exercise it vis-à-vis Nicaragua.

56. Nicaragua first denies that declarations under Article 36 are always inherently terminable; the general view is said to be that declarations which contain no provision for termination continue in force indefinitely, in contractual terms; the question how far they may be terminable is governed by the principles of the law of treaties applicable to consensual legal relations arising within the system of the Optional Clause. Nicaragua concludes that its declaration was made without limit of time, and that there can be no legal justification for the view that it is subject to unilateral modification. The thesis that Nicaragua has not accepted "the same obligation" as the United States is, Nicaragua suggests, completely baseless. So far as reciprocity is concerned, Nicaragua concludes from its examination of the views of publicists that reciprocity is *ex-hypothesi* inapplicable to time-limits, as opposed to express reservations reserving the power to modify or terminate declarations, and that in respect of such express reservations reciprocity can only operate when a specific act of modification or termination is notified by virtue of the express reservation.

57. The terms of the 1984 notification, introducing substantial changes in the United States Declaration of Acceptance of 1946, have been quoted above; they constitute an important element for the development of the Court's reasoning. The 1984 notification has two salient aspects: on the one hand it states that the 1946 Declaration of acceptance shall not apply to disputes with any Central American State or arising out of or related to events in Central America; on the other hand it states that it is to take effect immediately, notwithstanding the terms of the 1946 Declaration, and is to remain in force for two years.

58. The argument between the Parties as to whether the 1984 notification should be categorized as a modification or as a termination of the 1946 Declaration appears in fact to be without consequence for the purpose of this Judgment. The truth is that it is intended to secure a partial and temporary termination, namely to exempt, with immediate effect, the United States from the obligation to subject itself to the Court's jurisdiction with regard to any application concerning disputes with Central

American States, and disputes arising out of events in Central America. Counsel for the United States during the hearings claimed that the notification was equally valid against Nicaragua whether it was regarded as a "modification" or as a "termination" of the Acceptance Declaration.

59. Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations. In particular, it may limit its effect to disputes arising after a certain date ; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it. However, the unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases. In the *Nuclear Tests* cases the Court expressed its position on this point very clearly :

"It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration." (*I.C.J. Reports 1974*, p. 267, para. 43 ; p. 472, para. 46.)

60. In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration. In the establishment of this network of engagements, which constitutes the Optional-Clause system, the principle of good faith plays an important role ; the Court has emphasized the need in international relations for respect for good faith and confidence in particularly unambiguous terms, also in the *Nuclear Tests* cases :

"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declarations. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected." (*Ibid.*, p. 268, para. 46 ; p. 473, para. 49.)

61. The most important question relating to the effect of the 1984 notification is whether the United States was free to disregard the clause of six months' notice which, freely and by its own choice, it had appended to its 1946 Declaration. In so doing the United States entered into an obligation which is binding upon it vis-à-vis other States parties to the Optional-Clause system. Although the United States retained the right to modify the contents of the 1946 Declaration or to terminate it, a power which is inherent in any unilateral act of a State, it has, nevertheless assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice.

62. The United States has argued that the Nicaraguan 1929 Declaration, being of undefined duration, is liable to immediate termination, without previous notice, and that therefore Nicaragua has not accepted "the same obligation" as itself for the purposes of Article 36, paragraph 2, and consequently may not rely on the six months' notice proviso against the United States. The Court does not however consider that this argument entitles the United States validly to act in non-application of the time-limit proviso included in the 1946 Declaration. The notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration, whatever its scope, limitations or conditions. As the Court observed in the *Interhandel* case :

"Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other party, Switzerland, has not included in its own Declaration." (*I.C.J. Reports 1959*, p. 23.)

The maintenance in force of the United States Declaration for six months after notice of termination is a positive undertaking, flowing from the time-limit clause, but the Nicaraguan Declaration contains no express restriction at all. It is therefore clear that the United States is not in a position to invoke reciprocity as a basis for its action in making the 1984 notification which purported to modify the content of the 1946 Declaration. On the contrary it is Nicaragua that can invoke the six months' notice against the United States — not of course on the basis of reciprocity, but because it is an undertaking which is an integral part of the instrument that contains it.

63. Moreover, since the United States purported to act on 6 April 1984 in such a way as to modify its 1946 Declaration with sufficiently immediate effect to bar an Application filed on 9 April 1984, it would be necessary, if

reciprocity is to be relied on, for the Nicaraguan Declaration to be terminable with immediate effect. But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity. Since Nicaragua has in fact not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that from 6 to 9 April would not amount to a "reasonable time".

64. The Court would also recall that in previous cases in which it has had to examine the reciprocal effect of declarations made under the Optional Clause, it has determined whether or not the "same obligation" was in existence at the moment of seising of the Court, by comparing the effect of the provisions, in particular the reservations, of the two declarations at that moment. The Court is not convinced that it would be appropriate, or possible, to try to determine whether a State against which proceedings had not yet been instituted could rely on a provision in another State's declaration to terminate or modify its obligations before the Court was seised. The United States argument attributes to the concept of reciprocity, as embodied in Article 36 of the Statute, especially in paragraphs 2 and 3, a meaning that goes beyond the way in which it has been interpreted by the Court, according to its consistent jurisprudence. That jurisprudence supports the view that a determination of the existence of the "same obligation" requires the presence of two parties to a case, and a defined issue between them, which conditions can only be satisfied when proceedings have been instituted. In the case of *Right of Passage over Indian Territory*, the Court observed that

"when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations" (*I.C.J. Reports 1957*, p. 143).

"It is not necessary that the 'same obligation' should be irrevocably defined at the time of the deposit of the Declaration of Acceptance for the entire period of its duration. That expression means no more than that, as between States adhering to the Optional Clause, each and all of them are bound by such identical obligations as may exist at any time during which the Acceptance is mutually binding." (*Ibid.*, p. 144.)

The coincidence or interrelation of those obligations thus remain in a state of flux until the moment of the filing of an application instituting proceedings. The Court has then to ascertain whether, at that moment, the two

States accepted "the same obligation" in relation to the subject-matter of the proceedings; the possibility that, prior to that moment, the one enjoyed a wider right to modify its obligation than did the other, is without incidence on the question.

65. In sum, the six months' notice clause forms an important integral part of the United States Declaration and it is a condition that must be complied with in case of either termination or modification. Consequently, the 1984 notification, in the present case, cannot override the obligation of the United States to submit to the compulsory jurisdiction of the Court vis-à-vis Nicaragua, a State accepting the same obligation.

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66. The conclusion just reached renders it unnecessary for the Court to pass upon a further reason advanced by Nicaragua for the ineffectiveness of the 1984 notification. An acceptance of the compulsory jurisdiction of the Court, governed in many respects by the principles of treaty law, cannot, Nicaragua argues, be contracted or varied by a mere letter from the United States Secretary of State. Drawing attention to the provisions of the Constitution of the United States as to the power of making treaties, Nicaragua contends that the 1984 notification is, as a matter of United States law, a nullity, and is equally invalid under the principles of the law of treaties, because it was issued in manifest violation of an internal rule of law of fundamental importance (cf. Art. 46 of the Vienna Convention on the Law of Treaties). However, since the Court has found that, even assuming that the 1984 notification is otherwise valid and effective, its operation remains subject to the six months' notice stipulated in 1946, and hence it is inapplicable in this case, the question of the effect of internal constitutional procedures on the international validity of the notification does not have to be determined.

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67. The question remains to be resolved whether the United States Declaration of 1946, though not suspended in its effects vis-à-vis Nicaragua by the 1984 notification, constitutes the necessary consent of the United States to the jurisdiction of the Court in the present case, taking into account the reservations which were attached to the declaration. Specifically, the United States has invoked proviso (c) to that declaration, which provides that the United States acceptance of the Court's compulsory jurisdiction shall not extend to

"disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before

the Court, or (2) the United States of America specially agrees to jurisdiction”.

This reservation will be referred to for convenience as the “multilateral treaty reservation”. Of the two remaining provisos to the declaration, it has not been suggested that proviso (a), referring to disputes the solution of which is entrusted to other tribunals, has any relevance to the present case. As for proviso (b), excluding jurisdiction over “disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America”, the United States has informed the Court that it has determined not to invoke this proviso, but “without prejudice to the rights of the United States under that proviso in relation to any subsequent pleadings, proceedings, or cases before this Court”.

68. The United States points out that Nicaragua relies in its Application on four multilateral treaties, namely the Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on Rights and Duties of States of 26 December 1933, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928. In so far as the dispute brought before the Court is thus one “arising under” those multilateral treaties, since the United States has not specially agreed to jurisdiction here, the Court may, it is claimed, exercise jurisdiction only if all treaty parties affected by a prospective decision of the Court are also parties to the case. The United States explains the rationale of its multilateral treaty reservation as being that it protects the United States and third States from the inherently prejudicial effects of partial adjudication of complex multiparty disputes. Emphasizing that the reservation speaks only of States “affected by” a decision, and not of States having a legal right or interest in the proceedings, the United States identifies, as States parties to the four multilateral treaties above mentioned which would be “affected”, in a legal and practical sense, by adjudication of the claims submitted to the Court, Nicaragua’s three Central American neighbours, Honduras, Costa Rica and El Salvador.

69. The United States recognizes that the multilateral treaty reservation applies in terms only to “disputes arising under a multilateral treaty”, and notes that Nicaragua in its Application asserts also that the United States has “violated fundamental rules of general and customary international law”. However, it is nonetheless the submission of the United States that

all the claims set forth in Nicaragua’s Application are outside the jurisdiction of the Court. According to the argument of the United States, Nicaragua’s claims styled as violations of general and customary international law merely restate or paraphrase its claims and allegations based expressly on the multilateral treaties mentioned above, and Nicaragua in its Memorial itself states that its “fundamental contention” is that the conduct of the United States is a violation of the United Nations Charter and the Charter of the Organization of American States. The evidence of customary law offered by Nicaragua consists of General Assembly resolutions that merely reiterate or elucidate the United Nations Charter; nor can the Court determine the merits of Nicaragua’s claims formulated under customary and general international law without interpreting and applying the United Nations Charter and the Organization of American States Charter, and since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all Nicaragua’s claims.

70. Nicaragua on the other hand contends that if the multilateral treaty reservation is given its correct interpretation, taking into account in particular the *travaux préparatoires* leading to the insertion by the United States Senate of the reservation into the draft text of the 1946 Declaration, the reservation cannot preclude jurisdiction over any part of Nicaragua’s Application. According to Nicaragua, the record demonstrates that the reservation is pure surplusage and does not impose any limitation on acceptance of compulsory jurisdiction by the United States. The amendment whereby the reservation was introduced was conceived, intended and enacted to deal with a specific situation: a multiparty suit against the United States that included parties that had not accepted the Court’s compulsory jurisdiction. Nicaragua contends, not that the reservation is a nullity, but that when its meaning is properly understood, it turns out to be redundant. The United States interpretation of the reservation finds no support, according to Nicaragua, in its legislative history, and would establish a thoroughly unworkable standard inasmuch as it would be necessary to ascertain in what circumstances a State not party to a case should be deemed “affected” by the decision which is yet to be taken by the Court. Nicaragua argues that the supposed interests of those States that the United States alleges might be affected by a decision in this case are either non-existent or plainly beyond the scope of any such decision, and that the communications sent by those States to the Court fail to establish that they would be so affected.

71. Furthermore, Nicaragua denies that its claims based on customary law are no more than paraphrases of its allegations of violation of the United Nations Charter, and emphasizes that the same facts may justify invocation of distinct causes of action. Specifically, the provisions of the United Nations Charter relating to the use of force by States, while they may still rank as provisions of a treaty for certain purposes, are now within

the realm of general international law and their application is not a question exclusively of interpreting a multilateral treaty. The law relating to the use of force is not contained wholly in the Charter, and in the practice of States claims of State responsibility involving violence may be and frequently are formulated without relying on the Charter. Accordingly, Nicaragua submits that the multilateral treaty reservation, even if it has any relevance or validity, has no application to the claims of Nicaragua based upon customary international law.

72. The multilateral treaty reservation in the United States Declaration has some obscure aspects, which have been the subject of comment since its making in 1946. There are two interpretations of the need for the presence of the parties to the multilateral treaties concerned in the proceedings before the Court as a condition for the validity of the acceptance of the compulsory jurisdiction by the United States. It is not clear whether what are "affected", according to the terms of the proviso, are the treaties themselves or the parties to them. Similar reservations to be found in certain other declarations of acceptance, such as those of India, El Salvador and the Philippines, refer clearly to "all parties" to the treaties. The phrase "all parties to the treaty affected by the decision" is at the centre of the present doubts. The United States interprets the reservation in the present case as referring to the States parties affected by the decision of the Court, merely mentioning the alternative interpretation, whereby it is the treaty which is "affected", so that all parties to the treaty would have to be before the Court, as "an *a fortiori* case". This latter interpretation need not therefore be considered. The argument of the United States relates specifically to El Salvador, Honduras and Costa Rica, the neighbour States of Nicaragua, which allegedly would be affected by the decision of the Court.

73. It may first be noted that the multilateral treaty reservation could not bar adjudication by the Court of all Nicaragua's claims, because Nicaragua, in its Application, does not confine those claims only to violations of the four multilateral conventions referred to above (paragraph 68). On the contrary, Nicaragua invokes a number of principles of customary and general international law that, according to the Application, have been violated by the United States. The Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated. Therefore, since

the claim before the Court in this case is not confined to violation of the multilateral conventional provisions invoked, it would not in any event be barred by the multilateral treaty reservation in the United States 1946 Declaration.

74. The Court would observe, further, that all three States have made declarations of acceptance of the compulsory jurisdiction of the Court, and are free, at any time, to come before the Court, on the basis of Article 36, paragraph 2, with an application instituting proceedings against Nicaragua – a State which is also bound by the compulsory jurisdiction of the Court by an unconditional declaration without limit of duration –, if they should find that they might be affected by the future decision of the Court. Moreover, these States are also free to resort to the incidental procedures of intervention under Articles 62 and 63 of the Statute, to the second of which El Salvador has already unsuccessfully resorted in the jurisdictional phase of the proceedings, but to which it may revert in the merits phase of the case. There is therefore no question of these States being defenceless against any consequences that may arise out of adjudication by the Court, or of their needing the protection of the multilateral treaty reservation of the United States.

75. The United States Declaration uses the word "affected", without making it clear who is to determine whether the States referred to are, or are not, affected. The States themselves would have the choice of either instituting proceedings or intervening for the protection of their interests, in so far as these are not already protected by Article 59 of the Statute. As for the Court, it is only when the general lines of the judgment to be given become clear that the States "affected" could be identified. By way of example we may take the hypothesis that if the Court were to decide to reject the Application of Nicaragua on the facts, there would be no third State's claim to be affected. Certainly the determination of the States "affected" could not be left to the parties but must be made by the Court.

76. At any rate, this is a question concerning matters of substance relating to the merits of the case: obviously the question of what States may be "affected" by the decision on the merits is not in itself a jurisdictional problem. The present phase of examination of jurisdictional questions was opened by the Court itself by its Order of 10 May 1984, not by a formal preliminary objection submitted by the United States; but it is appropriate to consider the grounds put forward by the United States for alleged lack of jurisdiction in the light of the procedural provisions for such objections. That being so, and since the procedural technique formerly available of joinder of preliminary objections to the merits has been done away with since the 1972 revision of the Rules of Court, the Court has no choice but to avail itself of Article 79, paragraph 7, of the present Rules of Court, and declare that the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance does not possess, in the circumstances of the case, an exclusively preliminary character, and that consequently it does not constitute an obstacle for the Court

to entertain the proceedings instituted by Nicaragua under the Application of 9 April 1984.

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77. It is in view of this finding on the United States multilateral treaty reservation that the Court has to turn to the other ground of jurisdiction relied on by Nicaragua, even though it is *prima facie* narrower in scope than the jurisdiction deriving from the declarations of the two Parties under the Optional Clause. As noted in paragraphs 1 and 12 above, Nicaragua in its Application relies on the declarations of the Parties accepting the compulsory jurisdiction of the Court in order to found jurisdiction, but in its Memorial it invokes also a 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States as a complementary foundation for the Court's jurisdiction. Since the multilateral treaty reservation obviously does not affect the jurisdiction of the Court under the 1956 Treaty, it is appropriate to ascertain the existence of such jurisdiction, limited as it is.

78. The United States objects to this invocation of a jurisdictional basis not specified in the Application instituting proceedings : it argues that in proceedings instituted by means of an application, the jurisdiction of the Court is founded upon the legal grounds specified in that application. An Applicant is not permitted, in the view of the United States, to assert in subsequent pleadings jurisdictional grounds of which it was presumably aware at the time it filed its Application. While Nicaragua in its Application purported to reserve the right to amend that Application, and invokes that reservation to justify adding an alternative jurisdictional basis, the United States contends that it is ineffective, as it cannot alter the requirements of the Statute and Rules of Court.

79. Nicaragua has not advanced any arguments to refute the United States contention that the belated invocation of the 1956 Treaty is impermissible. During the oral proceedings the Agent of Nicaragua merely explained that in order to respect the Court's indications regarding the necessity of being as concise as possible, Nicaragua had omitted from the oral arguments presented on its behalf a number of arguments developed in the Memorial, and still asserted by Nicaragua. The Agent stated that Nicaragua does maintain that the 1956 Treaty constitutes a "subsidiary basis" for the Court's jurisdiction in the present proceedings, and the final submissions of Nicaragua incorporated by reference Submission D in the Memorial of Nicaragua, asserting jurisdiction under the Treaty.

80. The Court considers that the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial. Since the Court must always be satisfied that it has jurisdiction before proceeding to

examine the merits of a case, it is certainly desirable that "the legal grounds upon which the jurisdiction of the Court is said to be based" should be indicated at an early stage in the proceedings, and Article 38 of the Rules of Court therefore provides for these to be specified "as far as possible" in the application. An additional ground of jurisdiction may however be brought to the Court's attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis (*Certain Norwegian Loans, I.C.J. Reports 1957*, p. 25), and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character (*Société Commerciale de Belgique, P.C.I.J., Series A/B, No. 78*, p. 173). Both these conditions are satisfied in the present case.

81. Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua, signed at Managua on 21 January 1956, reads as follows :

"Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means."

The treaty entered into force on 24 May 1958 on exchange of ratifications ; it was registered with the Secretariat of the United Nations by the United States on 11 July 1960. The provisions of Article XXIV, paragraph 2, are in terms which are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court in the absence of agreement to employ some other pacific means of settlement (cf. *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 27, para. 52). In the present case, the United States does not deny either that the Treaty is in force, or that Article XXIV is in general capable of conferring jurisdiction on the Court. It contends however that if the basis of jurisdiction is limited to the Treaty, since Nicaragua's Application presents no claims of any violations of it, there are no claims properly before the Court for adjudication. In order to establish the Court's jurisdiction over the present dispute under the Treaty, Nicaragua must establish a reasonable connection between the Treaty and the claims submitted to the Court ; but according to the United States, Nicaragua cannot establish such a connection. Furthermore, the United States has drawn attention to the reference in Article XXIV to disputes "not satisfactorily adjusted by diplomacy", and argues that an attempt so to adjust the dispute is thus a prerequisite of its submission to the Court. Since, according to the United States, Nicaragua has never even raised in negotiations with the United States the application or interpretation of the Treaty to any of the factual or legal allegations in its Application, Nicaragua has

failed to satisfy the Treaty's own terms for invoking the compromissory clause.

82. Nicaragua in its Memorial submits that the 1956 Treaty has been and was being violated by the military and paramilitary activities of the United States in and against Nicaragua, as described in the Application ; specifically, it is submitted that these activities directly violate the following Articles :

*Article XIX* : providing for freedom of commerce and navigation, and for vessels of either party to have liberty "to come with their cargoes to all ports, places and waters of such other party open to foreign commerce and navigation", and to be accorded national treatment and most-favored-nation treatment within those ports, places and waters.

*Article XIV* : forbidding the imposition of restrictions or prohibitions on the importation of any product of the other party, or on the exportation of any product to the territories of the other party.

*Article XVII* : forbidding any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either party.

*Article XX* : providing for freedom of transit through the territories of each party.

*Article I* : providing that each party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other party.

83. Taking into account these Articles of the Treaty of 1956, particularly the provision in, *inter alia*, Article XIX, for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, *inter alia*, as to the "interpretation or application" of the Treaty. That dispute is also clearly one which is not "satisfactorily adjusted by diplomacy" within the meaning of Article XXIV of the 1956 Treaty (cf. *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, pp. 26-28, paras. 50 to 54). In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted ; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceed-

ings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed,

"the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14*).

Accordingly, the Court finds that, to the extent that the claims in Nicaragua's Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 described in paragraph 82 above, the Court has jurisdiction under that Treaty to entertain such claims.

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84. The Court now turns to the question of the admissibility of the Application of Nicaragua. The United States of America contended in its Counter-Memorial that Nicaragua's Application is inadmissible on five separate grounds, each of which, it is said, is sufficient to establish such inadmissibility, whether considered as a legal bar to adjudication or as "a matter requiring the exercise of prudential discretion in the interest of the integrity of the judicial function". Some of these grounds have in fact been presented in terms suggesting that they are matters of competence or jurisdiction rather than admissibility, but it does not appear to be of critical importance how they are classified in this respect. These grounds will now be examined ; but for the sake of clarity it will first be convenient to recall briefly what are the allegations of Nicaragua upon which it bases its claims against the United States.

85. In its Application instituting proceedings, Nicaragua asserts that :

"The United States of America is using military force against Nicaragua and intervening in Nicaragua's internal affairs, in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law. The United States has created an 'army' of more than 10,000 mercenaries ... installed them in more than ten base camps in Honduras along the border with Nicaragua, trained them, paid them, supplied them with arms, ammunition, food and medical supplies, and directed their attacks against human and economic targets inside Nicaragua".

and that Nicaragua has already suffered and is now suffering grievous consequences as a result of these activities. The purpose of these activities is claimed to be

"to harass and destabilize the Government of Nicaragua so that ultimately it will be overthrown, or, at a minimum, compelled to change those of its domestic and foreign policies that displease the United States".

86. The first ground of inadmissibility relied on by the United States is that Nicaragua has failed to bring before the Court parties whose presence and participation is necessary for the rights of those parties to be protected and for the adjudication of the issues raised in the Application. The United States first asserts that adjudication of Nicaragua's claim would necessarily implicate the rights and obligations of other States, in particular those of Honduras, since it is alleged that Honduras has allowed its territory to be used as a staging ground for unlawful uses of force against Nicaragua, and the adjudication of Nicaragua's claims would necessarily involve the adjudication of the rights of third States with respect to measures taken to protect themselves, in accordance with Article 51 of the United Nations Charter, against unlawful uses of force employed, according to the United States, by Nicaragua. Secondly, it is claimed by the United States that it is fundamental to the jurisprudence of the Court that it cannot determine the rights and obligations of States without their express consent or participation in the proceedings before the Court. Nicaragua questions whether the practice of the Court supports the contention that a case cannot be allowed to go forward in the absence of "indispensable parties", and emphasizes that in the present proceedings Nicaragua asserts claims against the United States only, and not against any absent State, so that the Court is not required to exercise jurisdiction over any such State. Nicaragua's Application does not put in issue the right of a third State to receive military or economic assistance from the United States (or from any other source). As another basis for the indispensable status of third States, the United States contends that facts concerning relevant activities by or against them may not be in the possession or control of a Party. Nicaragua refers to the powers of the Court under Article 44 of the Statute and Article 66 of the Rules of Court, and observes that it would be in the third States' interest to provide the United States with factual material under their control.

87. This contention was already raised by the United States at the stage of the proceedings on the request for provisional measures when it argued that

"the other States of Central America have stated their view that Nicaragua's request for the indication of provisional measures directly implicates their rights and interests, and that an indication of such measures would interfere with the Contadora negotiations. These other Central American States are indispensable parties in whose absence this Court cannot properly proceed." (*I.C.J. Reports 1984*, p. 184, para. 35.)

The United States then referred to communications addressed to the Court by the Governments of Costa Rica and El Salvador, and a telex message to the United Nations Secretary-General addressed by the Government of Honduras which, according to the United States, "make it quite clear that Nicaragua's claims are inextricably linked to the rights and interests of

those other States", and added "Any decision to indicate the interim measures requested, or a decision on the merits, would necessarily affect the rights of States not party to the proceedings" (*ibid.*). It should be pointed out, however, that in none of the communications from the three States mentioned by the United States was there any indication of an intention to intervene in the proceedings before the Court between Nicaragua and the United States of America, and one (Costa Rica) made it abundantly clear that it was not to be regarded as indicating such an intention. At a later date El Salvador did of course endeavour to intervene.

88. There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning *Monetary Gold Removed from Rome in 1943*, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings "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). Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated (paragraph 74, above) other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an "indispensable parties" rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings.

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89. Secondly, the United States regards the Application as inadmissible because each of Nicaragua's allegations constitutes no more than a reformulation and restatement of a single fundamental claim, that the United States is engaged in an unlawful use of armed force, or breach of the peace, or acts of aggression against Nicaragua, a matter which is committed by the Charter and by practice to the competence of other organs, in particular the United Nations Security Council. All allegations of this kind are confided to the political organs of the Organization for consideration and determination; the United States quotes Article 24 of the Charter, which confers upon the Security Council "primary responsibility for the maintenance of international peace and security". The provisions of the Charter

dealing with the ongoing use of armed force contain no recognition of the possibility of settlement by judicial, as opposed to political, means. Under Article 52 of the Charter there is also a commitment of responsibility for the maintenance of international peace and security to regional agencies and arrangements, and in the view of the United States the Contadora process is precisely the sort of regional arrangement or agency that Article 52 contemplates.

90. Nicaragua contends that the United States argument fails to take account of the fundamental distinction between Article 2, paragraph 4, of the Charter which defines a legal obligation to refrain from the threat or use of force, and Article 39, which establishes a political process. The responsibility of the Security Council under Article 24 of the Charter for the maintenance of international peace and security is "primary", not exclusive. Until the Security Council makes a determination under Article 39, a dispute remains to be dealt with by the methods of peaceful settlement provided under Article 33, including judicial settlement; and even after a determination under Article 39, there is no necessary inconsistency between Security Council action and adjudication by the Court. From a juridical standpoint, the decisions of the Court and the actions of the Security Council are entirely separate.

91. It will be convenient to deal with this alleged ground of inadmissibility together with the third ground advanced by the United States namely that the Court should hold the Application of Nicaragua to be inadmissible in view of the subject-matter of the Application and the position of the Court within the United Nations system, including the impact of proceedings before the Court on the ongoing exercise of the "inherent right of individual or collective self-defence" under Article 51 of the Charter. This is, it is argued, a reason why the Court may not properly exercise "subject-matter jurisdiction" over Nicaragua's claims. Under this head, the United States repeats its contention that the Nicaraguan Application requires the Court to determine that the activities complained of constitute a threat to the peace, a breach of the peace, or an act of aggression, and proceeds to demonstrate that the political organs of the United Nations, to which such matters are entrusted by the Charter, have acted, and are acting, in respect of virtually identical claims placed before them by Nicaragua. The United States points to the approach made by Nicaragua to the Security Council on 4 April 1984, a few days before the institution of the present proceedings; the draft resolution then presented, corresponding to the claims submitted by Nicaragua to the Court, failed to achieve the requisite majority under Article 27, paragraph 3, of the Charter. However, this fact, it is argued, and the perceived likelihood that similar claims in future would fail to secure the required majority, does not vest the Court with subject-matter jurisdiction over the Application. Since Nicaragua's Application in effect asks the Court for a judgment in all material respects identical to the decision which the Security Council did not take, it amounts to an appeal to the Court from an adverse consid-

eration in the Security Council. Furthermore, in order to reach a determination on what amounts to a claim of aggression the Court would have to decide whether the actions of the United States, and the other States not before the Court, are or are not unlawful: more specifically, it would have to decide on the application of Article 51 of the Charter, concerning the right of self-defence. Any such action by the Court cannot be reconciled with the terms of Article 51, which provides a role in such matters only for the Security Council. Nor would it be only in case of a decision by the Court that the inherent right of self-defence would be impaired: the fact that such claims are being subjected to judicial examination in the midst of the conflict that gives rise to them may alone be sufficient to constitute such impairment.

92. Nicaragua observes in this connection that there is no generalized right of self-defence: Article 51 of the Charter refers to the inherent right of self-defence "if an armed attack occurs against a Member of the United Nations". The factual allegations made against Nicaragua by the United States, even if true, fall short of an "armed attack" within the meaning of Article 51. While that Article requires that actions under it "must be immediately reported to the Security Council" — and no such report has been made — it does not support the claim that the question of the legitimacy of actions assertedly taken in self-defence is committed exclusively to the Security Council. The argument of the United States as to the powers of the Security Council and of the Court is an attempt to transfer municipal-law concepts of separation of powers to the international plane, whereas these concepts are not applicable to the relations among international institutions for the settlement of disputes.

93. The United States is thus arguing that the matter was essentially one for the Security Council since it concerned a complaint by Nicaragua involving the use of force. However, having regard to the *United States Diplomatic and Consular Staff in Tehran* case, the Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*. In that case the Court held:

"In the preamble to this second resolution the Security Council expressly took into account the Court's Order of 15 December 1979 indicating provisional measures; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise." (*I.C.J. Reports 1980*, p. 21, para. 40.)

The Court in fact went further, to say:

"Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in

respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to the dispute ; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that :

'In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.' ( *I.C.J. Reports 1980*, p. 22, para. 40.)

94. The United States argument is also founded on a construction, which the Court is unable to share, of Nicaragua's complaint about the United States use, or threat of the use, of force against its territorial integrity and national independence, in breach of Article 2, paragraph 4, of the United Nations Charter. The United States argues that Nicaragua has thereby invoked a charge of aggression and armed conflict envisaged in Article 39 of the United Nations Charter, which can only be dealt with by the Security Council in accordance with the provisions of Chapter VII of the Charter, and not in accordance with the provisions of Chapter VI. This presentation of the matter by the United States treats the present dispute between Nicaragua and itself as a case of armed conflict which must be dealt with only by the Security Council and not by the Court which, under Article 2, paragraph 4, and Chapter VI of the Charter, deals with pacific settlement of all disputes between member States of the United Nations. But, if so, it has to be noted that, while the matter has been discussed in the Security Council, no notification has been given to it in accordance with Chapter VII of the Charter, so that the issue could be tabled for full discussion before a decision were taken for the necessary enforcement measures to be authorized. It is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States, but one requiring, and indeed demanding, the peaceful settlement of disputes between the two States. Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement.

95. It is necessary to emphasize that Article 24 of the Charter of the United Nations provides that

"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council *primary* responsibility for the maintenance of international peace and security . . ."

The Charter accordingly does not confer *exclusive* responsibility upon the Security Council for the purpose. While in Article 12 there is a provision

for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.

96. It must also be remembered that, as the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 4) shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force. The Court was concerned with a question of a "demonstration of force" (*cf. loc. cit.*, p. 31) or "violation of a country's sovereignty" (*ibid.*) ; the Court, indeed, found that

"Intervention is perhaps still less admissible in the particular form it would take here ; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." (*Ibid.*, p. 35.)

What is also significant is that the Security Council itself in that case had "undoubtedly intended that the whole dispute should be decided by the Court" (p. 26).

97. It is relevant also to observe that while the United States is arguing today that because of the alleged ongoing armed conflict between the two States the matter could not be brought to the International Court of Justice but should be referred to the Security Council, in the 1950s the United States brought seven cases to the Court involving armed attacks by military aircraft of other States against United States military aircraft ; the only reason the cases were not dealt with by the Court was that each of the Respondent States indicated that it had not accepted the jurisdiction of the Court, and was not willing to do so for the purposes of the case. The United States did not contradict Nicaragua's argument that the United States indeed brought these suits against the Respondents in this Court, rather than in the Security Council. It has argued further that in both the *Corfu Channel* case and the *Aerial Incident* cases, the Court was asked to adjudicate the rights and duties of the parties with respect to a matter that was fully in the past. To a considerable extent this is a question relevant to the fourth ground of inadmissibility advanced by the United States, to be examined below. However the United States also contends that the *Corfu Channel* case, at least, shows that it was the fact that the incident in question was not part of an ongoing use of armed force that led the Security Council to conclude that its competence was not engaged. In the view of the Court, this argument is not relevant.

98. Nor can the Court accept that the present proceedings are objectionable as being in effect an appeal to the Court from an adverse decision of the Security Council. The Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote. The Court is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations. As to the inherent right of self-defence, the fact that it is referred to in the Charter as a "right" is indicative of a legal dimension ; if in the present proceedings it becomes necessary for the Court to judge in this respect between the Parties – for the rights of no other State may be adjudicated in these proceedings – it cannot be debarred from doing so by the existence of a procedure for the States concerned to report to the Security Council in this connection.

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99. The fourth ground of inadmissibility put forward by the United States is that the Application should be held inadmissible in consideration of the inability of the judicial function to deal with situations involving ongoing conflict. The allegation, attributed by the United States to Nicaragua, of an ongoing conflict involving the use of armed force contrary to the Charter is said to be central to, and inseparable from, the Application as a whole, and is one with which a court cannot deal effectively without overstepping proper judicial bounds. The resort to force during ongoing armed conflict lacks the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal, establishable in conformity with applicable norms of evidence and proof, and not subject to further material evolution during the course of, or subsequent to, the judicial proceedings. It is for reasons of this nature that ongoing armed conflict must be entrusted to resolution by political processes. The situation alleged in the Nicaraguan Application, in particular, cannot be judicially managed or resolved ; continuing practical guidance to the Parties in respect of the measures required of them is critical to the effective control of situations of armed conflict such as is there alleged to exist. But the Court has, it is said, recognized that giving such practical guidance to the Parties lies outside the scope of the judicial function. The United States does not argue that the Application must be dismissed because it presents a "political" question rather than a "legal" question, but rather that an allegation of an ongoing use of unlawful armed force was never intended by the drafters of the Charter to be encompassed by Article 36, paragraph 2, of the Statute. It is also recalled that the circumstances alleged in the Application involve the activities of "groups indigenous to Nicaragua" that have their own motivations and are beyond the control of any State. The United States emphasizes, however, that to conclude that the Court

cannot adjudicate the merits of the complaints alleged does not require the conclusion that international law is neither directly relevant nor of fundamental importance in the settlement of international disputes, but merely that in this respect the application of international legal principles is the responsibility of other organs set up under the Charter.

100. Nicaragua contends that, inasmuch as the United States questions whether the Court would have at its disposal vital evidence necessary to resolve the dispute, the problem is not so much the nature of the dispute as the willingness of the Respondent fully to inform the Court about the activities of which it is accused. Nicaragua also points to the *Corfu Channel* case as showing, as the Court has noted above (paragraph 96), that the Court does exercise its judicial functions in situations of armed conflict. The Court will decide in the light of the evidence produced by the Parties, and enjoys considerable powers in the obtaining of evidence. Nicaragua disputes that the judicial function, being governed by the principle of *res judicata*, is "inherently retrospective", and therefore inapplicable to a fluid situation. Nicaragua concedes that a judgment delivered by the Court must be capable of execution, but points out that such a judgment does not by itself resolve – and is not intended to resolve – all the difficulties between the parties. The Court is not being asked to bring an armed conflict to an end by nothing more than the power of words.

101. The Court is bound to observe that any judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law. A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowance for this (*Corfu Channel, I.C.J. Reports 1949*, p. 18 ; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 10, para. 13). Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it ; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof. As to the possibility of implementation of the judgment, the Court will have to assess this question also on the basis of each specific submission, and in the light of the facts as then established ; it cannot at this stage rule out *a priori* any judicial contribution to the settlement of the dispute by declaring the Application inadmissible. It should be observed however that the Court "neither can nor should contemplate the contingency of the judgment not being complied with" (*Factory at Chorzów, P.C.I.J., Series A, No. 17*, p. 63). Both the Parties have undertaken to comply with the decisions of the Court, under Article 94 of the Charter ; and

"Once the Court has found that a State has entered into a com-

mitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it." (*Nuclear Tests, I.C.J. Reports 1974*, p. 272, para. 60 ; p. 477, para. 63.)

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102. The fifth and final contention of the United States under this head is that the Application should be held inadmissible because Nicaragua has failed to exhaust the established processes for the resolution of the conflicts occurring in Central America. In the contention of the United States, the Contadora process, to which Nicaragua is party, is recognized both by the political organs of the United Nations and by the Organization of American States, as the appropriate method for the resolution of the issues of Central America. That process has achieved agreement among the States of the region, including Nicaragua, on aims which go to the very heart of the claims and issues raised by the Application. The United States repeats its contention (paragraph 89, above) that the Contadora process is a "regional arrangement" within the meaning of Article 52, paragraph 2, of the Charter, and contends that under that Article, Nicaragua is obliged to make every effort to achieve a solution to the security problems of Central America through the Contadora process. The exhaustion of such regional processes is laid down in the Charter as a precondition to the reference of a dispute to the Security Council only, in view of its primary responsibility in this domain, but such a limitation must *a fortiori* apply with even greater force with respect to the Court, which has no specific responsibility under the Charter for dealing with such matters. Nicaragua is, it is claimed, under a similar obligation under Articles 20 and 21 of the Charter of the Organization of American States. Furthermore, Nicaragua is asking the Court to adjudicate only certain of the issues involved in the Contadora process, and this would have the inevitable effect of rendering those issues largely immune to further adjustment in the course of the negotiations, thus disrupting the balance of the negotiating process. The Nicaraguan Application is incompatible with the Contadora process and, given the commitment of both Parties to that process, the international endorsement of it, and its comprehensive, integrated nature, the Court should, it is contended, refrain from adjudicating the merits of the Nicaraguan allegations and hold the Application to be inadmissible.

103. Nicaragua points out that the United States is not taking part in the Contadora process, and cannot shelter behind negotiations between third States in a forum in which it is not participating. The support given by the international community to the Contadora process does not constitute an obstacle to the exercise by the Court of its jurisdiction ; and the United Nations Charter and the Charter of the Organization of American States do not require the exhaustion of prior regional negotiations. In reply to this objection of the United States as well as to the third ground of inadmissibility (paragraphs 91 *et seq.*, above), Nicaragua emphasizes the parallel competence of the political organs of the United Nations. The Court may

pronounce on a dispute which is examined by other political organs of the United Nations, for it exercises different functions.

104. This issue also was raised at the stage of the request by Nicaragua for provisional measures, when the Court noted that

"The United States notes that the allegations of the Government of Nicaragua comprise but one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region. Those matters are the subject of a regional diplomatic effort, known as the 'Contadora Process', which has been endorsed by the Organization of American States, and in which the Government of Nicaragua participates." (*I.C.J. Reports 1984*, p. 183, para. 33.)

To this Nicaragua then replied that, while it was

"actively participating in the Contadora Process, and will continue to do so, our legal claims against the United States cannot be resolved, or even addressed, through that Process" (*ibid.*, p. 185, para. 38).

Nicaragua further denied that the present proceedings could prejudice the legitimate rights of any other States or disrupt the Contadora Process, and referred to previous decisions of the Court as establishing the principle that the Court is not required to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects and that the Court should not decline its essentially judicial task merely because the question before the Court is intertwined with political questions.

105. On this latter point, the Court would recall that in the *United States Diplomatic and Consular Staff in Tehran* case it stated :

"The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important." (*I.C.J. Reports 1980*, p. 19, para. 36.)

And, a little later, added :

"Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court ; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and

unwarranted restriction upon the role of the Court in the peaceful solution of international disputes." (*I.C.J. Reports 1980*, p. 20, para. 37.)

106. With regard to the contention of the United States of America that the matter raised in the Nicaraguan Application was part of the Contadora Process, the Court considers that even the existence of active negotiations in which both parties might be involved should not prevent both the Security Council and the Court from exercising their separate functions under the Charter and the Statute of the Court. It may further be recalled that in the *Aegean Sea Continental Shelf* case the Court said :

"The Turkish Government's attitude might thus be interpreted as suggesting that the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court's exercise of jurisdiction in the present case. The Court is unable to share this view. Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu*. Several cases, the most recent being that concerning the *Trial of Pakistani Prisoners of War* (*I.C.J. Reports 1973*, p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function." (*I.C.J. Reports 1978*, p. 12, para. 29.)

107. The Court does not consider that the Contadora process, whatever its merits, can properly be regarded as a "regional arrangement" for the purposes of Chapter VIII of the Charter of the United Nations. Furthermore, it is also important always to bear in mind that all regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made, touching on the issue of settlement of disputes or the jurisdiction of the International Court of Justice, must be made always subject to the provisions of Article 103 of the Charter which reads as follows :

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

108. In the light of the foregoing, the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court ; or that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of the Nicaraguan Application and judicial determi-

nation in due course of the submissions of the Parties in the case. The Court is therefore unable to declare the Application inadmissible, as requested by the United States, on any of the grounds it has advanced as requiring such a finding.

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109. The Court thus has found that Nicaragua, as authorized by the second paragraph of Article 36 of the Statute of the Permanent Court of International Justice, made, on 24 September 1929, following its signature of the Protocol to which the Statute was adjoined, an unconditional Declaration recognizing the compulsory jurisdiction of the Permanent Court, in particular without conditions as to ratification and without limit of time, though it has not been established that the instrument of ratification of that Protocol ever reached the Secretariat of the League. Nevertheless, the Court has not been convinced by the arguments addressed to it that the absence of such formality excluded the operation of Article 36, paragraph 5, of the Statute of the present Court, and prevented the transfer to the present Court of the Declaration as a result of the consent thereto given by Nicaragua which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears. It has also found that the constant acquiescence of Nicaragua in affirmations, to be found in United Nations and other publications, of its position as bound by the optional clause constitutes a valid manifestation of its intent to recognize the compulsory jurisdiction of the Court.

110. Consequently, the Court finds that the Nicaraguan Declaration of 24 September 1929 is valid, and that Nicaragua accordingly was, for the purposes of Article 36, paragraph 2, of the Statute of the Court, a "State accepting the same obligation" as the United States of America at the date of filing of the Application, so as to be able to rely on the United States Declaration of 26 August 1946. The Court also finds that despite the United States notification of 6 April 1984, the present Application is not excluded from the scope of the acceptance by the United States of America of the compulsory jurisdiction of the Court. Accordingly the Court finds that the two Declarations do afford a basis for the jurisdiction of the Court.

111. Furthermore, it is quite clear for the Court that, on the basis alone of the Treaty of Friendship, Commerce and Navigation of 1956, Nicaragua and the United States of America are bound to accept the compulsory jurisdiction of this Court over claims presented by the Application of Nicaragua in so far as they imply violations of provisions of this treaty.

\* \* \*

112. In its above-mentioned Order of 10 May 1984, the Court indicated provisional measures "pending its final decision in the proceedings instituted on 9 April 1984 by the Republic of Nicaragua against the United States of America". It follows that the Order of 10 May 1984, and the provisional measures indicated therein, remain operative until the delivery of the final judgment in the present case.

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113. For these reasons,

THE COURT,

(1) (a) *finds*, by eleven votes to five, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court;

IN FAVOUR : *President* Elias ; *Vice-President* Sette-Camara ; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, El-Khani, de Lacharrière, Mbaye, Bedjaoui ; *Judge ad hoc* Colliard ;

AGAINST : *Judges* Mosler, Oda, Ago, Schwebel and Sir Robert Jennings.

(b) *finds*, by fourteen votes to two, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, in so far as that Application relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956, on the basis of Article XXIV of that Treaty ;

IN FAVOUR : *President* Elias ; *Vice-President* Sette-Camara ; *Judges* Lachs, Morozov, Nagendra Singh, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui ; *Judge ad hoc* Colliard ;

AGAINST : *Judges* Ruda and Schwebel.

(c) *finds*, by fifteen votes to one, that it has jurisdiction to entertain the case ;

IN FAVOUR : *President* Elias ; *Vice-President* Sette-Camara ; *Judges* Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui ; *Judge ad hoc* Colliard ;

AGAINST : *Judge* Schwebel.

(2) *finds*, unanimously, that the said Application is admissible.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of November, one thousand nine hundred and eighty-four, in three copies, one of which will be placed in the archives of the Court and the others will be transmitted to the Government of Nicaragua and to the Government of the United States of America, respectively.

(Signed) Taslim O. ELIAS,  
President.

(Signed) Santiago TORRES BERNÁRDEZ,  
Registrar.

Judges NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO and Sir Robert JENNINGS append separate opinions to the Judgment of the Court.

Judge SCHWEBEL appends a dissenting opinion to the Judgment of the Court.

(Initialed) T.O.E.

(Initialed) S.T.B.

**International Court of Justice**

**Legality of the Threat or Use of Nuclear Weapons  
Advisory Opinion**

***I.C.J. Reports 1996***

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

LEGALITY OF THE THREAT OR USE  
OF NUCLEAR WEAPONS

ADVISORY OPINION OF 8 JULY 1996

1996

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES

LICÉITÉ DE LA MENACE OU DE L'EMPLOI  
D'ARMES NUCLÉAIRES

AVIS CONSULTATIF DU 8 JUILLET 1996

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## INTERNATIONAL COURT OF JUSTICE

YEAR 1996

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LEGALITY OF THE THREAT OR USE  
OF NUCLEAR WEAPONS

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## ADVISORY OPINION

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

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

THE COURT,

composed as above,

gives the following Advisory Opinion:

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

“*The General Assembly,*

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

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

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

*Recalling* its resolutions 1653 (XVI) of 24 November 1961, 33/71 B of 14 December 1978, 34/83 G of 11 December 1979, 35/152 D of 12 December 1980, 36/921 of 9 December 1981, 45/59 B of 4 December 1990 and 46/37 D of 6 December 1991, in which it declared that the use of nuclear weapons would be a violation of the Charter and a crime against humanity,

*Welcoming* the progress made on the prohibition and elimination of weapons of mass destruction, including the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction<sup>1</sup> and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction<sup>2</sup>,

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

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

*Recalling* that, convinced of the need to strengthen the rule of law in international relations, it has declared the period 1990-1999 the United Nations Decade of International Law<sup>3</sup>,

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

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

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

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

<sup>1</sup> Resolution 2826 (XXVI), annex.

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

<sup>3</sup> Resolution 44/23.

<sup>4</sup> A/47/27-S/24111."

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

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

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

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

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

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

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

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

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

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

*for the Commonwealth of Australia:*

Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, Counsel,  
The Honourable Gareth Evans, Q.C., Senator,  
Minister for Foreign Affairs, Counsel;

*for the Arab Republic of Egypt:*

Mr. George Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law;

*for the French Republic:*

Mr. Marc Perrin de Brichambaut, Director of Legal Affairs, Ministry of Foreign Affairs,

*for the Federal Republic of Germany:*

Mr. Alain Pellet, Professor of International Law, University of Paris X and Institute of Political Studies, Paris;

*for the Federal Republic of Germany:*

Mr. Hartmut Hillgenberg, Director-General of Legal Affairs, Ministry of Foreign Affairs;

*for Indonesia:*

H.E. Mr. Johannes Berchmans Soedarmanto Kadarisman, Ambassador of Indonesia to the Netherlands;

*for Mexico:*

H.E. Mr. Sergio González Gálvez, Ambassador, Under-Secretary of Foreign Relations;

*for the Islamic Republic of Iran:*

H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs;

*for Italy:*

Mr. Umberto Leanza, Professor of International Law at the Faculty of Law at the University of Rome "Tor Vergata", Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;

*for Japan:*

H.E. Mr. Takekazu Kawamura, Ambassador, Director General for Arms Control and Scientific Affairs, Ministry of Foreign Affairs,

Mr. Takashi Hiraoka, Mayor of Hiroshima,  
Mr. Ichio Itoh, Mayor of Nagasaki;

*for Malaysia:*

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

*for New Zealand:*

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

*for the Philippines:*

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

*for Qatar:*

H.E. Mr. Najeeb ibn Mohammed Al-Naumi, Minister of Justice;

*for the Russian Federation:*

Mr. A. G. Khodakov, Director, Legal Department, Ministry of Foreign Affairs;

*for San Marino:*

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

*for Samoa:*

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

*for the Marshall Islands:*

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

*for Solomon Islands:*

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

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

for *Costa Rica*:

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

for the *United Kingdom of Great Britain and Northern Ireland*:

The Rt. Honourable Sir Nicholas Lyell, Q.C., M.P., Her Majesty's Attorney-General;

for the *United States of America*:

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

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

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

for *Zimbabwe*:

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

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

\* \* \*

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

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

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

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

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

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

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

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

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

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

The Court has already had occasion to indicate that questions

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

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

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

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

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

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

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

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

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

"The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; and *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 189.)

The Court has constantly been mindful of its responsibilities as "the principal judicial organ of the United Nations" (Charter, Art. 92). When considering each request, it is mindful that it should not, in principle, refuse to give an advisory opinion. In accordance with the consistent jurisprudence of the Court, only "compelling reasons" could lead it to such a refusal (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 183; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 21; and *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 191). There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court; in the case concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court's lack of jurisdiction in that case. The Permanent Court of International Justice took the view on only one occasion that it could not reply to a question put to it, having regard to the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was

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

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

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

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

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

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

16. Certain States have observed that the General Assembly has 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.

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

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

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

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

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

\* \* \*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and, on the other hand, it

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) Parties to the Treaty; or
- (b) any territory within the South Pacific Nuclear Free Zone for which a State that has become a Party to Protocol I is internationally responsible.”

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

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

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

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

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

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

and welcomed the fact that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and

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

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

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

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

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

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

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

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

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

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

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

and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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105. For these reasons,

THE COURT,

(1) By thirteen votes to one,

*Decides* to comply with the request for an advisory opinion;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges*

Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: *Judge* Oda;

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

A. Unanimously,

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

B. By eleven votes to three,

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

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

AGAINST: *Judges Shahabuddeen, Weeramantry, Koroma*;

C. Unanimously,

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

D. Unanimously,

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

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

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

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

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

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

F. Unanimously,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighth day of July, one thousand nine hundred and ninety-six, 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*) Mohammed BEDJAOUI,  
President.

(*Signed*) Eduardo VALENCIA-OSPINA,  
Registrar.

President BEDJAOUI, Judges HERCZEGH, SHI, VERESHCHETIN and FERRARI BRAVO append declarations to the Advisory Opinion of the Court.

Judges GUILLAUME, RANJEVA AND FLEISCHHAUER append separate opinions to the Advisory Opinion of the Court.

Vice-President SCHWEBEL, Judges ODA, SHAHABUDDIEN, WEERAMANTRY, KOROMA and HIGGINS append dissenting opinions to the Advisory Opinion of the Court.

(*Initialled*) M.B.  
(*Initialled*) E.V.O.

**International Court of Justice**

**Arrest Warrant of 11 April 2000  
(Democratic Republic of Congo v. Belgium)  
Judgment**

***I.C.J. Reports 2002***

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES

**AFFAIRE RELATIVE AU MANDAT D'ARRÊT  
DU 11 AVRIL 2000**

(RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. BELGIQUE)

**ARRÊT DU 14 FÉVRIER 2002**

**2002**

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I.C.J. Reports 2002, p. 3*

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

**CASE CONCERNING THE ARREST WARRANT  
OF 11 APRIL 2000**

(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

**JUDGMENT OF 14 FEBRUARY 2002**

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(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

MANDAT D'ARRÊT DU 11 AVRIL 2000  
(RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. BELGIQUE)

*Facts of the case — Issue by a Belgian investigating magistrate of "an international arrest warrant in absentia" against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.*

ARREST WARRANT OF 11 APRIL 2000  
(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

*First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a "legal dispute" between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.*

*Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.*

*Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.*

*Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.*

*Subsidiary argument of Belgium — Non ultra peti a rule — Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that ques-*

14 FEBRUARY 2002  
JUDGMENT

tion in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.

\* \*

*Immunity from criminal jurisdiction in other States; and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".*

*No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and impunity.*

*Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.*

\* \*

*Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.*

## JUDGMENT

*Present: President GUILLAUME; Vice-President SHI. Judges ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; Judges ad hoc BULA-BULA, VAN DEN WYNGAERT; Registrar COUVREUR.*

In the case concerning the arrest warrant of 11 April 2000,  
between

the Democratic Republic of the Congo,

represented by

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

as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals, Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic, Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain,

Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),

Mr. Pierre d'Argent, Chargé de cours, Catholic University of Louvain,

Mr. Moka N'Golo, Bâtonnier,

Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice, as Counsellor,

and

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,

as Agent;

Mr. Eric David, Professor of Public International Law, Université libre de Bruxelles,

Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,

as Counsel and Advocates;

H.E. Baron Olivier Gillès de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice, Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,

Mr. Pierre Morlet, Advocate-General, Brussels Cour d'Appel,

Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,

Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge,

Mr. Tom Vanderhaeghe, Assistant at the Université libre de Bruxelles,

THE COURT,

composed as above,  
after deliberation,

delivers the following Judgment:

1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdoulaye Yerodia Ndombasi".

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. 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; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition".

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request

by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

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

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

*For the Congo:* H.E. Mr. Jacques Masangu-a-Mwanza,  
H.E. Mr. Ngele Masudi,  
Maitre Kosisaka Kombé,  
Mr. François Rigaux,  
Ms Monique Chemillier-Gendreau,  
Mr. Pierre d'Argent.

*For Belgium:* Mr. Jan Devadder,  
Mr. Daniel Bethlehem,  
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

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10. In its Application, the Congo formulated the decision requested in the following terms:

"The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels Tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdoulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

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

*On behalf of the Government of the Congo,*

in the Memorial:

"In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;
3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."

*On behalf of the Government of Belgium,*  
in the Counter-Memorial:

"For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."

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

*On behalf of the Government of the Congo,*

"In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the war-

rant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

*On behalf of the Government of Belgium,*

"For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

\* \* \*

13. On 11 April 2000 an investigating judge of the Brussels Tribunal de première instance issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 10 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which

the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law".

16. At the hearings, Belgium further claimed that it offered "to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution", and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: "We have scant information concerning the form [of these Belgian proposals]." It added that: "these proposals . . . appear to have been made very belatedly, namely *after* an arrest warrant against Mr. Yerodia had been issued".

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a

"[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations".

Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo's Application had become moot and asked the Court, as has already been

recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium's submissions to that effect and also the Congo's request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation "in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (see paragraphs 11 and 12 above).

\* \* \*

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

\* \* \*

23. The first objection presented by Belgium reads as follows:

"That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seized by that Application. However, it contends that the question is not whether a legal dispute

existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect *inter alia* to the *Northern Cameroons* case, in which the Court found that it “may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties” (*I.C.J. Reports 1963*, pp. 33-34), as well as to the *Nuclear Tests* cases (*Australia v. France*)/(*New Zealand v. France*), in which the Court stated the following: “The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision” (*I.C.J. Reports 1974*, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo’s Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium’s view, is that the case has become an attempt by the Congo to “[seek] an advisory opinion from the Court”, and no longer a “concrete case” involving an “actual controversy” between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful *ab initio*, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia’s official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

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26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently

become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 23-24, para. 38; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

“The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.”

On 17 October 2000, the date that the Congo’s Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court’s jurisprudence, namely “a dispute agreement on a point of law or fact, a conflict of legal views or of interests between two persons” in which “the claim of one party is positively opposed by the other” (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seized

of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium's first objection must therefore be rejected.

\* \*

29. The second objection presented by Belgium is the following:

"That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case."

30. Belgium also relies in support of this objection on the *Northern Cameroons* case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be "without object" (*I.C.J. Reports 1963*, p. 38), and on the *Nuclear Tests* cases, in which the Court saw "no reason to allow the continuance of proceedings which it knows are bound to be fruitless" (*I.C.J. Reports 1974*, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

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32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see *Questions of Interpretation and Application of the 1971 Mont-*

*real Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 131, para. 45).

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection must accordingly be rejected.

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33. The third Belgian objection is put as follows:

"That the case as it now stands is materially different to that set out in the [Congo]'s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have formed the subject of the dispute originally brought before it under the terms of the Application (see *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but “condense and refine” its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

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36. The Court notes that, in accordance with settled jurisprudence, it “cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character” (*Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 173; cf. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 427, para. 80; see also Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 264-267, in particular paras. 69 and 70*). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo’s final submissions arise “directly out of the question which is the subject-matter of that Application” (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 203, para. 72; see also Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962, p. 36*).

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37. The fourth Belgian objection reads as follows:

“That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being pro-

tected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.”

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo’s Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo’s final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seised of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chambre and seek to have the charge dismissed.

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40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia’s personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 26; Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 42, para. 49*). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed

(see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 25-26, paras. 43-44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection must accordingly be rejected.

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41. As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible. . . the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo's] final submissions". Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction *in absentia*. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the "exercise of an excessive universal jurisdiction" being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can "represent a valid counterweight to the observance of immunities".

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43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*,

p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

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44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot and that the Application is admissible. Thus, the Court now turns to the merits of the case.

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45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

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47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability

and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers *all* their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts".

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence". The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

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51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain

holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

"The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for

example, Article 7, paragraph 2 (a), of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that *chargés d'affaires* are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

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56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *ius cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the

French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that “international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State”.

As regards the instruments creating international criminal tribunals and the latter’s jurisprudence, these, in the Congo’s view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium’s argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus,

although various international conventions or the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter’s Statute expressly provides, in Article 27, paragraph 2, that “[i]mmunities or special procedural rules which may attach to the

official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.

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62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction and enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

“[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdoulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States.”

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a “coercive legal act” which violates the Congo’s immunity and sovereign rights, inasmuch as it seeks to “subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach” and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo’s view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium “thus cast upon one of the most prominent members of its Government”. The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo’s former President. In the Congo’s view, Belgium “[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition”. The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly

“no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related” to that of the Belgian State. The Congo observes that, in such circumstances, “there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere”.

65. Belgium rejects the Congo’s argument on the ground that “the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]”.

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly “to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium”, the warrant had no legal effect unless it was validated or completed by some prior act “requiring the arrest of Mr. Yerodia by the relevant authorities in a third State”. Belgium further argues that “[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia’s] criminal immunity”, but that “the Party directly responsible for that infringement would have been that State and not Belgium”.

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67. The Court will first recall that the “international arrest warrant *in absentia*”, issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de première instance, is directed against Mr. Yerodia,

stating that he is “currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa”. The warrant states that Mr. Yerodia is charged with being “the perpetrator or co-perpetrator” of:

- Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)
- Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law).”

The warrant refers to “various speeches inciting racial hatred” and to “particularly virulent remarks” allegedly made by Mr. Yerodia during “public addresses reported by the media” on 4 August and 27 August 1998. It adds:

“These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunt (the Tutsi enemy) and lynchings.

The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials.”

68. The warrant further states that “the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement”. The investigating judge does, however, observe in the warrant that “the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement” and explains as follows:

“Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on ‘official visits’). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this

undertaking could give rise to the host State’s international responsibility.”

69. The arrest warrant concludes with the following order:

“We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it.”

70. The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to “all bailiffs and agents of public authority . . . to execute this arrest warrant” (see paragraph 69 above) and from the assertion in the warrant that “the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement”. The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo’s incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was “to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium”. The Respondent maintains, however, that the enforcement of the warrant in third States was “dependent on some further preliminary steps having been taken” and that, given the “inchoate” quality of the warrant as regards third States, there was no “infringement of] the sovereignty of the [Congo]”. It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant’s issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yerodia’s

dia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium", adding that "[t]hus, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

\* \* \*

72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

"A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful *ab initio*, that "[i]t is fundamentally flawed" and that it cannot therefore have any legal effect today. It points

out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself". The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs". Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

\*

75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

"[t]he 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 conse-

quences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” (*P.C.I.J., Series A, No. 17, p. 47*).

In the present case, “the situation which would, in all probability, have existed if [the illegal act] had not been committed” cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment’s implications might be for third States, and the Court cannot therefore accept the Congo’s submissions on this point.

\* \* \*

78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

*Rejects* the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herzeg, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(B) By fifteen votes to one,

*Finds* that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herzeg, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(C) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herzeg, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren,

Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(D) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herzeg, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(2) By thirteen votes to three,

*Finds* that the issue against Mr. Abdoulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herzeg, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Al-Khasawneh; *Judge* ad hoc Van den Wyngaert;

(3) By ten votes to six,

*Finds* that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herzeg, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; *Judge* ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-

cratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert GUILLAUME,  
President.

(Signed) Philippe COUVREUR,  
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOUMANS and BURGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* BULA-BULA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.

(Initialled) Ph.C.

**International Court of Justice**

**Application of the Convention on the Prevention  
and Punishment of the Crime of Genocide  
(Bosnia and Herzegovina *v.* Serbia and Montenegro)  
Judgment**

*I.C.J. Reports 2007*

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,  
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**CASE CONCERNING APPLICATION OF  
THE CONVENTION ON THE PREVENTION AND  
PUNISHMENT OF THE CRIME OF GENOCIDE  
(BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO)**

**JUDGMENT OF 26 FEBRUARY 2007**

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du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro),  
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COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES

**AFFAIRE RELATIVE À L'APPLICATION  
DE LA CONVENTION POUR LA PRÉVENTION  
ET LA RÉPRESSION DU CRIME DE GÉNOCIDE  
(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)**

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AND PUNISHMENT OF THE CRIME OF GENOCIDE  
(BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO)

APPLICATION DE LA CONVENTION POUR LA PRÉVENTION  
ET LA RÉPRESSION DU CRIME DE GENOCIDE  
(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)

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## LIST OF ACRONYMS

<i>Abbreviation</i>	<i>Full name</i>	<i>Comments</i>
ARBIH	Army of the Republic of Bosnia and Herzegovina	
FRY	Federal Republic of Yugoslavia	Name of Serbia and Montenegro between 27 April 1992 (adoption of the Constitution) and 3 February 2003
ICTR	International Criminal Tribunal for Rwanda	
ICTY	International Criminal Tribunal for the former Yugoslavia	
ILC	International Law Commission	
JNA	Yugoslav People's Army	Army of the SFRY (ceased to exist on 27 April 1992, with the creation of the VJ)
MUP	Ministarstvo Unutrašnjih Pollova	Ministry of the Interior
NATO	North Atlantic Treaty Organization	
SFRY	Socialist Federal Republic of Yugoslavia	
TO	Teritorijalna Odbrana	Territorial Defence Forces
UNHCR	United Nations High Commissioner for Refugees	
UNPROFOR	United Nations Protection Force	
VJ	Yugoslav Army	Army of the FRY, under the Constitution of 27 April 1992 (succeeded to the JNA)
VRS	Army of the Republika Srpska	

## INTERNATIONAL COURT OF JUSTICE

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26 February 2007

**CASE CONCERNING APPLICATION OF  
THE CONVENTION ON THE PREVENTION AND  
PUNISHMENT OF THE CRIME OF GENOCIDE  
(BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO)**

## JUDGMENT

*Present: President HIGGINS; Vice-President AL-KHASAWNEH; Judges RANJEVA, SHI, KOROMA, OWADA, SIMMA, TOMKA, ABRAHAM, KEITH, SEPÜLVEDA-AMOR, BENNOUNA, SKOTNIKOV; Judges ad hoc MAHIU, KREĆA; Registrar COUVREUR.*

In the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide,

*between*

Bosnia and Herzegovina,

represented by

Mr. Sakib Softić,

as Agent;

Mr. Phon van den Biesen, Attorney at Law, Amsterdam,

as Deputy Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the United Nations International Law Commission,

Mr. Thomas M. Franck, Professor Emeritus of Law, New York University School of Law,

Ms Brigitte Stern, Professor at the University of Paris I,

Mr. Luigi Condorelli, Professor at the Faculty of Law of the University of Florence,  
 Ms Magda Karagiannakis, B.Ec., LL.B., LL.M., Barrister at Law, Melbourne, Australia,  
 Ms Joanna Korner Q.C., Barrister at Law, London,  
 Ms Laura Dauban, LL.B. (Hons),  
 Mr. Antoine Ollivier, Temporary Lecturer and Research Assistant, University of Paris X-Nanterre,  
 as Counsel and Advocates;  
 Mr. Morten Torkildsen, BSc., MSc., Torkildsen Granskin og Rådgivning, Norway,  
 as Expert Counsel and Advocate;  
 H.E. Mr. Fuad Šabeta, Ambassador of Bosnia and Herzegovina to the Kingdom of the Netherlands,  
 Mr. Wim Muller, LL.M., M.A.,  
 Mr. Mauro Barelli, LL.M. (University of Bristol),  
 Mr. Ermin Sarajlija, LL.M.,  
 Mr. Amir Bajrić, LL.M.,  
 Ms Amra Mehmedić, LL.M.,  
 Ms Isabelle Moulter, Research Student in International Law, University of Paris I,  
 Mr. Paolo Patchetti, Associate Professor at the University of Macerata, Italy,  
 as Counsel,

and

Serbia and Montenegro,  
 represented by  
 H.E. Mr. Radoslav Stojanović, S.J.D., Head of the Law Council of the Ministry of Foreign Affairs of Serbia and Montenegro, Professor at the Belgrade University School of Law,  
 as Agent;  
 Mr. Saša Obradović, First Counsellor of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,  
 Mr. Vladimir Cvetković, Second Secretary of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,  
 as Co-Agents;  
 Mr. Tibor Varady, S.J.D. (Harvard), Professor of Law at the Central European University, Budapest, and Emory University, Atlanta,  
 Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Member of the International Law Commission, member of the English Bar, Distinguished Fellow of All Souls College, Oxford,  
 Mr. Xavier de Roux, Maître de droit, avocat à la cour, Paris,  
 Ms Nataša Fauveau-Ivanović, avocat à la cour, Paris, member of the Council of the International Criminal Bar,  
 Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of Law at the University of Kiel, Director of the Walther-Schücking Institute,

Mr. Vladimir Djerić, LL.M. (Michigan), Attorney at Law, Mikijelj, Janković & Bogdanović, Belgrade, President of the International Law Association of Serbia and Montenegro,  
 Mr. Igor Olujić, Attorney at Law, Belgrade,  
 as Counsel and Advocates;  
 Ms Sanja Djajić, S.J.D., Associate Professor at the Novi Sad University School of Law,  
 Ms Ivana Mroz, LL.M. (Minneapolis),  
 Mr. Svetislav Rabrenović, Expert-associate at the Office of the Prosecutor for War Crimes of the Republic of Serbia,  
 Mr. Aleksandar Djurdjić, LL.M., First Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,  
 Mr. Miloš Jastrebić, Second Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,  
 Mr. Christian J. Tams, LL.M., Ph.D. (Cambridge), Walther-Schücking Institute, University of Kiel,  
 Ms Dina Dobrković, LL.B.,  
 as Assistants,

THE COURT,

composed as above,  
 after deliberation,

*delivers the following Judgment:*

1. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina (with effect from 14 December 1995 “Bosnia and Herzegovina”) filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Yugoslavia (with effect from 4 February 2003, “Serbia and Montenegro” and with effect from 3 June 2006, the Republic of Serbia — see paragraphs 67 and 79 below) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter “the Genocide Convention” or “the Convention”), as well as various matters which Bosnia and Herzegovina claimed were connected therewith. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.
2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Application was immediately communicated to the Government of the Federal Republic of Yugoslavia (hereinafter “the FRY”) by the Registrar; and in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.
3. In conformity with Article 43 of the Rules of Court, the Registrar addressed the notification provided for in Article 63, paragraph 1, of the Statute to all the States appearing on the list of the parties to the Genocide Convention held by the Secretary-General of the United Nations as depository. The Registrar also sent to the Secretary-General of the United Nations as depository in Article 34, paragraph 3, of the Statute.
4. On 20 March 1993, immediately after the filing of its Application, Bosnia

and Herzegovina submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court. On 31 March 1993, Bosnia and Herzegovina filed in the Registry, and invoked as an additional basis of jurisdiction, the text of a letter dated 8 June 1992, addressed jointly by the President of the then Republic of Montenegro and the President of the then Republic of Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia. On 1 April 1993, the FRY submitted written observations on Bosnia and Herzegovina's request for provisional measures, in which it, in turn, recommended that the Court indicate provisional measures to be applied to Bosnia and Herzegovina. By an Order dated 8 April 1993, the Court, after hearing the Parties, indicated certain provisional measures with a view to the protection of rights under the Genocide Convention.

5. By an Order dated 16 April 1993, the President of the Court fixed 15 October 1993 as the time-limit for the filing of the Memorial of Bosnia and Herzegovina and 15 April 1994 as the time-limit for the filing of the Counter-Memorial of the FRY.

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Bosnia and Herzegovina chose Mr. Elihu Lauterpacht and the FRY chose Mr. Milenko Kreća.

7. On 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures. By letters of 6 August and 10 August 1993, the Agent of Bosnia and Herzegovina indicated that his Government wished to invoke additional bases of jurisdiction in the case: the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities, signed at Saint-Germain-en-Laye on 10 September 1919, and customary and conventional international laws of war and international humanitarian law. By a letter of 13 August 1993, the Agent of Bosnia and Herzegovina confirmed his Government's intention also to rely on the above-mentioned letter from the Presidents of Montenegro and Serbia dated 8 June 1992 as an additional basis of jurisdiction (see paragraph 4).

8. On 10 August 1993, the FRY also submitted a request for the indication of provisional measures and on 10 August and 23 August 1993, it filed written observations on Bosnia and Herzegovina's new request. By an Order dated 13 September 1993, the Court, after hearing the Parties, reaffirmed the measures indicated in its Order of 8 April 1993 and stated that those measures should be immediately and effectively implemented.

9. By an Order dated 7 October 1993, the Vice-President of the Court, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Memorial to 15 April 1994 and accordingly extended the time-limit for the filing of the Counter-Memorial to 15 April 1995. Bosnia and Herzegovina filed its Memorial within the time-limit thus extended. By a letter dated 9 May 1994, the Agent of the FRY submitted that the Memorial filed by Bosnia and Herzegovina failed to meet the requirements of Article 43 of the Statute and Articles 50 and 51 of the Rules of Court. By letter of 30 June 1994, the Registrar, acting on the instructions of the Court, requested Bosnia and Herzegovina, pursuant to Article 50, paragraph 2, of the Rules of Court, to file as annexes to its Memorial the extracts of the documents to which it referred therein. Bosnia and

Herzegovina accordingly filed Additional Annexes to its Memorial on 4 January 1995.

10. By an Order dated 21 March 1995, the President of the Court, at the request of the FRY, extended the time-limit for the filing of the Counter-Memorial to 30 June 1995. Within the time-limit thus extended, the FRY, referring to Article 79, paragraph 1, of the Rules of Court of 14 April 1978, raised preliminary objections concerning the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 July 1995, the President of the Court noted that, by virtue of Article 79, paragraph 3, of the 1978 Rules of Court, the proceedings on the merits were suspended, and fixed 14 November 1995 as the time-limit within which Bosnia and Herzegovina might present a written statement of its observations and submissions on the preliminary objections raised by the FRY. Bosnia and Herzegovina filed such a statement within the time-limit thus fixed.

11. By a letter dated 2 February 1996, the Agent of the FRY submitted to the Court the text of the General Framework Agreement for Peace in Bosnia and Herzegovina and the annexes thereto, initialled in Dayton, Ohio, on 21 November 1995, and signed in Paris on 14 December 1995 (hereinafter the "Dayton Agreement").

12. Public hearings were held on preliminary objections between 29 April and 3 May 1996. By a Judgment of 11 July 1996, the Court dismissed the preliminary objections and found that it had jurisdiction to adjudicate on the dispute on the basis of Article IX of the Genocide Convention and that the Application was admissible.

13. By an Order dated 23 July 1996, the President fixed 23 July 1997 as the time-limit for the filing of the Counter-Memorial of the FRY. The Counter-Memorial, which was filed on 22 July 1997, contained counter-claims. By a letter dated 28 July 1997, Bosnia and Herzegovina, invoking Article 80 of the 1978 Rules of Court, challenged the admissibility of the counter-claims. On 22 September 1997, at a meeting held between the President of the Court and the Agents of the Parties, the Agents accepted that their respective Governments submit written observations on the question of the admissibility of the counter-claims. Bosnia and Herzegovina and the FRY submitted their observations to the Court on 10 October 1997 and 24 October 1997, respectively. By an Order dated 17 December 1997, the Court found that the counter-claims submitted by the FRY were admissible as such and formed part of the current proceedings since they fulfilled the conditions set out in Article 80, paragraphs 1 and 2, of the 1978 Rules of Court. The Court further directed Bosnia and Herzegovina to submit a Reply and the FRY to submit a Rejoinder relating to the claims of both Parties and fixed 23 January 1998 and 23 July 1998 as the respective time-limits for the filing of those pleadings. The Court also reserved the right of Bosnia and Herzegovina to present its views on the counter-claims of the FRY in an additional pleading.

14. By an Order dated 22 January 1998, the President, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Reply of Bosnia and Herzegovina to 23 April 1998 and accordingly extended the time-limit for the filing of the Rejoinder of the FRY to 22 January 1999.

15. On 15 April 1998, the Co-Agent of the FRY filed "Additional Annexes

to the Counter-Memorial of the Federal Republic of Yugoslavia". By a letter dated 14 May 1998, the Deputy Agent of Bosnia and Herzegovina, referring to Articles 50 and 52 of the Rules of Court, objected to the admissibility of these documents in view of their late filing. On 22 September 1998, the Parties were informed that the Court had decided that the documents in question "[were] admissible as Annexes to the Counter-Memorial to the extent that they were established, in the original language, on or before the date fixed by the Order of 23 July 1996 for the filing of the Counter-Memorial" and that "[a]ny such document established after that date [would] have to be submitted as an Annex to the Rejoinder, if Yugoslavia so wishe[d]".

16. On 23 April 1998, within the time-limit thus extended, Bosnia and Herzegovina filed its Reply. By a letter dated 27 November 1998, the FRY requested the Court to extend the time-limit for the filing of its Rejoinder to 22 April 1999. By a letter dated 9 December 1998, Bosnia and Herzegovina objected to any extension of the time-limit fixed for the filing of the Rejoinder. By an Order of 11 December 1998, the Court, having regard to the fact that Bosnia and Herzegovina had been granted an extension of the time-limit for the filing of its Reply, extended the time-limit for the filing of the Rejoinder of the FRY to 22 February 1999. The FRY filed its Rejoinder within the time-limit thus extended.

17. On 19 April 1999, the President of the Court held a meeting with the representatives of the Parties in order to ascertain their views with regard to questions of procedure. Bosnia and Herzegovina indicated that it did not intend to file an additional pleading concerning the counter-claims made by the FRY and considered the case ready for oral proceedings. The Parties also expressed their views about the organization of the oral proceedings.

18. By a letter dated 9 June 1999, the then Chairman of the Presidency of Bosnia and Herzegovina, Mr. Zivko Radšić, informed the Court of the appointment of a Co-Agent, Mr. Svetozar Miletić. By a letter dated 10 June 1999, the thus appointed Co-Agent informed the Court that Bosnia and Herzegovina wished to discontinue the case. By a letter of 14 June 1999, the Agent of Bosnia and Herzegovina asserted that the Presidency of Bosnia and Herzegovina had taken no action to appoint a Co-Agent or to terminate the proceedings before the Court. By a letter of 15 June 1999, the Agent of the FRY stated that his Government accepted the discontinuance of the proceedings. By a letter of 21 June 1999, the Agent of Bosnia and Herzegovina reiterated that the Presidency had not made any decision to discontinue the proceedings and transmitted to the Court letters from two members of the Presidency, including the new Chairman of the Presidency, confirming that no such decision had been made.

19. By letters dated 30 June 1999 and 2 September 1999, the President of the Court requested the Chairman of the Presidency to clarify the position of Bosnia and Herzegovina regarding the pendency of the case. By a letter dated 3 September 1999, the Agent of the FRY submitted certain observations on this matter, concluding that there was an agreement between the Parties to discontinue the case. By a letter dated 15 September 1999, the Chairman of the Presidency of Bosnia and Herzegovina informed the Court that at its 58th session held on 8 September 1999, the Presidency had concluded that: (i) the Presidency "did not make a decision to discontinue legal proceedings before the International Court of Justice"; (ii) the Presidency "did not make a decision to name a Co-Agent in this case"; (iii) the Presidency would "inform [the Court] timely about any further decisions concerning this case".

20. By a letter of 20 September 1999, the President of the Court informed

the Parties that the Court intended to schedule hearings in the case beginning in the latter part of February 2000 and requested the Chairman of the Presidency of Bosnia and Herzegovina to confirm that Bosnia and Herzegovina's position was that the case should so proceed. By a letter of 4 October 1999, the Agent of Bosnia and Herzegovina confirmed that the position of his Government was that the case should proceed and he requested the Court to set a date for the beginning of the oral proceedings as soon as possible. By a letter dated 10 October 1999, the member of the Presidency of Bosnia and Herzegovina from the Republika Srpska informed the Court that the letter of 15 September 1999 from the Chairman of the Presidency was "without legal effects" *inter alia* because the National Assembly of the Republika Srpska, acting pursuant to the Constitution of Bosnia and Herzegovina, had declared the decision of 15 September "destructive of a vital interest" of the Republika Srpska. On 22 October 1999, the President informed the Parties that, having regard to the correspondence received on this matter, the Court had decided not to hold hearings in the case in February 2000.

21. By a letter dated 23 March 2000 transmitting to the Court a letter dated 20 March 2000 from the Chairman of the Presidency, the Agent of Bosnia and Herzegovina reaffirmed that the appointment of a Co-Agent by the former Chairman of the Presidency of Bosnia and Herzegovina on 9 June 1999 lacked any legal basis and that the communications of the Co-Agent did not reflect the position of Bosnia and Herzegovina. Further, the Agent asserted that, contrary to the claims of the member of the Presidency of Bosnia and Herzegovina from the Republic of Srpska, the letter of 15 September 1999 was not subject to the veto mechanism contained in the Constitution of Bosnia and Herzegovina. The Agent requested the Court to set a date for oral proceedings at its earliest convenience.

22. By a letter dated 13 April 2000, the Agent of the FRY transmitted to the Court a document entitled "Application for the Interpretation of the Decision of the Court on the Pendency of the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)", requesting an interpretation of the decision of the Court to which the President of the Court had referred in his letter dated 22 October 1999. By a letter dated 18 April 2000, the Registrar informed the Agent of the FRY that, according to Article 60 of the Statute, a request for interpretation could relate only to a judgment of the Court and therefore the document transmitted to the Court on 13 April 2000 could not constitute a request for interpretation and had not been entered on the Court's General List. The Registrar further explained that the sole decision to which reference was made in the letter of 22 October 1999 was that no hearings would be held in February 2000. The Registrar requested the Agent to transmit as soon as possible any comments he might have on the letter dated 23 March 2000 from the Agent of Bosnia and Herzegovina and the letter from the Chairman of the Presidency enclosed therewith. By a letter dated 25 April 2000, the Agent of the FRY submitted such comments to the Court and requested that the Court record and implement the agreement for the discontinuance of the case evidenced by the exchange of the letter of the Co-Agent of the Applicant dated 10 June 1999 and the letter of the Agent of the FRY dated 15 June 1999. By a letter dated 8 May 2000, the Agent of Bosnia and Herzegovina submitted certain observations regarding the letter dated 25 April 2000 from the Agent of the FRY and reiterated the wish of his Government to continue with the proceedings in the case. By letters dated 8 June, 26 June and 4 October 2000 from the

FRY and letters dated 9 June and 21 September 2000 from Bosnia and Herzegovina, the Agents of the Parties restated their positions.

23. By a letter dated 29 September 2000, Mr. Svetozar Miletić, who had previously been appointed Co-Agent on 9 June 1999 by the then Chairman of the Presidency of Bosnia and Herzegovina, reiterated his position that the case had been discontinued. By a letter dated 6 October 2000, the Agent of Bosnia and Herzegovina stated that this letter and the recent communication from the Agent of the FRY had not altered the commitment of the Government of Bosnia and Herzegovina to continue the proceedings.

24. By letters dated 16 October 2000 from the President of the Court and from the Registrar, the Parties were informed that, at its meeting of 10 October 2000, the Court, having examined all the correspondence received on this question, had found that Bosnia and Herzegovina had not demonstrated its will to withdraw the Application in an unequivocal manner. The Court had thus concluded that there had been no discontinuance of the case by Bosnia and Herzegovina. Consequently, in accordance with Article 54 of the Rules, the Court, after having consulted the Parties, would, at an appropriate time, fix a date for the opening of the oral proceedings.

25. By a letter dated 18 January 2001, the Minister for Foreign Affairs of the FRY requested the Court to grant a stay of the proceedings or alternatively to postpone the opening of the oral proceedings for a period of 12 months due, *inter alia*, to the change of Government of the FRY and the resulting fundamental change in the policies and international position of that State. By a letter dated 25 January 2001, the Agent of Bosnia and Herzegovina communicated the views of his Government on the request made by the FRY and reserved his Government's final judgment on the matter, indicating that, in the intervening period, Bosnia and Herzegovina's position continued to be that there should be an expedited resolution of the case.

26. By a letter dated 20 April 2001, the Agent of the FRY informed the Court that his Government wished to withdraw the counter-claims submitted by the FRY in its Counter-Memorial. The Agent also informed the Court that his Government was of the opinion that the Court did not have jurisdiction *ratione personae* over the FRY and further that the FRY intended to submit an application for revision of the Judgment of 11 July 1996. On 24 April 2001, the FRY filed in the Registry of the Court an Application instituting proceedings whereby, referring to Article 61 of the Statute, it requested the Court to revise the Judgment delivered on Preliminary Objections on 11 July 1996 (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), hereinafter referred to as "the *Application for Revision case*"). In the present case the Agent of the FRY submitted, under cover of a letter dated 4 May 2001, a document entitled "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia", accompanied by one volume of annexes (hereinafter "the Initiative"). The Agent informed the Court that the Initiative was based on facts and arguments which were essentially identical to those submitted in the FRY's Application for revision of the Judgment of 11 July 1996 since his Government believed that these were both appropriate procedural avenues. In the Initiative, the FRY requested the Court to adjudge and declare that it had no jurisdiction *ratione personae* over the FRY, contending that it had not been a party to the Statute of the Court until its admission to the United Nations on 1 November 2000, that it had not been

and still was not a party to the Genocide Convention; it added moreover that its notification of accession to that Convention dated 8 March 2001 contained a reservation to Article IX thereof. The FRY asked the Court to suspend the proceedings on the merits until a decision was rendered on the Initiative.

27. By a letter dated 12 July 2001 and received in the Registry on 15 August 2001, Bosnia and Herzegovina informed the Court that it had no objection to the withdrawal of the counter-claims by the FRY and stated that it intended to submit observations regarding the Initiative. By an Order dated 10 September 2001, the President of the Court placed on record the withdrawal by the FRY of the counter-claims submitted in its Counter-Memorial.

28. By a letter dated 3 December 2001, Bosnia and Herzegovina provided the Court with its views regarding the Initiative and transmitted a memorandum on "differences between the Application for Revision of 23 April 2001 and the 'Initiative' of 4 May 2001" as well as a copy of the written observations and annexes filed by Bosnia and Herzegovina on 3 December 2001 in the *Application for Revision case*. In that letter, Bosnia and Herzegovina submitted that "there [was] no basis in fact nor in law to honour this so-called 'Initiative'" and requested the Court *inter alia* to "respond in the negative to the request embodied in the 'Initiative'".

29. By a letter dated 22 February 2002 to the President of the Court, Judge *ad hoc* Lauterpacht resigned from the case.

30. Under cover of a letter of 18 April 2002, the Registrar, referring to Article 34, paragraph 3, of the Statute, transmitted copies of the written proceedings to the Secretary-General of the United Nations.

31. In its Judgment of 3 February 2003 in the *Application for Revision case*, the Court found that the FRY's Application for revision, under Article 61 of the Statute of the Court, of the Judgment of 11 July 1996 on preliminary objections was inadmissible.

32. By a letter dated 5 February 2003, the FRY informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro". The title of the case was duly changed and the name "Serbia and Montenegro" was used thereafter for all official purposes of the Court.

33. By a letter of 17 February 2003, Bosnia and Herzegovina reaffirmed its position with respect to the Initiative, as stated in the letter of 3 December 2001, and expressed its desire to proceed with the case. By a letter dated 8 April 2003, Serbia and Montenegro submitted that, due to major new developments since the filing of the last written pleading, additional written pleadings were necessary in order to make the oral proceedings more effective and less time-consuming. On 24 April 2003, the President of the Court held a meeting with the Agents of the Parties to discuss questions of procedure. Serbia and Montenegro stated that it maintained its request for the Court to rule on its Initiative while Bosnia and Herzegovina considered that there was no need for additional written pleadings. The possible dates and duration of the oral proceedings were also discussed.

34. By a letter dated 25 April 2003, Bosnia and Herzegovina chose Mr. Ahmed Mahiou to sit as judge *ad hoc* in the case.

35. By a letter of 12 June 2003, the Registrar informed Serbia and Montenegro that the Court could not accede to its request that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised in the Initiative; however, should it wish to do so, Serbia and Montenegro would be free to present further argument on jurisdictional questions during the oral proceedings on the merits. In further letters of the same date, the Parties were informed that the Court, having considered Serbia and Montenegro's request, had decided not to authorize the filing of further written pleadings in the case.

36. In an exchange of letters in October and November 2003, the Agents of the Parties made submissions as to the scheduling of the oral proceedings.

37. Following a further exchange of letters between the Parties in March and April 2004, the President held a meeting with the Agents of the Parties on 25 June 2004, at which the Parties presented their views on, *inter alia*, the scheduling of the hearings and the calling of witnesses and experts.

38. By letters dated 26 October 2004, the Parties were informed that, after examining the list of cases before it ready for hearing and considering all the relevant circumstances, the Court had decided to fix Monday 27 February 2006 for the opening of the oral proceedings in the case.

39. On 14 March 2005, the President met with the Agents of the Parties in order to ascertain their views with regard to the organization of the oral proceedings. At this meeting, both Parties indicated that they intended to call witnesses and experts.

40. By letters dated 19 March 2005, the Registrar, referring to Articles 57 and 58 of the Rules of Court, requested the Parties to provide, by 9 September 2005, details of the witnesses, experts and witness-experts whom they intended to call and indications of the specific point or points to which the evidence of the witness, expert or witness-expert would be directed. By a letter of 8 September 2005, the Agent of Serbia and Montenegro transmitted to the Court a list of eight witnesses and two witness-experts whom his Government wished to call during the oral proceedings. By a further letter of the same date, the Agent of Serbia and Montenegro communicated a list of five witnesses whose attendance his Government requested the Court to arrange pursuant to Article 62, paragraph 2, of the Rules of Court. By a letter dated 9 September 2005, Bosnia and Herzegovina transmitted to the Court a list of three experts whom it wished to call at the hearings.

41. By a letter dated 5 October 2005, the Deputy Agent of Bosnia and Herzegovina informed the Registry of Bosnia and Herzegovina's views with regard to the time that it considered necessary for the hearing of the experts it wished to call and made certain submissions, *inter alia*, with respect to the request made by Serbia and Montenegro pursuant to Article 62, paragraph 2, of the Rules of Court. By letters of 4 and 11 October 2005, the Agent and the Co-Agent of Serbia and Montenegro, respectively, informed the Registry of the views of their Government with respect to the time necessary for the hearing of the witnesses and witness-experts whom it wished to call.

42. By letters of 15 November 2005, the Registrar informed the Parties, *inter alia*, that the Court had decided that it would hear the three experts and ten witnesses and witness-experts that Bosnia and Herzegovina and Serbia and Montenegro respectively wished to call and, moreover, that it had decided not to arrange for the attendance, pursuant to Article 62, paragraph 2, of the Rules

of Court, of the five witnesses proposed by Serbia and Montenegro. However, the Court reserved the right to exercise subsequently, if necessary, its powers under that provision to call persons of its choosing on its own initiative. The Registrar also requested the Parties to provide certain information related to the hearing of the witnesses, experts and witness-experts including, *inter alia*, the language in which each witness, expert or witness-expert would speak and, in respect of those speaking in a language other than English or French, the arrangements which the Party intended to make, pursuant to Article 70, paragraph 2, of the Rules of Court, for interpretation into one of the official languages of the Court. Finally the Registrar transmitted to the Parties the calendar for the oral proceedings as adopted by the Court.

43. By a letter dated 12 December 2005, the Agent of Serbia and Montenegro informed the Court, *inter alia*, that eight of the ten witnesses and witness-experts it wished to call would speak in Serbian and outlined the arrangements that Serbia and Montenegro would make for interpretation from Serbian to one of the official languages of the Court. By a letter dated 15 December 2005, the Deputy Agent of Bosnia and Herzegovina informed the Court, *inter alia*, that the three experts called by Bosnia and Herzegovina would speak in one of the official languages of the Court.

44. By a letter dated 28 December 2005, the Deputy Agent of Bosnia and Herzegovina, on behalf of the Government, requested that the Court call upon Serbia and Montenegro, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. By a letter dated 16 January 2006, the Agent of Serbia and Montenegro informed the Court of his Government's views on this request. By a letter dated 19 January 2006, the Registrar, acting on the instructions of the Court, asked Bosnia and Herzegovina to provide certain further information relating to its request under Article 49 of the Statute and Article 62, paragraph 2, of the Rules of Court. By letters dated 19 and 24 January 2006, the Deputy Agent of Bosnia and Herzegovina submitted additional information and informed the Court that Bosnia and Herzegovina had decided, for the time being, to restrict its request to the redacted sections of certain documents. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro communicated his Government's views regarding this modified request. By letters dated 2 February 2006, the Registrar informed the Parties that the Court had decided, at this stage of the proceedings, not to call upon Serbia and Montenegro to produce the documents in question. However, the Court reserved the right to exercise subsequently, if necessary, its powers under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to request, *proprio motu*, the production by Serbia and Montenegro of the documents in question.

45. By a letter dated 16 January 2006, the Deputy Agent of Bosnia and Herzegovina transmitted to the Registry copies of new documents that Bosnia and Herzegovina wished to produce pursuant to Article 56 of the Rules of Court. Under cover of the same letter and of a letter dated 23 January 2006, the Deputy Agent of Bosnia and Herzegovina also transmitted to the Registry copies of video material, extracts of which Bosnia and Herzegovina intended to present at the oral proceedings. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro informed the Court that his Government did not object to the production of the new documents by Bosnia and Herzegovina. Nor did it object to the video material being shown at the oral proceedings. By

letters of 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objections had been raised by Serbia and Montenegro, the Court had decided to authorize the production of the new documents by Bosnia and Herzegovina pursuant to Article 56 of the Rules of Court and that it had further decided that Bosnia and Herzegovina could show extracts of the video material at the hearings.

46. Under cover of a letter dated 18 January 2006 and received on 20 January 2006, the Agent of Serbia and Montenegro provided the Registry with copies of new documents which his Government wished to produce pursuant to Article 56 of the Rules of Court. By a letter of 1 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not object to the production of the said documents by Serbia and Montenegro. By a letter dated 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objection had been raised by Bosnia and Herzegovina, the Court had decided to authorize the production of the new documents by Serbia and Montenegro. By a letter dated 9 February 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court certain missing elements of the new documents submitted on 20 January 2006 and made a number of observations concerning the new documents produced by Bosnia and Herzegovina. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not intend to make any observations regarding the new documents produced by Serbia and Montenegro.

47. Under cover of a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court a list of public documents that his Government would refer to in its first round of oral argument. By a further letter dated 14 February 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court copies of folders containing the public documents referred to in the list submitted on 31 January 2006 and informed the Court that Serbia and Montenegro had decided not to submit the video materials included in that list. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina had no observations to make regarding the list of public documents submitted by Serbia and Montenegro on 31 January 2006. He also stated that Bosnia and Herzegovina would refer to similar sources during its pleadings and was planning to provide the Court and the Respondent, at the end of the first round of its oral argument, with a CD-ROM containing materials it had quoted (see below, paragraph 54).

48. By a letter dated 26 January 2006, the Registrar informed the Parties of certain decisions taken by the Court with regard to the hearing of the witnesses, experts and witness-experts called by the Parties including, *inter alia*, that, exceptionally, the verbatim records of the sittings at which the witnesses, experts and witness-experts were heard would not be made available to the public or posted on the website of the Court until the end of the oral proceedings.

49. By a letter dated 13 February 2006, the Agent of Serbia and Montenegro informed the Court that his Government had decided not to call two of the witnesses and witness-experts included in the list transmitted to the Court on 8 September 2005 and that the order in which the remaining witnesses and witness-expert would be heard had been modified. By a letter dated 21 February 2006, the Agent of Serbia and Montenegro requested the Court's per-

mission for the examination of three of the witnesses called by his Government to be conducted in Serbian (namely, Mr. Dušan Mihajlović, Mr. Vladimir Milićević, Mr. Dragoljub Mićunović). By a letter dated 22 February 2006, the Registrar informed the Agent of Serbia and Montenegro that there was no objection to such a procedure being followed, pursuant to the provisions of Article 39, paragraph 3, of the Statute and Article 70 of the Rules of Court.

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

51. Public sittings were held from 27 February to 9 May 2006, at which the Court heard the oral arguments and replies of:

*For Bosnia and Herzegovina:* Mr. Sakib Softić,  
Mr. Phon van den Biesen,  
Mr. Alain Pellet,  
Mr. Thomas M. Franck,  
Ms Brigitte Stern,  
Mr. Luigi Condorelli,  
Ms Magda Karagiannakis,  
Ms Joanna Korner,  
Ms Laura Dauban,  
Mr. Antoine Ollivier,  
Mr. Morten Torkildsen.

*For Serbia and Montenegro:* H.E. Mr. Radoslav Stojanović,  
Mr. Saša Obradović,  
Mr. Vladimir Cvetković,  
Mr. Tibor Varady,  
Mr. Ian Brownlie,  
Mr. Xavier de Roux,  
Ms Nataša Fauveau-Ivanović,  
Mr. Andreas Zimmerman,  
Mr. Vladimir Djerić,  
Mr. Igor Olujčić.

52. On 1 March 2006, the Registrar, on the instructions of the Court, requested Bosnia and Herzegovina to specify the precise origin of each of the extracts of video material and of the graphics, charts and photographs shown or to be shown at the oral proceedings. On 2 March 2006 Bosnia and Herzegovina provided the Court with certain information regarding the extracts of video material shown at the sitting on 1 March 2006 and those to be shown at the sittings on 2 March 2006 including the source of such video material. Under cover of a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina transmitted to the Court a list detailing the origin of the extracts of video material, graphics, charts and photographs shown or to be shown by it during its first round of oral argument, as well as transcripts, in English and in French, of the above-mentioned extracts of video material.

53. By a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina informed the Court that it wished to withdraw one of the experts it had intended to call. In that letter, the Agent of Bosnia and Herzegovina also asked the Court to request each of the Parties to provide a one-page outline per wit-

ness, expert or witness-expert detailing the topics which would be covered in his evidence or statement. By letters dated 7 March 2006, the Parties were informed that the Court requested them to provide, at least three days before the hearing of each witness, expert or witness-expert, a one-page summary of the latter's evidence or statement.

54. On 7 March 2006, Bosnia and Herzegovina provided the Court and the Respondent with a CD-ROM containing "ICTY Public Exhibits and other Documents cited by Bosnia and Herzegovina during its Oral Pleadings (07/03/2006)". By a letter dated 10 March 2006, Serbia and Montenegro informed the Court that it objected to the production of the CD-ROM on the grounds that the submission at such a late stage of so many documents "raise[d] serious concerns related to the respect for the Rules of Court and the principles of fairness and equality of the parties". It also pointed out that the documents included on the CD-ROM "appear[ed] questionable from the point of [view of] Article 56, paragraph 4, of the Rules [of Court]". By a letter dated 13 March 2006, the Agent of Bosnia and Herzegovina informed the Court of his Government's views regarding the above-mentioned objections raised by Serbia and Montenegro. In that letter, the Agent submitted, *inter alia*, that all the documents on the CD-ROM had been referred to by Bosnia and Herzegovina in its oral argument and were documents which were in the public domain and were readily available within the terms of Article 56, paragraph 4, of the Rules of Court. The Agent added that Bosnia and Herzegovina was prepared to withdraw the CD-ROM if the Court found it advisable. By a letter of 14 March 2006, the Registrar informed Bosnia and Herzegovina that, given that Article 56, paragraph 4, of the Rules of Court did not require or authorize the submission to the Court of the full text of a document to which reference was made during the oral proceedings pursuant to that provision and since it was difficult for the other Party and the Court to come to terms, at the late stage of the proceedings, with such an immense mass of documents, which in any case were in the public domain and could thus be consulted if necessary, the Court had decided that it was in the interests of the good administration of justice that the CD-ROM be withdrawn. By a letter dated 16 March 2006, the Agent of Bosnia and Herzegovina withdrew the CD-ROM which it had submitted on 7 March 2006.

55. On 17 March 2006, Bosnia and Herzegovina submitted a map for use during the statement to be made by one of its experts on the morning of 20 March 2006. On 20 March 2006, Bosnia and Herzegovina produced a folder of further documents to be used in the examination of that expert. Serbia and Montenegro objected strongly to the production of the documents at such a late stage since its counsel would not have time to prepare for cross-examination. On 20 March 2006, the Court decided that the map submitted on 17 March 2006 could not be used during the statement of the expert. Moreover, having consulted both Parties, the Court decided to cancel the morning sitting and instead hear the expert during an afternoon sitting in order to allow Serbia and Montenegro to be ready for cross-examination.

56. On 20 March 2006, Serbia and Montenegro informed the Court that one of the witnesses it had intended to call finally would not be giving evidence.

57. The following experts were called by Bosnia and Herzegovina and made their statements at public sittings on 17 and 20 March 2006: Mr. Andráš J. Riedlmayer and General Sir Richard Dannatt. The experts were examined by

counsel for Bosnia and Herzegovina and cross-examined by counsel for Serbia and Montenegro. The experts were subsequently re-examined by counsel for Bosnia and Herzegovina. Questions were put to Mr. Riedlmayer by Judges Křeča, Tomka, Simma and the Vice-President and replies were given orally. Questions were put to General Dannatt by the President, Judge Koroma and Judge Tomka and replies were given orally.

58. The following witnesses and witness-expert were called by Serbia and Montenegro and gave evidence at public sittings on 23, 24, 27 and 28 March 2006: Mr. Vladimir Lukić; Mr. Vitomir Popović; General Sir Michael Rose; Mr. Jean-Paul Sardon (witness-expert); Mr. Dušan Mihajlović; Mr. Vladimir Milićević; Mr. Dragoljub Mićunović. The witnesses and witness-expert were examined by counsel for Serbia and Montenegro and cross-examined by counsel for Bosnia and Herzegovina. General Rose, Mr. Mihajlović and Mr. Milićević were subsequently re-examined by counsel for Serbia and Montenegro. Questions were put to Mr. Lukić by Judges Ranjeva, Simma, Tomka and Bennouna and replies were given orally. Questions were put to General Rose by the Vice-President and Judges Owada and Simma and replies were given orally.

59. With the exception of General Rose and Mr. Jean-Paul Sardon, the above-mentioned witnesses called by Serbia and Montenegro gave their evidence in Serbian and, in accordance with Article 39, paragraph 3, of the Statute and Article 70, paragraph 2, of the Rules of Court, Serbia and Montenegro made the necessary arrangements for interpretation into one of the official languages of the Court and the Registry verified this interpretation. Mr. Stojanović conducted his examination of Mr. Dragoljub Mićunović in Serbian in accordance with the exchange of correspondence between Serbia and Montenegro and the Court on 21 and 22 February 2006 (see paragraph 49 above).

60. In the course of the hearings, questions were put by Members of the Court, to which replies were given orally and in writing, pursuant to Article 61, paragraph 4, of the Rules of Court.

61. By a letter of 8 May 2006, the Agent of Bosnia and Herzegovina requested the Court to allow the Deputy Agent to take the floor briefly on 9 May 2006, in order to correct an assertion about one of the counsel of and one of the experts called by Bosnia and Herzegovina which had been made by Serbia and Montenegro in its oral argument. By a letter dated 9 May 2006, the Agent of Serbia and Montenegro communicated the views of his Government on that matter. On 9 May 2006, the Court decided, in the particular circumstances of the case, to authorize the Deputy Agent of Bosnia and Herzegovina to make a very brief statement regarding the assertion made about its counsel.

62. By a letter dated 3 May 2006, the Agent of Bosnia and Herzegovina informed the Court that there had been a number of errors in references included in its oral argument presented on 2 March 2006 and provided the Court with the corrected references. By a letter dated 8 May 2006, the Agent of Serbia and Montenegro, "in light of the belated corrections by the Applicant, and for the sake of the equality between the parties", requested the Court to accept a paragraph of its draft oral argument of 2 May 2006 which had responded to one of the corrections made by Bosnia and Herzegovina but had been left out of the final version of its oral argument "in order to fit the schedule of [Serbia and Montenegro's] presentations". By a letter dated 7 June 2006, the Parties were informed that the Court had taken due note of both the explana-

tion given by the Agent of Bosnia and Herzegovina and the observations made in response by the Agent of Serbia and Montenegro.

63. In January 2007, Judge Parra-Aranguren, who had attended the oral proceedings in the case, and had participated in part of the deliberation, but had for medical reasons been prevented from participating in the later stages thereof, informed the President of the Court, pursuant to Article 24, paragraph 1, of the Statute, that he considered that he should not take part in the decision of the case. The President took the view that the Court should respect and accept Judge Parra-Aranguren's position, and so informed the Court.

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64. In its Application, the following requests were made by Bosnia and Herzegovina:

“Accordingly, while reserving the right to revise, supplement or amend this Application, and subject to the presentation to the Court of the relevant evidence and legal arguments, Bosnia and Herzegovina requests the Court to adjudge and declare as follows:

- (a) that Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V of the Genocide Convention;
- (b) that Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the People and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;
- (c) that Yugoslavia (Serbia and Montenegro) has violated and continues to violate Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;
- (d) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;
- (e) that in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1 (3), 55 and 56 of the United Nations Charter;
- (f) that Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4) and 33 (1), of the United Nations Charter;
- (g) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;

(h) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:

- armed attacks against Bosnia and Herzegovina by air and land;
- aerial trespass into Bosnian airspace;
- efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;

(i) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;

(j) that Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2 (4), of the United Nations Charter, as well as its obligations under general and customary international law;

(k) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend itself and its People under United Nations Charter Article 51 and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;

(l) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under United Nations Charter Article 51 and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment, supplies, troops, etc.);

(m) that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

(n) that all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

(o) that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United

Nations Charter and in accordance with the customary doctrine of *ultra vires*;

- (p) that pursuant to the right of collective self-defence recognized by United Nations Charter Article 51, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina — at its request — including by means of immediately providing it with weapons, military equipment and supplies, and armed forces (soldiers, sailors, air-people, etc.);
- (q) that Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:
- from its systematic practice of so-called ‘ethnic cleansing’ of the citizens and sovereign territory of Bosnia and Herzegovina;
  - from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;
  - from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;
  - from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
  - from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
  - from the starvation of the civilian population in Bosnia and Herzegovina;
  - from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;
  - from all use of force — whether direct or indirect, overt or covert — against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;
  - from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;
  - from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;
- (r) that Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro).”

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

*On behalf of the Government of Bosnia and Herzegovina,*  
in the Memorial:

“On the basis of the evidence and legal arguments presented in this Memorial, the Republic of Bosnia and Herzegovina,

Requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia (Serbia and Montenegro), directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population, by
  - killing members of the group;
  - causing deliberate bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - imposing measures intended to prevent births within the group;
2. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;
3. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;
4. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;
5. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;
6. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;
7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia (Serbia and Montenegro) is required to pay, and the Republic of Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the

amount to be determined by the Court in a subsequent phase of the proceedings in this case.

The Republic of Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings.

The Republic of Bosnia and Herzegovina also respectfully draws the attention of the Court to the fact that it has not reiterated, at this point, several of the requests it made in its Application, on the formal assumption that the Federal Republic of Yugoslavia (Serbia and Montenegro) has accepted the jurisdiction of this Court under the terms of the Convention on the Prevention and Punishment of the Crime of Genocide. If the Respondent were to reconsider its acceptance of the jurisdiction of the Court under the terms of that Convention — which it is, in any event, not entitled to do — the Government of Bosnia and Herzegovina reserves its right to invoke also all or some of the other existing titles of jurisdiction and to revive all or some of its previous submissions and requests.”

*On behalf of the Government of Serbia and Montenegro,*

in the Counter-Memorial<sup>1</sup>:

“The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,
  - since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or
  - if some have been committed, there was absolutely no intention of committing genocide, and/or
  - they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group, consequently, they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; and/or
2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,
  - since they have not been committed by the organs of the Federal Republic of Yugoslavia,
  - since they have not been committed on the territory of the Federal Republic of Yugoslavia,
  - since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,
  - since there is no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

<sup>1</sup> Submissions 3 to 6 relate to counter-claims which were subsequently withdrawn (see paragraphs 26 and 27 above).

therefore the Court rejects all claims of the Applicant; and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,
  - because it has incited acts of genocide by the ‘Islamic Declaration’, and in particular by the position contained in it that ‘there can be no peace or coexistence between “Islamic faith” and “non-Islamic” social and political institutions’,
  - because it has incited acts of genocide by the *Novi Vok*, paper of the Muslim youth, and in particular by the verses of a ‘Patriotic Song’ which read as follows:
    - ‘Dear mother, I’m going to plant willows,
    - We’ll hang Serbs from them.
    - Dear mother, I’m going to sharpen knives,
    - We’ll soon fill pits again’;
  - because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that ‘Each Muslim must name a Serb and take oath to kill him’;
  - because public calls for the execution of Serbs were broadcast on radio ‘Hajat’ and thereby acts of genocide were incited;
  - because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;
  - because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;
4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;
5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;
6. Bosnia and Herzegovina is bound to eliminate all consequences of the violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and provide adequate compensation.”

*On behalf of the Government of Bosnia and Herzegovina,*

in the Reply:

“Therefore the Applicant persists in its claims as presented to this Court on 14 April 1994, and recapitulates its Submissions in their entirety.

Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia, directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of Bosnia and Herzegovina, including in particular the Muslim population, by
  - killing members of the group;
  - causing deliberate bodily or mental harm to members of the group;
  - deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia is required to pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the amount to be determined by the Court in a subsequent phase of the proceedings in this case.

Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings;

8. On the very same grounds the conclusions and submissions of the Federal Republic of Yugoslavia with regard to the submissions of Bosnia and Herzegovina need to be rejected;

9. With regard to the Respondent's counter-claims the Applicant comes to the following conclusion. There is no basis in fact and no basis in law

for the proposition that genocidal acts have been committed against Serbs in Bosnia and Herzegovina. There is no basis in fact and no basis in law for the proposition that any such acts, if proven, would have been committed under the responsibility of Bosnia and Herzegovina or that such acts, if proven, would be attributable to Bosnia and Herzegovina. Also, there is no basis in fact and no basis in law for the proposition that Bosnia and Herzegovina has violated any of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. On the contrary, Bosnia and Herzegovina has continuously done everything within its possibilities to adhere to its obligations under the Convention, and will continue to do so;

10. For these reasons, Bosnia and Herzegovina requests the International Court of Justice to reject the counter-claims submitted by the Respondent in its Counter-Memorial of 23 July 1997.”

*On behalf of the Government of Serbia and Montenegro,*

in the Rejoinder<sup>2</sup> :

“The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare :

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,

- since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or

- if some have been committed, there was absolutely no intention of committing genocide, and/or

- they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group,

consequently they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,

- since they have not been committed by the organs of the Federal Republic of Yugoslavia,

- since they have not been committed on the territory of the Federal Republic of Yugoslavia,

- since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,

- since there are no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

<sup>2</sup> Submissions 3 to 6 relate to counter-claims which were subsequently withdrawn (see paragraphs 26 and 27 above).

therefore the Court rejects all the claims of the Applicant, and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,
    - because it has incited acts of genocide by the ‘Islamic Declaration’, and in particular by the position contained in it that ‘*there can be no peace or coexistence between “Islamic faith” and “non-Islamic” social and political institutions*’;
    - because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth, and in particular by the verses of a ‘Patriotic Song’ which read as follows:
      - ‘Dear mother, I’m going to plant willows,
      - We’ll hang Serbs from them.
      - Dear mother, I’m going to sharpen knives,
      - We’ll soon fill pits again’;
    - because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that ‘Each Muslim’ must name a Serb and take oath to kill him;
    - because public calls for the execution of Serbs were broadcast on radio ‘Hajat’ and thereby acts of genocide were incited;
    - because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;
    - because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;
  4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;
  5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;
  6. Bosnia and Herzegovina is bound to eliminate all the consequences of violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and to provide adequate compensation.”
66. At the oral proceedings, the following final submissions were presented by the Parties:

*On behalf of the Government of Bosnia and Herzegovina,*  
at the hearing of 24 April 2006:

“Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare:

1. That Serbia and Montenegro, through its organs or entities under its control, has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying in part the non-Serb national, ethnic or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population, by
  - killing members of the group;
  - causing serious bodily or mental harm to members of the group;
  - deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - imposing measures intended to prevent births within the group;
  - forcibly transferring children of the group to another group;
2. Substantially:
  - (i) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by complicity in genocide as defined in paragraph 1, above; and/or
  - (ii) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals, groups and entities engaged in acts of genocide, as defined in paragraph 1 above;
3. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide and by inciting to commit genocide, as defined in paragraph 1 above;
4. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed to prevent genocide;
5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;
6. That the violations of international law set out in submissions 1 to 5 constitute wrongful acts attributable to Serbia and Montenegro which entail its international responsibility, and, accordingly,
  - (a) that Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act pro-

hibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

(b) that Serbia and Montenegro must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused. That, in particular, the compensation shall cover any financially assessable damage which corresponds to:

- (i) damage caused to natural persons by the acts enumerated in Article III of the Convention, including non-material damage suffered by the victims or the surviving heirs or successors and their dependants;
  - (ii) material damage caused to properties of natural or legal persons, public or private, by the acts enumerated in Article III of the Convention;
  - (iii) material damage suffered by Bosnia and Herzegovina in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from the acts enumerated in Article III of the Convention;
- (c) that the nature, form and amount of the compensation shall be determined by the Court, failing agreement thereon between the Parties one year after the Judgment of the Court, and that the Court shall reserve the subsequent procedure for that purpose;
- (d) that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court;
7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court.”

*On behalf of the Government of Serbia and Montenegro,*  
at the hearing of 9 May 2006:

- “Serbia and Montenegro asks the Court to adjudge and declare:
- that this Court has no jurisdiction because the Respondent had no access to the Court at the relevant moment; or, in the alternative;
  - that this Court has no jurisdiction over the Respondent because the Respondent never remained or became bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and because there is no other ground on which jurisdiction over the Respondent could be based.
- In case the Court determines that jurisdiction exists Serbia and Montenegro asks the Court to adjudge and declare:
- That the requests in paragraphs 1 to 6 of the Submissions of Bosnia

and Herzegovina relating to alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide be rejected as lacking a basis either in law or in fact.

- In any event, that the acts and/or omissions for which the respondent State is alleged to be responsible are not attributable to the respondent State. Such attribution would necessarily involve breaches of the law applicable in these proceedings.
- Without prejudice to the foregoing, that the relief available to the applicant State in these proceedings, in accordance with the appropriate interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide, is limited to the rendering of a declaratory judgment.
- Further, without prejudice to the foregoing, that any question of legal responsibility for alleged breaches of the Orders for the indication of provisional measures, rendered by the Court on 8 April 1993 and 13 September 1993, does not fall within the competence of the Court to provide appropriate remedies to an applicant State in the context of contentious proceedings, and, accordingly, the request in paragraph 7 of the Submissions of Bosnia and Herzegovina should be rejected.”

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## II. IDENTIFICATION OF THE RESPONDENT PARTY

67. The Court has first to consider a question concerning the identification of the Respondent Party before it in these proceedings. After the close of the oral proceedings, by a letter dated 3 June 2006, the President of the Republic of Serbia informed the Secretary-General of the United Nations that, following the Declaration of Independence adopted by the National Assembly of Montenegro on 3 June 2006, “the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organisations of the United Nations system, [would be] continued by the Republic of Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro”. He further stated that “in the United Nations the name ‘Republic of Serbia’ [was] to be henceforth used instead of the name ‘Serbia and Montenegro’” and added that the Republic of Serbia “remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter”.

68. By a letter of 16 June 2006, the Minister for Foreign Affairs of the Republic of Serbia informed the Secretary-General, *inter alia*, that “[t]he Republic of Serbia continue[d] to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro” and requested that “the Republic of Serbia be considered a party to all international agreements in force, instead of Serbia and Montenegro”. By a letter addressed to the Secretary-General dated 30 June

2006, the Minister for Foreign Affairs confirmed the intention of the Republic of Serbia to continue to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro. He specified that “all treaty actions undertaken by Serbia and Montenegro w[ould] continue in force with respect to the Republic of Serbia with effect from 3 June 2006”, and that, “all declarations, reservations and notifications made by Serbia and Montenegro w[ould] be maintained by the Republic of Serbia until the Secretary-General, as depositary, [were] duly notified otherwise”.

69. On 28 June 2006, by its resolution 60/264, the General Assembly admitted the Republic of Montenegro (hereinafter “Montenegro”) as a new Member of the United Nations.

70. By letters dated 19 July 2006, the Registrar requested the Agent of Bosnia and Herzegovina, the Agent of Serbia and Montenegro and the Foreign Minister of Montenegro to communicate to the Court the views of their Governments on the consequences to be attached to the above-mentioned developments in the context of the case. By a letter dated 26 July 2006, the Agent of Serbia and Montenegro explained that, in his Government’s opinion, “there [was] continuity between Serbia and Montenegro and the Republic of Serbia (on the grounds of Article 60 of the Constitutional Charter of Serbia and Montenegro)”. He noted that the entity which had been Serbia and Montenegro “ha[d] been replaced by two distinct States, one of them [was] Serbia, the other [was] Montenegro”. In those circumstances, the view of his Government was that “the Applicant ha[d] first to take a position, and to decide whether it wishe[d] to maintain its original claim encompassing both Serbia and Montenegro, or whether it [chose] to do otherwise”.

71. By a letter to the Registrar dated 16 October 2006, the Agent of Bosnia and Herzegovina referred to the letter of 26 July 2006 from the Agent of Serbia and Montenegro, and observed that Serbia’s definition of itself as the continuator of the former Serbia and Montenegro had been accepted both by Montenegro and the international community. He continued however as follows:

“this acceptance cannot have, and does not have, any effect on the applicable rules of state responsibility. Obviously, these cannot be altered bilaterally or retroactively. At the time when genocide was committed and at the time of the initiation of this case, Serbia and Montenegro constituted a single state. Therefore, Bosnia and Herzegovina is of the opinion that both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute the cause of action in this case.”

72. By a letter dated 29 November 2006, the Chief State Prosecutor of Montenegro, after indicating her capacity to act as legal representative of the Republic of Montenegro, referred to the letter from the Agent of

Bosnia and Herzegovina dated 16 October 2006, quoted in the previous paragraph, expressing the view that “both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute[s] the cause of action in this case”. The Chief State Prosecutor stated that the allegation concerned the liability in international law of the sovereign State of Montenegro, and that Montenegro regarded it as an attempt to have it become a participant in this way, without its consent, “i.e. to become a respondent in this procedure”. The Chief State Prosecutor drew attention to the fact that, following the referendum held in Montenegro on 21 May 2006, the National Assembly of Montenegro had adopted a decision pronouncing the independence of the Republic of Montenegro. In the view of the Chief State Prosecutor, the Republic of Montenegro had become “an independent state with full international legal personality within its existing administrative borders”, and she continued:

“The issue of international-law succession of [the] State union of Serbia and Montenegro is regulated in Article 60 of [the] Constitutional Charter, and according to [that] Article the legal successor of [the] State union of Serbia and Montenegro is the Republic of Serbia, which, as a sovereign state, [has] become [the] follower of all international obligations and successor in international organizations.”

The Chief State Prosecutor concluded that in the dispute before the Court, “the Republic of Montenegro may not have [the] capacity of respondent, [for the] above mentioned reasons”.

73. By a letter dated 11 December 2006, the Agent of Serbia referred to the letters from the Applicant and from Montenegro described in paragraphs 71 and 72 above, and observed that there was “an obvious contradiction between the position of the Applicant on the one hand and the position of Montenegro on the other regarding the question whether these proceedings may or may not yield a decision which would result in the international responsibility of Montenegro” for the unlawful conduct invoked by the Applicant. The Agent stated that “Serbia is of the opinion that this issue needs to be resolved by the Court”.

74. The Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State.

75. The Court notes that Serbia has accepted “continuity between Serbia and Montenegro and the Republic of Serbia” (paragraph 70 above), and has assumed responsibility for “its commitments deriving from international treaties concluded by Serbia and Montenegro” (paragraph 68 above), thus including commitments under the Genocide Convention. Montenegro, on the other hand, does not claim to be the continuator of Serbia and Montenegro.

76. The Court recalls a fundamental principle that no State may be subject to its jurisdiction without its consent; as the Court observed in the case of *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Court's "jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it . . ." (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 260, para. 53). In its Judgment of 11 July 1996 (see paragraph 12 above), the significance of which will be explained below, the Court found that such consent existed, for the purposes of the present case, on the part of the FRY, which subsequently assumed the name of Serbia and Montenegro, without however any change in its legal personality. The events related in paragraphs 67 to 69 above clearly show that the Republic of Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the present case. It is also clear from the letter of 29 November 2006 quoted in paragraph 72 above that it does not give its consent to the jurisdiction of the Court over it for the purposes of the present dispute. Furthermore, the Applicant did not in its letter of 16 October 2006 assert that Montenegro is still a party to the present case; it merely emphasized its views as to the joint and several liability of Serbia and of Montenegro.

77. The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. Accordingly, any findings that the Court may make in the operative part of the present Judgment are to be addressed to Serbia.

78. That being said, it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro.

79. The Court observes that the Republic of Montenegro is a party to the Genocide Convention. Parties to that Convention have undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.

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### III. THE COURT'S JURISDICTION

#### (1) *Introduction: The Jurisdictional Objection of Serbia and Montenegro*

80. Notwithstanding the fact that in this case the stage of oral proceedings on the merits has been reached, and the fact that in 1996 the Court gave a judgment on preliminary objections to its jurisdiction (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595, hereinafter "the 1996 Judgment"), an important issue of a jurisdictional character has

since been raised by the Initiative, and the Court has been asked to rule upon it (see paragraphs 26-28 above). The basis of jurisdiction asserted by the Applicant, and found applicable by the Court by the 1996 Judgment, is Article IX of the Genocide Convention. The Socialist Federal Republic of Yugoslavia (hereinafter "the SFRY") became a party to that Convention on 29 August 1950. In substance, the central question now raised by the Respondent is whether at the time of the filing of the Application instituting the present proceedings the Respondent was or was not the continuator of the SFRY. The Respondent now contends that it was not a continuator State, and that therefore not only was it not a party to the Genocide Convention when the present proceedings were instituted, but it was not then a party to the Statute of the Court by virtue of membership in the United Nations; and that, not being such a party, it did not have access to the Court, with the consequence that the Court had no jurisdiction *ratione personae* over it.

81. This contention was first raised, in the context of the present case, by the "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia" filed by the Respondent on 4 May 2001 (paragraph 26 above). The circumstances underlying that Initiative will be examined in more detail below (paragraphs 88-99). Briefly stated, the situation was that the Respondent, after claiming that since the break-up of the SFRY in 1992 it was the continuator of that State, and as such maintained the membership of the SFRY in the United Nations, had on 27 October 2000 applied, "in light of the implementation of the Security Council resolution 777 (1992)", to be admitted to the Organization as a new Member, thereby in effect relinquishing its previous claim. The Respondent contended that it had in 2000 become apparent that it had not been a Member of the United Nations in the period 1992-2000, and was thus not a party to the Statute at the date of the filing of the Application in this case; and that it was not a party to the Genocide Convention on that date. The Respondent concluded that "the Court has no jurisdiction over [the Respondent] *ratione personae*". It requested the Court "to suspend proceedings regarding the merits of the Case until a decision on this Initiative is rendered".

82. By a letter of 12 June 2003, the Registrar, acting on the instructions of the Court, informed the Respondent that the Court could not accede to the request made in that document, that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised therein. The Respondent was informed, nevertheless, that the Court "[w]ould] not give judgment on the merits in the present case unless it [was] satisfied that it ha[d] jurisdiction" and that, "[s]hould Serbia and Montenegro wish to present further arguments to the Court on jurisdictional questions during the oral proceedings on the merits, it [w]ould] be free to do so". The Respondent accordingly raised, as an "issue of procedure", the question whether the Respondent had access to the Court at the date of the Application, and each of the parties has now addressed

argument to the Court on that question. It has however at the same time been argued by the Applicant that the Court may not deal with the question, or that the Respondent is debarred from raising it at this stage of the proceedings. These contentions will be examined below.

83. Subsequently, on 15 December 2004, the Court delivered judgment in eight cases brought by Serbia and Montenegro against Member States of NATO (cases concerning the *Legality of Use of Force*). The Applications instituting proceedings in those cases had been filed on 29 April 1999, that is to say prior to the admission of Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. In each of these cases, the Court held that it had no jurisdiction to entertain the claims made in the Application (see, for example, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 328, para. 129), on the grounds that “Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute” (*ibid.*, p. 327, para. 127). It held, “in light of the legal consequences of the new development since 1 November 2000”, that “Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application . . .” (*ibid.*, p. 311, para. 79). No finding was made in those judgments on the question whether or not the Respondent was a party to the Genocide Convention at the relevant time.

84. Both Parties recognize that each of these Judgments has the force of *res judicata* in the specific case for the parties thereto; but they also recognize that these Judgments, not having been rendered in the present case, and involving as parties States not parties to the present case, do not constitute *res judicata* for the purposes of the present proceedings. In view however of the findings in the cases concerning the *Legality of Use of Force* as to the status of the FRY vis-à-vis the United Nations and the Court in 1999, the Respondent has invoked those decisions as supportive of its contentions in the present case.

85. The grounds upon which, according to Bosnia and Herzegovina, the Court should, at this late stage of the proceedings, decline to examine the questions raised by the Respondent as to the status of Serbia and Montenegro in relation to Article 35 of the Statute, and its status as a party to the Genocide Convention, are because the conduct of the Respondent in relation to the case has been such as to create a sort of *forum prorogatum*, or an estoppel, or to debar it, as a matter of good faith, from asserting at this stage of the proceedings that it had no access to the Court at the date the proceedings were instituted; and because the questions raised by the Respondent had already been resolved by the 1996 Judgment, with the authority of *res judicata*.

86. As a result of the Initiative of the Respondent (paragraph 81 above), and its subsequent argument on what it has referred to as an “issue of procedure”, the Court has before it what is essentially an objection by the Respondent to its jurisdiction, which is preliminary in the sense that, if it is upheld, the Court will not proceed to determine the merits. The Applicant objects in turn to the Court examining further the Respondent’s jurisdictional objection. These matters evidently require to be examined as preliminary points, and it was for this reason that the Court instructed the Registrar to write to the Parties the letter of 12 June 2003, referred to in paragraph 82 above. The letter was intended to convey that the Court would listen to any argument raised by the Initiative which might be put to it, but not as an indication of what its ruling might be on any such arguments.

87. In order to make clear the background to these issues, the Court will first briefly review the history of the relationship between the Respondent and the United Nations during the period from the break-up of the SFRY in 1992 to the admission of Serbia and Montenegro (then called the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. The previous decisions of the Court in this case, and in the *Application for Revision* case, have been briefly recalled above (paragraphs 4, 8, 12 and 31). They will be referred to more fully below (paragraphs 105-113) for the purpose of (in particular) an examination of the contentions of Bosnia and Herzegovina on the question of *res judicata*.

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(2) *History of the Status of the FRY with Regard to the United Nations*

88. In the early 1990s the SFRY, a founding Member State of the United Nations, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to disintegrate. On 25 June 1991 Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia were admitted as Members to the United Nations; as was the former Yugoslav Republic of Macedonia on 8 April 1993.

89. On 27 April 1992 the “participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro” had adopted a declaration, stating in pertinent parts:

“ . . . . .  
 1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,  
 . . . . .

Remaining bound by all obligations to international organizations and institutions whose member it is . . . .” (United Nations doc. A/46/915, Ann. II).

90. An official Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General of the United Nations, stated *inter alia* that:

“The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.

Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia.” (United Nations doc. A/46/915, Ann. I.)

91. On 30 May 1992, the Security Council adopted resolution 757 (1992), in which, *inter alia*, it noted that “the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted”.

92. On 19 September 1992, the Security Council adopted resolution 777 (1992) which read as follows:

“The Security Council,  
 Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Considering that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

Recalling in particular resolution 757 (1992) which notes that ‘the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted’,

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Decides* to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly.”

The resolution was adopted by 12 votes in favour, none against, and 3 abstentions.

93. On 22 September 1992 the General Assembly adopted resolution 47/11, according to which:

“The General Assembly,

Having received the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *decides* that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Takes note* of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly.”

The resolution was adopted by 127 votes to 6, with 26 abstentions.  
 94. On 25 September 1992, the Permanent Representatives of Bosnia and Herzegovina and Croatia addressed a letter to the Secretary-General, in which, with reference to Security Council resolution 777 (1992) and

General Assembly resolution 47/1, they stated their understanding as follows: “At this moment, there is no doubt that the Socialist Federal Republic of Yugoslavia is not a member of the United Nations any more. At the same time, the Federal Republic of Yugoslavia is clearly not yet a member.” They concluded that “[t]he flag flying in front of the United Nations and the name-plaque bearing the name ‘Yugoslavia’ do not represent anything or anybody any more” and “kindly request[ed] that [the Secretary-General] provide a legal explanatory statement concerning the questions raised” (United Nations doc. A/47/474).

95. In response, on 29 September 1992, the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia, in which he stated that the “considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1” was as follows:

“While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

On the other hand, the resolution neither terminates nor suspends Yugoslavia’s *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign ‘Yugoslavia’. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1.” (United Nations doc. A/47/485; emphasis in the original.)

96. On 29 April 1993, the General Assembly, upon the recommendation contained in Security Council resolution 821 (1993) (couched in terms similar to those of Security Council resolution 777 (1992)), adopted resolution 47/229 in which it decided that “the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council”.

97. In its Judgments in the cases concerning the *Legality of Use of Force* (paragraph 83 above), the Court commented on this sequence of events by observing that “all these events testify to the rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period” (*Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 308, para. 73), and earlier the Court, in another context, had referred to the “*sui generis* position which the FRY found itself in” during the period between 1992 to 2000 (*loc. cit.*, citing *I.C.J. Reports 2003*, p. 31, para. 71).

98. This situation, however, came to an end with a new development in 2000. On 24 September 2000, Mr. Koštunica was elected President of the FRY. In that capacity, on 27 October 2000 he sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations, in the following terms:

“In the wake of fundamental democratic changes that took place in the Federal Republic of Yugoslavia, in the capacity of President, I have the honour to request the admission of the Federal Republic of Yugoslavia to the United Nations *in light of the implementation of the Security Council resolution 777 (1992)*.” (United Nations doc. A/55/528-S/2000/1043; emphasis added.)

99. Acting upon this application by the FRY for membership in the United Nations, the Security Council on 31 October 2000 “*recommended*” to the General Assembly that the Federal Republic of Yugoslavia be admitted to membership in the United Nations” (United Nations doc. S/RES/1326). On 1 November 2000, the General Assembly, by resolution 55/12, “*having received* the recommendation of the Security Council of 31 October 2000” and “*having considered* the application for membership of the Federal Republic of Yugoslavia”, decided to “admit the Federal Republic of Yugoslavia to membership in the United Nations”.

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### (3) *The Response of Bosnia and Herzegovina*

100. The Court will now consider the Applicant’s response to the jurisdictional objection raised by the Respondent, that is to say the conten-

tion of Bosnia and Herzegovina that the Court should not examine the question, raised by the Respondent in its Initiative (paragraph 81 above), of the status of the Respondent at the date of the filing of the Application instituting proceedings. It is first submitted by Bosnia and Herzegovina that the Respondent was under a duty to raise the issue of whether the FRY (Serbia and Montenegro) was a Member of the United Nations at the time of the proceedings on the preliminary objections, in 1996, and that since it did not do so, the principle of *res judicata*, attaching to the Court's 1996 Judgment on those objections, prevents it from reopening the issue. Secondly, the Applicant argues that the Court itself, having decided in 1996 that it had jurisdiction in the case, would be in breach of the principle of *res judicata* if it were now to decide otherwise, and that the Court cannot call in question the authority of its decisions as *res judicata*.

101. The first contention, as to the alleged consequences of the fact that Serbia did not raise the question of access to the Court under Article 35 at the preliminary objection stage, can be dealt with succinctly. Bosnia and Herzegovina has argued that to uphold the Respondent's objection "would mean that a respondent, after having asserted one or more preliminary objections, could still raise others, to the detriment of the effective administration of justice, the smooth conduct of proceedings, and, in the present case, the doctrine of *res judicata*". It should however be noted that if a party to proceedings before the Court chooses not to raise an issue of jurisdiction by way of the preliminary objection procedure under Article 79 of the Rules, that party is not necessarily thereby debarred from raising such issue during the proceedings on the merits of the case. As the Court stated in the case of *Avena and Other Mexican Nationals (Mexico v. United States of America)*,

"There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 52, para. 13). However, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits." (*Judgment, I.C.J. Reports 2004*, p. 29, para. 24).

This first contention of Bosnia and Herzegovina must thus be understood as a claim that the Respondent, by its conduct in relation to the case, including the failure to raise the issue of the application of Article 35 of the Statute, by way of preliminary objection or otherwise, at an earlier stage of the proceedings, should be held to have acquiesced in jurisdiction. This contention is thus parallel to the argument mentioned above (paragraph 85), also advanced by Bosnia and Herzegovina, that the Respondent is debarred from asking the Court to examine that issue for

reasons of good faith, including estoppel and the principle *allegans contraria nemo audietur*.

102. The Court does not however find it necessary to consider here whether the conduct of the Respondent could be held to constitute an acquiescence in the jurisdiction of the Court. Such acquiescence, if established, might be relevant to questions of consensual jurisdiction, and in particular jurisdiction *ratione materiae* under Article IX of the Genocide Convention, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court.

The latter question may be regarded as an issue prior to that of jurisdiction *ratione personae*, or as one constitutive element within the concept of jurisdiction *ratione personae*. Either way, unlike the majority of questions of jurisdiction, it is not a matter of the consent of the parties. As the Court observed in the cases concerning the *Legality of Use of Force*,

"a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent. The question is whether *as a matter of law* Serbia and Montenegro was entitled to seize the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent." (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 295, para. 36; emphasis in the original.)

103. It follows that, whether or not the Respondent should be held to have acquiesced in the jurisdiction of the Court in this case, such acquiescence would in no way debar the Court from examining and ruling upon the question stated above. The same reasoning applies to the argument that the Respondent is estopped from raising the matter at this stage, or debarred from doing so by considerations of good faith. All such considerations can, at the end of the day, only amount to attributing to the Respondent an implied acceptance, or deemed consent, in relation to the jurisdiction of the Court; but, as explained above, *ad hoc* consent of a party is distinct from the question of its capacity to be a party to proceedings before the Court.

104. However Bosnia and Herzegovina's second contention is that,

objectively and apart from any effect of the conduct of the Respondent, the question of the application of Article 35 of the Statute in this case has already been resolved as a matter of *res judicata*, and that if the Court were to go back on its 1996 decision on jurisdiction, it would disregard fundamental rules of law. In order to assess the validity of this contention, the Court will first review its previous decisions in the present case in which its jurisdiction, or specifically the question whether Serbia and Montenegro could properly appear before the Court, has been in issue.

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#### (4) *Relevant Past Decisions of the Court*

105. On 8 April 1993, the Court made an Order in this case indicating certain provisional measures. In that Order the Court briefly examined the circumstances of the break-up of the SFRY, and the claim of the Respondent (then known as “Yugoslavia (Serbia and Montenegro)”) to continuity with that State, and consequent entitlement to continued membership in the United Nations. It noted that “the solution adopted” within the United Nations was “not free from legal difficulties”, but concluded that “the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993*, I.C.J. Reports 1993, p. 14 para. 18). This conclusion was based in part on a provisional view taken by the Court as to the effect of the proviso to Article 35, paragraph 2, of the Statute (*ibid.*, para. 19). The Order contained the reservation, normally included in orders on requests for provisional measures, that “the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case . . . and leaves unaffected the right of the Governments of Bosnia-Herzegovina and Yugoslavia to submit arguments in respect of [that question]” (*ibid.*, p. 23, para. 51). It is therefore evident that no question of *res judicata* arises in connection with the Order of 8 April 1993. A further Order on provisional measures was made on 13 September 1993, but contained nothing material to the question now being considered.

106. In 1995 the Respondent raised seven preliminary objections (one of which was later withdrawn), three of which invited the Court to find that it had no jurisdiction in the case. None of these objections were however founded on a contention that the FRY was not a party to the Statute at the relevant time; that was not a contention specifically advanced in the proceedings on the preliminary objections. At the time of those

proceedings, the FRY was persisting in the claim, that it was continuing the membership of the former SFRY in the United Nations; and while that claim was opposed by a number of States, the position taken by the various organs gave rise to a “confused and complex state of affairs . . . within the United Nations” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2004, p. 308, para. 73). Neither party raised the matter before the Court: Bosnia and Herzegovina as Applicant, while denying that the FRY was a Member of the United Nations as a continuator of the SFRY, was asserting before this Court that the FRY was nevertheless a party to the Statute, either under Article 35, paragraph 2, thereof, or on the basis of the declaration of 27 April 1992 (see paragraphs 89 to 90 above); and for the FRY to raise the issue would have involved undermining or abandoning its claim to be the continuator of the SFRY as the basis for continuing membership of the United Nations.

107. By the 1996 Judgment, the Court rejected the preliminary objections of the Respondent, and found that, “on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections, Judgment*, I.C.J. Reports 1996 (II), p. 623, para. 47 (2) (a)). It also found that the Application was admissible, and stated that “the Court may now proceed to consider the merits of the case . . .” (*ibid.*, p. 622, para. 46).

108. However, on 24 April 2001 Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) filed an Application instituting proceedings seeking revision, under Article 61 of the Statute, of the 1996 Judgment on jurisdiction in this case. That Article requires that there exist “some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court . . .”. The FRY claimed in its Application that:

“The admission of the FRY to the United Nations as a new Member on 1 November 2000 is certainly a new fact . . .

The admission of the FRY to the United Nations as a new Member clears ambiguities and sheds a different light on the issue of the membership of the FRY in the United Nations, in the Statute and in the Genocide Convention.” (*Application for Revision*, I.C.J. Reports 2003, p. 12, para. 18.)

Essentially the contention of the FRY was that its admission to membership in 2000 necessarily implied that it was not a Member of the United Nations and thus not a party to the Statute in 1993, when the proceed-

ings in the present case were instituted, so that the Court would have had no jurisdiction in the case.

109. The history of the relationship between the FRY and the United Nations, from the break-up of the SFRY in 1991-1992 up to the admission of the FRY as a new Member in 2000, has been briefly recalled in paragraphs 88 to 99 above. That history has been examined in detail on more than one occasion, both in the context of the Application for revision referred to in paragraph 108 and in the Court's Judgments in 2004 in the cases concerning the *Legality of Use of Force*. In its Judgment of 3 February 2003 on the Application for revision, the Court carefully studied that relationship; it also recalled the terms of its 1996 Judgment finding in favour of jurisdiction. The Court noted that

“the FRY claims that the facts which existed at the time of the 1996 Judgment and upon the discovery of which its request for revision of that Judgment is based ‘are that the FRY was *not* a party to the Statute, and that it did *not* remain bound by the Genocide Convention continuing the personality of the former Yugoslavia’. It argues that these ‘facts’ were ‘revealed’ by its admission to the United Nations on 1 November 2000 and by [a letter from the United Nations Legal Counsel] of 8 December 2000.

.....  
 In the final version of its argument, the FRY claims that its admission to the United Nations and the Legal Counsel's letter of 8 December 2000 simply ‘revealed’ two facts which had existed in 1996 but had been unknown at the time: that it was not then a party to the Statute of the Court and that it was not bound by the Genocide Convention.” (*I.C.J. Reports 2003*, p. 30, paras. 66 and 69.)

110. The Court did not consider that the admission of the FRY to membership was itself a “new fact”, since it occurred after the date of the Judgment of which the revision was sought (*ibid.*, para. 68). As to the argument that facts on which an application for revision could be based were “revealed” by the events of 2000, the Court ruled as follows:

“In advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61. The FRY's argument cannot accordingly be upheld.” (*Ibid.*, pp. 30-31, para. 69.)

111. The Court therefore found the Application for revision inadmissible. However, as the Court has observed in the cases concerning *Legal-*

*ity of Use of Force*, it did not, in its Judgment on the Application for revision,

“regard the alleged ‘decisive facts’ specified by Serbia and Montenegro as ‘facts that existed in 1996’ for the purpose of Article 61. The Court therefore did not have to rule on the question whether ‘the legal consequences’ could indeed legitimately be deduced from the later facts; in other words, it did not have to say whether it was correct that Serbia and Montenegro had not been a party to the Statute or to the Genocide Convention in 1996.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 313, para. 87.)

112. In a subsequent paragraph of the 2003 Judgment on the Application for revision of the 1996 Judgment, the Court had stated:

“It follows from the foregoing that it has not been established that the request of the FRY is based upon the discovery of ‘some fact’ which was ‘when the judgment was given, unknown to the Court and also to the party claiming revision’. The Court therefore concludes that one of the conditions for the admissibility of an application for revision prescribed by paragraph 1 of Article 61 of the Statute has not been satisfied.” (*I.C.J. Reports 2003*, p. 31, para. 72.)

In its 2004 decisions in the *Legality of Use of Force* cases the Court further commented on this finding:

“The Court thus made its position clear that there could have been no retroactive modification of the situation in 2000, which would amount to a new fact, and that therefore the conditions of Article 61 were not satisfied. This, however, did not entail any finding by the Court, in the revision proceedings, as to what that situation actually was.” (*Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 314, para. 89.)

113. For the purposes of the present case, it is thus clear that the Judgment of 2003 on the Application by the FRY for revision, while binding on the parties, and final and without appeal, did not contain any finding on the question whether or not that State had actually been a Member of the United Nations in 1993. The question of the status of the FRY in 1993 formed no part of the issues upon which the Court pronounced judgment when dismissing that Application.

\* \* \*

(5) *The Principle of Res Judicata*

114. The Court will now consider the principle of *res judicata*, and its application to the 1996 Judgment in this case. The Applicant asserts that the 1996 Judgment, whereby the Court found that it had jurisdiction

under the Genocide Convention, “enjoys the authority of *res judicata* and is not susceptible of appeal” and that “any ruling whereby the Court reversed the 1996 Judgment . . . would be incompatible both with the *res judicata* principle and with Articles 59, 60 and 61 of the Statute”. The Applicant submits that, like its judgments on the merits, “the Court’s decisions on jurisdiction are *res judicata*”. It further observes that, pursuant to Article 60 of the Statute, the Court’s 1996 Judgment is “final and without appeal” subject only to the possibility of a request for interpretation and revision; and the FRY’s request for revision was rejected by the Court in its Judgment of 3 February 2003. The Respondent contends that jurisdiction once upheld may be challenged by new objections; and considers that this does not contravene the principle of *res judicata* or the wording of Article 79 of the Rules of Court. It emphasizes “the right and duty of the Court to act *proprio motu*” to examine its jurisdiction, mentioned in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* (see paragraph 118 below), and contends that the Court cannot “forfeit” that right by not having itself raised the issue in the preliminary objections phase.

115. There is no dispute between the Parties as to the existence of the principle of *res judicata* even if they interpret it differently as regards judgments deciding questions of jurisdiction. The fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal; Article 61 places close limits of time and substance on the ability of the parties to seek the revision of the judgment. The Court stressed those limits in 2003 when it found inadmissible the Application made by Serbia and Montenegro for revision of the 1996 Judgment in the *Application for Revision* case (*I.C.J. Reports 2003*, p. 12, para. 17).

116. Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court’s function, according to Article 38 of its Statute, is to “decide”, that is, to bring to an end, “such disputes as are submitted to it”. Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articu-

lates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.

117. It has however been suggested by the Respondent that a distinction may be drawn between the application of the principle of *res judicata* to judgments given on the merits of a case, and judgments determining the Court’s jurisdiction, in response to preliminary objections; specifically, the Respondent contends that “decisions on preliminary objections do not and cannot have the same consequences as decisions on the merits”. The Court will however observe that the decision on questions of jurisdiction, pursuant to Article 36, paragraph 6, of the Statute, is given by a judgment, and Article 60 of the Statute provides that “[t]he judgment is final and without appeal”, without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits. In its Judgment of 25 March 1999 on the request for interpretation of the Judgment of 11 June 1998 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court expressly recognized that the 1998 Judgment, given on a number of preliminary objections to jurisdiction and admissibility, constituted *res judicata*, so that the Court could not consider a submission inconsistent with that judgment (*Judgment, I.C.J. Reports 1999 (I)*, p. 39, para. 16). Similarly, in its Judgment of 3 February 2003 in the *Application for Revision* case, the Court, when it began by examining whether the conditions for the opening of the revision procedure, laid down by Article 61 of the Statute, were satisfied, undoubtedly recognized that an application could be made for revision of a judgment on preliminary objections; this could in turn only derive from a recognition that such a judgment is “final and without appeal”. Furthermore, the contention put forward by the Respondent would signify that the principle of *res judicata* would not prevent a judgment dismissing a preliminary objection from remaining open to further challenge indefinitely, while a judgment upholding such an objection, and putting an end to the case, would in the nature of things be final and determinative as regards that specific case.

118. The Court recalls that, as it has stated in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, it “must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*” (*Judgment, I.C.J. Reports 1972*, p. 52, para. 13). That decision in its context (in a case in which there was no question of reopening a previous decision of the Court) does not support the Respondent’s contention. It does not signify that jurisdictional decisions remain reviewable indefinitely, nor that the Court may, *proprio motu* or otherwise, reopen matters already decided with the force of *res judicata*. The Respondent has argued that there is a principle that “an international court may consider or reconsider the issue of juris-

dition at any stage of the proceedings". It has referred in this connection both to the dictum just cited from the *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, and to the *Corfu Channel (United Kingdom v. Albania)* case. It is correct that the Court, having in the first phase of that case rejected Albania's preliminary objection to jurisdiction, and having decided that proceedings on the merits were to continue (*Preliminary Objection, Judgment, I.C.J. Reports 1947-1948*, p. 15), did at the merits stage consider and rule on a challenge to its jurisdiction, in particular whether it had jurisdiction to assess compensation (*I.C.J. Reports 1949*, pp. 23-26; 171). But no reconsideration at all by the Court of its earlier Judgment was entailed in this because, following that earlier Judgment, the Parties had concluded a special agreement submitting to the Court, *inter alia*, the question of compensation. The later challenge to jurisdiction concerned only the scope of the jurisdiction conferred by that subsequent agreement.

119. The Respondent also invokes certain international conventions and the rules of other international tribunals. It is true that the European Court of Human Rights may reject, at any stage of the proceedings, an application which it considers inadmissible; and the International Criminal Court may, in exceptional circumstances, permit the admissibility of a case or the jurisdiction of the Court to be challenged after the commencement of the trial. However, these specific authorizations in the instruments governing certain other tribunals reflect their particular admissibility procedures, which are not identical with the procedures of the Court in the field of jurisdiction. They thus do not support the view that there exists a general principle which would apply to the Court, whose Statute not merely contains no such provision, but declares, in Article 60, the *res judicata* principle without exception. The Respondent has also cited certain jurisprudence of the European Court of Human Rights, and an arbitral decision of the German-Polish Mixed Arbitral Tribunal (*von Tiedemann* case); but, in the view of the Court, these too, being based on their particular facts, and the nature of the jurisdictions involved, do not indicate the existence of a principle of sufficient generality and weight to override the clear provisions of the Court's Statute, and the principle of *res judicata*.

120. This does not however mean that, should a party to a case believe that elements have come to light subsequent to the decision of the Court which tend to show that the Court's conclusions may have been based on incorrect or insufficient facts, the decision must remain final, even if it is in apparent contradiction to reality. The Statute provides for only one procedure in such an event: the procedure under Article 61, which offers the possibility for the revision of judgments, subject to the restrictions stated in that Article. In the interests of the stability of legal relations, those restrictions must be rigorously applied. As noted above (para-

graph 110) the FRY's Application for revision of the 1996 Judgment in this case was dismissed, as not meeting the conditions of Article 61. Subject only to this possibility of revision, the applicable principle is *res judicata pro veritate habetur*, that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events.

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(6) *Application of the Principle of Res Judicata to the 1996 Judgment*

121. In the light of these considerations, the Court reverts to the effect and significance of the 1996 Judgment. That Judgment was essentially addressed, so far as questions of jurisdiction were concerned, to the question of the Court's jurisdiction under the Genocide Convention. It resolved in particular certain questions that had been raised as to the status of Bosnia and Herzegovina in relation to the Convention; as regards the FRY, the Judgment stated simply as follows:

"the former Socialist Federal Republic of Yugoslavia . . . signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:

'The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'

This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17.)

122. Nothing was stated in the 1996 Judgment about the status of the FRY in relation to the United Nations, or the question whether it could participate in proceedings before the Court; for the reasons already mentioned above (paragraph 106), both Parties had chosen to refrain from asking for a decision on these matters. The Court however considers it necessary to emphasize that the question whether a State may properly come before the Court, on the basis of the provisions of the Statute, whether it be classified as a matter of capacity to be a party to the proceedings or as an aspect of jurisdiction *ratione personae*, is a matter which precedes that of jurisdiction *ratione materiae*, that is, whether that State has consented to the settlement by the Court of the specific dispute brought before it. The question is in fact one which the Court is bound to raise and examine, if necessary, *ex officio*, and if appropriate after notification to the parties. Thus if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits.

123. The operative part of a judgment of the Court possesses the force of *res judicata*. The operative part of the 1996 Judgment stated, in paragraph 47 (2) (a), that the Court found “that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to decide upon the dispute”. That jurisdiction is thus established with the full weight of the Court’s judicial authority. For a party to assert today that, at the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is, for the reason given in the preceding paragraph, to call in question the force as *res judicata* of the operative clause of the Judgment. At first sight, therefore, the Court need not examine the Respondent’s objection to jurisdiction based on its contention as to its lack of status in 1993.

124. The Respondent has however advanced a number of arguments tending to show that the 1996 Judgment is not conclusive on the matter, and the Court will now examine these. The passage just quoted from the 1996 Judgment is of course not the sole provision of the operative clause of that Judgment: as, the Applicant has noted, the Court first dismissed *seriatim* the specific preliminary objections raised (and not withdrawn) by the Respondent; it then made the finding quoted in paragraph 123 above; and finally it dismissed certain additional bases of jurisdiction invoked by the Applicant. The Respondent suggests that, for the purposes of applying the principle of *res judicata* to a judgment of this kind on preliminary objections, the operative clause (*dispositif*) to be taken into account and given the force of *res judicata* is the decision rejecting specified preliminary objections, rather than “the broad ascertainment

upholding jurisdiction”. The Respondent has drawn attention to the provisions of Article 79, paragraph 7, of the 1978 Rules of Court, which provides that the judgment on preliminary objections shall, in respect of each objection “either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character”. The Respondent suggests therefore that only the clauses of a judgment on preliminary objections that are directed to these ends have the force of *res judicata*, which is, it contends, consistent with the view that new objections may be raised subsequently.

125. The Court does not however consider that it was the purpose of Article 79 of the Rules of Court to limit the extent of the force of *res judicata* attaching to a judgment on preliminary objections, nor that, in the case of such judgment, such force is necessarily limited to the clauses of the *dispositif* specifically rejecting particular objections. There are many examples in the Court’s jurisprudence of decisions on preliminary objections which contain a general finding that the Court has jurisdiction, or that the application is admissible, as the case may be; and it would be going too far to suppose that all of these are necessarily superfluous conclusions. In the view of the Court, if any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given (cf. *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1985, pp. 218-219, para. 48).

126. For this purpose, in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all. Thus an application for interpretation of a judgment under Article 60 of the Statute may well require the Court to settle “[a] difference of opinion [between the parties] as to whether a particular point has or has not been decided with binding force” (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J. Series A, No. 13, pp. 11-12). If a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it.

127. In particular, the fact that a judgment may, in addition to rejecting specific preliminary objections, contain a finding that “the Court has jurisdiction” in the case does not necessarily prevent subsequent examination of any jurisdictional issues later arising that have not been resolved, with the force of *res judicata*, by such judgment. The Parties have each referred in this connection to the successive decisions in the *Corfu Chan-*

*ne l* case, which the Court has already considered above (paragraph 118). Mention may also be made of the judgments on the merits in the two cases concerning *Fisheries Jurisdiction (United Kingdom v. Iceland)* (*Federal Republic of Germany v. Iceland*) (*I.C.J. Reports 1974*, p. 20, para. 42; pp. 203-204, para. 74), which dealt with minor issues of jurisdiction despite an express finding of jurisdiction in previous judgments (*I.C.J. Reports 1973*, p. 22, para. 46; p. 66, para. 46). Even where the Court has, in a preliminary judgment, specifically reserved certain matters of jurisdiction for later decision, the judgment may nevertheless contain a finding that “the Court has jurisdiction” in the case, this being understood as being subject to the matters reserved (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, Judgment, *I.C.J. Reports 1984*, p. 442, para. 113 (1) (c), and pp. 425-426, para. 76; cf. also, in connection with an objection to admissibility, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* (*Libyan Arab Jamahiriya v. United States of America*), *I.C.J. Reports 1998*, p. 29, para. 51, and pp. 30-31, paras. 53 (2) (b) and 53 (3); p. 134, para. 50, and p. 156, paras. 53 (2) (b) and 53 (3)).

128. On the other hand, the fact that the Court has in these past cases dealt with jurisdictional issues after having delivered a judgment on jurisdiction does not support the contention that such a judgment can be reopened at any time, so as to permit reconsideration of issues already settled with the force of *res judicata*. The essential difference between the cases mentioned in the previous paragraph and the present case is this: the jurisdictional issues examined at a late stage in those cases were such that the decision on them would not contradict the finding of jurisdiction made in the earlier judgment. In the *Fisheries Jurisdiction* cases, the issues raised related to the extent of the jurisdiction already established in principle with the force of *res judicata*; in the *Military and Paramilitary Activities* case, the Court had clearly indicated in the 1984 Judgment that its finding in favour of jurisdiction did not extend to a definitive ruling on the interpretation of the United States reservation to its optional clause declaration. By contrast, the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment; that indeed is their purpose.

129. The Respondent has contended that the issue whether the FRY had access to the Court under Article 35 of the Statute has in fact never been decided in the present case, so that no barrier of *res judicata* would prevent the Court from examining that issue at the present stage of the

proceedings. It has drawn attention to the fact that when commenting on the 1996 Judgment, in its 2004 Judgments in the cases concerning the *Legality of Use of Force*, the Court observed that “[t]he question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised and the Court saw no reason to examine it” (see, for example, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *I.C.J. Reports 2004*, p. 311, para. 82), and that “in its pronouncements in incidental proceedings” in the present case, the Court “did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute” (*ibid.*, pp. 308-309, para. 74).

130. That does not however signify that in 1996 the Court was unaware of the fact that the solution adopted in the United Nations to the question of continuation of the membership of the SFRY “[was] not free from legal difficulties”, as the Court had noted in its Order of 8 April 1993 indicating provisional measures in the case (*I.C.J. Reports 1993*, p. 14, para. 18; above, paragraph 105). The FRY was, at the time of the proceedings on its preliminary objections culminating in the 1996 Judgment, maintaining that it was the continuator State of the SFRY. As the Court indicated in its Judgments in the cases concerning the *Legality of Use of Force*,

“No specific assertion was made in the Application [of 1993, in the present case] that the Court was open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute of the Court, but it was later made clear that the Applicant claimed to be a Member of the United Nations and thus a party to the Statute of the Court, by virtue of Article 93, paragraph 1, of the Charter, at the time of filing of the Application . . . [T]his position was expressly stated in the Memorial filed by Serbia and Montenegro on 4 January 2000 . . .” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections*, Judgment, *I.C.J. Reports 2004*, p. 299, para. 47.)

The question whether the FRY was a continuator or a successor State of the SFRY was mentioned in the Memorial of Bosnia and Herzegovina. The view of Bosnia and Herzegovina was that, while the FRY was not a Member of the United Nations, as a successor State of the SFRY which had expressly declared that it would abide by the international commitments of the SFRY, it was nevertheless a party to the Statute. It is also essential, when examining the text of the 1996 Judgment, to take note of the context in which it was delivered, in particular as regards the contemporary state of relations between the Respondent and the United Nations, as recounted in paragraphs 88 to 99 above.

131. The “legal difficulties” referred to were finally dissipated when in 2000 the FRY abandoned its former insistence that it was the continuator of the SFRY, and applied for membership in the United Nations (paragraph 98 above). As the Court observed in its 2004 Judgments in the cases concerning the *Legality of Use of Force*,

“the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 310-311, para. 79.)

As the Court here recognized, in 1999 — and even more so in 1996 — it was by no means so clear as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations at the relevant time. The inconsistencies of approach expressed by the various United Nations organs are apparent from the passages quoted in paragraphs 91 to 96 above.

132. As already noted, the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment. The Court stated, as mentioned in paragraph 121 above, that “Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17), and found that “on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute” (*ibid.*, p. 623, para. 47 (2) (a)). Since, as observed above, the question of a State’s capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae*, and one which the Court must, if necessary, raise *ex officio* (see

paragraph 122 above), this finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of *res judicata*. The Court does not need, for the purpose of the present proceedings, to go behind that finding and consider on what basis the Court was able to satisfy itself on the point. Whether the Parties classify the matter as one of “access to the Court” or of “jurisdiction *ratione personae*”, the fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court.

133. In the view of the Court, the express finding in the 1996 Judgment that the Court had jurisdiction in the case *ratione materiae*, on the basis of Article IX of the Genocide Convention, seen in its context, is a finding which is only consistent, in law and logic, with the proposition that, in relation to both Parties, it had jurisdiction *ratione personae* in its comprehensive sense, that is to say, that the status of each of them was such as to comply with the provisions of the Statute concerning the capacity of States to be parties before the Court. As regards Bosnia and Herzegovina, there was no question but that it was a party to the Statute at the date of filing its Application instituting proceedings; and in relation to the Convention, the Court found that it “could . . . become a party to the Convention” from the time of its admission to the United Nations (*I.C.J. Reports 1996 (II)*, p. 611, para. 19), and had in fact done so. As regards the FRY, the Court found that it “was bound by the provisions of the Convention”, i.e. was a party thereto, “on the date of the filing of the Application” (*ibid.*, p. 610, para. 17); in this respect the Court took note of the declaration made by the FRY on 27 April 1992, set out in paragraph 89 above, whereby the FRY “continuing the State, international legal and political personality” of the SFRY, declared that it would “strictly abide by” the international commitments of the SFRY. The determination by the Court that it had jurisdiction under the Genocide Convention is thus to be interpreted as incorporating a determination that all the conditions relating to the capacity of the Parties to appear before it had been met.

134. It has been suggested by the Respondent that the Court’s finding of jurisdiction in the 1996 Judgment was based merely upon an assumption: an assumption of continuity between the SFRY and the FRY. It has drawn attention to passages, already referred to above (paragraph 129), in the Judgments in the *Legality of Use of Force* cases, to the effect that in 1996 the Court saw no reason to examine the question of access, and that, in its pronouncements in incidental proceedings, the Court did not commit itself to a definitive position on the issue of the legal status of the Respondent.

135. That the FRY had the capacity to appear before the Court in

accordance with the Statute was an element in the reasoning of the 1996 Judgment which can — and indeed must — be read into the Judgment as a matter of logical construction. That element is not one which can at any time be reopened and re-examined, for the reasons already stated above. As regards the passages in the 2004 Judgments relied on by the Respondent, it should be borne in mind that the concern of the Court was not then with the scope of *res judicata* of the 1996 Judgment, since in any event such *res judicata* could not extend to the proceedings in the cases that were then before it, between different parties. It was simply appropriate in 2004 for the Court to consider whether there was an expressly stated finding in another case that would throw light on the matters before it. No such express finding having been shown to exist, the Court in 2004 did not, as it has in the present case, have to go on to consider what might be the unstated foundations of a judgment given in another case, between different parties.

136. The Court thus considers that the 1996 Judgment contained a finding, whether it be regarded as one of jurisdiction *ratione personae*, or as one anterior to questions of jurisdiction, which was necessary as a matter of logical construction, and related to the question of the FRY's capacity to appear before the Court under the Statute. The force of *res judicata* attaching to that judgment thus extends to that particular finding.

137. However it has been argued by the Respondent that even were that so,

“the fundamental nature of access as a precondition for the exercise of the Court's judicial function means that positive findings on access cannot be taken as definitive and final until the final judgment is rendered in proceedings, because otherwise it would be possible that the Court renders its final decision with respect to a party over which it cannot exercise [its] judicial function. In other words, access is so fundamental that, until the final judgment, it overrides the principle of *res judicata*. Thus, even if the 1996 Judgment had made a finding on access, *quod non*, that would not be a bar for the Court to re-examine this issue until the end of the proceedings.”

A similar argument advanced by the Respondent is based on the principle that the jurisdiction of the Court derives from a treaty, namely the Statute of the Court; the Respondent questions whether the Statute could have endowed the 1996 Judgment with any effects at all, since the Respondent was, it alleges, not a party to the Statute. Counsel for the Respondent argued that

“Today it is known that in 1996 when the decision on preliminary objections was rendered, the Respondent was not a party to the Statute. Thus, there was no foothold, Articles 36 (6), 59, and 60 did

not represent a binding treaty provision providing a possible basis for deciding on jurisdiction with *res judicata* effects.”

138. It appears to the Court that these contentions are inconsistent with the nature of the principle of *res judicata*. That principle signifies that once the Court has made a determination, whether on a matter of the merits of a dispute brought before it, or on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case. However fundamental the question of the capacity of States to be parties in cases before the Court may be, it remains a question to be determined by the Court, in accordance with Article 36, paragraph 6, of the Statute, and once a finding in favour of jurisdiction has been pronounced with the force of *res judicata*, it is not open to question or re-examination, except by way of revision under Article 61 of the Statute. There is thus, *as a matter of law*, no possibility that the Court might render “its final decision with respect to a party over which it cannot exercise its judicial function”, because the question whether a State is or is not a party subject to the jurisdiction of the Court is one which is reserved for the sole and authoritative decision of the Court.

139. Counsel for the Respondent contended further that, in the circumstances of the present case, reliance on the *res judicata* principle “would justify the Court's *ultra vires* exercise of its judicial functions contrary to the mandatory requirements of the Statute”. However, the operation of the “mandatory requirements of the Statute” falls to be determined by the Court in each case before it; and once the Court has determined, with the force of *res judicata*, that it has jurisdiction, then for the purposes of that case no question of *ultra vires* action can arise, the Court having sole competence to determine such matters under the Statute. For the Court *res judicata pro veritate habetur*, and the judicial truth within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations.

\* \* \*

(7) *Conclusion: Jurisdiction Affirmed*

140. The Court accordingly concludes that, in respect of the contention that the Respondent was not, on the date of filing of the Application instituting proceedings, a State having the capacity to come before the Court under the Statute, the principle of *res judicata* precludes any reopening of the decision embodied in the 1996 Judgment. The Respondent

has however also argued that the 1996 Judgment is not *res judicata* as to the further question whether the FRY was, at the time of institution of proceedings, a party to the Genocide Convention, and has sought to show that at that time it was not, and could not have been, such a party. The Court however considers that the reasons given above for holding that the 1996 Judgment settles the question of jurisdiction in this case with the force of *res judicata* are applicable *a fortiori* as regards this contention, since on this point the 1996 Judgment was quite specific, as it was not on the question of capacity to come before the Court. The Court does not therefore find it necessary to examine the argument of the Applicant that the failure of the Respondent to advance at the time the reasons why it now contends that it was not a party to the Genocide Convention might raise considerations of estoppel, or *forum prorogatum* (cf. paragraphs 85 and 101 above). The Court thus concludes that, as stated in the 1996 Judgment, it has jurisdiction, under Article IX of the Genocide Convention, to adjudicate upon the dispute brought before it by the Application filed on 20 March 1993. It follows from the above that the Court does not find it necessary to consider the questions, extensively addressed by the Parties, of the status of the Respondent under the Charter of the United Nations and the Statute of the Court, and its position in relation to the Genocide Convention at the time of the filing of the Application.

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141. There has been some reference in the Parties' arguments before the Court to the question whether Article 35, paragraphs 1 and 2, of the Statute apply equally to applicants and to respondents. This matter, being one of interpretation of the Statute, would be one for the Court to determine. However, in the light of the conclusion that the Court has reached as to the *res judicata* status of the 1996 decision, it does not find at present the necessity to do so.

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#### IV. THE APPLICABLE LAW: THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

##### (1) *The Convention in Brief*

142. The Contracting Parties to the Convention, adopted on 9 December 1948, offer the following reasons for agreeing to its text:

“The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary

to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided . . .”

143. Under Article I “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Article II defines genocide in these terms:

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

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

Article III provides as follows:

“The following acts shall be punishable:

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

144. According to Article IV, persons committing any of those acts shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. Article V requires the parties to enact the necessary legislation to give effect to the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or other acts enumerated in Article III. Article VI provides that

“[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

Article VII provides for extradition.

## 145. Under Article VIII

“Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.”

146. Article IX provides for certain disputes to be submitted to the Court:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

The remaining ten Articles are final clauses dealing with such matters as parties to the Convention and its entry into force.

147. The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (*I.C.J. Reports 1996 (II)*, pp. 617-621, paras. 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. The Parties disagree on whether the Court finally decided the scope and meaning of that provision in its 1996 Judgment and, if it did not, on the matters over which the Court has jurisdiction under that provision. The Court rules on those two matters in following sections of this Judgment. It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.

148. As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them (e.g. case concerning *Armed Activities on the Territory of the Congo (New Appli-*

*cation: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127).

149. The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those “relating to the interpretation, application or fulfilment” of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.

\* \* \*

(2) *The Court’s 1996 Decision about the Scope and Meaning of Article IX*

150. According to the Applicant, the Court in 1996 at the preliminary objections stage decided that it had jurisdiction under Article IX of the Convention to adjudicate upon the responsibility of the respondent State, as indicated in that Article, “for genocide or any of the other acts enumerated in article III”, and that that reference “does not exclude any form of State responsibility”. The issue, it says, is *res judicata*. The Respondent supports a narrower interpretation of the Convention: the Court’s jurisdiction is confined to giving a declaratory judgment relating to breaches of the duties to prevent and punish the commission of genocide by individuals.

151. The Respondent accepts that the first, wider, interpretation “was preferred by the majority of the Court in the preliminary objections phase” and quotes the following passage in the Judgment:

“The Court now comes to the second proposition advanced by Yugoslavia [in support of one of its preliminary objections], regarding the type of State responsibility envisaged in Article IX of the Convention. According to Yugoslavia, that Article would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.

*The Court would observe that the reference to Article IX to ‘the responsibility of a State for genocide or for any of the other acts enumerated in Article III’, does not exclude any form of State responsibility.*

*Nor is the responsibility of a State for acts of its organs excluded*

by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'.

In the light of the foregoing, the Court considers that it must reject the fifth preliminary objection of Yugoslavia. It would moreover observe that it is sufficiently apparent from the very terms of that objection that the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions, including Article IX. For the Court, there is accordingly no doubt that there exists a dispute between them relating to 'the interpretation, application or fulfilment of the . . . Convention, including . . . the responsibility of a State for genocide . . .', according to the form of words employed by that latter provision (cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, pp. 27-32). (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*), pp. 616-617, paras. 32-33; emphasis now added to 1996 text.)

The Applicant relies in particular on the sentences in paragraph 32 which have been emphasized in the above quotation. The Respondent submits that

"this expression of opinion is of marked brevity and is contingent upon the dismissal of the preliminary objection based upon the existence or otherwise of a dispute relating to the interpretation of the Genocide Convention. The interpretation adopted in this provisional mode by the Court is not buttressed by any reference to the substantial preparatory work of the Convention.

In the circumstances, there is no reason of principle or consideration of common sense indicating that the issue of interpretation is no longer open."

While submitting that the Court determined the issue and spoke emphatically on the matter in 1996 the Applicant also says that this present phase of the case

"will provide an additional opportunity for this Court to rule on [the] important matter, not only for the guidance of the Parties here before you, but for the benefit of future generations that should not have to fear the immunity of States from responsibility for their genocidal acts".

152. The Court has already examined above the question of the authority of *res judicata* attaching to the 1996 Judgment, and indicated that it cannot reopen issues decided with that authority. Whether or not the issue now raised by the Respondent falls in that category, the Court

observes that the final part of paragraph 33 of that Judgment, quoted above, must be taken as indicating that "the meaning and legal scope" of Article IX and of other provisions of the Convention remain in dispute. In particular a dispute "exists" about whether the only obligations of the Contracting Parties for the breach of which they may be held responsible under the Convention are to legislate, and to prosecute or extradite, or whether the obligations extend to the obligation not to commit genocide and the other acts enumerated in Article III. That dispute "exists" and was left by the Court for resolution at the merits stage. In these circumstances, and taking into account the positions of the Parties, the Court will determine at this stage whether the obligations of the Parties under the Convention do so extend. That is to say, the Court will decide "the meaning and legal scope" of several provisions of the Convention, including Article IX with its reference to "the responsibility of a State for genocide or any of the other acts enumerated in Article III".

\* \*

(3) *The Court's 1996 Decision about the Territorial Scope of the Convention*

153. A second issue about the *res judicata* effect of the 1996 Judgment concerns the territorial limits, if any, on the obligations of the States parties to prevent and punish genocide. In support of one of its preliminary objections the Respondent argued that it did not exercise jurisdiction over the Applicant's territory at the relevant time. In the final sentence of its reasons for rejecting this argument the Court said this: "[t]he Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention" (*I.C.J. Reports 1996 (II)*), p. 616, para. 31).

154. The Applicant suggests that the Court in that sentence ruled that the obligation extends without territorial limit. The Court does not state the obligation in that positive way. The Court does not say that the obligation is "territorially unlimited by the Convention". Further, earlier in the paragraph, it had quoted from Article VI (about the obligation of any State in the territory of which the act was committed to prosecute) as "the only provision relevant to" territorial "problems" related to the application of the Convention. The quoted sentence is therefore to be understood as relating to the undertaking stated in Article I. The Court did not in 1996 rule on the territorial scope of each particular obligation arising under the Convention. Accordingly the Court has still to rule on that matter. It is not *res judicata*.

\* \*

(4) *The Obligations Imposed by the Convention on the Contracting Parties*

155. The Applicant, in the words of its Agent, contends that “[t]his case is about State responsibility and seeks to establish the responsibilities of a State which, through its leadership, through its organs, committed the most brutal violations of one of the most sacred instruments of international law”. The Applicant has emphasized that in its view, the Genocide Convention “created a universal, treaty-based concept of State responsibility”, and that “[i]t is State responsibility for genocide that this legal proceeding is all about”. It relies in this respect on Article IX of the Convention, which, it argues, “quite explicitly impose[s] on States a direct responsibility themselves not to commit genocide or to aid in the commission of genocide”. As to the obligation of prevention under Article I, a breach of that obligation, according to the Applicant, “is established — it might be said is ‘eclipsed’ — by the fact that [the Respondent] is *itself* responsible for the genocide committed; . . . a State which commits genocide has not fulfilled its commitment to prevent it” (emphasis in the original). The argument moves on from alleged breaches of Article I to “violations [by the Respondent] of its obligations under Article III . . . to which express reference is made in Article IX, violations which stand at the heart of our case. This fundamental provision establishes the obligations whose violation engages the responsibility of States parties.” It follows that, in the contention of the Applicant, the Court has jurisdiction under Article IX over alleged violations by a Contracting Party of those obligations.

156. The Respondent contends to the contrary that

“the Genocide Convention does not provide for the responsibility of States for acts of genocide as such. The duties prescribed by the Convention relate to ‘the prevention and punishment of the crime of genocide’ when this crime is committed by individuals: and the provisions of Articles V and VI [about enforcement and prescription] . . . make this abundantly clear.”

It argues that the Court therefore does not have jurisdiction *ratione materiae* under Article IX; and continues:

“[t]hese provisions [Articles I, V, VI and IX] do not extend to the responsibility of a Contracting Party as such for acts of genocide but [only] to responsibility for failure to prevent or to punish acts of genocide committed by individuals within its territory or . . . its control”.

The sole remedy in respect of that failure would, in the Respondent’s view, be a declaratory judgment.

157. As a subsidiary argument, the Respondent also contended that

“for a State to be responsible under the Genocide Convention, the facts must first be established. As genocide is a crime, it can only be established in accordance with the rules of criminal law, under which the first requirement to be met is that of individual responsibility. The State can incur responsibility only when the existence of genocide has been established beyond all reasonable doubt. In addition, it must then be shown that the person who committed the genocide can engage the responsibility of the State . . .”

(This contention went on to mention responsibility based on breach of the obligation to prevent and punish, matters considered later in this Judgment.)

158. The Respondent has in addition presented what it refers to as “alternative arguments concerning solely State responsibility for breaches of Articles II and III”. Those arguments addressed the necessary conditions, especially of intent, as well as of attribution. When presenting those alternative arguments, counsel for the Respondent repeated the principal submission set out above that “the Convention does not suggest in any way that States themselves can commit genocide”.

159. The Court notes that there is no disagreement between the Parties that the reference in Article IX to disputes about “the responsibility of a State” as being among the disputes relating to the interpretation, application or fulfilment of the Convention which come within the Court’s jurisdiction, indicates that provisions of the Convention do impose obligations on States in respect of which they may, in the event of breach, incur responsibility. Articles V, VI and VII requiring legislation, in particular providing effective penalties for persons guilty of genocide and the other acts enumerated in Article III, and for the prosecution and extradition of alleged offenders are plainly among them. Because those provisions regulating punishment also have a deterrent and therefore a preventive effect or purpose, they could be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide stated in Article I and mentioned in the title. On that basis, in support of the Respondent’s principal position, that Article would rank as merely hortatory, introductory or purposive and as preambular to those specific obligations. The remaining specific provision, Article VIII about competent organs of the United Nations taking action, may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility.

160. The Court observes that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of

the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion. Those propositions, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, are well recognized as part of customary international law: see *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 174, para. 94; case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Judgment, I.C.J. Reports 2004*, p. 48, para. 83; *LaGrand (Germany v. United States of America)*, *Judgment, I.C.J. Reports 2001*, p. 501, para. 99; and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *Judgment, I.C.J. Reports 2002*, p. 645, para. 37, and the other cases referred to in those decisions.

161. To determine what are the obligations of the Contracting Parties under the Genocide Convention, the Court will begin with the terms of its Article I. It contains two propositions. The first is the affirmation that genocide is a crime under international law. That affirmation is to be read in conjunction with the declaration that genocide is a crime under international law, unanimously adopted by the General Assembly two years earlier in its resolution 96 (I), and referred to in the Preamble to the Convention (paragraph 142, above). The affirmation recognizes the existing requirements of customary international law, a matter emphasized by the Court in 1951:

“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention) . . .

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human

groups and on the other to confirm and endorse the most elementary principles of morality.” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

Later in that Opinion, the Court referred to “the moral and humanitarian principles which are its basis” (*ibid.*, p. 24). In earlier phases of the present case the Court has also recalled resolution 96 (I) (*I.C.J. Reports 1993*, p. 23; see also pp. 348 and 440) and has quoted the 1951 statement (*I.C.J. Reports 1996 (II)*, p. 616). The Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)*, paragraph 64, when it added that the norm prohibiting genocide was assuredly a peremptory norm of international law (*ius cogens*).

162. Those characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I — the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent. Several features of that undertaking are significant. The ordinary meaning of the word “undertake” is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties (cf., for example, International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966), Art. 2, para. 1; International Covenant on Civil and Political Rights (16 December 1966), Art. 2, para. 1, and 3, for example). It is not merely hortatory or purposive. The undertaking is unqualified (a matter considered later in relation to the scope of the obligation of prevention); and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

163. The conclusion is confirmed by two aspects of the preparatory work of the Convention and the circumstances of its conclusion as referred to in Article 32 of the Vienna Convention. In 1947 the United Nations General Assembly, in requesting the Economic and Social Council to submit a report and a draft convention on genocide to the Third Session of the Assembly, declared “that genocide is an international crime entailing national and international responsibility on the part of individuals and States” (A/RES/180 (II)). That duality of responsibilities

is also to be seen in two other associated resolutions adopted on the same day, both directed to the newly established International Law Commission (hereinafter “the ILC”): the first on the formulation of the Nuremberg principles, concerned with the rights (Principle V) and duties of individuals, and the second on the draft declaration on the rights and duties of States (A/RES/177 and A/RES/178 (II)). The duality of responsibilities is further considered later in this Judgment (paragraphs 173-174).

164. The second feature of the drafting history emphasizes the operative and non-preambular character of Article I. The Preamble to the draft Convention, prepared by the *Ad Hoc* Committee on Genocide for the Third Session of the General Assembly and considered by its Sixth Committee, read in part as follows:

“The High Contracting Parties  
. . . . .  
Being convinced that the prevention and punishment of genocide  
requires international co-operation,  
*Hereby agree to prevent and punish the crime as hereinafter pro-  
vided.*”

The first Article would have provided “[g]enocide is a crime under international law whether committed in time of peace or in time of war” (report of the *Ad Hoc* Committee on Genocide, 5 April to 10 May 1948, United Nations, *Official Records of the Economic and Social Council, Seventh Session, Supplement No. 6*, doc. E/794, pp. 2, 18).

Belgium was of the view that the undertaking to prevent and punish should be made more effective by being contained in the operative part of the Convention rather than in the Preamble and proposed the following Article I to the Sixth Committee of the General Assembly: “The High Contracting Parties undertake to prevent and punish the crime of genocide.” (United Nations doc. A/C.6/217.) The Netherlands then proposed a new text of Article I combining the *Ad Hoc* Committee draft and the Belgian proposal with some changes: “The High Contracting Parties reaffirm that genocide is a crime under international law, which they undertake to prevent and to punish, in accordance with the following articles.” (United Nations docs. A/C.6/220; United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 68th meeting*, p. 45.) The Danish representative thought that Article I should be worded more effectively and proposed the deletion of the final phrase — “in accordance with the following articles” (*ibid.*, p. 47). The Netherlands representative agreed with that suggestion (*ibid.*, pp. 49-50). After the USSR’s proposal to delete Article I was rejected by 36 votes to 8 with 5 abstentions and its proposal to transfer its various points to the Preamble was rejected by 40 votes to 8, and the phrase “whether committed in time of peace or of

war” was inserted by 30 votes to 7 with 6 abstentions, the amended text of Article I was adopted by 37 votes to 3 with 2 abstentions (*ibid.*, pp. 51 and 53).

165. For the Court both changes — the movement of the undertaking from the Preamble to the first operative Article and the removal of the linking clause (“in accordance with the following articles”) — confirm that Article I does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide.

166. The Court next considers whether the Parties are also under an obligation, by virtue of the Convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention. The Applicant has however advanced as its main argument that such an obligation is imposed by Article IX, which confers on the Court jurisdiction over disputes “including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III”. Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention. Under Article I the States parties are bound to prevent such an act, which it describes as “a crime under international law”, being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as “a crime under international law”: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.

167. The Court accordingly concludes that Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. That conclusion must also apply to the other acts enumerated in Article III. Those acts are forbidden along with genocide itself in the list included in Article III. They are referred to equally with genocide in Article IX and without being characterized as “punishable”; and the “purely humanitarian and civilizing purpose” of the Convention may be seen as being promoted by the fact that States are subject to that full set of obligations, supporting their undertaking to prevent genocide. It is true that the concepts used in paragraphs (b) to (e) of Article III, and particularly that of “complicity”, refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals. It would however not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State — even though quite different in nature from criminal responsibility — can be engaged through one of the acts, other than genocide itself, enumerated in Article III.

168. The conclusion that the Contracting Parties are bound in this way by the Convention not to commit genocide and the other acts enumerated in Article III is confirmed by one unusual feature of the wording of Article IX. But for that unusual feature and the addition of the word “fulfilment” to the provision conferring on the Court jurisdiction over disputes as to the “interpretation and application” of the Convention (an addition which does not appear to be significant in this case), Article IX would be a standard dispute settlement provision.

169. The unusual feature of Article IX is the phrase “including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III”. The word “including” tends to confirm that disputes relating to the responsibility of Contracting Parties for genocide, and the other acts enumerated in Article III to which it refers, are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention. The responsibility of a party for genocide and the other acts enumerated in Article III arises from its failure to comply with the obligations imposed by the other provisions of the Convention, and in particular, in the present context, with Article III read with Articles I and II. According to the English text of the Convention, the responsibility contemplated is responsibility “for genocide” (in French, “responsabilité . . . en matière de génocide”), not merely responsibility “for failing to prevent or punish genocide”. The particular terms of the phrase as a whole confirm that Contracting Parties may be responsible for genocide and the other acts enumerated in Article III of the Convention.

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170. The Court now considers three arguments, advanced by the Respondent which may be seen as contradicting the proposition that the Convention imposes a duty on the Contracting Parties not to commit genocide and the other acts enumerated in Article III. The first is that, as a matter of general principle, international law does not recognize the criminal responsibility of the State, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility. On the matter of principle the Respondent calls attention to the rejection by the ILC of the concept of international crimes when it prepared the final draft of its Articles on State Responsibility, a decision reflecting the strongly negative reactions of a number of States to any such concept. The Applicant accepts that general international law does not recognize the criminal responsibility of States. It contends, on the specific issue, that the obligation for which the Respondent may be held responsible, in the event of breach, in proceedings under Article IX, is simply an obligation arising under international law, in this case the provisions of the Convention. The Court observes that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature. This argument accordingly cannot be accepted.

171. The second argument of the Respondent is that the nature of the Convention is such as to exclude from its scope State responsibility for genocide and the other enumerated acts. The Convention, it is said, is a standard international criminal law convention focused essentially on the criminal prosecution and punishment of individuals and not on the responsibility of States. The emphasis of the Convention on the obligations and responsibility of individuals excludes any possibility of States being liable and responsible in the event of breach of the obligations reflected in Article III. In particular, it is said, that possibility cannot stand in the face of the references, in Article III to punishment (of individuals), and in Article IV to individuals being punished, and the requirement, in Article V for legislation in particular for effective penalties for persons guilty of genocide, the provision in Article VI for the prosecution of persons charged with genocide, and requirement in Article VII for extradition.

172. The Court is mindful of the fact that the famous sentence in the Nuremberg Judgment that “[c]rimes against international law are committed by men, not by abstract entities . . .” (Judgment of the International Military Tribunal, Trial of the Major War Criminals, 1947, *Official Documents*, Vol. 1, p. 223) might be invoked in support of the proposition that only individuals can breach the obligations set out in Article III. But the Court notes that that Tribunal was answering the argument that “international law is concerned with the actions of sov-

foreign States, and provides no punishment for individuals” (Judgment of the International Military Tribunal, *op. cit.*, p. 222), and that thus States alone were responsible under international law. The Tribunal rejected that argument in the following terms: “[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized” (*ibid.*, p. 223; the phrase “as well as upon States” is missing in the French text of the Judgment).

173. The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” The Court notes also that the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001), to be referred to hereinafter as “the ILC Articles on State Responsibility”, affirm in Article 58 the other side of the coin: “These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.” In its Commentary on this provision, the Commission said:

“Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.” (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.)

The Commission quoted Article 25, paragraph 4, of the Rome Statute, and concluded as follows:

“Article 58 . . . [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term ‘individual responsibility’ has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.”

174. The Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs (a) to (e) of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals. Furthermore, the fact that Articles V, VI and VII focus on individuals cannot itself establish that the Contracting Parties may not be subject to obligations not to commit genocide and the other acts enumerated in Article III.

175. The third and final argument of the Respondent against the proposition that the Contracting Parties are bound by the Convention not to commit genocide is based on the preparatory work of the Convention and particularly of Article IX. The Court has already used part of that work to confirm the operative significance of the undertaking in Article I (see paragraphs 164 and 165 above), an interpretation already determined from the terms of the Convention, its context and purpose.

176. The Respondent, claiming that the Convention and in particular Article IX is ambiguous, submits that the drafting history of the Convention, in the Sixth Committee of the General Assembly, shows that “there was no question of direct responsibility of the State for acts of genocide”. It claims that the responsibility of the State was related to the “key provisions” of Articles IV-VI: the Convention is about the criminal responsibility of individuals supported by the civil responsibility of States to prevent and punish. This argument against any wider responsibility for the Contracting Parties is based on the records of the discussion in the Sixth Committee, and is, it is contended, supported by the rejection of United Kingdom amendments to what became Articles IV and VI. Had the first amendment been adopted, Article IV, concerning the punishment of individuals committing genocide or any of the acts enumerated in Article III, would have been extended by the following additional sentence: “[Acts of genocide] committed by or on behalf of States or governments constitute a breach of the present Convention.” (A/C.6/236 and Corr. 1.) That amendment was defeated (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 96th Meeting*, p. 355). What became Article VI would have been replaced by a provision conferring jurisdiction on the Court if an act of genocide is or is alleged to be the act of a State or government or its organs. The United Kingdom in response to objections that the proposal was out of order (because it meant going back on a decision already taken) withdrew the amendment in favour of the joint amendment to what became Article IX, submitted by the United Kingdom and Belgium (*ibid.*, 100th Meeting, p. 394). In speaking to that joint amendment the United Kingdom delegate acknowledged that the debate had clearly shown the Committee’s decision to confine what is now Article VI to the responsibility of individuals (*ibid.*, 100th Meeting, p. 430). The United Kingdom/Belgium amendment would have added

the words “including disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV [as the Convention was then drafted]”. The United Kingdom delegate explained that what was involved was civil responsibility, not criminal responsibility (United Nations, *Official Records of the General Assembly, op. cit., 103rd Meetings*, p. 440). A proposal to delete those words failed and the provision was adopted (*ibid., 104th Meeting*, p. 447), with style changes being made by the Drafting Committee.

177. At a later stage a Belgium/United Kingdom/United States proposal which would have replaced the disputed phrase by including “disputes arising from a charge by a Contracting Party that the crime of genocide or any other of the acts enumerated in article III has been committed within the jurisdiction of another Contracting Party” was ruled by the Chairman of the Sixth Committee as a change of substance and the Committee did not adopt the motion (which required a two-thirds majority) for reconsideration (A/C.6/305). The Chairman gave the following reason for his ruling which was not challenged:

“it was provided in article IX that those disputes, among others, which concerned the responsibility of a State for genocide or for any of the acts enumerated in article III, should be submitted to the International Court of Justice. According to the joint amendment, on the other hand, the disputes would not be those which concerned the responsibility of the State but those which resulted from an accusation to the effect that the crime had been committed in the territory of one of the contracting parties.” (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 131st Meeting*, p. 690.)

By that time in the deliberations of the Sixth Committee it was clear that only individuals could be held criminally responsible under the draft Convention for genocide. The Chairman was plainly of the view that the Article IX, as it had been modified, provided for State responsibility for genocide.

178. In the view of the Court, two points may be drawn from the drafting history just reviewed. The first is that much of it was concerned with proposals supporting the criminal responsibility of States; but those proposals were *not* adopted. The second is that the amendment which was adopted — to Article IX — is about jurisdiction in respect of the responsibility of States *simpliciter*. Consequently, the drafting history may be seen as supporting the conclusion reached by the Court in paragraph 167 above.

179. Accordingly, having considered the various arguments, the Court

affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.

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(5) *Question Whether the Court May Make a Finding of Genocide by a State in the Absence of a Prior Conviction of an Individual for Genocide by a Competent Court*

180. The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph (b), and complicity under Article III, paragraph (e); and, as explained below (paragraph 431) for purposes of the obligation to prevent genocide. The Respondent has raised the question whether it is necessary, as a matter of law, for the Court to be able to uphold a claim of the responsibility of a State for an act of genocide, or any other act enumerated in Article III, that there should have been a finding of genocide by a court or tribunal exercising criminal jurisdiction. According to the Respondent, the condition *sine qua non* for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State's responsibility.

181. The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity (paragraphs 209-210 below). Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction under Article IX to find a State responsible if genocide or other acts enumerated in Article III are committed by its organs, or persons or groups whose acts are attributable to it.

182. Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the

police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.

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(6) *The Possible Territorial Limits of the Obligations*

183. The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question. The extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the Judgment concerned with that obligation (cf. paragraph 430 below). The significant relevant condition concerning the obligation not to commit genocide and the other acts enumerated in Article III is provided by the rules on attribution (paragraphs 379 ff. below).

184. The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed (cf. paragraph 442 below), or by an international penal tribunal with jurisdiction (paragraphs 443 ff. below).

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(7) *The Applicant's Claims in Respect of Alleged Genocide Committed Outside Its Territory against Non-Nationals*

185. In its final submissions the Applicant requests the Court to make rulings about acts of genocide and other unlawful acts allegedly committed against "non-Serbs" outside its own territory (as well as within it) by the Respondent. Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the *ius cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations. For the reasons explained in paragraphs 368 and 369 below, the Court will not however need to address those questions of law.

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(8) *The Question of Intent to Commit Genocide*

186. The Court notes that genocide as defined in Article II of the Convention comprises "acts" and an "intent". It is well established that the acts —

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

themselves include mental elements. "Killing" must be intentional, as must "causing serious bodily or mental harm". Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words "deliberately" and "intended", quite apart from the implications of the words "inflicting" and "imposing"; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 44, para. 5).

187. In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the "intent to destroy, in whole or in part, . . . [the protected] group, as such". It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; in the present Judgment it will usually be referred to as the "specific intent (*dolus specialis*)". It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.

188. The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY" or "the Tribunal") did in the *Kupreskić et al.* case:

“the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhuman forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.” (IT-95-16-T, Judgment, 14 January 2000, para. 636.)

189. The specific intent is also to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.

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(9) *Intent and “Ethnic Cleansing”*

190. The term “ethnic cleansing” has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case; see, for example, Security Council resolution 787 (1992), para. 2; resolution 827 (1993), Preamble; and the Report with that title attached as Annex IV to the Final Report of the United Nations Commission of Experts (S/1994/674/Add.2) (hereinafter “Report of the Commission of Experts”). General Assembly resolution 47/121 referred in its Preamble to “the abhorrent policy of ‘ethnic cleansing’, which is a form of genocide”, as being carried on in Bosnia and Herzegovina. It will be convenient at this point to consider what legal significance the expression may have. It is in practice used, by reference to a specific region or area, to mean “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area” (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal

during the drafting of the Convention to include in the definition “measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment” was not accepted (A/C.6/234). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area “ethnically homogeneous”, nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is “to destroy, in whole or in part” a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as “ethnic cleansing” may never constitute genocide, if they are such as to be characterized as, for example, “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”, contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while “there are obvious similarities between a genocidal policy and the policy commonly known as ‘ethnic cleansing’” (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.” (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as “ethnic cleansing” amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term “ethnic cleansing” has no legal significance of its own. That said, it is clear that acts of “ethnic cleansing” may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts.

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(10) *Definition of the Protected Group*

191. When examining the facts brought before the Court in support of the accusations of the commission of acts of genocide, it is necessary to have in mind the identity of the group against which genocide may be considered to have been committed. The Court will therefore next consider the application in this case of the requirement of Article II of the Genocide Convention, as an element of genocide, that the proscribed acts be “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. The Parties disagreed on aspects of the definition of the “group”. The Applicant in its final submission refers to “the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population” (paragraph 66 above). It thus follows what is termed the negative approach to the definition of the group in question. The Respondent sees two legal problems with that formulation:

“First, the group targeted is not sufficiently well defined as such, since, according to the Applicant’s allegation, that group consists of the non-Serbs, thus an admixture of all the individuals living in Bosnia and Herzegovina except the Serbs, but more particularly the Muslim population, which accounts for only a part of the non-Serb population. Second, the intent to destroy concerned only a part of the non-Serb population, but the Applicant failed to specify which part of the group was targeted.”

In addition to those issues of the negative definition of the group and its geographic limits (or their lack), the Parties also discussed the choice between subjective and objective approaches to the definition. The Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach. The issue is not in any event significant on the facts of this case and the Court takes it no further.

192. While the Applicant has employed the negative approach to the definition of a protected group, it places major, for the most part exclusive, emphasis on the Bosnian Muslims as the group being targeted. The Respondent, for instance, makes the point that the Applicant did not mention the Croats in its oral arguments relating to sexual violence, Srebrenica and Sarajevo, and that other groups including “the Jews, Roma and Yugoslavs” were not mentioned. The Applicant does however maintain the negative approach to the definition of the group in its final submissions and the Court accordingly needs to consider it.

193. The Court recalls first that the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics — national, ethnical, racial or religious — and not the lack of them. The intent must also relate to the group “as such”. That means that the crime requires an intent to destroy

a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not. The etymology of the word — killing a group — also indicates a positive definition; and Raphael Lemkin has explained that he created the word from the Greek *genos*, meaning race or tribe, and the termination “-cide”, from the Latin *caedere*, to kill (*Axis Rule in Occupied Europe* (1944), p. 79). In 1945 the word was used in the Nuremberg indictment which stated that the defendants “conducted deliberate and systematic genocide, viz., the extermination of racial and national groups . . . in order to destroy particular races and classes of people and national, racial or religious groups . . .” (Indictment, Trial of the Major War Criminals before the International Military Tribunal, *Official Documents*, Vol. 1, pp. 43 and 44). As the Court explains below (paragraph 198), when part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole. Further, each of the acts listed in Article II require that the proscribed action be against members of the “group”.

194. The drafting history of the Convention confirms that a positive definition must be used. Genocide as “the denial of the existence of entire human groups” was contrasted with homicide, “the denial of the right to life of individual human beings” by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of “the very existence of certain human groups” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way.

195. The Court observes that the ICTY Appeals Chamber in the *Stakić* case (IT-97-24-A, Judgment, 22 March 2006, paras. 20-28) also came to the conclusion that the group must be defined positively, essentially for the same reasons as the Court has given.

196. Accordingly, the Court concludes that it should deal with the matter on the basis that the targeted group must in law be defined posi-

tively, and thus not negatively as the “non-Serb” population. The Applicant has made only very limited reference to the non-Serb populations of Bosnia and Herzegovina other than the Bosnian Muslims, e.g. the Croats. The Court will therefore examine the facts of the case on the basis that genocide may be found to have been committed if an intent to destroy the Bosnian Muslims, as a group, in whole or in part, can be established.

197. The Parties also addressed a specific question relating to the impact of geographic criteria on the group as identified positively. The question concerns in particular the atrocities committed in and around Srebrenica in July 1995, and the question whether in the circumstances of that situation the definition of genocide in Article II was satisfied so far as the intent of destruction of the “group” “in whole or in part” requirement is concerned. This question arises because of a critical finding in the *Krstić* case. In that case the Trial Chamber was “ultimately satisfied that murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica” (IT-98-33, Judgment, 2 August 2001, para. 546). Those men were systematically targeted whether they were civilians or soldiers (*ibid.*). The Court addresses the facts of that particular situation later (paragraphs 278-297). For the moment, it considers how as a matter of law the “group” is to be defined, in territorial and other respects.

198. In terms of that question of law, the Court refers to three matters relevant to the determination of “part” of the “group” for the purposes of Article II. In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of *Kayishema*, *Bylilshema*, and *Semanza* there referred to; and *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17).

199. Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, “it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe” (*ibid.*). The area of the perpetrator’s activity and control are to be considered. As the ICTY Appeals

Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant (*Krstić*, IT-98-33-A, Judgment, 19 April 2004, para. 13). This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide (*Stakić*, IT-97-24-T, Judgment, 31 July 2003, para. 523). The Respondent, while not challenging this criterion, does contend that the limit militates against the existence of the specific intent (*dolus specialis*) at the national or State level as opposed to the local level — a submission which, in the view of the Court, relates to attribution rather than to the “group” requirement.

200. A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the *Krstić* case put the matter in these carefully measured terms:

“The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute which exactly reproduces Article II of the Convention].” (IT-98-33-A, Judgment, 19 April 2004, para. 12; footnote omitted.)

Establishing the “group” requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court’s opinion that the qualitative approach cannot stand alone. The Appeals Chamber in *Krstić* also expresses that view.

201. The above list of criteria is not exhaustive, but, as just indicated, the substantiality criterion is critical. They are essentially those stated by the Appeals Chamber in the *Krstić* case, although the Court does give this first criterion priority. Much will depend on the Court’s assessment of those and all other relevant factors in any particular case.

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#### V. QUESTIONS OF PROOF: BURDEN OF PROOF, THE STANDARD OF PROOF, METHODS OF PROOF

202. When turning to the facts of the dispute, the Court must note that many allegations of fact made by the Applicant are disputed by the

Respondent. That is so notwithstanding increasing agreement between the Parties on certain matters through the course of the proceedings. The disputes relate to issues about the facts, for instance the number of rapes committed by Serbs against Bosnian Muslims, and the day-to-day relationships between the authorities in Belgrade and the authorities in Pale, and the inferences to be drawn from, or the evaluations to be made of, facts, for instance about the existence or otherwise of the necessary specific intent (*dolus specialis*) and about the attributability of the acts of the organs of Republika Srpska and various paramilitary groups to the Respondent. The allegations also cover a very wide range of activity affecting many communities and individuals over an extensive area and over a long period. They have already been the subject of many accounts, official and non-official, by many individuals and bodies. The Parties drew on many of those accounts in their pleadings and oral argument.

203. Accordingly, before proceeding to an examination of the alleged facts underlying the claim in this case, the Court first considers, in this section of the Judgment, in turn the burden or onus of proof, the standard of proof, and the methods of proof.

204. On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, “it is the litigant seeking to establish a fact who bears the burden of proving it” (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). While the Applicant accepts that approach as a general proposition, it contends that in certain respects the onus should be reversed, especially in respect of the attributability of alleged acts of genocide to the Respondent, given the refusal of the Respondent to produce the full text of certain documents.

205. The particular issue concerns the “redacted” sections of documents of the Supreme Defence Council of the Respondent, i.e. sections in which parts of the text had been blacked out so as to be illegible. The documents had been classified, according to the Co-Agent of the Respondent, by decision of the Council as a military secret, and by a confidential decision of the Council of Ministers of Serbia and Montenegro as a matter of national security interest. The Applicant contends that the Court should draw its own conclusions from the failure of the Respondent to produce complete copies of the documents. It refers to the power of the Court, which it had invoked earlier (paragraph 44 above), to call for documents under Article 49 of the Statute, which provides that “[f]ormal note shall be taken of any refusal”. In the second round of oral argument the Applicant’s Deputy Agent submitted that

“Serbia and Montenegro should not be allowed to respond to our quoting the redacted SDC reports if it does not provide at the very same time the Applicant and the Court with copies of entirely

unredacted versions of *all* the SDC shorthand records and of *all* of the minutes of the same. Otherwise, Serbia and Montenegro would have an overriding advantage over Bosnia and Herzegovina with respect to documents, which are apparently, and not in the last place in the Respondent’s eyes, of direct relevance to winning or losing the present case. We explicitly, Madam President, request the Court to instruct the Respondent accordingly.” (Emphasis in the original.)

206. On this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records. It has made very ample use of it. In the month before the hearings it submitted what must be taken to have been a careful selection of documents from the very many available from the ICTY. The Applicant called General Sir Richard Dannatt, who, drawing on a number of those documents, gave evidence on the relationship between the authorities in the Federal Republic of Yugoslavia and those in the Republika Srpska and on the matter of control and instruction. Although the Court has not agreed to either of the Applicant’s requests to be provided with unedited copies of the documents, it has not failed to note the Applicant’s suggestion that the Court may be free to draw its own conclusions.

207. On a final matter relating to the burden of proof, the Applicant contends that the Court should draw inferences, notably about specific intent (*dolus specialis*), from established facts, i.e., from what the Applicant refers to as a “pattern of acts” that “speaks for itself”. The Court considers that matter later in the Judgment (paragraphs 370–376 below).

208. The Parties also differ on the second matter, the standard of proof. The Applicant, emphasizing that the matter is not one of criminal law, says that the standard is the balance of evidence or the balance of probabilities, inasmuch as what is alleged is breach of treaty obligations. According to the Respondent, the proceedings “concern the most serious issues of State responsibility and . . . a charge of such exceptional gravity against a State requires a proper degree of certainty. The proofs should be such as to leave no room for reasonable doubt.”

209. The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom v. Albania)*, *Judgment, I.C.J. Reports 1949*, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.

210. In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.

211. The Court now turns to the third matter — the method of proof. The Parties submitted a vast array of material, from different sources, to the Court. It included reports, resolutions and findings by various United Nations organs, including the Secretary-General, the General Assembly, the Security Council and its Commission of Experts, and the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Special Rapporteur on Human Rights in the former Yugoslavia; documents from other inter-governmental organizations such as the Conference for Security and Cooperation in Europe; documents, evidence and decisions from the ICTY; publications from governments; documents from non-governmental organizations; media reports, articles and books. They also called witnesses, experts and witness-experts (paragraphs 57-58 above).

212. The Court must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached. This case does however have an unusual feature. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY. The Court considers their significance later in this section of the Judgment.

213. The assessment made by the Court of the weight to be given to a particular item of evidence may lead to the Court rejecting the item as unreliable, or finding it probative, as appears from the practice followed for instance in the case concerning *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, pp. 9-10, paras. 11-13; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 39-41, paras. 59-73; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, pp. 200-201, paras. 57-61. In the most recent case the Court said this:

“The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activi-*

*ties in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties.” (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 35, para. 61. See also paras. 78-79, 114 and 237-242.)

214. The fact-finding process of the ICTY falls within this formulation, as “evidence obtained by examination of persons directly involved”, tested by cross-examination, the credibility of which has not been challenged subsequently. The Court has been referred to extensive documentation arising from the Tribunal's processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing judgments following a plea agreement and decisions of the Appeals Chamber.

215. By the end of the oral proceedings the Parties were in a broad measure of agreement on the significance of the ICTY material. The Applicant throughout has given and gives major weight to that material. At the written stage the Respondent had challenged the reliability of the Tribunal's findings, the adequacy of the legal framework under which it operates, the adequacy of its procedures and its neutrality. At the stage of the oral proceedings, its position had changed in a major way. In its Agent's words, the Respondent now based itself on the jurisprudence of the Tribunal and had “in effect” distanced itself from the opinions about the Tribunal expressed in its Rejoinder. The Agent was however careful to distinguish between different categories of material:

“[W]e do not regard all the material of the Tribunal for the former Yugoslavia as having the same relevance or probative value. We have primarily based ourselves upon the judgments of the Tribunal's Trial and Appeals Chambers, given that only the judgments can be

regarded as establishing the facts about the crimes in a credible way.”

And he went on to point out that the Tribunal has not so far, with the exception of Srebrenica, held that genocide was committed in any of the situations cited by the Applicant. He also called attention to the criticisms already made by Respondent’s counsel of the relevant judgment concerning General Krstić who was found guilty of aiding and abetting genocide at Srebrenica.

216. The Court was referred to actions and decisions taken at various stages of the ICTY processes:

- (1) The Prosecutor’s decision to include or not certain changes in an indictment;
- (2) The decision of a judge on reviewing the indictment to confirm it and issue an arrest warrant or not;
- (3) If such warrant is not executed, a decision of a Trial Chamber (of three judges) to issue an international arrest warrant, provided the Chamber is satisfied that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged;
- (4) The decision of a Trial Chamber on the accused’s motion for acquittal at the end of the prosecution case;
- (5) The judgment of a Trial Chamber following the full hearings;
- (6) The sentencing judgment of a Trial Chamber following a guilty plea.

The Court was also referred to certain decisions of the Appeals Chamber.

217. The Court will consider these stages in turn. The Applicant placed some weight on indictments filed by the Prosecutor. But the claims made by the Prosecutor in the indictments are just that — allegations made by one party. They have still to proceed through the various phases outlined earlier. The Prosecutor may, instead, decide to withdraw charges of genocide or they may be dismissed at trial. Accordingly, as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide.

218. The second and third stages, relating to the confirmation of the indictment, issues of arrest warrants and charges, are the responsibility of the judges (one in the second stage and three in the third) rather than the Prosecutor, and witnesses may also be called in the third, but the accused is generally not involved. Moreover, the grounds for a judge to act are, at the second stage, that a *prima facie* case has been established, and at the

third, that reasonable grounds exist for belief that the accused has committed crimes charged.

219. The accused does have a role at the fourth stage — motions for acquittal made by the defence at the end of the prosecution’s case and after the defence has had the opportunity to cross-examine the prosecution’s witnesses, on the basis that “there is no evidence capable of supporting a conviction”. This stage is understood to require a decision, not that the Chamber trying the facts *would* be satisfied beyond reasonable doubt by the prosecution’s evidence (if accepted), but rather that it *could* be so satisfied (*Jelisić*, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001, para. 37). The significance of that lesser standard for present purposes appears from one case on which the Applicant relied. The Trial Chamber in August 2005 in *Krajišnik* dismissed the defence motion that the accused who was charged with genocide and other crimes had no case to answer (IT-00-39-T, transcript of 19 August 2005, pp. 17112-17132). But following the full hearing the accused was found not guilty of genocide nor of complicity in genocide. While the *actus reus* of genocide was established, the specific intent (*dolus specialis*) was not (Trial Chamber Judgment, 27 September 2006, paras. 867-869). Because the judge or the Chamber does not make definitive findings at any of the four stages described, the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met.

220. The processes of the Tribunal at the fifth stage, leading to a judgment of the Trial Chamber following the full hearing are to be contrasted with those earlier stages. The processes of the Tribunal leading to final findings are rigorous. Accused are presumed innocent until proved guilty beyond reasonable doubt. They are entitled to listed minimum guarantees (taken from the International Covenant on Civil and Political Rights), including the right to counsel, to examine witness against them, to obtain the examination of witness on their behalf, and not to be compelled to testify against themselves or to confess guilt. The Tribunal has powers to require Member States of the United Nations to co-operate with it, among other things, in the taking of testimony and the production of evidence. Accused are provided with extensive pre-trial disclosure including materials gathered by the prosecution and supporting the indictment, relevant witness statements and the pre-trial brief summarizing the evidence against them. The prosecutor is also to disclose exculpatory material to the accused and to make available in electronic form the collections of relevant material which the prosecution holds.

221. In practice, now extending over ten years, the trials, many of important military or political figures for alleged crimes committed over long periods and involving complex allegations, usually last for months, even years, and can involve thousands of documents and numerous witnesses. The Trial Chamber may admit any relevant evidence which has probative value. The Chamber is to give its reasons in writing and separate and dissenting opinions may be appended.

222. Each party has a right of appeal from the judgment of the Trial Chamber to the Appeals Chamber on the grounds of error of law invalidating the decision or error of fact occasioning a miscarriage of justice. The Appeals Chamber of five judges does not rehear the evidence, but it does have power to hear additional evidence if it finds that it was not available at trial, is relevant and credible and could have been a decisive factor in the trial. It too is to give a reasoned opinion in writing to which separate or dissenting opinions may be appended.

223. In view of the above, the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.

224. There remains for consideration the sixth stage, that of sentencing judgments given following a guilty plea. The process involves a statement of agreed facts and a sentencing judgment. Notwithstanding the guilty plea the Trial Chamber must be satisfied that there is sufficient factual basis for the crime and the accused's participation in it. It must also be satisfied that the guilty plea has been made voluntarily, is informed and is not equivocal. Accordingly the agreed statement and the sentencing judgment may when relevant be given a certain weight.

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225. The Court will now comment in a general way on some of the other evidence submitted to it. Some of that evidence has been produced to prove that a particular statement was made so that the Party may make use of its content. In many of these cases the accuracy of the document as a record is not in doubt; rather its significance is. That is often the case for instance with official documents, such as the record of parliamentary bodies and budget and financial statements. Another instance is when the statement was recorded contemporaneously on audio or videotape. Yet another is the evidence recorded by the ICTY.

226. In some cases the account represents the speaker's own knowledge of the fact to be determined or evaluated. In other cases the account may set out the speaker's opinion or understanding of events after they have occurred and in some cases the account will not be based on direct observation but may be hearsay. In fact the Parties rarely disagreed about the authenticity of such material but rather about whether it was being accurately presented (for instance with contention that passages were being taken out of context) and what weight or significance should be given to it.

227. The Court was also referred to a number of reports from official or independent bodies, giving accounts of relevant events. Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).

228. One particular instance is the comprehensive report, "The Fall of Srebrenica", which the United Nations Secretary-General submitted in November 1999 to the General Assembly (United Nations doc. A/54/549). It was prepared at the request of the General Assembly, and covered the events from the establishing by the Security Council of the "safe area" on 16 April 1993 (Security Council resolution 819 (1993)) until the endorsement by the Security Council on 15 December 1995 of the Dayton Agreement. Member States and others concerned had been encouraged to provide relevant information. The Secretary-General was in a very good position to prepare a comprehensive report, some years after the events, as appears in part from this description of the method of preparation:

"This report has been prepared on the basis of archival research within the United Nations system, as well as on the basis of interviews with individuals who, in one capacity or another, participated in or had knowledge of the events in question. In the interest of gaining a clearer understanding of these events, I have taken the exceptional step of entering into the public record information from the classified files of the United Nations. In addition, I would like to record my thanks to those Member States, organizations and individuals who provided information for this report. A list of persons interviewed in this connection is attached as annex I. While that list is fairly extensive, time, as well as budgetary and other constraints, precluded interviewing many other individuals who would be in a position to offer important perspectives on the subject at hand. In most cases, the interviews were conducted on a non-attribution basis to encourage as candid a disclosure as possible. I have also honoured the request of those individuals who provided informa-

tion for this report on the condition that they not be identified.” (A/54/549, para. 8.)

229. The chapter, “Fall of Srebrenica: 6-11 July 1995”, is preceded by this note:

“The United Nations has hitherto not publicly disclosed the full details of the attack carried out on Srebrenica from 6 to 11 July 1995. The account which follows has now been reconstructed mainly from reports filed at that time by Dutchbat and the United Nations military observers. The accounts provided have also been supplemented with information contained in the Netherlands report on the debriefing of Dutchbat, completed in October 1995, and by information provided by Bosniac, Bosnian Serb and international sources. In order to independently examine the information contained in various secondary sources published over the past four years, as well to corroborate key information contained in the Netherlands debriefing report, interviews were conducted during the preparation of this report with a number of key personnel who were either in Srebrenica at the time, or who were involved in decision-making at higher levels in the United Nations chain of command.” (A/54/549, Chap. VII, p. 57.)

The introductory note to the next chapter, “The Aftermath of the fall of Srebrenica: 12-20 July 1995”, contains this description of the sources:

“The following section attempts to describe in a coherent narrative how thousands of men and boys were summarily executed and buried in mass graves within a matter of days while the international community attempted to negotiate access to them. It details how evidence of atrocities taking place gradually came to light, but too late to prevent the tragedy which was unfolding. In 1995, the details of the tragedy were told in piecemeal fashion, as survivors of the mass executions began to provide accounts of the horrors they had witnessed; satellite photos later gave credence to their accounts.

The first official United Nations report which signalled the possibility of mass executions having taken place was the report of the Special Rapporteur of the Commission on Human Rights, dated 22 August 1995 (E/CN.4/1996/9). It was followed by the Secretary-General’s reports to the Security Council, pursuant to resolution 1010 (1995), of 30 August (S/1995/755) and 27 November 1995 (S/1995/988). Those reports included information obtained from governmental and non-governmental organizations, as well as information that had appeared in the international and local press. By the end of 1995, however, the International Tribunal for the Former

Yugoslavia had still not been granted access to the area to corroborate the allegations of mass executions with forensic evidence.

The Tribunal first gained access to the crime scenes in January 1996. The details of many of their findings were made public in July 1996, during testimony under rule 60 of the Tribunal’s rules of procedure, in the case against RATIO [*sic*: Ratko] Mladić and Radovan Karadžić. Between that time and the present, the Tribunal has been able to conduct further investigations in the areas where the executions were reported to have taken place and where the primary and secondary mass graves were reported to have been located. On the basis of the forensic evidence obtained during those investigations, the Tribunal has now been able to further corroborate much of the testimony of the survivors of the massacres. On 30 October 1998, the Tribunal indicted Radislav Krstić, Commander of the BSA’s Drina Corps, for his alleged involvement in those massacres. The text of the indictment provides a succinct summary of the information obtained to date on where and when the mass executions took place.

The aforementioned sources of information, coupled with certain additional confidential information that was obtained during the preparation of this report, form the basis of the account which follows. Sources are purposely not cited in those instances where such disclosure could potentially compromise the Tribunal’s ongoing work.” (A/54/549, Chap. VIII, p. 77.)

230. The care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. As will appear later in this Judgment, the Court has gained substantial assistance from this report.

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## VI. THE FACTS INVOKED BY THE APPLICANT, IN RELATION TO ARTICLE II

### (1) *The Background*

231. In this case the Court is seized of a dispute between two sovereign States, each of which is established in part of the territory of the former State known as the Socialist Federal Republic of Yugoslavia, concerning the application and fulfilment of an international convention to which they are parties, the Convention on the Prevention and Punishment of the Crime of Genocide. The task of the Court is to deal with the legal claims and factual allegations advanced by Bosnia and Herzegovina against Serbia and Montenegro; the counter-claim advanced earlier in the proceedings by Serbia and Montenegro against Bosnia and Herzegovina has been withdrawn.

232. Following the death on 4 May 1980 of President Tito, a rotating presidency was implemented in accordance with the 1974 Constitution of the SFRY. After almost ten years of economic crisis and the rise of nationalism within the republics and growing tension between different ethnic and national groups, the SFRY began to break up. On 25 June 1991, Slovenia and Croatia declared independence, followed by Macedonia on 17 September 1991. (Slovenia and Macedonia are not concerned in the present proceedings; Croatia has brought a separate case against Serbia and Montenegro, which is still pending on the General List.) On the eve of the war in Bosnia and Herzegovina which then broke out, according to the last census (31 March 1991), some 44 per cent of the population of the country described themselves as Muslims, some 31 per cent as Serbs and some 17 per cent as Croats (*Krajišnik*, IT-00-39-T and 40-T, Trial Chamber Judgment, 27 September 2006, para. 15).

233. By a "sovereignty" resolution adopted on 14 October 1991, the Parliament of Bosnia and Herzegovina declared the independence of the Republic. The validity of this resolution was contested at the time by the Serbian community of Bosnia and Herzegovina (Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia (the Badinter Commission), p. 3). On 24 October 1991, the Serb Members of the Bosnian Parliament proclaimed a separate Assembly of the Serb Nation/Assembly of the Serb People of Bosnia and Herzegovina. On 9 January 1992, the Republic of the Serb People of Bosnia and Herzegovina (subsequently renamed the Republika Srpska on 12 August 1992) was declared with the proviso that the declaration would come into force upon international recognition of the Republic of Bosnia and Herzegovina. On 28 February 1992, the Constitution of the Republic of the Serb People of Bosnia and Herzegovina was adopted. The Republic of the Serb People of Bosnia and Herzegovina (and subsequently the Republika Srpska) was not and has not been recognized internationally as a State; it has however enjoyed some *de facto* independence.

234. On 29 February and 1 March 1992, a referendum was held on the question of independence in Bosnia and Herzegovina. On 6 March 1992, Bosnia and Herzegovina officially declared its independence. With effect from 7 April 1992, Bosnia and Herzegovina was recognized by the European Community. On 7 April 1992, Bosnia and Herzegovina was recognized by the United States. On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia was adopted consisting of the Republic of Serbia and the Republic of Montenegro. As explained above (paragraph 67), Montenegro declared its independence on 3 June 2006. All three States have been admitted to membership of the United Nations: Bosnia and Herzegovina on 22 May 1992; Serbia and Montenegro, under the name of the Federal Republic of Yugoslavia on 1 November 2000; and the Republic of Montenegro on 28 June 2006.

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(2) *The Entities Involved in the Events Complaind of*

235. It will be convenient next to define the institutions, organizations or groups that were the actors in the tragic events that were to unfold in Bosnia and Herzegovina. Of the independent sovereign States that had emerged from the break-up of the SFRY, two are concerned in the present proceedings: on the one side, the FRY (later to be called Serbia and Montenegro), which was composed of the two constituent republics of Serbia and Montenegro; on the other, the Republic of Bosnia and Herzegovina. At the time when the latter State declared its independence (15 October 1991), the independence of two other entities had already been declared: in Croatia, the Republika Srpska Krajina, on 26 April 1991, and the Republic of the Serb People of Bosnia and Herzegovina, later to be called the Republika Srpska, on 9 January 1992 (paragraph 233 above). The Republika Srpska never attained international recognition as a sovereign State, but it had *de facto* control of substantial territory, and the loyalty of large numbers of Bosnian Serbs.

236. The Parties both recognize that there were a number of entities at a lower level than the activities of which have formed part of the factual issues in the case, though they disagree as to the significance of those activities. Of the military and paramilitary units active in the hostilities, there were in April 1992 five types of armed formations involved in Bosnia: first, the Yugoslav People's Army (JNA), subsequently the Yugoslav Army (VJ); second, volunteer units supported by the JNA and later by the VJ, and the Ministry of the Interior (MUP) of the FRY; third, municipal Bosnian Serb Territorial Defence (TO) detachments; and, fourth, police forces of the Bosnian Serb Ministry of the Interior. The MUP of the Republika Srpska controlled the police and the security services, and operated, according to the Applicant, in close co-operation and co-ordination with the MUP of the FRY. On 15 April 1992, the Bosnian Government established a military force, based on the former Territorial Defence of the Republic, the Army of the Republic of Bosnia and Herzegovina (ARBiH), merging several non-official forces, including a number of paramilitary defence groups, such as the Green Berets, and the Patriotic League, being the military wing of the Muslim Party of Democratic Action. The Court does not overlook the evidence suggesting the existence of Muslim organizations involved in the conflict, such as foreign Mujahideen, although as a result of the withdrawal of the Respondent's counter-claims, the activities of these bodies are not the subject of specific claims before the Court.

237. The Applicant has asserted the existence of close ties between the Government of the Respondent and the authorities of the Republika Srpska, of a political and financial nature, and also as regards administra-

tion and control of the army of the Republika Srpska (VRS). The Court observes that insofar as the political sympathies of the Respondent lay with the Bosnian Serbs, this is not contrary to any legal rule. It is however argued by the Applicant that the Respondent, under the guise of protecting the Serb population of Bosnia and Herzegovina, in fact conceived and shared with them the vision of a "Greater Serbia", in pursuit of which it gave its support to those persons and groups responsible for the activities which allegedly constitute the genocidal acts complained of. The Applicant bases this contention first on the "Strategic Goals" articulated by President Karadžić at the 16th Session of the FRY Assembly on 12 May 1992, and subsequently published in the *Official Gazette* of the Republika Srpska (paragraph 371), and secondly on the consistent conduct of the Serb military and paramilitary forces vis-à-vis the non-Serb Bosnians showing, it is suggested, an overall specific intent (*dolus specialis*). These activities will be examined below.

238. As regards the relationship between the armies of the FRY and the Republika Srpska, the Yugoslav Peoples' Army (JNA) of the SFRY had, during the greater part of the period of existence of the SFRY, been effectively a federal army, composed of soldiers from all the constituent republics of the Federation, with no distinction between different ethnic and religious groups. It is however contended by the Applicant that even before the break-up of the SFRY arrangements were being made to transform the JNA into an effectively Serb army. The Court notes that on 8 May 1992, all JNA troops who were not of Bosnian origin were withdrawn from Bosnia-Herzegovina. However, JNA troops of Bosnian Serb origin who were serving in Bosnia and Herzegovina were transformed into, or joined, the army of the Republika Srpska (the VRS) which was established on 12 May 1992, or the VRS Territorial Defence. Moreover, Bosnian Serb soldiers serving in JNA units elsewhere were transferred to Bosnia and Herzegovina and subsequently joined the VRS. The remainder of the JNA was transformed into the Yugoslav army (VJ) and became the army of the Federal Republic of Yugoslavia. On 15 May 1992 the Security Council, by resolution 752, demanded that units of the JNA in Bosnia and Herzegovina "be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed". On 19 May 1992, the Yugoslav army was officially withdrawn from Bosnia and Herzegovina. The Applicant contended that from 1993 onwards, around 1,800 VRS officers were "administered" by the 30th Personnel Centre of the VJ in Belgrade; this meant that matters like their payment, promotions, pensions, etc., were handled, not by the Republika Srpska, but by the army of the Respondent. According to the Respondent, the importance of this fact was greatly exaggerated by the Applicant: the VRS had around 14,000 officers and thus only a small number of them were dealt with by the 30th Personnel Centre; this Centre only gave a certain degree of assistance to the VRS. The Applicant maintains that all VRS officers remained members of the

FRY army — only the label changed; according to the Respondent, there is no evidence for this last allegation. The Court takes note however of the comprehensive description of the processes involved set out in paragraphs 113 to 117 of the Judgment of 7 May 1997 of the ICTY Trial Chamber in the *Tadić* case (IT-94-I-T) quoted by the Applicant which mainly corroborate the account given by the latter. Insofar as the Respondent does not deny the fact of these developments, it insists that they were normal reactions to the threat of civil war, and there was no pre-meditated plan behind them.

239. The Court further notes the submission of the Applicant that the VRS was armed and equipped by the Respondent. The Applicant contends that when the JNA formally withdrew on 19 May 1992, it left behind all its military equipment which was subsequently taken over by the VRS. This claim is supported by the Secretary-General's report of 3 December 1992 in which he concluded that "[t]hrough the JNA has completely withdrawn from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the 'Serb Republic'" (A/47/747, para. 11). Moreover, the Applicant submits that Belgrade actively supplied the VRS with arms and equipment throughout the war in Bosnia and Herzegovina. On the basis of evidence produced before the ICTY, the Applicant contended that up to 90 per cent of the material needs of the VRS were supplied by Belgrade. General Dannatt, one of the experts called by the Applicant (paragraph 57 above), testified that, according to a "consumption review" given by General Mladić at the Bosnian Serb Assembly on 16 April 1995, 42.2 per cent of VRS supplies of infantry ammunition were inherited from the former JNA and 47 per cent of VRS requirements were supplied by the VJ. For its part, the Respondent generally denies that it supplied and equipped the VRS but maintains that, even if that were the case, such assistance "is very familiar and is an aspect of numerous treaties of mutual security, both bilateral and regional". The Respondent adds that moreover it is a matter of public knowledge that the armed forces of Bosnia and Herzegovina received external assistance from friendly sources. However, one of the witnesses called by the Respondent, Mr. Vladimir Lukić, who was the Prime Minister of the Republika Srpska from 20 January 1993 to 18 August 1994 testified that the army of the Republika Srpska was supplied from different sources "including but not limited to the Federal Republic of Yugoslavia" but asserted that the Republika Srpska "mainly paid for the military materiel which it obtained" from the States that supplied it.

240. As regards effective links between the two Governments in the financial sphere, the Applicant maintains that the economies of the FRY, the Republika Srpska, and the Republika Srpska Krajina were integrated through the creation of a single economic entity, thus enabling the FRY Government to finance the armies of the two other bodies in addition to its own. The Applicant argued that the National Banks of the

Republika Srpska and of the Republika Srpska Krajina were set up as under the control of, and directly subordinate to, the National Bank of Yugoslavia in Belgrade. The national budget of the FRY was to a large extent financed through primary issues from the National Bank of Yugoslavia, which was said to be entirely under governmental control, i.e. in effect through creating money by providing credit to the FRY budget for the use of the JNA. The same was the case for the budgets of the Republika Srpska and the Republika Srpska Krajina, which according to the Applicant had virtually no independent sources of income; the Respondent asserts that income was forthcoming from various sources, but has not specified the extent of this. The National Bank of Yugoslavia was making available funds (80 per cent of those available from primary issues) for "special purposes", that is to say "to avoid the adverse effects of war on the economy of the Serbian Republic of Bosnia and Herzegovina". The Respondent has denied that the budget deficit of the Republika Srpska was financed by the FRY but has not presented evidence to show how it was financed. Furthermore, the Respondent emphasizes that any financing supplied was simply on the basis of credits, to be repaid, and was therefore quite normal, particularly in view of the economic isolation of the FRY, the Republika Srpska and the Republika Srpska Krajina; it also suggested that any funds received would have been under the sole control of the recipient, the Republika Srpska or the Republika Srpska Krajina.

241. The Court finds it established that the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities.

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### (3) Examination of Factual Evidence: Introduction

242. The Court will therefore now examine the facts alleged by the Applicant, in order to satisfy itself, first, whether the alleged atrocities occurred; secondly, whether such atrocities, if established, fall within the scope of Article II of the Genocide Convention, that is to say whether the facts establish the existence of an intent, on the part of the perpetrators of those atrocities, to destroy, in whole or in part, a defined group (*dolus specialis*). The group taken into account for this purpose will, for the reasons explained above (paragraphs 191-196), be that of the Bosnian Muslims; while the Applicant has presented evidence said to relate to a wider group of non-Serb Bosnians, the Bosnian Muslims formed such a substantial part of this wider group that that evidence appears to have equal probative value as regards the facts, in relation to the more restricted

group. The Court will also consider the facts alleged in the light of the question whether there is persuasive and consistent evidence for a pattern of atrocities, as alleged by the Applicant, which would constitute evidence of *dolus specialis* on the part of the Respondent. For this purpose it is not necessary to examine every single incident reported by the Applicant, nor is it necessary to make an exhaustive list of the allegations; the Court finds it sufficient to examine those facts that would illuminate the question of intent, or illustrate the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent (*dolus specialis*).

243. The Court will examine the evidence following the categories of prohibited acts to be found in Article II of the Genocide Convention. The nature of the events to be described is however such that there is considerable overlap between these categories: thus, for example, the conditions of life in the camps to which members of the protected group were confined have been presented by the Applicant as violations of Article II, paragraph (c), of the Convention (the deliberate infliction of destructive conditions of life), but since numerous inmates of the camps died, allegedly as a result of those conditions, or were killed there, the camps fall to be mentioned also under paragraph (a), killing of members of the protected group.

244. In the evidentiary material submitted to the Court, and that referred to by the ICTY, frequent reference is made to the actions of "Serbs" or "Serb forces", and it is not always clear what relationship, if any, the participants are alleged to have had with the Respondent. In some cases it is contended, for example, that the JNA, as an organ *de jure* of the Respondent, was involved; in other cases it seems clear that the participants were Bosnian Serbs, with no *de jure* link with the Respondent, but persons whose actions are, it is argued, attributable to the Respondent on other grounds. Furthermore, as noted in paragraph 238 above, it appears that JNA troops of Bosnian Serb origin were transformed into, or joined the VRS. At this stage of the present Judgment, the Court is not yet concerned with the question of the attributability to the Respondent of the atrocities described; it will therefore use the terms "Serb" and "Serb forces" purely descriptively, without prejudice to the status they may later, in relation to each incident, be shown to have had. When referring to documents of the ICTY, or to the Applicant's pleadings or oral argument, the Court will use the terminology of the original.

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(4) *Article II (a): Killing Members of the Protected Group*

245. Article II (a) of the Convention deals with acts of killing members of the protected group. The Court will first examine the evidence of killings of members of the protected group in the principal areas of Bosnia and in the various detention camps, and ascertain whether there is evidence of a specific intent (*dolus specialis*) in one or more of them. The Court will then consider under this heading the evidence of the massacres reported to have occurred in July 1995 at Srebrenica.

*Sarajevo*

246. The Court notes that the Applicant refers repeatedly to killings, by shelling and sniping, perpetrated in Sarajevo. The Fifth Periodic Report of the United Nations Special Rapporteur is presented by the Applicant in support of the allegation that between 1992 and 1993 killings of Muslim civilians were perpetrated in Sarajevo, partly as a result of continuous shelling by Bosnian Serb forces. The Special Rapporteur stated that on 9 and 10 November 1993 mortar attacks killed 12 people (E/CN.4/1994/47, 17 November 1992, p. 4, para. 14). In his periodic Report of 5 July 1995, the Special Rapporteur observed that as from late February 1995 numerous civilians were killed by sniping activities of Bosnian Serb forces and that “one local source reported that a total of 41 civilians were killed . . . in Sarajevo during the month of May 1995” (Report of 5 July 1995, para. 69). The Report also noted that, in late June and early July 1995, there was further indiscriminate shelling and rocket attacks on Sarajevo by Bosnian Serb forces as a result of which many civilian deaths were reported (Report of 5 July 1995, para. 70).

247. The Report of the Commission of Experts gives a detailed account of the battle and siege of Sarajevo. The Commission estimated that over the course of the siege nearly 10,000 persons had been killed or were missing in the city of Sarajevo (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). According to the estimates made in a report presented by the Prosecution before the ICTY in the *Galić* case (IT-98-29-T, Trial Chamber Judgment, 5 December 2003, paras. 578 and 579), the monthly average of civilians killed fell from 105 in September to December 1992, to around 64 in 1993 and to around 28 in the first six months of 1994.

248. The Trial Chamber of the ICTY, in its Judgment of 5 December 2003 in the *Galić* case examined specific incidents in the area of Sarajevo, for instance the shelling of the Markale market on 5 February 1994 which resulted in the killing of 60 persons. The majority of the Trial

Chamber found that “civilians in ARBiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory during the Indictment Period, and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured” (*Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 591), the Trial Chamber further concluded that “[i]n sum, the Majority of the Trial Chamber finds that each of the crimes alleged in the Indictment — crime of terror, attacks on civilians, murder and inhumane acts — were committed by SRK forces during the Indictment Period” (*ibid.*, para. 600).

249. In this connection, the Respondent makes the general point that in a civil war it is not always possible to differentiate between military personnel and civilians. It does not deny that crimes were committed during the siege of Sarajevo, crimes that “could certainly be characterized as war crimes and certain even as crimes against humanity”, but it does not accept that there was a strategy of targeting civilians.

*Drina River Valley*(a) *Zvornik*

250. The Applicant made a number of allegations with regard to killings that occurred in the area of Drina River Valley. The Applicant, relying on the Report of the Commission of Experts, claims that at least 2,500 Muslims died in Zvornik from April to May 1992. The Court notes that the findings of the Report of the Commission of Experts are based on individual witness statements and one declassified United States State Department document No. 94-11 (Vol. V, Ann. X, para. 387; Vol. IV, Ann. VIII, p. 342 and para. 2884; Vol. I, Ann. III.A, para. 578). Further, a video reporting on massacres in Zvornik was shown during the oral proceedings (excerpts from “The Death of Yugoslavia”, BBC documentary). With regard to specific incidents, the Applicant alleges that Serb soldiers shot 36 Muslims and mistreated 27 Muslim children in the local hospital of Zvornik in the second half of May 1992.

251. The Respondent contests those allegations and contends that all three sources used by the Applicant are based solely on the account of one witness. It considers that the three reports cited by the Applicant cannot be used as evidence before the Court. The Respondent produced the statement of a witness made before an investigating judge in Zvornik which claimed that the alleged massacre in the local hospital of Zvornik had never taken place. The Court notes that the Office of the Prosecutor of the ICTY had never indicted any of the accused for the alleged massacres in the hospital.

(b) *Camps*(i) *Sušica camp*

252. The Applicant further presents claims with regard to killings perpetrated in detention camps in the area of Drina River Valley. The Report of the Commission of Experts includes the statement of an ex-guard at the Sušica camp who personally witnessed 3,000 Muslims being killed (Vol. IV, Ann. VIII, p. 334) and the execution of the last 200 surviving detainees (Vol. I, Ann. IV, pp. 31-32). In proceedings before the ICTY, the Commander of that camp, Dragan Nikolić, pleaded guilty to murdering nine non-Serb detainees and, according to the Sentencing Judgment of 18 December 2003, “the Accused persecuted Muslim and other non-Serb detainees by subjecting them to murders, rapes and torture as charged specifically in the Indictment” (*Nikolić*, IT-94-2-S, para. 67).

(ii) *Foča Kazneno-Popravni Dom camp*

253. The Report of the Commission of Experts further mentions numerous killings at the camp of Foča Kazneno-Popravni Dom (Foča KP Dom). The Experts estimated that the number of prisoners at the camp fell from 570 to 130 over two months (Vol. IV, Ann. VIII, p. 129). The United States State Department reported one eye-witness statement of regular executions in July 1992 and mass graves at the camp.

254. The Trial Chamber of the ICTY made the following findings on several killings at this camp in its Judgment in the *Krnjelac* case:

“The Trial Chamber is satisfied beyond reasonable doubt that all but three of the persons listed in Schedule C to the Indictment were killed at the KP Dom. The Trial Chamber is satisfied that these persons fell within the pattern of events that occurred at the KP Dom during the months of June and July 1992, and that the only reasonable explanation for the disappearance of these persons since that time is that they died as a result of acts or omissions, with the relevant state of mind [sc. that required to establish murder], at the KP Dom.” (IT-97-25-T, Judgment, 15 March 2002, para. 330.)

(iii) *Batković camp*

255. As regards the detention camp of Batković, the Applicant claims that many prisoners died at this camp as a result of mistreatment by the Serb guards. The Report of the Commission of Experts reports one witness statement according to which there was a mass grave located next to the Batković prison camp. At least 15 bodies were buried next to a cow stable, and the prisoners neither knew the identity of those buried at the stable nor the circumstances of their deaths (Report of the Commission

of Experts, Vol. V, Ann. X, p. 9). The Report furthermore stresses that

“[b]ecause of the level of mistreatment, many prisoners died. One man stated that during his stay, mid-July to mid-August, 13 prisoners were beaten to death. Another prisoner died because he had gangrene which went untreated. Five more may have died from hunger. Allegedly, 20 prisoners died prior to September.” (Vol. IV, Ann. VIII, p. 63.)

Killings at the Batković camp are also mentioned in the Dispatch of the United States State Department of 19 April 1993. According to a witness, several men died as a result of bad conditions and beatings at the camp (United States Dispatch, 19 April 1993, Vol. 4, No. 30, p. 538).

256. On the other hand, the Respondent stressed that, when the United Nations Special Rapporteur visited the Batković prison camp, he found that: “The prisoners did not complain of ill-treatment and, in general appeared to be in good health.” (Report of 17 November 1992, para. 29) However, the Applicant contends that “it is without any doubt that Mazowiecki was shown a ‘model’ camp”.

*Prijedor*(a) *Kozarac and Hambarine*

257. With regard to the area of the municipality of Prijedor, the Applicant has placed particular emphasis on the shelling and attacks on Kozarac, 20 km east of Prijedor, and on Hambarine in May 1992. The Applicant contends that after the shelling, Serb forces shot people in their homes and that those who surrendered were taken to a soccer stadium in Kozarac where some men were randomly shot. The Report of the Commission of Experts (Vol. I, Ann. III, pp. 154-155) states that:

“The attack on Kozarac lasted three days and caused many villagers to flee to the forest while the soldiers were shooting at ‘every moving thing’. Survivors calculated that at least 2,000 villagers were killed in that period. The villagers’ defence fell on 26 May . . .

Serbs then reportedly announced that the villagers had 10 minutes to reach the town’s soccer stadium. However, many people were shot in their homes before given a chance to leave. One witness reported that several thousand people tried to surrender by carrying white flags, but three Serb tanks opened fire on them, killing many.”

The Respondent submits that the number of killings is exaggerated and that “there was severe fighting in Kozarac, which took place on 25 and 26 May, and naturally, it should be concluded that a certain number of the victims were Muslim combatants”.

258. As regards Hambarine, the Report of the Commission of Experts (Vol. I, p. 39) states that:

“Following an incident in which less than a handful of Serb[ian] soldiers were shot dead under unclear circumstances, the village of Hambarine was given an ultimatum to hand over a policeman who lived where the shooting had occurred. As it was not met, Hambarine was subjected to several hours of artillery bombardment on 23 May 1992.

The shells were fired from the aerodrome Urije just outside Prijedor town. When the bombardment stopped, the village was stormed by infantry, including paramilitary units, which sought out the inhabitants in every home. Hambarine had a population of 2,499 in 1991.”

The Report of the Special Rapporteur of 17 November 1992, states that:

“Between 23 and 25 May, the Muslim village of Hambarine, 5 km south of Prijedor, received an ultimatum: all weapons must be surrendered by 11 a.m. Then, alleging that a shot was fired at a Serbian patrol, heavy artillery began to shell the village and tanks appeared, firing at homes. The villagers fled to Prijedor. Witnesses reported many deaths, probably as many as 1,000.” (Periodic Report of 17 November 1992, p. 8, para. 17 (c).)

The Respondent says, citing the indictment in the *Stakić* case, that “merely 11 names of the victims are known” and that it is therefore impossible that the total number of victims in Hambarine was “as many as 1,000”.

259. The Report of the Commission of Experts found that on 26, 27 or 28 May, the Muslim village of Kozarac, came under attack of heavy Serb artillery. It furthermore notes that:

“The population, estimated at 15,000, suffered a great many summary executions, possibly as many as 5,000 persons according to some witnesses.” (Report of the Commission of Experts, Vol. IV, pt. 4.)

260. The Applicant also claimed that killings of members of the protected group were perpetrated in Prijedor itself. The Report of the Commission of Experts, as well as the United Nations Special Rapporteur collected individual witness statements on several incidents of killing in the town of Prijedor (Report of the Commission of Experts, Vol. I, Ann. V, pp. 54 *et seq.*). In particular, the Special Rapporteur received

testimony “from a number of reliable sources” that 200 people were killed in Prijedor on 29 May 1992 (Report of 17 November 1992, para. 17).

261. In the *Stakić* case, the ICTY Trial Chamber found that “many people were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Prijedor municipality and several massacres of Muslims took place”, and that “a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 ha[d] been proved beyond reasonable doubt” (IT-97-24-T, Judgment, 31 July 2003, paras. 544 and 546). Further, in the *Brdanin* case, the Trial Chamber was satisfied that “at least 80 Bosnian Muslim civilians were killed when Bosnian Serb soldiers and police entered the villages of the Kozarac area” (IT-99-36, Judgment, 1 September 2004, para. 403).

#### (b) Camps

##### (i) Omarska camp

262. With respect to the detention camps in the area of Prijedor, the Applicant has stressed that the camp of Omarska was “arguably the cruellest camp in Bosnia and Herzegovina”. The Report of the Commission of Experts gives an account of seven witness statements reporting between 1,000 to 3,000 killings (Vol. IV, Ann. VIII, p. 222). The Report noted that

“[s]ome prisoners estimate that on an average there may have been 10 to 15 bodies displayed on the grass each morning, when the first prisoners went to receive their daily food rations. But there were also other dead bodies observed in other places at other times. Some prisoners died from their wounds or other causes in the rooms where they were detained. Constantly being exposed to the death and suffering of fellow prisoners made it impossible for anyone over any period of time to forget in what setting he or she was. Given the length of time Logor Omarska was used, the numbers of prisoners detained in the open, and the allegations that dead bodies were exhibited there almost every morning.”

The Report of the Commission of Experts concludes that “all information available . . . seems to indicate that [Omarska] was more than anything else a death camp” (Vol. I, Ann. V, p. 80). The United Nations Secretary-General also received submissions from Canada, Austria and the United States, containing witness statements about the killings at Omarska.

263. In the Opinion and Judgment of the Trial Chamber in the *Tadić* case, the ICTY made the following findings on Omarska: “Perhaps the most notorious of the camps, where the most horrific conditions existed,

was the Omarska camp.” (IT-94-I-T, Judgment, 7 May 1997, para. 155.) “The Trial Chamber heard from 30 witnesses who survived the brutality to which they were systematically subjected at Omarska. By all accounts, the conditions at the camp were horrendous; killings and torture were frequent.” (*Ibid.*, para. 157.) The Trial Chamber in the *Stakić* Judgment found that “over a hundred people were killed in late July 1992 in the Omarska camp” and that

“[a]round late July 1992, 44 people were taken out of Omarska and put in a bus. They were told that they would be exchanged in the direction of Bosanska Krupa; they were never seen again. During the exhumation in Jama Lisac, 56 bodies were found: most of them had died from gunshot injuries.” (IT-97-24-T, Judgment, 31 July 2003, paras. 208 and 210).

At least 120 people detained at Omarska were killed after having been taken away by bus.

“The corpses of some of those taken away on the buses were later found in Hrastova Glavica and identified. A large number of bodies, 126, were found in this area, which is about 30 kilometres away from Prijedor. In 121 of the cases, the forensic experts determined that the cause of death was gunshot wounds.” (*Ibid.*, para. 212.)

264. In the *Brđanin* case, the Trial Chamber, in its Judgment of 1 September 2004 held that between 28 May and 6 August, a massive number of people were killed at Omarska camp. The Trial Chamber went on to say specifically that “[a]s of late May 1992, a camp was set up at Omarska, where evidence shows that several hundred Bosnian Muslim and Bosnian Croat civilians from the Prijedor area were detained, and where killings occurred on a massive scale” (IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 441). “The Trial Chamber is unable to precisely identify all detainees that were killed at Omarska camp. It is satisfied beyond reasonable doubt however that, at a minimum, 94 persons were killed, including those who disappeared.” (*Ibid.*, para. 448.)

#### (ii) Keraterm camp

265. A second detention camp in the area of Prijedor was the Keraterm camp where, according to the Applicant, killings of members of the protected group were also perpetrated. Several corroborating accounts of a mass execution on the morning of 25 July 1992 in Room 3 at Keraterm camp were presented to the Court. This included the United States Dispatch of the State Department and a letter from the Permanent Represent-

sentative of Austria to the United Nations dated 5 March 1993, addressed to the Secretary-General. The Report of the Commission of Experts cites three separate witness statements to the effect that ten prisoners were killed per day at Keraterm over three months (Vol. IV, para. 1932; see also Vol. I, Ann. V, para. 445).

266. The Trial Chamber of the ICTY, in the *Sikirica et al.* case, concerning the Commander of Keraterm camp, found that 160 to 200 men were killed or wounded in the so-called Room 3 massacre (IT-95-8-S, Sentencing Judgment, 13 November 2001, para. 103). According to the Judgment, Sikirica himself admitted that there was considerable evidence “concerning the murder and killing of other named individuals at Keraterm during the period of his duties”. There was also evidence that “others were killed because of their rank and position in society and their membership of a particular ethnic group or nationality” (*ibid.*, para. 122). In the *Stakić* case, the Trial Chamber found that “from 30 April 1992 to 30 September 1992 . . . killings occurred frequently in the Omarska, Keraterm and Trnopolje camps” (IT-97-24-T, Judgment, 31 July 2003, para. 544).

#### (iii) Trnopolje camp

267. The Applicant further contends that there is persuasive evidence of killing at Trnopolje camp, with individual eye-witnesses corroborating each other. The Report of the Commission of Experts found that “[i]n Trnopolje, the regime was far better than in Omarska and Keraterm. Nonetheless, harassment and malnutrition was a problem for all the inmates. Rapes, beatings and other kinds of torture, and even killings, were not rare.” (Report of the Commission of Experts, Vol. IV, Ann. V, p. 10.)

“The first period was allegedly the worst in Trnopolje, with the highest numbers of inmates killed, raped, and otherwise mistreated and tortured . . .

The people killed in the camp were usually removed soon after by some camp inmates who were ordered by the Serbs to take them away and bury them . . .

Albeit *Logor* Trnopolje was not a death camp like *Logor* Omarska or *Logor* Keraterm, the label ‘concentration camp’ is none the less justified for *Logor* Trnopolje due to the regime prevailing in the camp.” (*Ibid.*, Vol. I, Ann. V, pp. 88-90.)

268. With regard to the number of killings at Trnopolje, the ICTY considered the period between 25 May and 30 September 1992, the relevant period in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 226-227). The Trial Chamber came to the conclusion that “killings occurred frequently in the Omarska, Keraterm and Trno-

polje camps and other detention centres” (IT-97-24-T, para. 544). In the Judgment in the *Brđanin* case, the Trial Chamber found that in the period from 28 May to October 1992,

“numerous killings occurred in Trnopolje camp. A number of detainees died as a result of the beatings received by the guards. Others were killed by camp guards with rifles. The Trial Chamber also [found] that at least 20 inmates were taken outside the camp and killed there.” (IT-99-36-T, Judgment, 1 September 2004, para. 450.)

269. In response to the allegations of killings at the detention camps in the area of Prijedor, the Respondent questions the number of victims, but not the fact that killings occurred. It contends that killings in Prijedor “were committed sporadically and against individuals who were not a significant part of the group”. It further observed that the ICTY had not characterized the acts committed in the Prijedor region as genocide.

#### *Banja Luka*

##### *Manjača camp*

270. The Applicant further contends that killings were also frequent at Manjača camp in Banja Luka. The Court notes that multiple witness accounts of killings are contained in the Report of the Commission of Experts (Vol. IV, paras. 370-376) and a mass grave of 540 bodies, “presumably” from prisoners at Manjača, is mentioned in a report on missing persons submitted by Manfred Nowak, the United Nations Expert on Missing Persons:

“In September 1995, mass graves were discovered near Krasulje in northwest Bosnia and Herzegovina. The Government has exhumed 540 bodies of persons who were presumably detained at Manjača concentration camp in 1992. In January 1996, a mass grave containing 27 bodies of Bosnian Muslims was discovered near Sanski Most; the victims were reportedly killed in July 1992 during their transfer from Sanski Most to Manjača concentration camp (near Banja Luka).” (E/CN.4/1996/36 of 4 March 1996, para. 52.)

#### *Brčko*

##### *Luka camp*

271. The Applicant claims that killings of members of the protected group were also perpetrated at Luka camp and Brčko. The Report of the Commission of Experts confirms these allegations. One witness reported that “[s]hootings often occurred at 4.00 a.m. The witness estimates that during his first week at Luka more than 2,000 men were killed and

thrown into the Sava River.” (Report of the Commission of Experts Vol. IV, Ann. VIII, p. 93.) The Report further affirms that “[a]pparently, murder and torture were a daily occurrence” (*ibid.*, p. 96), and that it was reported that

“[t]he bodies of the dead or dying internees were often taken to the camp dump or moved behind the prisoner hangars. Other internees were required to move the bodies. Sometimes the prisoners who carried the dead were killed while carrying such bodies to the dump. The dead were also taken and dumped outside the Serbian Police Station located on Majevička Brigada Road in Brčko.” (*Ibid.*)

These findings are corroborated by evidence of a mass grave being found near the site (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 101, and United States State Department Dispatch).

272. In the *Jelisić* case, eight of the 13 murders to which the accused pleaded guilty were perpetrated at Luka camp and five were perpetrated at the Brčko police station (IT-95-10-T, Trial Chamber Judgment, 14 December 1999, paras. 37-38). The Trial Chamber further held that “[a]lthough the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelisić for the period in the indictment, it notes that, in this instance, the material element of the crime of genocide has been satisfied” (*ibid.*, para. 65).

273. In the *Milošević* Decision on Motion for Judgment of Acquittal, the Trial Chamber found that many Muslims were detained in Luka camp in May and June 1992 and that many killings were observed by witnesses (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras. 159, 160-168), it held that “[t]he conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings” (*ibid.*, para. 159). “At Luka Camp . . . The witness personally moved about 12 to 15 bodies and saw approximately 100 bodies stacked up like firewood at Luka Camp; each day a refrigerated meat truck from the local Bimeks Company in Brčko would come to take away the dead bodies.” (*Ibid.*, para. 161.)

274. The Court notes that the *Brđanin* Trial Chamber Judgment of 1 September 2004 made a general finding as to killings of civilians in camps and municipalities at Banja Luka, Prijedor, Sanski Most, Klujuč, Kotor Varoš and Bosanski Novi. It held that:

“In sum, the Trial Chamber is satisfied beyond reasonable doubt that, considering all the incidents described in this section of the judgment, at least 1,669 Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces, all of whom were non-combatants.” (IT-99-36-T, Judgment, 1 September 2004, para. 465.)

There are contemporaneous Security Council and General Assembly resolutions condemning the killing of civilians in connection with ethnic cleansing, or expressing alarm at reports of mass killings (Security Council resolution 819 (1993), Preamble, paras. 6 and 7; General Assembly resolution 48/153 (1993), paras. 5 and 6; General Assembly resolution 49/196 (1994), para. 6).

275. The Court further notes that several resolutions condemn specific incidents. These resolutions, *inter alia*, condemn “the Bosnian Serb forces for their continued offensive against the safe area of Goražde, which has resulted in the death of numerous civilians” (Security Council resolution 913 (1994), Preamble, para. 5); condemn ethnic cleansing “perpetrated in Banja Luka, Bijeljina and other areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces” (Security Council resolution 941 (1994), para. 2); express concern at “grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder” (Security Council resolution 1019 (1995), Preamble, para. 2); and condemn “the indiscriminate shelling of civilians in the safe areas of Sarajevo, Tuzla, Bihac and Goražde and the use of cluster bombs on civilian targets by Bosnian Serb and Croatian Serb forces” (General Assembly resolution 50/193 (1995) para. 5).

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276. On the basis of the facts set out above, the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings. The Court notes in fact that, while the Respondent contested the veracity of certain allegations, and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina. The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II (a) of the Convention, are fulfilled. At this stage of its reasoning, the Court is not called upon to list the specific killings, nor even to make a conclusive finding on the total number of victims.

277. The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such. The Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observes that none of those convicted were found to have acted with specific intent (*dolus specialis*). The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention. As to the Applicant’s contention that the specific intent (*dolus specialis*) can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide (violations of Article II, paragraphs (b) to (e)) (see paragraph 370 below).

\* \* \*

#### (5) *The Massacre at Srebrenica*

278. The atrocities committed in and around Srebrenica are nowhere better summarized than in the first paragraph of the Judgment of the Trial Chamber in the *Krstić* case:

“The events surrounding the Bosnian Serb take-over of the United Nations (‘UN’) ‘safe area’ of Srebrenica in Bosnia and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be ‘free from armed attack or any other hostile act’, units of the Bosnian Serb Army (‘VRS’) launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again.” (IT-98-33-T, Judgment, 2 August 2001, para. 1; footnotes omitted.)

While the Respondent raises a question about the number of deaths, it does not essentially question that account. What it does question is whether specific intent (*dolus specialis*) existed and whether the acts complained of can be attributed to it. It also calls attention to the attacks carried out by the Bosnian army from within Srebrenica and the fact that the enclave was never demilitarized. In the Respondent's view the military action taken by the Bosnian Serbs was in revenge and part of a war for territory.

279. The Applicant contends that the planning for the final attack on Srebrenica must have been prepared quite some time before July 1995. It refers to a report of 4 July 1994 by the commandant of the Bratunac Brigade. He outlined the "final goal" of the VRS: "an entirely Serbian Podrinje. The enclaves of Srebrenica, Žepa and Goražde must be militarily defeated." The report continued:

"We must continue to arm, train, discipline, and prepare the RS Army for the execution of this crucial task — the expulsion of Muslims from the Srebrenica enclave. There will be no retreat when it comes to the Srebrenica enclave, we must advance. The enemy's life has to be made unbearable and their temporary stay in the enclave impossible so that they leave *en masse* as soon as possible, realising that they cannot survive there."

The Chamber in the *Blagojević* case mentioned testimony showing that some "members of the Bratunac Brigade . . . did not consider this report to be an order. Testimony of other witnesses and documentary evidence show that the strategy was in fact implemented." (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 104; footnotes omitted.) The Applicant sees the "final goal" described here as "an entirely Serbian Podrinje", in conformity with the objective of a Serbian region 50 km to the west of the Drina river identified in an April or a May 1991 meeting of the political and State leadership of Yugoslavia. The Court observes that the object stated in the report, like the 1992 Strategic Objectives, does not envisage the destruction of the Muslims in Srebrenica, but rather their departure. The Chamber did not give the report any particular significance.

280. The Applicant, like the Chamber, refers to a meeting on 7 March 1995 between the Commander of the United Nations Protection Force (UNPROFOR) and General Mladić, at which the latter expressed dissatisfaction with the safe area régime and indicated that he might take military action against the eastern enclaves. He gave assurances however for the safety of the Bosnian Muslim population of those enclaves. On the following day, 8 March 1995, President Karadžić issued the Directive for Further Operations 7, also quoted by the Chamber and the Applicant: "'Planned and well-thought-out combat operations' were

to create 'an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves'." The *Blagojević* Chamber continues as follows:

"The separation of the Srebrenica and Žepa enclaves became the task of the Drina Corps. As a result of this directive, General Ratko Mladić on 31 March 1995 issued Directive for Further Operations, Operative No. 7/1, which further directive specified the Drina Corps' tasks." (IT-02-60-T, pp. 38-39, para. 106.)

281. Counsel for the Applicant asked in respect of the first of those directives "[w]hat could be a more clear-cut definition of the genocidal intent to destroy on the part of the authorities in Pale?". As with the July 1994 report, the Court observes that the expulsion of the inhabitants would achieve the purpose of the operation. That observation is supported by the ruling of the Appeals Chamber in the *Krstić* case that the directives were "insufficiently clear" to establish specific intent (*dolus specialis*) on the part of the members of the Main Staff who issued them. "Indeed, the Trial Chamber did not even find that those who issued Directives 7 and 7.1 had genocidal intent, concluding instead that the genocidal plan crystallized at a later stage." (IT-98-33-A, Judgment, 19 April 2004, para. 90.)

282. A Netherlands Battalion (Dutchbat) was deployed in the Srebrenica safe area. Within that area in January 1995 it had about 600 personnel. By February and through the spring the VRS was refusing to allow the return of Dutch soldiers who had gone on leave, causing their numbers to drop by at least 150, and were restricting the movement of international convoys of aid and supplies to Srebrenica and to other enclaves. It was estimated that without new supplies about half of the population of Srebrenica would be without food after mid-June.

283. On 2 July the Commander of the Drina Corps issued an order for active combat operations; its stated objective on the Srebrenica enclave was to reduce "the enclave to its urban area". The attack began on 6 July with rockets exploding near the Dutchbat headquarters in Potocari; 7 and 8 July were relatively quiet because of poor weather, but the shelling intensified around 9 July. Srebrenica remained under fire until 11 July when it fell, with the Dutchbat observation posts having been taken by the VRS. Contrary to the expectations of the VRS, the Bosnia and Herzegovina army showed very little resistance (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 125). The United Nations Secretary-General's report quotes an assessment made by United Nations military observers on the afternoon of 9 July which concluded as follows:

“the BSA offensive will continue until they achieve their aims. These aims may even be widening since the United Nations response has been almost non-existent and the BSA are now in a position to overrun the enclave if they wish.’ Documents later obtained from Serb sources appear to suggest that this assessment was correct. Those documents indicate that the Serb attack on Srebrenica initially had limited objectives. Only after having advanced with unexpected ease did the Serbs decide to overrun the entire enclave. Serb civilian and military officials from the Srebrenica area have stated the same thing, adding, in the course of discussions with a United Nations official, that they decided to advance all the way to Srebrenica town when they assessed that UNPROFOR was not willing or able to stop them.” (A/54/549, para. 264.)

Consistently with that conclusion, the Chamber in the *Blagojević* case says this:

“As the operation progressed its military object changed from ‘reducing the enclave to the urban area’ [the objective stated in a Drina Corps order of 2 July] to the taking-over of Srebrenica town and the enclave as a whole. The Trial Chamber has heard no direct evidence as to the exact moment the military objective changed. The evidence does show that President Karadžić was ‘informed of successful combat operations around Srebrenica . . . which enable them to occupy the very town of Srebrenica’ on 9 July. According to Miroslav Deronjić, the President of the Executive Board of the Bratunac Municipality, President Karadžić told him on 9 July that there were two options in relation to the operation, one of which was the complete take-over of Srebrenica. Later on 9 July, President Karadžić ‘agreed with continuation of operations for the takeover of Srebrenica’. By the morning of 11 July the change of objective of the ‘Krivaja 95’ operation had reached the units in the field; and by the middle of the afternoon, the order to enter Srebrenica had reached the Bratunac Brigade’s IKM in Pribićevac and Colonel Blagojević. Miroslav Deronjić visited the Bratunac Brigade IKM in Pribićevac on 11 July. He briefly spoke with Colonel Blagojević about the Srebrenica operation. According to Miroslav Deronjić, the VRS had just received the order to enter Srebrenica town.” (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 130.)

284. The Chamber then begins an account of the dreadful aftermath of the fall of Srebrenica. A Dutchbat Company on 11 July started directing the refugees to the UNPROFOR headquarters in Potočari which was

considered to be the only safe place for them. Not all the refugees went towards Potočari; many of the Bosnian Muslim men took to the woods. Refugees were soon shelled and shot at by the VRS despite attempts to find a safe route to Potočari where, to quote the ICTY, chaos reigned:

“The crowd outside the UNPROFOR compound grew by the thousands during the course of 11 July. By the end of the day, an estimated 20,000 to 30,000 Bosnian Muslims were in the surrounding area and some 4,000 to 5,000 refugees were in the UNPROFOR compound.

(b) Conditions in Potočari

The standards of hygiene within Potočari had completely deteriorated. Many of the refugees seeking shelter in the UNPROFOR headquarters were injured. Medical assistance was given to the extent possible; however, there was a dramatic shortage of medical supplies. As a result of the VRS having prevented aid convoys from getting through during the previous months, there was hardly any fresh food in the DutchBat headquarters. There was some running water available outside the compound. From 11 to 13 July 1995 the temperature was very high, reaching 35 degrees centigrade and this small water supply was insufficient for the 20,000 to 30,000 refugees who were outside the UNPROFOR compound.” (IT-02-60-T, paras. 146-147.)

The Tribunal elaborates on those matters and some efforts made by Bosnian Serb and Serbian authorities, i.e., the local Municipal Assembly, the Bratunac Brigade and the Drina Corps, as well as UNHCR, to assist the Bosnian Muslim refugees (*ibid.*, para. 148).

285. On 10 July at 10.45 p.m., according to the Secretary-General’s 1999 Report, the delegate in Belgrade of the Secretary-General’s Special Representative telephoned the Representative to say that he had seen President Milošević who had responded that not much should be expected of him because “the Bosnian Serbs did not listen to him” (A/54/549, para. 292). At 3 p.m. the next day, the President rang the Special Representative and, according to the same report, “stated that the Dutchbat soldiers in Serb-held areas had retained their weapons and equipment and were free to move about. This was not true.” (*Ibid.*, para. 307.) About 20 minutes earlier two NATO aircraft had dropped two bombs on what were thought to be Serb vehicles advancing towards the town from the south. The Secretary-General’s report gives the VRS reaction:

“Immediately following this first deployment of NATO close air support, the BSA radioed a message to Dutchbat. They threatened

to shell the town and the compound where thousands of inhabitants had begun to gather, and to kill the Dutchbat soldiers being held hostage, if NATO continued with its use of air power. The Special Representative of the Secretary-General recalled having received a telephone call from the Netherlands Minister of Defence at this time, requesting that the close air support action be discontinued, because Serb soldiers on the scene were too close to Netherlands troops, and their safety would be jeopardized. The Special Representative considered that he had no choice but to comply with this request.” (A/54/549, para. 306.)

286. The Trial Chamber in the *Blagojević* case recorded that on 11 July at 8 p.m. there was a meeting between a Dutch colonel and General Mladić and others. The former said that he had come to negotiate the withdrawal of the refugees and to ask for food and medicine for them. He sought assurances that the Bosnian Muslim population and Dutchbat would be allowed to withdraw from the area. General Mladić said that the civilian population was not the target of his actions and the goal of the meeting was to work out an arrangement. He then said “‘you can leave, all stay, or all die here’ . . . ‘we can work out an agreement for all this to stop and for the issues of the civilian population, your soldiers and the Muslim military to be resolved in a peaceful way’.” (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, paras. 150-152). Later that night at a meeting beginning at 11 p.m., attended by a representative of the Bosnian Muslim community, General Mladić said:

“‘Number one, you need to lay down your weapons and I guarantee that all those who lay down their weapon will live. I give you my word, as a man and a General, that I will use my influence to help the innocent Muslim population which is not the target of the combat operations carried out by the VRS . . . In order to make a decision as a man and a Commander, I need to have a clear position of the representatives of your people on whether you want to survive . . . stay or vanish. I am prepared to receive here tomorrow at 10 a.m. hrs. a delegation of officials from the Muslim side with whom I can discuss the salvation of your people from . . . the former enclave of Srebrenica . . . Nesib [a Muslim representative], the future of your people is in your hands, not only in this territory . . . Bring the people who can secure the surrender of weapons and save your people from destruction.’

The Trial Chamber finds, based on General Mladić’s comments, that he was unaware that the Bosnian Muslim men had left the Srebrenica enclave in the column.

General Mladić also stated that he would provide the vehicles to transport the Bosnian Muslims out of Potočari. The Bosnian

Muslim and Bosnian Serb sides were not on equal terms and Nesib Mandžić felt his presence was only required to put up a front for the international public. Nesib Mandžić felt intimidated by General Mladić. There was no indication that anything would happen the next day.” (IT-02-60-T, paras. 156-158.)

287. A third meeting was held the next morning, 12 July. The Tribunal in the *Blagojević* case gives this account:

“‘After the Bosnian Muslim representatives had introduced themselves, General Mladić stated:

‘I want to help you, but I want absolute co-operation from the civilian population because your army has been defeated. There is no need for your people to get killed, your husband, your brothers or your neighbours . . . As I told this gentleman last night, you can either survive or disappear. For your survival, I demand that all your armed men, even those who committed crimes, and many did, against our people, surrender their weapons to the VRS . . . You can choose to stay or you can choose to leave. If you wish to leave, you can go anywhere you like. When the weapons have been surrendered every individual will go where they say they want to go. The only thing is to provide the needed gasoline. You can pay for it if you have the means. If you can’t pay for it, UNPROFOR should bring four or five tanker trucks to fill up trucks . . .’

Čamila Omanović [one of the Muslim representatives] interpreted this to mean that if the Bosnian Muslim population left they would be saved, but that if they stayed they would die. General Mladić did not give a clear answer in relation to whether a safe transport of the civilian population out of the enclave would be carried out. General Mladić stated that the male Bosnian Muslim population from the age of 16 to 65 would be screened for the presence of war criminals. He indicated that after this screening, the men would be returned to the enclave. This was the first time that the separation of men from the rest of the population was mentioned. The Bosnian Muslim representatives had the impression that ‘everything had been prepared in advance, that there was a team of people working together in an organized manner’ and that ‘Mladić was the chief organizer.’

The third Hotel Fontana meeting ended with an agreement that the VRS would transport the Bosnian Muslim civilian population out of the enclave to ARBiH-held territory, with the assistance of UNPROFOR to ensure that the transportation was carried out in a humane manner.” (*Ibid.*, paras. 160-161.)

The Court notes that the accounts of the statements made at the meetings come from transcripts of contemporary video recordings.

288. The VRS and MUP of the Republika Srpska from 12 July separated men aged 16 to approximately 60 or 70 from their families. The Bosnian Muslim men were directed to various locations but most were sent to a particular house (“The White House”) near the UNPROFOR headquarters in Potočari, where they were interrogated. During the afternoon of 12 July a large number of buses and other vehicles arrived in Potočari including some from Serbia. Only women, children and the elderly were allowed to board the buses bound for territory held by the Bosnia and Herzegovina military. Dutchbat vehicles escorted convoys to begin with, but the VRS stopped that and soon after stole 16-18 Dutchbat jeeps, as well as around 100 small arms, making further escorts impossible. Many of the Bosnian Muslim men from Srebrenica and its surroundings including those who had attempted to flee through the woods were detained and killed.

289. Mention should also be made of the activities of certain paramilitary units, the “Red Berets” and the “Scorpions”, who are alleged by the Applicant to have participated in the events in and around Srebrenica. The Court was presented with certain documents by the Applicant, which were said to show that the “Scorpions” were indeed sent to the Trnovo area near Srebrenica and remained there through the relevant time period. The Respondent cast some doubt on the authenticity of these documents (which were copies of intercepts, but not originals) without ever formally denying their authenticity. There was no denial of the fact of the relocation of the “Scorpions” to Trnovo. The Applicant during the oral proceedings presented video material showing the execution by paramilitaries of six Bosnian Muslims, in Trnovo, in July 1995.

290. The Trial Chambers in the *Krstić* and *Blagojević* cases both found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of Srebrenica in July 1995 (*Krstić*, IT-98-33-T, Judgment, 2 August 2001, paras. 426-427 and *Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 643). Accordingly they found that the *actus reus* of killings in Article II (a) of the Convention was satisfied. Both also found that actions of Bosnian Serb forces also satisfied the *actus reus* of causing serious bodily or mental harm, as defined in Article II (b) of the Convention — both to those who where about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them (*Krstić*, *ibid.*, para. 543, and *Blagojević*, *ibid.*, paras. 644-654).

291. The Court is fully persuaded that both killings within the terms of Article II (a) of the Convention, and acts causing serious bodily or men-

tal harm within the terms of Article II (b) thereof occurred during the Srebrenica massacre. Three further aspects of the ICTY decisions relating to Srebrenica require closer examination — the specific intent (*dolus specialis*), the date by which the intent was formed, and the definition of the “group” in terms of Article II. A fourth issue which was not directly before the ICTY but which this Court must address is the involvement, if any, of the Respondent in the actions.

292. The issue of intent has been illuminated by the *Krstić* Trial Chamber. In its findings, it was convinced of the existence of intent by the evidence placed before it. Under the heading “A Plan to Execute the Bosnian Muslim Men of Srebrenica”, the Chamber “finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave” (IT-98-33-T, Judgment, 2 August 2001, para. 87). All the executions, the Chamber decided, “systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers” (*ibid.*, para. 546). While “[t]he VRS may have initially considered only targeting military men for execution, . . . [t]he evidence shows, however, that a decision was taken, at some point, to capture and kill all the Bosnian Muslim men indiscriminately. No effort was made to distinguish the soldiers from the civilians.” (*Ibid.*, para. 547.) Under the heading “Intent to Destroy”, the Chamber reviewed the Parties’ submissions and the documents, concluding that it would “adhere to the characterization of genocide which encompasses[es] only acts committed with the *goal* of destroying all or part of a group” (*ibid.*, para. 571; original emphasis). The acts of genocide need not be premeditated and the intent may become the goal later in an operation (*ibid.*, para. 572).

“Evidence presented in this case has shown that the killings were planned: the number and nature of the forces involved, the standardized coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied, indicate that a decision was made to kill all the Bosnian Muslim military aged men.

The Trial Chamber is unable to determine the precise date on which the decision to kill all the military aged men was taken. Hence, it cannot find that the killings committed in Potočari on 12 and 13 July 1995 formed part of the plan to kill all the military aged men. Nevertheless, the Trial Chamber is confident that the mass executions and other killings committed from 13 July onwards were part of this plan.” (*Ibid.*, paras. 572-573; see also paras. 591-598.)

293. The Court has already quoted (paragraph 281) the passage from the Judgment of the Appeals Chamber in the *Krstić* case rejecting the Prosecutor's attempted reliance on the Directives given earlier in July, and it would recall the evidence about the VRS's change of plan in the course of the operation in relation to the complete takeover of the enclave. The Appeals Chamber also rejected the appeal by General Krstić against the finding that genocide occurred in Srebrenica. It held that the Trial Chamber was entitled to conclude that the destruction of such a sizeable number of men, one fifth of the overall Srebrenica community, "would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica" (IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 28-33); and the Trial Chamber, as the best assessor of the evidence presented at trial, was entitled to conclude that the evidence of the transfer of the women and children supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The Appeals Chamber concluded this part of its Judgment as follows:

"The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements — the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part — guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.

In concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber

did not depart from the legal requirements for genocide. The Defence appeal on this issue is dismissed." (*Ibid.*, paras. 37-38.)

294. On one view, taken by the Applicant, the *Blagojević* Trial Chamber decided that the specific intent (*dolus specialis*) was formed earlier than 12 or 13 July, the time chosen by the *Krstić* Chamber. The Court has already called attention to that Chamber's statement that at some point (it could not determine "the exact moment") the military objective in Srebrenica changed, from "reducing the enclave to the urban area" (stated in a Drina Corps order of 2 July 1995 referred to at times as the "Krivaja 95 operation") to taking over Srebrenica town and the enclave as a whole. Later in the Judgment, under the heading "Findings: was genocide committed?", the Chamber refers to the 2 July document:

"The Trial Chamber is convinced that the criminal acts committed by the Bosnian Serb forces were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica, as reflected in the 'Krivaja 95 operation', the ultimate objective of which was to eliminate the enclave and, therefore, the Bosnian Muslim community living there." (*Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 674.)

The Chamber immediately goes on to refer only to the events — the massacres and the forcible transfer of the women and children — after the fall of Srebrenica, that is sometime after the change of military objective on 9 or 10 July. The conclusion on intent is similarly focused:

"The Trial Chamber has no doubt that all these acts constituted a single operation executed with the intent to destroy the Bosnian Muslim population of Srebrenica. The Trial Chamber finds that the Bosnian Serb forces not only knew that the combination of the killings of the men with the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group." (*Ibid.*, para. 677.) (See similarly all but the first item in the list in paragraph 786.)

295. The Court's conclusion, fortified by the Judgments of the Trial Chambers in the *Krstić* and *Blagojević* cases, is that the necessary intent was not established until after the change in the military objective and after the takeover of Srebrenica, on about 12 or 13 July. This may be significant for the application of the obligations of the Respondent under

the Convention (paragraph 423 below). The Court has no reason to depart from the Tribunal's determination that the necessary specific intent (*dolus specialis*) was established and that it was not established until that time.

296. The Court now turns to the requirement of Article II that there must be the intent to destroy a protected "group" in whole or in part. It recalls its earlier statement of the law and in particular the three elements there discussed: substantiality (the primary requirement), relevant geographic factors and the associated opportunity available to the perpetrators, and emblematic or qualitative factors (paragraphs 197-201). Next, the Court recalls the assessment it made earlier in the Judgment of the persuasiveness of the ICTY's findings of facts and its evaluation of them (paragraph 223). Against that background it turns to the findings in the *Krstić* case (IT-98-33-T, Trial Chamber Judgment, 2 August 2001, paras. 551-599 and IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 6-22), in which the Appeals Chamber endorsed the findings of the Trial Chamber in the following terms.

"In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size." (IT-98-33-A, Judgment, 19 April 2004, para. 15; footnotes omitted.)

The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.

297. The Court concludes that the acts committed at Srebrenica falling within Article II (*a*) and (*b*) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.

\* \*

(6) Article II (b): *Causing Serious Bodily or Mental Harm to Members of the Protected Group*

298. The Applicant contends that besides the massive killings, systematic serious harm was caused to the non-Serb population of Bosnia and Herzegovina. The Applicant includes the practice of terrorizing the non-Serb population, the infliction of pain and the administration of torture as well as the practice of systematic humiliation into this category of acts of genocide. Further, the Applicant puts a particular emphasis on the issue of systematic rapes of Muslim women, perpetrated as part of genocide against the Muslims in Bosnia during the conflict.

299. The Respondent does not dispute that, as a matter of legal qualification, the crime of rape may constitute an act of genocide, causing serious bodily or mental harm. It disputes, however, that the rapes in the territory of Bosnia and Herzegovina were part of a genocide perpetrated therein. The Respondent, relying on the Report of the Commission of Experts, maintains that the rapes and acts of sexual violence committed during the conflict, were not part of genocide, but were committed on all sides of the conflict, without any specific intent (*dolus specialis*).

300. The Court notes that there is no dispute between the Parties that rapes and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group. It notes also that the ICTR, in its Judgment of 2 September 1998 in the *Akayesu* case, addressed the issue of acts of rape and sexual violence as acts of genocide in the following terms:

"Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm." (ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 731.)

The ICTY, in its Judgment of 31 July 2003 in the *Stakić* case, recognized that:

"'Causing serious bodily and mental harm' in subparagraph (*b*) [of Article 4 (2) of the Statute of the ICTY] is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irreparable." (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 516.)

301. The Court notes furthermore that Security Council and General Assembly resolutions contemporary with the facts are explicit in referring

to sexual violence. These resolutions were in turn based on reports before the General Assembly and the Security Council, such as the Reports of the Secretary-General, the Commission of Experts, the Special Rapporteur for Human Rights, Tadeusz Mazowiecki, and various United Nations agencies in the field. The General Assembly stressed the “extraordinary suffering of the victims of rape and sexual violence” (General Assembly resolution 48/143 (1993), Preamble; General Assembly resolution 50/192 (1995), para. 8). In resolution 48/143 (1993), the General Assembly declared it was:

“*Appalled* at the recurring and substantiated reports of widespread rape and abuse of women and children in the areas of armed conflict in the former Yugoslavia, in particular its systematic use against the Muslim women and children in Bosnia and Herzegovina by Serbian forces” (Preamble, para. 4).

302. Several Security Council resolutions expressed alarm at the “massive, organised and systematic detention and rape of women”, in particular Muslim women in Bosnia and Herzegovina (Security Council resolutions 798 (1992), Preamble, para. 2; resolution 820 (1993), para. 6; 827 (1993), Preamble, para. 3). In terms of other kinds of serious harm, Security Council resolution 1034 (1995) condemned

“in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most as described in the report of the Secretary-General of 27 November 1995 and showing a consistent pattern of summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances” (para. 2).

The Security Council further referred to a “persistent and systematic campaign of terror” in Banja Luka, Bijeljina and other areas under the control of Bosnian Serb forces (Security Council resolution 941 (1994), Preamble, para. 4). It also expressed concern at reports of mass murder, unlawful detention and forced labour, rape and deportation of civilians in Banja Luka and Sanski Most (Security Council resolution 1019 (1995), Preamble, para. 2).

303. The General Assembly also condemned specific violations including torture, beatings, rape, disappearances, destruction of houses, and other acts or threats of violence aimed at forcing individuals to leave their homes (General Assembly resolution 47/147 (1992), para. 4; see also General Assembly resolution 49/10 (1994), Preamble, para. 14, and General Assembly resolution 50/193 (1995), para. 2).

304. The Court will now examine the specific allegations of the Applicant under this heading, in relation to the various areas and camps identified as having been the scene of acts causing “bodily or mental harm” within the meaning of the Convention. As regards the events of Srebrenica, the Court has already found it to be established that such acts were committed (paragraph 291 above).

#### *Drina River Valley*

##### (a) *Zvornik*

305. As regards the area of the Drina River Valley, the Applicant has stressed the perpetration of acts and abuses causing serious bodily or mental harm in the events at Zvornik. In particular, the Court has been presented with a report on events at Zvornik which is based on eyewitness accounts and extensive research (Hannes Tretter *et al.*, “Ethnic cleansing’ Operations in the Northeast Bosnian-City of Zvornik from April through June 1992”, Ludwig Boltzmann Institute of Human Rights (1994), p. 48). The report of the Ludwig Boltzmann Institute gives account of a policy of terrorization, forced relocation, torture, rape during the takeover of Zvornik in April-June 1992. The Report of the Commission of Experts received 35 reports of rape in the area of Zvornik in May 1992 (Vol. V, Ann. IX, p. 54).

##### (b) *Foča*

306. Further acts causing serious bodily and mental harm were perpetrated in the municipality of Foča. The Applicant, relying on the Judgment in the *Kunarac et al.* case (IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001, paras. 574 and 592), claims, in particular, that many women were raped repeatedly by Bosnian Serb soldiers or policemen in the city of Foča.

##### (c) *Camps*

###### (i) *Batković camp*

307. The Applicant further claims that in Batković camp, prisoners were frequently beaten and mistreated. The Report of the Commission of Experts gives an account of a witness statement according to which “prisoners were forced to perform sexual acts with each other, and sometimes with guards”. The Report continues: “Reports of the frequency of beatings vary from daily beatings to beatings 10 times each day.” (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 62, para. 469.) Individual witness accounts reported by the Commission of Experts (Report of the Commission of Experts, Vol. IV, Ann. VIII, pp. 62-63, and Ann. X, p. 9) provide second-hand testimony that beatings occurred and prisoners lived in terrible conditions. As already noted

above (paragraph 256), however, the periodic Report of Special Rapporteur Mazowiecki of 17 November 1992 stated that “[t]he prisoners . . . appeared to be in good health” (p. 13); but according to the Applicant, Mazowiecki was shown a “model” camp and therefore his impression was inaccurate. The United States Department of State Dispatch of 19 April 1993 (Vol. 4, No. 16), alleges that in Batković camp, prisoners were frequently beaten and mistreated. In particular, the Dispatch records two witness statements according to which “[o]n several occasions, they and other prisoners were forced to remove their clothes and perform sex acts on each other and on some guards”.

(ii) *Sušica camp*

308. According to the Applicant, rapes and physical assaults were also perpetrated at Sušica camp; it pointed out that in the proceedings before the ICTY, in the “Rule 61 Review of the Indictment” and the Sentencing Judgment, in the *Nikolić* case, the accused admitted that many Muslim women were raped and subjected to degrading physical and verbal abuse in the camp and at locations outside of it (*Nikolić*, IT-94-2-T, Sentencing Judgment, 18 December 2003, paras. 87-90), and that several men were tortured in that same camp.

(iii) *Foča Kazneno-Popravni Dom camp*

309. With regard to the Foča Kazneno-Popravni Dom camp, the Applicant asserts that beatings, rapes of women and torture were perpetrated. The Applicant bases these allegations mainly on the Report of the Commission of Experts and the United States State Department Dispatch. The Commission of Experts based its findings on information provided by a Helsinki Watch Report. A witness claimed that some prisoners were beaten in Foča KP Dom (Report of the Commission of Experts, Vol. IV, pp. 128-132); similar accounts are contained in the United States State Department Dispatch. One witness stated that

“Those running the center instilled fear in the Muslim prisoners by selecting certain prisoners for beatings. From his window in Room 13, the witness saw prisoners regularly being taken to a building where beatings were conducted. This building was close enough for him to hear the screams of those who were being beaten.” (Dispatch of the United States Department of State, 19 April 1993, No. 16, p. 262.)

310. The ICTY Trial Chamber in its *Kunarac* Judgment of 22 February 2001, described the statements of several witnesses as to the poor and brutal living conditions in Foča KP Dom. These seem to confirm that the Muslim men and women from Foča, Gacko and Kalinovik municipalities were arrested, rounded up, separated from each other, and imprisoned or detained at several detention centres like the Foča KP

Dom where some of them were killed, raped or severely beaten (*Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001).

*Prijedor*

(a) *Municipality*

311. Most of the allegations of abuses said by the Applicant to have occurred in Prijedor have been examined in the section of the present Judgment concerning the camps situated in Prijedor. However, the Report of the Commission of Experts refers to a family of nine found dead in Stara Rijeka in Prijedor, who had obviously been tortured (Vol. V, Ann. X, p. 41). The Trial Chamber of the ICTY, in its Judgment in the *Tadić* case made the following factual finding as to an attack on two villages in the Kozarac area, Jaskići and Sivci:

“On 14 June 1992 both villages were attacked. In the morning the approaching sound of shots was heard by the inhabitants of Sivci and soon after Serb tanks and Serb soldiers entered the village . . . There they were made to run along that road, hands clasped behind their heads, to a collecting point in the yard of one of the houses. On the way there they were repeatedly made to stop, lie down on the road and be beaten and kicked by soldiers as they lay there, before being made to get up again and run some distance further, where the whole performance would be repeated . . . In all some 350 men, mainly Muslims but including a few Croats, were treated in this way in Sivci.

On arrival at the collecting point, beaten and in many cases covered with blood, some men were called out and questioned about others, and were threatened and beaten again. Soon buses arrived, five in all, and the men were made to run to them, hands again behind the head, and to crowd on to them. They were then taken to the Keraterm camp.

The experience of the inhabitants of the smaller village of Jaskići, which contained only 11 houses, on 14 June 1992 was somewhat similar but accompanied by the killing of villagers. Like Sivci, Jaskići had received refugees after the attack on Kozarac but by 14 June 1992 many of those refugees had left for other villages. In the afternoon of 14 June 1992 gunfire was heard and Serb soldiers arrived in Jaskići and ordered men out of their homes and onto the village street, their hands clasped behind their heads; there they were made to lie down and were severely beaten.” (IT-94-1-T, Judgment, 7 May 1997, paras. 346-348.)

(b) *Camps*(i) *Omarska camp*

312. As noted above in connection with the killings (paragraph 262), the Applicant has been able to present abundant and persuasive evidence of physical abuses causing serious bodily harm in Omarska camp. The Report of the Commission of Experts contains witness accounts regarding the “white house” used for physical abuses, rapes, torture and, occasionally, killings, and the “red house” used for killings (Vol. IV, Ann. VIII, pp. 207-222). Those accounts of the sadistic methods of killing are corroborated by United States submissions to the Secretary-General. The most persuasive and reliable source of evidence may be taken to be the factual part of the Opinion and Judgment of the ICTY in the *Tadić* case (IT-94-I-T, Trial Chamber Judgment, 7 May 1997). Relying on the statements of 30 witnesses, the *Tadić* Trial Judgment made findings as to interrogations, beatings, rapes, as well as the torture and humiliation of Muslim prisoners in Omarska camp (in particular: *ibid.*, paras. 155-158, 163-167). The Trial Chamber was satisfied beyond reasonable doubt of the fact that several victims were mistreated and beaten by Tadić and suffered permanent harm, and that he had compelled one prisoner to sexually mutilate another (*ibid.*, paras. 194-206). Findings of mistreatment, torture, rape and sexual violence at Omarska camp were also made by the ICTY in other cases; in particular, the Trial Judgment of 2 November 2001 in the *Kvočka et al.* case (IT-98-30/I-T, Trial Chamber Judgment, paras. 21-50, and 98-108) — upheld on appeal, the Trial Judgment of 1 September 2004 in the *Brdanin* case (IT-99-36-T, Trial Chamber Judgment, paras. 515-517) and the Trial Judgment of 31 July 2003 in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, paras. 229-336).

(ii) *Keraterm camp*

313. The Applicant also pointed to evidence of beatings and rapes at Keraterm camp. Several witness accounts are reported in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 225, 231, 233, 238) and corroborated by witness accounts reported by the Permanent Mission of Austria to the United Nations and Helsinki Watch. The attention of the Court has been drawn to several judgments of the ICTY which also document the severe physical abuses, rapes and sexual violence that occurred at this camp. The Trial Judgment of 1 September 2004 in the *Brdanin* case found that:

“At Keraterm camp, detainees were beaten on arrival . . . . Beatings were carried out with wooden clubs, baseball bats, electric cables and police batons . . . .

In some cases the beatings were so severe as to result in serious injury and death. Beatings and humiliation were often administered in front of other detainees. Female detainees were raped in Keraterm camp.” (IT-99-36-T, Trial Chamber Judgment, paras. 851-852.)

The Trial Chamber in its Judgment of 31 July 2003 in the *Stakić* case found that

“the detainees at the Keraterm camp were subjected to terrible abuse. The evidence demonstrates that many of the detainees at the Keraterm camp were beaten on a daily basis. Up until the middle of July, most of the beatings happened at night. After the detainees from Brdo arrived, around 20 July 1992, there were ‘no rules’, with beatings committed both day and night. Guards and others who entered the camp, including some in military uniforms carried out the beatings. There were no beatings in the rooms since the guards did not enter the rooms — people were generally called out day and night for beatings.” (IT-97-24-T, Trial Chamber Judgment, para. 237.)

The Chamber also found that there was convincing evidence of further beatings and rape perpetrated in Keraterm camp (*ibid.*, paras. 238-241).

In the Trial Judgment in the *Kvočka et al.* case, the Chamber held that, in addition to the “dreadful” general conditions of life, detainees at Keraterm camp were “mercilessly beaten” and “women were raped” (IT-98-30/I-T, Trial Chamber Judgment, 2 November 2001, para. 114).

(iii) *Trnopolje camp*

314. The Court has furthermore been presented with evidence that beatings and rapes occurred at Trnopolje camp. The rape of 30-40 prisoners on 6 June 1992 is reported by both the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 251-253) and a publication of the United States State Department. In the *Tadić* case the Trial Chamber of the ICTY concluded that at Trnopolje camp beatings occurred and that “[b]ecause this camp housed the largest number of women and girls, there were more rapes at this camp than at any other” (IT-94-I-T, Judgment, 7 May 1997, paras. 172-177 (para. 175)). These findings concerning beatings and rapes are corroborated by other Judgments of the ICTY, such as the Trial Judgment in the *Stakić* case where it found that,

“although the scale of the abuse at the Trnopolje camp was less than that in the Omarska camp, mistreatment was commonplace. The

Serb soldiers used baseball bats, iron bars, rifle butts and their hands and feet or whatever they had at their disposal to beat the detainees. Individuals were who taken out for questioning would often return bruised or injured” (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 242);

and that, having heard the witness statement of a victim, it was satisfied beyond reasonable doubt “that rapes did occur in the Trnopolje camp” (*ibid.*, para. 244). Similar conclusions were drawn in the Judgment of the Trial Chamber in the *Brdanin* case (IT-99-36-T, 1 September 2004, paras. 513-514 and 854-857).

#### *Banja Luka*

##### *Manjača camp*

315. With regard to the Manjača camp in Banja Luka, the Applicant alleges that beatings, torture and rapes were occurring at this camp. The Applicant relies mainly on the witnesses cited in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 50-54). This evidence is corroborated by the testimony of a former prisoner at the Joint Hearing before the Select Committee on Intelligence in the United States Senate on 9 August 1995, and a witness account reported in the Memorial of the Applicant (United States State Department Dispatch, 2 November 1992, p. 806). The Trial Chamber, in its Decision on Motion for Judgment of Acquittal of 16 June 2004, in the *Milošević* case reproduced the statement of a witness who testified that,

“at the Manjača camp, they were beaten with clubs, cables, bats, or other similar items by the military police. The men were placed in small, bare stables, which were overcrowded and contained no toilet facilities. While at the camp, the detainees received inadequate food and water. Their heads were shaved, and they were severely beaten during interrogations.” (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 178.)

316. The Applicant refers to the Report of the Commission of Experts, which contains reports that the Manjača camp held a limited number of women and that during their stay they were “raped repeatedly”. Muslim male prisoners were also forced to rape female prisoners (Report of the Commission of Experts, Vol. IV, Annex VIII, pp. 53-54). The Respondent points out that the *Brdanin* Trial Judgment found no evidence had been presented that detainees were subjected to “acts of sexual degradation” in Manjača.

#### *Brčko*

##### *Luka camp*

317. The Applicant alleges that torture, rape and beatings occurred at Luka camp (Brčko). The Report of the Commission of Experts contains multiple witness accounts, including the evidence of a local guard forced into committing rape (Vol. IV, Ann. VIII, pp. 93-97). The account of the rapes is corroborated by multiple sources (United States State Department Dispatch, 19 April 1993). The Court notes in particular the findings of the ICTY Trial Chamber in the *Češić* case, with regard to acts perpetrated in the Luka camp. In his plea agreement the accused admitted several grave incidents, such as beatings and compelling two Muslim brothers to perform sexual acts with each other (IT-95-10/1-S, Sentencing Judgment, 11 March 2004, paras. 8-17). These findings are corroborated by witness statements and the guilty plea in the *Jelisić* case.

318. The Respondent does not deny that the camps in Bosnia and Herzegovina were “in breach of humanitarian law and, in most cases, in breach of the law of war”, but argues that the conditions in all the camps were not of the kind described by the Applicant. It stated that all that had been demonstrated was “the existence of serious crimes, committed in a particularly complex situation, in a civil and fratricidal war”, but not the requisite specific intent (*dolus specialis*).

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319. Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The requirements of the material element, as defined by Article II (b) of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent (*dolus specialis*) to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.

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(7) *Article II (c): Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part*

320. Article II (c) of the Genocide Convention concerns the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part. Under this heading, the Applicant first points to an alleged policy by the Bosnian Serb forces to encircle civilians of the protected group in villages, towns or entire regions and to subsequently shell those areas and cut off all supplies in order to starve the population. Secondly, the Applicant claims that Bosnian Serb forces attempted to deport and expel the protected group from the areas which those forces occupied. Finally, the Applicant alleges that Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property.

321. The Respondent argues that the events referred to by the Applicant took place in a context of war which affected the entire population, whatever its origin. In its view, "it is obvious that in any armed conflict the conditions of life of the civilian population deteriorate". The Respondent considers that, taking into account the civil war in Bosnia and Herzegovina which generated inhuman conditions of life for the entire population in the territory of that State, "it is impossible to speak of the deliberate infliction on the Muslim group alone or the non-Serb group alone of conditions of life calculated to bring about its destruction".

322. The Court will examine in turn the evidence concerning the three sets of claims made by the Applicant: encirclement, shelling and starvation; deportation and expulsion; destruction of historical, religious and cultural property. It will also go on to consider the evidence presented regarding the conditions of life in the detention camps already extensively referred to above (paragraphs 252-256, 262-273, 307-310 and 312-318).

*Alleged encirclement, shelling and starvation*

323. The principal incident referred to by the Applicant in this regard is the siege of Sarajevo by Bosnian Serb forces. Armed conflict broke out in Sarajevo at the beginning of April 1992 following the recognition by the European Community of Bosnia and Herzegovina as an independent State. The Commission of Experts estimated that, between the beginning of April 1992 and 28 February 1994, in addition to those killed or missing in the city (paragraph 247 above), 56,000 persons had been wounded (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). It was further estimated that, "over the course of the siege, the city [was] hit by an average of approximately 329 shell impacts per day, with a high of 3,777 shell impacts on 22 July 1993" (*ibid.*). In his report of 28 August 1992, the Special Rapporteur observed that:

"The city is shelled on a regular basis . . . Snipers shoot innocent civilians . . .

The civilian population lives in a constant state of anxiety, leaving their homes or shelters only when necessary . . . The public systems for distribution of electrical power and water no longer function. Food and other basic necessities are scarce, and depend on the airlift organized by UNHCR and protected by UNPROFOR." (Report of 28 August 1992, paras. 17-18.)

324. The Court notes that, in resolutions adopted on 16 April and 6 May 1993, the Security Council declared Sarajevo, together with Tuzla, Žepa, Gorazde, Bihać and Srebrenica, to be "safe areas" which should be free from any armed attack or any other hostile act and fully accessible to UNPROFOR and international humanitarian agencies (resolutions 819 of 16 April 1993 and 824 of 6 May 1993). However, these resolutions were not adhered to by the parties to the conflict. In his report of 26 August 1993, the Special Rapporteur noted that

"Since May 1993 supplies of electricity, water and gas to Sarajevo have all but stopped . . . a significant proportion of the damage caused to the supply lines has been deliberate, according to United Nations Protection Force engineers who have attempted to repair them. Repair crews have been shot at by both Bosnian Serb and government forces . . ." (Report of 26 August 1993, para. 6.)

He further found that UNHCR food and fuel convoys had been "obstructed or attacked by Bosnian Serb and Bosnian Croat forces and sometimes also by governmental forces" (Report of 26 August 1993, para. 15). The Commission of Experts also found that the "blockade of humanitarian aid hajd] been used as an important tool in the siege" (Report of the Commission of Experts, Ann. VI, p. 17). According to the Special Rapporteur, the targeting of the civilian population by shelling and sniping continued and even intensified throughout 1994 and 1995 (Report of 4 November 1994, paras. 27-28; Report of 16 January 1995, para. 13; Report of 5 July 1995, paras. 67-70). The Special Rapporteur noted that

"[a]ll sides are guilty of the use of military force against civilian populations and relief operations in Sarajevo. However, one cannot lose sight of the fact that the main responsibility lies with the [Bosnian Serb] forces, since it is they who have adopted the tactic of laying siege to the city." (Report of 17 November 1992, para. 42.)

325. The Court notes that in the *Galić* case, the Trial Chamber of the ICTY found that the Serb forces (the SRK) conducted a campaign of sniping and shelling against the civilian population of Sarajevo (*Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 583). It was

“convinced by the evidence in the Trial Record that civilians in ARBiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory . . . , and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured” (*ibid.*, para. 591).

These findings were subsequently confirmed by the Appeals Chamber (*Galić*, IT-98-29-A, Judgment, 30 November 2006, paras. 107-109). The ICTY also found that the shelling which hit the Markale market on 5 February 1994, resulting in 60 persons killed and over 140 injured, came from behind Bosnian Serb lines, and was deliberately aimed at civilians (*ibid.*, paras. 333 and 335 and *Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 496).

326. The Respondent argues that the safe areas proclaimed by the Security Council had not been completely disarmed by the Bosnian army. For instance, according to testimony given in the *Galić* case by the Deputy Commander of the Bosnian army corps covering the Sarajevo area, the Bosnian army had deployed 45,000 troops within Sarajevo. The Respondent also pointed to further testimony in that case to the effect that certain troops in the Bosnian army were wearing civilian clothes and that the Bosnian army was using civilian buildings for its bases and positioning its tanks and artillery in public places. Moreover, the Respondent observes that, in his book, *Fighting for Peace*, General Rose was of the view that military equipment was installed in the vicinity of civilians, for instance, in the grounds of the hospital in Sarajevo and that “[t]he Bosnians had evidently chosen this location with the intention of attracting Serb fire, in the hope that the resulting carnage would further tilt international support in their favour” (Michael Rose, *Fighting for Peace*, 1998, p. 254).

327. The Applicant also points to evidence of sieges of other towns in Bosnia and Herzegovina. For instance, with regard to Goražde, the Special Rapporteur found that the enclave was being shelled and had been denied convoys of humanitarian aid for two months. Although food was being air-dropped, it was insufficient (Report of 5 May 1992, para. 42). In a later report, the Special Rapporteur noted that, as of spring 1994, the town had been subject to a military offensive by Bosnian Serb forces, during which civilian objects including the hospital had been targeted and the water supply had been cut off (Report of 10 June 1994, paras. 7-12). Humanitarian convoys were harassed including by the detention of UNPROFOR personnel and the theft of equipment (Report of

19 May 1994, paras. 17 *et seq.*). Similar patterns occurred in Bihać, Tuzla, Cerska and Maglaj (Bihać: Special Rapporteur’s Report of 28 August 1992, para. 20; Report of the Secretary-General pursuant to resolution 959 (1994), para. 17; Special Rapporteur’s Report of 16 January 1995, para. 12; Tuzla: Report of the Secretary-General pursuant to resolutions 844 (1993), 836 (1993) and 776 (1992), paras. 2-4; Special Rapporteur’s Report of 5 July 1995; Cerska: Special Rapporteur’s Report of 5 May 1993, paras. 8-17; Maglaj: Special Rapporteur’s Report of 17 November 1993, para. 93).

328. The Court finds that virtually all the incidents recounted by the Applicant have been established by the available evidence. It takes account of the assertion that the Bosnian army may have provoked attacks on civilian areas by Bosnian Serb forces, but does not consider that this, even if true, can provide any justification for attacks on civilian areas. On the basis of a careful examination of the evidence presented by the Parties, the Court concludes that civilian members of the protected group were deliberately targeted by Serb forces in Sarajevo and other cities. However, reserving the question whether such acts are in principle capable of falling within the scope of Article II, paragraph (c), of the Convention, the Court does not find sufficient evidence that the alleged acts were committed with the specific intent to destroy the protected group in whole or in part. For instance, in the *Galić* case, the ICTY found that

“the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition . . . the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear” (*Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 593).

These findings were not overruled by the judgment of the Appeals Chamber of 30 November 2006 (*Galić*, IT-98-29-A, Judgment: see e.g., paras. 107-109, 335 and 386-390). The Special Rapporteur of the United Nations Commission on Human Rights was of the view that “[t]he siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croats to flee” (Report of 28 August 1992, para. 17). The Court thus finds that it has not been conclusively established that the acts were committed with the specific intent (*dolus specialis*) to destroy the protected group in whole or in part.

*Deportation and expulsion*

329. The Applicant claims that deportations and expulsions occurred systematically all over Bosnia and Herzegovina. With regard to Banja Luka, the Special Rapporteur noted that since late November 1993, there had been a “sharp rise in repossessions of apartments, whereby Muslim and Croat tenants [were] summarily evicted” and that “a form of housing agency ha[d] been established . . . which chooses accommodation for incoming Serb displaced persons, evicts Muslim or Croat residents and reputedly receives payment for its services in the form of possessions left behind by those who have been evicted” (Report of 21 February 1994, para. 8). In a report dated 21 April 1995 dedicated to the situation in Banja Luka, the Special Rapporteur observed that since the beginning of the war, there had been a 90 per cent reduction in the local Muslim population (Report of 21 April 1995, para. 4). He noted that a forced labour obligation imposed by the *de facto* authorities in Banja Luka, as well as “the virulence of the ongoing campaign of violence” had resulted in “practically all non-Serbs fervently wishing to leave the Banja Luka area” (Report of 21 April 1995, para. 24). Those leaving Banja Luka were required to pay fees and to relinquish in writing their claim to their homes, without reimbursement (Report of 21 April 1995, para. 26). The displacements were “often very well organized, involving the bussing of people to the Croatian border, and involve[d] large numbers of people” (Report of 4 November 1994, para. 23). According to the Special Rapporteur, “[o]n one day alone in mid-June 1994, some 460 Muslims and Croats were displaced” (*ibid.*).

330. As regards Bijeljina, the Special Rapporteur observed that, between mid-June and 17 September 1994, some 4,700 non-Serbs were displaced from the Bijeljina and Janja regions. He noted that many of the displaced, “whether forced or choosing to depart, were subject to harassment and theft by the Bosnian Serb forces orchestrating the displacement” (Report of 4 November 1994, para. 21). These reports were confirmed by those of non-governmental organizations based on witness statements taken on the ground (Amnesty International, “Bosnia and Herzegovina: Living for the Day — Forced expulsions from Bijeljina and Janja”, December 1994, p. 2).

331. As for Zvornik, the Commission of Experts, relying on a study carried out by the Ludwig Boltzmann Institute of Human Rights based on an evaluation of 500 interviews of individuals who had fled the area, found that a systematic campaign of forced deportation had occurred (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 55 *et seq.*). The study observed that Bosnian Muslims obtained an official stamp on their identity card indicating a change of domicile in exchange for transferring their property to an “agency for the exchange of houses” which was subsequently a prerequisite for being able to leave the town (Lud-

wig Boltzmann Institute of Human Rights, “Ethnic Cleansing Operations’ in the northeast Bosnian city of Zvornik from April through June 1992”, pp. 28-29). According to the study, forced deportations of Bosnian Muslims began in May/June 1992 by bus to Mali Zvornik and from there to the Bosnian town of Tuzla or to Subotica on the Serbian-Hungarian border (*ibid.*, pp. 28 and 35-36). The Special Rapporteur’s report of 10 February 1993 supports this account, stating that deportees from Zvornik had been “ordered, some at gunpoint, to board buses and trucks and later trains”, provided with Yugoslav passports and subsequently taken to the Hungarian border to be admitted as refugees (Report of 10 February 1993, para. 99).

332. According to the Trial Chamber of the ICTY in its review of the indictment in the cases against *Karadžić and Mladić*, “[t]housands of civilians were unlawfully expelled or deported to other places inside and outside the Republic of Bosnia and Herzegovina” and “[t]he result of these expulsions was the partial or total elimination of Muslims and Bosnian Croats in some of [the] Bosnian Serb-held regions of Bosnia and Herzegovina”. The Chamber further stated that “[i]n the municipalities of Prijedor, Foča, Vlasenica, Brčko and Bosanski Šamac, to name but a few, the once non-Serbian majority was systematically exterminated or expelled by force or intimidation” (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 16).

333. The Respondent argues that displacements of populations may be necessary according to the obligations set down in Articles 17 and 49, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, for instance if the security of the population or imperative military reasons so demand. It adds that the displacement of populations has always been a way of settling certain conflicts between opposing parties and points to a number of examples of forced population displacements in history following an armed conflict. The Respondent also argues that the mere expulsion of a group cannot be characterized as genocide, but that, according to the ICTY Judgment in the *Stakić* case, “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group” and “[t]he expulsion of a group or part of a group does not in itself suffice for genocide” (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519).

334. The Court considers that there is persuasive and conclusive evidence that deportations and expulsions of members of the protected group occurred in Bosnia and Herzegovina. With regard to the Respondent’s argument that in time of war such deportations or expulsions may be justified under the Geneva Convention, or may be a normal way of settling a conflict, the Court would observe that no such justification

could be accepted in the face of proof of specific intent (*dolus specialis*). However, even assuming that deportations and expulsions may be categorized as falling within Article II, paragraph (c), of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part (see paragraph 190 above).

*Destruction of historical, religious and cultural property*

335. The Applicant claims that throughout the conflict in Bosnia and Herzegovina, Serb forces engaged in the deliberate destruction of historical, religious and cultural property of the protected group in “an attempt to wipe out the traces of their very existence”.

336. In the *Tadić* case, the ICTY found that “[n]on-Serb cultural and religious symbols throughout the region were targeted for destruction” in the Banja Luka area (*Tadić*, IT-94-I-T, Trial Chamber Judgment, 7 May 1997, para. 149). Further, in reviewing the indictments of Karadžić and Mladić, the Trial Chamber stated that:

“Throughout the territory of Bosnia and Herzegovina under their control, Bosnian Serb forces . . . destroyed, quasi-systematically, the Muslim and Catholic cultural heritage, in particular, sacred sites. According to estimates provided at the hearing by an expert witness, Dr. Kaiser, a total of 1.123 mosques, 504 Catholic churches and five synagogues were destroyed or damaged, for the most part, in the absence of military activity or after the cessation thereof.

This was the case in the destruction of the entire Islamic and Catholic heritage in the Banja Luka area, which had a Serbian majority and the nearest area of combat to which was several dozen kilometres away. All of the mosques and Catholic churches were destroyed. Some mosques were destroyed with explosives and the ruins were then levelled and the rubble thrown in the public dumps in order to eliminate any vestige of Muslim presence.

Aside from churches and mosques, other religious and cultural symbols like cemeteries and monasteries were targets of the attacks.” (*Karadžić and Mladić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 15.)

In the *Brđanin* case, the Trial Chamber was “satisfied beyond reasonable doubt that there was wilful damage done to both Muslim and Roman Catholic religious buildings and institutions in the relevant municipalities by Bosnian Serb forces” (*Brđanin*, IT-99-36-T, Judgment, 1 September 2004, paras. 640 and 658). On the basis of the findings regarding a number of incidents in various regions of Bosnia and Herzegovina, the

Trial Chamber concluded that a “campaign of devastation of institutions dedicated to religion took place throughout the conflict” but “intensified in the summer of 1992” and that this concentrated period of significant damage was “indicative that the devastation was targeted, controlled and deliberate” (*Brđanin*, IT-99-36-T, paras. 642-657). For instance, the Trial Chamber found that the Bosanska Krupa town mosque was mined by Bosnian Serb forces in April 1992, that two mosques in Bosanski Petrovac were destroyed by Bosnian Serb forces in July 1992 and that the mosques in Staro Šipovo, Bešnjevo and Pljeva were destroyed on 7 August 1992 (*ibid.*, paras. 644, 647 and 656).

337. The Commission of Experts also found that religious monuments especially mosques and churches had been destroyed by Bosnian Serb forces (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 5, 9, 21 ff.). In its report on the Prijedor region, the Commission found that at least five mosques and associated buildings in Prijedor town had been destroyed and noted that it was claimed that all 16 mosques in the Kozarac area had been destroyed and that not a single mosque, or other Muslim religious building, remained intact in the Prijedor region (Report of the Commission of Experts, Vol. I, Ann. V, p. 106). The report noted that those buildings were “allegedly not desecrated, damaged and destroyed for any military purpose nor as a side-effect of the military operations as such” but rather that the destruction “was due to later separate operations of dynamiting” (*ibid.*).

338. The Special Rapporteur found that, during the conflict, “many mosques, churches and other religious sites, including cemeteries and monasteries, have been destroyed or profaned” (Report of 17 November 1992, para. 26). He singled out the “systematic destruction and profanation of mosques and Catholic churches in areas currently or previously under [Bosnian Serb] control” (Report of 17 November 1992, para. 26).

339. Bosnia and Herzegovina called as an expert Mr. András Riedlmayer, who had carried out a field survey on the destruction of cultural heritage in 19 municipalities in Bosnia and Herzegovina for the Prosecutor of the ICTY in the *Milošević* case and had subsequently studied seven further municipalities in two other cases before the ICTY (“Destruction of Cultural Heritage in Bosnia and Herzegovina, 1992-1996: A Post-war Survey of Selected Municipalities”, *Milošević*, IT-02-54-T, Exhibit Number P486). In his report prepared for the *Milošević* case, Mr. Riedlmayer documented 392 sites, 60 per cent of which were inspected first hand while for the other 40 per cent his assessment was based on photographs and information obtained from other sources judged to be reliable and where there was corroborating documentation (Riedlmayer Report, p. 5).

340. The report compiled by Mr. Riedlmayer found that of the 277 mosques surveyed, none were undamaged and 136 were almost or entirely destroyed (Riedlmayer Report, pp. 9-10). The report found that:

“The damage to these monuments was clearly the result of attacks directed against them, rather than incidental to the fighting. Evidence of this includes signs of blast damage indicating explosives placed inside the mosques or inside the stairwells of minarets; many mosques [were] burnt out. In a number of towns, including Bijeljina, Janja (Bijeljina municipality), Foča, Banja Luka, Sanski Most, Zvornik and others, the destruction of mosques took place while the area was under the control of Serb forces, at times when there was no military action in the immediate vicinity.” (*Ibid.*, p. 11.)

The report also found that, following the destruction of mosques:

“the ruins [of the mosques] were razed and the sites levelled with heavy equipment, and all building materials were removed from the site . . . . Particularly well-documented instances of this practice include the destruction and razing of 5 mosques in the town of Bijeljina; of 2 mosques in the town of Janja (in Bijeljina municipality); of 12 mosques and 4 turbes in Banja Luka; and of 3 mosques in the city of Brčko.” (*Ibid.*, p. 12.)

Finally, the Report noted that the sites of razed mosques had been “turned into rubbish tips, bus stations, parking lots, automobile repair shops, or flea markets” (*ibid.*, p. 14), for example, a block of flats and shops had been erected on the site of the Zamlaz Mosque in Zvornik and a new Serbian Orthodox church was built on the site of the destroyed Divic Mosque (*ibid.*, p. 14).

341. Mr. Riedlmayer’s report together with his testimony before the Court and other corroborative sources detail the destruction of the cultural and religious heritage of the protected group in numerous locations in Bosnia and Herzegovina. For instance, according to the evidence before the Court, 12 of the 14 mosques in Mostar were destroyed or damaged and there are indications from the targeting of the minaret that the destruction or damage was deliberate (Council of Europe, *Information Report: The Destruction by War of the Cultural Heritage in Croatia and Bosnia-Herzegovina*, Parliamentary Assembly doc. 6756, 2 February 1993, paras. 129 and 155). In Foča, the town’s 14 historic mosques were allegedly destroyed by Serb forces. In Banja Luka, all 16 mosques were destroyed by Serb forces including the city’s two largest mosques,

the Ferhadija Mosque (built in 1578) and the Arnaudija Mosque (built in 1587) (United States Department of State, Bureau of Public Affairs, *Dispatch*, 26 July 1993, Vol. 4, No. 30, pp. 547-548; “War Crimes in Bosnia-Herzegovina: UN Cease-Fire Won’t Help Banja Luka”, Human Rights Watch/Helsinki Watch, June 1994, Vol. 6, No. 8, pp. 15-16; The Humanitarian Law Centre, Spotlight Report, No. 14, August 1994, pp. 143-144).

342. The Court notes that archives and libraries were also subjected to attacks during the war in Bosnia and Herzegovina. On 17 May 1992, the Institute for Oriental Studies in Sarajevo was bombarded with incendiary munitions and burnt, resulting in the loss of 200,000 documents including a collection of over 5,000 Islamic manuscripts (Riedlmayer Report, p. 18; Council of Europe, Parliamentary Assembly; Second Information Report on War Damage to the Cultural Heritage in Croatia and Bosnia-Herzegovina, doc. 6869, 17 June 1993, p. 11, Ann. 38). On 25 August 1992, Bosnia’s National Library was bombarded and an estimated 1.5 million volumes were destroyed (Riedlmayer Report, p. 19). The Court observes that, although the Respondent considers that there is no certainty as to who shelled these institutions, there is evidence that both the Institute for Oriental Studies in Sarajevo and the National Library were bombarded from Serb positions.

343. The Court notes that, in cross-examination of Mr. Riedlmayer, counsel for the Respondent pointed out that the municipalities included in Mr. Riedlmayer’s report only amounted to 25 per cent of the territory of Bosnia and Herzegovina. Counsel for the Respondent also called into question the methodology used by Mr. Riedlmayer in compiling his report. However, having closely examined Mr. Riedlmayer’s report and having listened to his testimony, the Court considers that Mr. Riedlmayer’s findings do constitute persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia and Herzegovina albeit in a limited geographical area.

344. In light of the foregoing, the Court considers that there is conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question. The Court takes note of the submission of the Applicant that the destruction of such heritage was “an essential part of the policy of ethnic purification” and was “an attempt to wipe out the traces of [the] very existence” of the Bosnian Muslims. However, in the Court’s view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group,

and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts. Moreover, the ILC subsequently confirmed this approach, stating that:

“As clearly shown by the preparatory work for the Convention . . . the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.” (Report of the International Law Commission on the work of its Forty-eighth Session, *Yearbook of the International Law Commission 1996*, Vol. II, Part Two, pp. 45-46, para. 12.)

Furthermore, the ICTY took a similar view in the *Krstić* case, finding that even in customary law, “despite recent developments”, the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 580). The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention. At the same time, it also endorses the observation made in the *Krstić* case that “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group” (*ibid.*).

#### Camps

345. The Court notes that the Applicant has presented substantial evidence as to the conditions of life in the detention camps and much of this evidence has already been discussed in the sections regarding Articles II (a) and (b). The Court will briefly examine the evidence presented by the Applicant which relates specifically to the conditions of life in the principal camps.

##### (a) *Drina River Valley*

###### (i) *Sušica camp*

346. In the Sentencing Judgment in the case of Dragan Nikolić, the Commander of Sušica camp, the ICTY found that he subjected detainees to inhumane living conditions by depriving them of adequate food, water, medical care, sleeping and toilet facilities (*Nikolić*, IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 69).

###### (ii) *Foča Kazneno-Popravni Domi camp*

347. In the *Krnjelijac* case, the ICTY Trial Chamber made the following findings regarding the conditions at the camp:

“the non-Serb detainees were forced to endure brutal and inadequate living conditions while being detained at the KP Dom, as a result of which numerous individuals have suffered lasting physical and psychological problems. Non-Serbs were locked in their rooms or in solitary confinement at all times except for meals and work duty, and kept in overcrowded rooms even though the prison had not reached its capacity. Because of the overcrowding, not everyone had a bed or even a mattress, and there were insufficient blankets. Hygienic conditions were poor. Access to baths or showers, with no hot water, was irregular at best. There were insufficient hygienic products and toiletries. The rooms in which the non-Serbs were held did not have sufficient heating during the harsh winter of 1992. Heaters were deliberately not placed in the rooms, windowpanes were left broken and clothes made from blankets to combat the cold were confiscated. Non-Serb detainees were fed starvation rations leading to severe weight loss and other health problems. They were not allowed to receive visits after April 1992 and therefore could not supplement their meagre food rations and hygienic supplies”. (*Krnjelijac*, IT-97-25-T, Judgment, 15 March 2002, para. 440.)

###### (b) *Prijedor*

###### (i) *Omarska camp*

348. In the Trial Judgment in the *Kvočka et al.* case, the ICTY Trial Chamber provided the following description of the poor conditions in the Omarska camp based on the accounts of detainees:

“Detainees were kept in inhuman conditions and an atmosphere of extreme mental and physical violence pervaded the camp. Intimidation, extortion, beatings, and torture were customary practices. The arrival of new detainees, interrogations, mealtimes, and use of the toilet facilities provided recurrent opportunities for abuse. Outsiders entered the camp and were permitted to attack the detainees at random and at will . . .

. . . . . The Trial Chamber finds that the detainees received poor quality food that was often rotten or inedible, caused by the high temperatures and sporadic electricity during the summer of 1992. The food

was sorely inadequate in quantity. Former detainees testified of the acute hunger they suffered in the camp: most lost 25 to 35 kilograms in body weight during their time at Omarska; some lost considerably more.” (*Kvočka et al.*, IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, paras. 45 and 55.)

(ii) *Keraterm camp*

349. The *Stakić* Trial Judgment contained the following description of conditions in the Keraterm camp based on multiple witness accounts:

“The detainees slept on wooden pallets used for the transport of goods or on bare concrete in a big storage room. The conditions were cramped and people often had to sleep on top of each other. In June 1992, Room 1, which according to witness statements was slightly larger than Courtroom 2 of this Tribunal (98.6 m<sup>2</sup>), held 320 people and the number continued to grow. The detainees were given one meal a day, made up of two small slices of bread and some sort of stew. The rations were insufficient for the detainees. Although families tried to deliver food and clothing every day they rarely succeeded. The detainees could see their families walking to the camp and leaving empty-handed, so in all likelihood someone at the gates of the camp took the food and prevented it from being distributed to the detainees.” (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 163.)

(iii) *Trnopolje camp*

350. With respect to the Trnopolje camp, the *Stakić* Trial Judgment described the conditions as follows, noting that they were slightly better than at Omarska and Keraterm:

“The detainees were provided with food at least once a day and, for some time, the families of detainees were allowed to bring food. However the quantity of food available was insufficient and people often went hungry. Moreover, the water supply was insufficient and the toilet facilities inadequate. The majority of the detainees slept in the open air. Some devised makeshift . . . shelters of blankets and plastic bags. While clearly inadequate, the conditions in the Trnopolje camp were not as appalling as those that prevailed in Omarska and Keraterm.” (*Ibid.*, para. 190.)

(c) *Banja Luka  
Manjača camp*

351. According to ICTY Trial Chamber in the *Plavšić* Sentencing Judgment:

“the sanitary conditions in Manjača were ‘disastrous . . . inhuman and really brutal’: the concept of sanitation did not exist. The temperature inside was low, the inmates slept on the concrete floor and they relieved themselves in the compound or in a bucket placed by the door at night. There was not enough water, and any water that became available was contaminated. In the first three months of Adil Draganović’s detention, Manjača was a ‘camp of hunger’ and when there was food available, it was of a very poor quality. The inmates were given two small meals per day, which usually consisted of half a cup of warm tea, which was more like warm water, and a small piece of thin, ‘transparent’ bread. Between two and a half thousand men there were only 90 loaves of bread, with each loaf divided into 20 or 40 pieces. Most inmates lost between 20 and 30 kilograms of body weight while they were detained at Manjača. The witness believes that had the ICRC and UNHCR not arrived, the inmates would have died of starvation.” (*Plavšić*, IT-00-39-S and 40/1-S, Sentencing Judgment, 27 February 2003, para. 48.)

(d) *Bosanski Šamac*

352. In its Judgment in the *Simić* case, the Trial Chamber made the following findings:

“the detainees who were imprisoned in the detention centres in Bosanski Šamac were confined under inhumane conditions. The prisoners were subjected to humiliation and degradation. The forced singing of ‘Chetnik’ songs and the verbal abuse of being called ‘ustasha’ or ‘balija’ were forms of such abuse and humiliation of the detainees. They did not have sufficient space, food or water. They suffered from unhygienic conditions, and they did not have appropriate access to medical care. These appalling detention conditions, the cruel and inhumane treatment through beatings and the acts of torture caused severe physical suffering, thus attacking the very fundamentals of human dignity . . . This was done because of the non-Serb ethnicity of the detainees.” (*Simić*, IT-95-9-T, Judgment, 17 October 2003, para. 773.)

353. The Respondent does not deny that the camps in Bosnia and Herzegovina were in breach of humanitarian law and, in most cases, in breach of the law of war. However, it notes that, although a number of

detention camps run by the Serbs in Bosnia and Herzegovina were the subject of investigation and trials at the ICTY, no conviction for genocide was handed down on account of any criminal acts committed in those camps. With specific reference to the Manjača camp, the Respondent points out that the Special Envoy of the United Nations Secretary-General visited the camp in 1992 and found that it was being run correctly and that a Muslim humanitarian organization also visited the camp and found that “material conditions were poor, especially concerning hygiene [but there were no signs of maltreatment or execution of prisoners”.

354. On the basis of the elements presented to it, the Court considers that there is convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps. However, the evidence presented has not enabled the Court to find that those acts were accompanied by specific intent (*dolus specialis*) to destroy the protected group, in whole or in part. In this regard, the Court observes that, in none of the ICTY cases concerning camps cited above, has the Tribunal found that the accused acted with such specific intent (*dolus specialis*).

\* \*

(8) *Article II (d): Imposing Measures to Prevent Births within the Protected Group*

355. The Applicant invoked several arguments to show that measures were imposed to prevent births, contrary to the provision of Article II, paragraph (d), of the Genocide Convention. First, the Applicant claimed that the

“forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces . . . in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months”.

The Court notes that no evidence was provided in support of this statement.

356. Secondly, the Applicant submitted that rape and sexual violence against women led to physical trauma which interfered with victims’ reproductive functions and in some cases resulted in infertility. However, the only evidence adduced by the Applicant was the indictment in the *Gagović* case before the ICTY in which the Prosecutor stated that one witness could no longer give birth to children as a result of the sexual abuse she suffered (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 7.10). In the Court’s view, an indictment by the Prosecutor

does not constitute persuasive evidence (see paragraph 217 above). Moreover, it notes that the *Gagović* case did not proceed to trial due to the death of the accused.

357. Thirdly, the Applicant referred to sexual violence against men which prevented them from procreating subsequently. In support of this assertion, the Applicant noted that, in the *Tadić* case, the Trial Chamber found that, in Omarska camp, the prison guards forced one Bosnian Muslim man to bite off the testicles of another Bosnian Muslim man (*Tadić*, IT-94-I-T, Judgment, 7 May 1997, para. 198). The Applicant also cited a report in the newspaper, *Le Monde*, on a study by the World Health Organization and the European Union on sexual assaults on men during the conflict in Bosnia and Herzegovina, which alleged that sexual violence against men was practically always accompanied by threats to the effect that the victim would no longer produce Muslim children. The article in *Le Monde* also referred to a statement by the President of a non-governmental organization called the Medical Centre for Human Rights to the effect that approximately 5,000 non-Serb men were the victims of sexual violence. However, the Court notes that the article in *Le Monde* is only a secondary source. Moreover, the results of the World Health Organization and European Union study were only preliminary, and there is no indication as to how the Medical Centre for Human Rights arrived at the figure of 5,000 male victims of sexual violence.

358. Fourthly, the Applicant argued that rape and sexual violence against men and women led to psychological trauma which prevented victims from forming relationships and founding a family. In this regard, the Applicant noted that in the *Akayesu* case, the ICTR considered that “rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate” (*Akayesu*, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 508). However, the Court notes that the Applicant presented no evidence that this was the case for women in Bosnia and Herzegovina.

359. Fifthly, the Applicant considered that Bosnian Muslim women who suffered sexual violence might be rejected by their husbands or not be able to find a husband. Again, the Court notes that no evidence was presented in support of this statement.

360. The Respondent considers that the Applicant “alleges no fact, puts forward no serious argument, and submits no evidence” for its allegations that rapes were committed in order to prevent births within a group and notes that the Applicant’s contention that there was a decline in births within the protected group is not supported by any evidence concerning the birth rate in Bosnia and Herzegovina either before or after the war.

361. Having carefully examined the arguments of the Parties, the Court finds that the evidence placed before it by the Applicant does not enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II (d) of the Convention.

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(9) *Article II (e): Forcibly Transferring Children of the Protected Group to Another Group*

362. The Applicant claims that rape was used “as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males” or, in other words, as “procreative rape”. The Applicant argues that children born as a result of these “forced pregnancies” would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.

363. As evidence for this claim, the Applicant referred to a number of sources including the following. In the indictment in the *Gagović et al.* case, the Prosecutor alleged that one of the witnesses was raped by two Bosnian Serb soldiers and that “[b]oth perpetrators told her that she would now give birth to Serb babies” (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 9.3). However, as in paragraph 356 above, the Court notes that an indictment cannot constitute persuasive evidence for the purposes of the case now before it and that the *Gagović* case did not proceed to trial. The Applicant further referred to the Report of the Commission of Experts which stated that one woman had been detained and raped daily by three or four soldiers and that “[s]he was told that she would give birth to a chetnik boy” (Report of the Commission of Experts, Vol. I, p. 59, para. 248).

364. The Applicant also cited the Review of the Indictment in the *Karadžić and Mladić* cases in which the Trial Chamber stated that “[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late to undergo an abortion” and that “[i]t would seem that the aim of many rapes was enforced impregnation” (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 64). However, the Court notes that this finding of the Trial Chamber was based only on the testimony of one *amicus curiae* and on the above-mentioned incident reported by the Commission of Experts (*ibid.*, para. 64, footnote 154).

365. Finally, the Applicant noted that in the *Kunarac* case, the ICTY Trial Chamber found that, after raping one of the witnesses, the accused had told her that “she would now carry a Serb baby and would not know who the father would be” (*Kunarac et al.* cases, Nos. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 583).

366. The Respondent points out that Muslim women who had been raped gave birth to their babies in Muslim territory and consequently the babies would have been brought up not by Serbs but, on the contrary, by Muslims. Therefore, in its view, it cannot be claimed that the children were transferred from one group to the other.

367. The Court, on the basis of the foregoing elements, finds that the evidence placed before it by the Applicant does not establish that there was any form of policy of forced pregnancy, nor that there was any aim to transfer children of the protected group to another group within the meaning of Article II (e) of the Convention.

\* \*

(10) *Alleged Genocide outside Bosnia and Herzegovina*

368. In the submissions in its Reply, the Applicant has claimed that the Respondent has violated its obligations under the Genocide Convention “by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of Bosnia and Herzegovina, including in particular the Muslim population . . .” (emphasis added). The Applicant devoted a section in its Reply to the contention that acts of genocide, for which the Respondent was allegedly responsible, also took place on the territory of the FRY; these acts were similar to those perpetrated on Bosnian territory, and the constituent elements of “ethnic cleansing as a policy” were also found in the territory of the FRY. This question of genocide committed within the FRY was not actively pursued by the Applicant in the course of the oral argument before the Court; however, the submission quoted above was maintained in the final submissions presented at the hearings, and the Court must therefore address it. It was claimed by the Applicant that the genocidal policy was aimed not only at citizens of Bosnia and Herzegovina, but also at Albanians, Sandžak Muslims, Croats, Hungarians and other minorities; however, the Applicant has not established to the satisfaction of the Court any facts in support of that allegation. The Court has already found (paragraph 196 above) that, for purposes of establishing genocide, the targeted group must be defined positively, and not as a “non-Serb” group.

369. The Applicant has not in its arguments dealt separately with the question of the nature of the specific intent (*dolus specialis*) alleged to accompany the acts in the FRY complained of. It does not appear to be

contending that actions attributable to the Respondent, and committed on the territory of the FRY, were accompanied by a specific intent (*dolus specialis*), peculiar to or limited to that territory, in the sense that the objective was to eliminate the presence of non-Serbs in the FRY itself. The Court finds in any event that the evidence offered does not in any way support such a contention. What the Applicant has sought to do is to convince the Court of a pattern of acts said to evidence specific intent (*dolus specialis*) inspiring the actions of Serb forces in Bosnia and Herzegovina, involving the destruction of the Bosnian Muslims in that territory; and that same pattern lay, it is contended, behind the treatment of Bosnian Muslims in the camps established in the FRY, so that that treatment supports the pattern thesis. The Applicant has emphasized that the same treatment was meted out to those Bosnian Muslims as was inflicted on their compatriots in Bosnia and Herzegovina. The Court will thus now turn to the question whether the specific intent (*dolus specialis*) can be deduced, as contended by the Applicant, from the pattern of actions against the Bosnian Muslims taken as a whole.

\* \* \*

(11) *The Question of Pattern of Acts Said to Evidence an Intent to Commit Genocide*

370. In the light of its review of the factual evidence before it of the atrocities committed in Bosnia and Herzegovina in 1991-1995, the Court has concluded that, save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident. The Applicant however relies on the alleged existence of an overall plan to commit genocide, indicated by the pattern of genocidal or potentially acts of genocide committed throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group. In the case, for example, of the conduct of Serbs in the various camps (described in paragraphs 252-256, 262-273, 307-310 and 312-318 above), it suggests that "[t]he genocidal intent of the Serbs becomes particularly clear in the description of camp practices, due to their striking similarity all over the territory of Bosnia and Herzegovina". Drawing attention to the similarities between actions attributed to the Serbs in Croatia, and the later events at, for example, Kosovo, the Applicant observed that

"it is not surprising that the picture of the takeovers and the following human and cultural destruction looks indeed similar from 1991

through 1999. These acts were perpetrated as the expression of one single project, which basically and effectively included the destruction in whole or in part of the non-Serb group, wherever this ethnically and religiously defined group could be conceived as obstructing the all-Serbs-in-one-State group concept."

371. The Court notes that this argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of to the intent of higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. In the absence of an official statement of aims reflecting such an intent, the Applicant contends that the specific intent (*dolus specialis*) of those directing the course of events is clear from the consistency of practices, particularly in the camps, showing that the pattern was of acts committed "within an organized institutional framework". However, something approaching an official statement of an overall plan is, the Applicant contends, to be found in the Decision on Strategic Goals issued on 12 May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska, published in the *Official Gazette* of the Republika Srpska, and the Court will first consider what significance that Decision may have in this context. The English translation of the Strategic Goals presented by the Parties during the hearings, taken from the Report of Expert Witness Donia in the *Milošević* case before the ICTY, Exhibit No. 537, reads as follows:

"DECISION ON THE STRATEGIC GOALS OF THE SERBIAN PEOPLE  
IN BOSNIA AND HERZEGOVINA

The Strategic Goals, i.e., the priorities, of the Serbian people in Bosnia and Herzegovina are:

1. Separation as a state from the other two ethnic communities.
2. A corridor between Semberija and Krajina.
3. The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states.
4. The establishment of a border on the Una and Neretva rivers.
5. The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part.
6. An outlet to the sea for the Republika Srpska."

While the Court notes that this document did not emanate from the Government of the Respondent, evidence before the Court of intercepted exchanges between President Milošević of Serbia and President Karadžić of the Republika Srpska is sufficient to show that the objectives defined represented their joint view.

372. The Parties have drawn the Court's attention to statements in the Assembly by President Karadžić which appear to give conflicting interpretations of the first and major goal of these objectives, the first on the day they were adopted, the second two years later. On that first occasion, the Applicant contended, he said: "It would be much better to solve this situation by political means. It would be best if a truce could be established right away and the borders set up, even if we lose something." Two years later he said (according to the translation of his speech supplied by the Applicant):

"We certainly know that we must give up something — that is beyond doubt in so far as we want to achieve our first strategic goal: to drive our enemies by the force of war from their homes, that is the Croats and Muslims, so that we will no longer be together [with them] in a State."

The Respondent disputes the accuracy of the translation, claiming that the stated goal was not "to drive our enemies by the force of war from their homes" but "to free the homes from the enemy". The 1992 objectives do not include the elimination of the Bosnian Muslim population. The 1994 statement even on the basis of the Applicant's translation, however shocking a statement, does not necessarily involve the intent to destroy in whole or in part the Muslim population in the enclaves. The Applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership — to create a larger Serb State, by a war of conquest if necessary — did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion. The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired, actions which the Respondent accepted (in the latter case at least) as being unlawful since they would be at variance with the inviolability of borders and the territorial integrity of a State which had just been recognized internationally. It is significant that in cases in which the Prosecutor has put the Strategic Goals in issue, the ICTY has not characterized them as genocidal (see *Brđanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 303, and *Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 546-561 (in particular para. 548)). The Court does not see the 1992 Strategic Goals as establishing the specific intent.

373. Turning now to the Applicant's contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demon-

strated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.

374. Furthermore, and again significantly, the proposition is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor, including decisions not to charge genocide offences in possibly relevant indictments, and to enter into plea agreements, as in the *Plavić* and *Sikirica et al.* cases (IT-00-40 and IT-95-8), by which the genocide-related charges were withdrawn. Those actions of the Prosecution and the Tribunal can be conveniently enumerated here. Prosecutions for genocide and related crimes before the ICTY can be grouped in the following way:

- (a) convictions in respect of charges involving genocide relating to Srebrenica in July 1995: *Krstić* (IT-98-33) (conviction of genocide at trial was reduced to aiding and abetting genocide on appeal) and *Blagojević* (IT-02-60) (conviction of complicity in genocide "through aiding and abetting" at trial is currently on appeal);
- (b) plea agreements in which such charges were withdrawn, with the accused pleading guilty to crimes against humanity: *Obrenović* (IT-02-60/2) and *Momir Nikolić* (IT-02-60/1);
- (c) acquittals on genocide-related charges in respect of events occurring elsewhere: *Krajišnik* (paragraph 219 above) (on appeal), *Jelišić* (IT-95-10) (completed), *Stakić* (IT-97-24) (completed), *Brđanin* (IT-99-36) (on appeal) and *Sikirica* (IT-95-8) (completed);
- (d) cases in which genocide-related charges in respect of events occurring elsewhere were withdrawn: *Plavić* (IT-00-39 and 40/1) (plea agreement), *Zupljanin* (IT-99-36) (genocide-related charges withdrawn) and *Mejakić* (IT-95-4) (genocide-related charges withdrawn);
- (e) case in which the indictment charged genocide and related crimes in Srebrenica and elsewhere in which the accused died during the proceedings: *Milošević* (IT-02-54);
- (f) cases in which indictments charge genocide or related crimes in respect of events occurring elsewhere, in which accused have died before or during proceedings: *Kovačević and Drljića* (IT-97-24) and *Talić* (IT-99-36/1);
- (g) pending cases in which the indictments charge genocide and related crimes in Srebrenica and elsewhere: *Karadžić and Mladić* (IT-95-5/18); and

(h) pending cases in which the indictments charge genocide and related crimes in Srebrenica: *Popović, Beara, Drago Nikolić, Borovčanin, Pandurević and Trbić* (IT-05-88/1) and *Tolimir* (IT-05-88/2).

375. In the cases of a number of accused, relating to events in July 1995 in Srebrenica, charges of genocide or its related acts have not been brought: *Erdemović* (IT-96-22) (completed), *Jokić* (IT-02-60) (on appeal), *Miletić and Gvero* (IT-05-88, part of the *Popović et al.* proceeding referred to in paragraph 374 (*h*) above), *Perišić* (IT-04-81) (pending) and *Stanišić and Simatović* (IT-03-69) (pending).

376. The Court has already concluded above that — save in the case of Srebrenica — the Applicant has not established that any of the widespread and serious atrocities, complained of as constituting violations of Article II, paragraphs (a) to (e), of the Genocide Convention, were accompanied by the necessary specific intent (*dolus specialis*) on the part of the perpetrators. It also finds that the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent. Having however concluded (paragraph 297 above), in the specific case of the massacres at Srebrenica in July 1995, that acts of genocide were committed in operations led by members of the VRS, the Court now turns to the question whether those acts are attributable to the Respondent.

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#### VII. THE QUESTION OF RESPONSIBILITY FOR EVENTS AT SREBRENICA UNDER ARTICLE III, PARAGRAPH (a), OF THE GENOCIDE CONVENTION

##### (1) *The Alleged Admission*

377. The Court first notes that the Applicant contends that the Respondent has in fact recognized that genocide was committed at Srebrenica, and has accepted legal responsibility for it. The Applicant called attention to the following official declaration made by the Council of Ministers of the Respondent on 15 June 2005, following the showing on a Belgrade television channel on 2 June 2005 of a video-recording of the murder by a paramilitary unit of six Bosnian Muslim prisoners near Srebrenica (paragraph 289 above). The statement reads as follows:

“Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia

nor Montenegro, but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance.

Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica.

Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime.”

The Applicant requests the Court to declare that this declaration “be regarded as a form of admission and as having decisive probative force regarding the attributability to the Yugoslav State of the Srebrenica massacre”.

378. It is for the Court to determine whether the Respondent is responsible for any acts of genocide which may be established. For purposes of a finding of this kind the Court may take into account any statements made by either party that appear to bear upon the matters in issue, and have been brought to its attention (cf. *Nuclear Tests (Australia v. France)*, *Judgment*, *I.C.J. Reports 1974*, pp. 263 ff., paras. 32 ff., and *Nuclear Tests (New Zealand v. France)*, *Judgment*, *I.C.J. Reports 1974*, pp. 465 ff., paras. 27 ff.; *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, *I.C.J. Reports 1986*, pp. 573-574, paras. 38-39), and may accord to them such legal effect as may be appropriate. However, in the present case, it appears to the Court that the declaration of 15 June 2005 was of a political nature; it was clearly not intended as an admission, which would have had a legal effect in complete contradiction to the submissions made by the Respondent before this Court, both at the time of the declaration and subsequently. The Court therefore does not find the statement of 15 June 2005 of assistance to it in determining the issues before it in the case.

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##### (2) *The Test of Responsibility*

379. In view of the foregoing conclusions, the Court now must ascertain whether the international responsibility of the Respondent can have been incurred, on whatever basis, in connection with the massacres committed in the Srebrenica area during the period in question. For the reasons set out above, those massacres constituted the crime of genocide within the meaning of the Convention. For this purpose, the Court may be required to consider the following three issues in turn. First, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court

will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility: that is to say, the acts referred to in Article III, paragraphs (b) to (e), one of these being complicity in genocide. Finally, it will be for the Court to rule on the issue as to whether the Respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.

380. These three issues must be addressed in the order set out above, because they are so interrelated that the answer on one point may affect the relevance or significance of the others. Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs (b) to (e), of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. (a)), conspiracy to commit genocide (Art. III, para. (b)), and direct and public incitement to commit genocide (Art. III, para. (c)), there would be little point, where the requirements for attribution are fulfilled under (a), in making a judicial finding that they are also satisfied under (b) and (c), since responsibility under (a) absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of "genocide" (Art. III, para. (a)), "attempt to commit genocide" (Art. III, para. (d)), and "complicity in genocide" (Art. III, para. (e)), in relation to the same actions, must be rejected as untenable both logically and legally.

381. On the other hand, there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph (a), of the Convention, can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent's responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs (b) to (e). In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility, the content of which will be considered below.

382. Furthermore, the question whether the Respondent has complied with its obligations to prevent and punish genocide arises in different terms, depending on the replies to the two preceding questions. It is only if the Court answers the first two questions in the negative that it will have to consider whether the Respondent fulfilled its obligation of pre-

vention, in relation to the whole accumulation of facts constituting genocide. If a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), or for one of the other acts referred to in Article III of the Convention (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated. On the other hand, it is self-evident, as the Parties recognize, that if a State is not responsible for any of the acts referred to in Article III, paragraphs (a) to (e), of the Convention, this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III.

383. Finally, it should be made clear that, while, as noted above, a State's responsibility deriving from any of those acts renders moot the question whether it satisfied its obligation of prevention in respect of the same conduct, it does not necessarily render superfluous the question whether the State complied with its obligation to punish the perpetrators of the acts in question. It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.

384. Having thus explained the interrelationship among the three issues set out above (paragraph 379), the Court will now proceed to consider the first of them. This is the question whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph (a), of the Convention, are attributable, in whole or in part, to the Respondent. This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.

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(3) *The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of the Conduct of Its Organs*

385. The first of these two questions relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility as follows:

“Article 4

*Conduct of organs of a State*

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

386. When applied to the present case, this rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by “persons or entities” having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. It must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica (see also paragraphs 278 to 297 above). Further, neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law.

387. The Applicant has however claimed that all officers in the VRS, including General Mladić, remained under FRY military administration, and that their salaries were paid from Belgrade right up to 2002, and

accordingly contends that these officers “were *de jure* organs of [the FRY], intended by their superiors to serve in Bosnia and Herzegovina with the VRS”. On this basis it has been alleged by the Applicant that those officers, in addition to being officers of the VRS, remained officers of the VJ, and were thus *de jure* organs of the Respondent (paragraph 238 above). The Respondent however asserts that only some of the VRS officers were being “administered” by the 30th Personnel Centre in Belgrade, so that matters like their payment, promotion, pension, etc., were being handled from the FRY (paragraph 238 above); and that it has not been clearly established whether General Mladić was one of them. The Applicant has shown that the promotion of Mladić to the rank of Colonel General on 24 June 1994 was handled in Belgrade, but the Respondent emphasizes that this was merely a verification for administrative purposes of a promotion decided by the authorities of the Republika Srpska.

388. The Court notes first that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of the army of the Respondent — *a de jure* organ of the Respondent. Nor has it been conclusively established that General Mladić was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY for the purposes of the application of the rules of State responsibility. There is no doubt that the FRY was providing substantial support, *inter alia*, financial support, to the Republika Srpska (cf. paragraph 241 above), and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinated to the political leadership of the Republika Srpska. In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. The expression “State organ”, as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC Commentary to Art. 4, para. (1)). The functions of the VRS officers, including General Mladić, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska. The particular situation of General Mladić, or of any other VRS officer present at Srebrenica who may have been being “administered” from Belgrade, is not therefore such as to lead the Court to modify the conclusion reached in the previous paragraph.

389. The issue also arises as to whether the Respondent might bear responsibility for the acts of the “Scorpions” in the Srebrenica area. In this connection, the Court will consider whether it has been proved that the Scorpions were a *de jure* organ of the Respondent. It is in dispute between the Parties as to when the “Scorpions” became incorporated into the forces of the Respondent. The Applicant has claimed that incorporation occurred by a decree of 1991 (which has not been produced as an Annex). The Respondent states that “these regulations [were] relevant exclusively for the war in Croatia in 1991” and that there is no evidence that they remained in force in 1992 in Bosnia and Herzegovina. The Court observes that, while the single State of Yugoslavia was disintegrating at that time, it is the status of the “Scorpions” in mid-1995 that is of relevance to the present case. In two of the intercepted documents presented by the Applicant (the authenticity of which was queried — see paragraph 289 above), there is reference to the “Scorpions” as “MUP of Serbia” and “a unit of Ministry of Interiors of Serbia”. The Respondent identified the senders of these communications, Ljubiša Borovčanin and Savo Cvjetinović, as being “officials of the police forces of Republika Srpska”. The Court observes that neither of these communications was addressed to Belgrade. Judging on the basis of these materials, the Court is unable to find that the “Scorpions” were, in mid-1995, *de jure* organs of the Respondent. Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.

390. The argument of the Applicant however goes beyond mere contemplation of the status, under the Respondent’s internal law, of the persons who committed the acts of genocide; it argues that Republika Srpska and the VRS, as well as the paramilitary militias known as the “Scorpions”, the “Red Berets”, the “Tigers” and the “White Eagles” must be deemed, notwithstanding their apparent status, to have been “*de facto* organs” of the FRY, in particular at the time in question, so that all of their acts, and specifically the massacres at Srebrenica, must be considered attributable to the FRY, just as if they had been organs of that State under its internal law; reality must prevail over appearances. The Respondent rejects this contention, and maintains that these were not *de facto* organs of the FRY.

391. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons — or groups of persons — who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State’s responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in

its Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (*Merits, Judgment, I.C.J. Reports 1986*, pp. 62-64). In paragraph 109 of that Judgment the Court stated that it had to

“determine . . . whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government” (p. 62).

Then, examining the facts in the light of the information in its possession, the Court observed that “there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf” (para. 109), and went on to conclude that “the evidence available to the Court . . . is insufficient to demonstrate [the *contras*] complete dependence on United States aid”, so that the Court was “unable to determine that the *contras* force may be equated for legal purposes with the forces of the United States” (pp. 62-63, para. 110).

392. The passages quoted show that, according to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

393. However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court’s Judgment quoted above expressly described as “complete dependence”. It remains to be determined in the present case whether, at the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it; it is only if this condition is met that they can be equated with organs of the Respondent for the purposes of its international responsibility.

394. The Court can only answer this question in the negative. At the relevant time, July 1995, neither the Republika Srpska nor the VRS could

be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years (see paragraph 238 above), and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have "conduct[ed] its crucial or most significant military and paramilitary activities" (*I.C.J. Reports 1986*, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

395. The Court now turns to the question whether the "Scorpions" were in fact acting in complete dependence on the Respondent. The Court has not been presented with materials to indicate this. The Court also notes that, in giving his evidence, General Dannatt, when asked under whose control or whose authority the paramilitary groups coming from Serbia were operating, replied, "they would have been under the command of Mladić and part of the chain of the command of the VRS". The Parties referred the Court to the *Stanišić and Simatović* case (IT-03-69, pending); notwithstanding that the defendants are not charged with genocide in that case, it could have its relevance for illuminating the status of the "Scorpions" as Serbian MUP or otherwise. However, the Court cannot draw further conclusions as this case remains at the indictment stage. In this respect, the Court recalls that it can only form its opinion on the basis of the information which has been brought to its notice at the time when it gives its decision, and which emerges from the pleadings and documents in the case file, and the arguments of the Parties made during the oral exchanges.

The Court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility.

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(4) *The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of Direction or Control*

396. As noted above (paragraph 384), the Court must now determine whether the massacres at Srebrenica were committed by persons who,

though not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control, as the Applicant argues in the alternative; the Respondent denies that such was the case.

397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs *de facto*, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FRY organs — incontestably having that status under the FRY's internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows:

"Article 8

*Conduct directed or controlled by a State*

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of

persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

399. This provision must be understood in the light of the Court’s jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the *contras* were to be equated with organs of the United States because they were “completely dependent” on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State” (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” (*Ibid.*, p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of “complete dependence” on the respondent State; it has to be proved that they acted in accordance with that State’s instructions or under its “effective control”. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the “effective control” of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (see paragraph 399 above). The rules

for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94-I-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the “overall control” exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid.*, para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY’s instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the “overall control” test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the “overall control” test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State’s responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under

the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.

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408. The Respondent has emphasized that in the final judgments of the Chambers of the ICTY relating to genocide in Srebrenica, none of its leaders have been found to have been implicated. The Applicant does not challenge that reading, but makes the point that that issue has not been before the ICTY for decision. The Court observes that the ICTY has indeed not up to the present been directly concerned in final judgments with the question whether those leaders might bear responsibility in that respect. The Court notes the fact that the report of the United Nations Secretary-General does not establish any direct involvement by President Milošević with the massacre. The Court has already recorded the contacts between Milošević and the United Nations on 10 and 11 July (paragraph 285). On 14 July, as recorded in the Secretary-General’s Report,

“the European Union negotiator, Mr. Bildt, travelled to Belgrade to meet with President Milošević. The meeting took place at Dobanovci, the hunting lodge outside Belgrade, where Mr. Bildt had met President Milošević and General Mladić one week earlier. According to Mr. Bildt’s public account of that second meeting, he pressed the President to arrange immediate access for UNHCR to assist the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war. He also insisted that the Netherlands soldiers be allowed to leave at will. Mr. Bildt added that the international community would not tolerate an attack on Goražde, and that a ‘green light’ would have to be secured for fire and unimpeded access to the enclaves. He also demanded that the road between Kiseljak and Sarajevo (‘Route Swan’) be opened to all non-military transport. President Milošević apparently acceded to the various demands, but also claimed that he did not have control over the matter. Milošević had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement.

A few hours into the meeting, General Mladić arrived at Dobanovci. Mr. Bildt noted that General Mladić readily agreed to most of the demands on Srebrenica, but remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular. Eventually, with President Milošević’s intervention, it appeared that an agreement in principle had been reached. It was decided that

another meeting would be held the next day in order to confirm the arrangements. Mr. Bildt had already arranged with Mr. Stoltenberg and Mr. Akashi [the Special Representative of the Secretary-General] that they would join him in Belgrade. He also requested that the UNPROFOR Commander also come to Belgrade in order to finalize some of the military details with Mladić.” (A/54/549, paras. 372-373.)

409. By 19 July, on the basis of the Belgrade meeting, Mr. Akashi was hopeful that both President Milošević and General Mladić might show some flexibility. The UNPROFOR Commander met with Mladić on 19 July and throughout the meeting kept in touch with Mr. Bildt who was holding parallel negotiations with President Milošević in Belgrade. Mladić gave his version of the events of the preceding days (his troops had “finished [it] in a correct way”; some “unfortunate small incidents” had occurred”). The UNPROFOR Commander and Mladić then signed an agreement which provided for

“ICRC access to all ‘reception centres’ where the men and boys of Srebrenica were being held, by the next day;

UNHCR and humanitarian aid convoys to be given access to Srebrenica;

The evacuation of wounded from Potočari, as well as the hospital in Bratunac;

The return of Dutchbat weapons and equipment taken by the BSA;

The transfer of Dutchbat out of the enclave commencing on the afternoon of 21 July, following the evacuation of the remaining women, children and elderly who wished to leave.

Subsequent to the signing of this agreement, the Special Representative wrote to President Milošević, reminding him of the agreement, that had not yet been honoured, to allow ICRC access to Srebrenica. The Special Representative later also telephoned President Milošević to reiterate the same point.” (*Ibid.*, para. 392.)

410. The Court was referred to other evidence supporting or denying the Respondent’s effective control over, participation in, involvement in, or influence over the events in and around Srebrenica in July 1995. The Respondent quotes two substantial reports prepared seven years after the events, both of which are in the public domain, and readily accessible. The first, *Srebrenica — a “Safe” Area*, published in 2002 by the Netherlands Institute for War Documentation was prepared over a lengthy period by an expert team. The Respondent has drawn attention to the fact that this report contains no suggestion that the FRY leadership was involved in planning the attack or inciting the killing of non-Serbs; nor

any hard evidence of assistance by the Yugoslav army to the armed forces of the Republika Srpska before the attack; nor any suggestion that the Belgrade Government had advance knowledge of the attack. The Respondent also quotes this passage from point 10 of the Epilogue to the Report relating to the “mass slaughter” and “the executions” following the fall of Srebrenica: “There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is highly improbable.” The Respondent further observes that the Applicant’s only response to this submission is to point out that “the report, by its own admission, is not exhaustive”, and that this Court has been referred to evidence not used by the authors.

411. The Court observes, in respect of the Respondent’s submissions, that the authors of the Report do conclude that Belgrade was aware of the intended attack on Srebrenica. They record that the Dutch Military Intelligence Service and another Western intelligence service concluded that the July 1995 operations were co-ordinated with Belgrade (Part III, Chap. 7, Sect. 7). More significantly for present purposes, however, the authors state that “there is no evidence to suggest participation in the preparations for executions on the part of Yugoslav military personnel or the security agency (RDB). In fact there is some evidence to support the opposite view . . .” (Part IV, Chap. 2, Sect. 20). That supports the passage from point 10 of the Epilogue quoted by the Respondent, which was preceded by the following sentence: “Everything points to a central decision by the General Staff of the VRS.”

412. The second report is *Balkan Battlegrounds*, prepared by the United States Central Intelligence Agency, also published in 2002. The first volume under the heading “The Possibility of Yugoslav involvement” arrives at the following conclusion:

“No basis has been established to implicate Belgrade’s military or security forces in the post-Srebrenica atrocities. While there are indications that the VJ or RDB [the Serbian State Security Department] may have contributed elements to the Srebrenica battle, there is no similar evidence that Belgrade-directed forces were involved in any of the subsequent massacres. Eyewitness accounts by survivors may be imperfect recollections of events, and details may have been overlooked. Narrations and other available evidence suggest that only Bosnian Serb troops were employed in the atrocities and executions that followed the military conquest of Srebrenica.” (*Balkan Battlegrounds*, p. 353.)

The response of the Applicant was to quote an earlier passage which refers to reports which “suggest” that VJ troops and possibly elements of the Serbian State Security Department may have been engaged in the battle in Srebrenica — as indeed the second sentence of the passage quoted by the Respondent indicates. It is a cautious passage, and significantly gives no indication of any involvement by the Respondent in the post-conflict atrocities which are the subject of genocide-related convictions. Counsel for the Respondent also quoted from the evidence of the Deputy Commander of Dutchbat, given in the *Milošević* trial, in which the accused put to the officer the point quoted earlier from the Epilogue to the Netherlands report. The officer responded:

“At least for me, I did not have any evidence that it was launched in co-operation with Belgrade. And again, I read all kinds of reports and opinions and papers where all kinds of scenarios were analysed, and so forth. Again, I do not have any proof that the action, being the attack on the enclave, was launched in co-operation with Belgrade.”

The other evidence on which the Applicant relied relates to the influence, rather than the control, that President Milošević had or did not have over the authorities in Pale. It mainly consists of the evidence given at the *Milošević* trial by Lord Owen and General Wesley Clark and also Lord Owen’s publications. It does not establish a factual basis for finding the Respondent responsible on a basis of direction or control.

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(5) *Conclusion as to Responsibility for Events at Srebrenica under Article III, Paragraph (a), of the Genocide Convention*

413. In the light of the information available to it, the Court finds, as indicated above, that it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent (see paragraph 395 above). It finds also that it has not been established that those massacres were committed on the instructions or under the direction of organs of the respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which, as indicated in paragraph 297 above, constituted the crime of genocide, were perpetrated.

The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent (*dolus specialis*) characterizing the crime of genocide, which would have had to be present in order for the Respondent to be held responsible on this basis. All indications are to the contrary: that the

decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

As for the killings committed by the “Scorpions” paramilitary militias, notably at Trnovo (paragraph 289 above), even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY (see, in particular, the Trial Chamber’s decision of 12 April 2006 in the *Stanišić and Simatović* case, IT-03-69), it has not been proved that they took place either on the instructions or under the control of organs of the FRY.

414. Finally, the Court observes that none of the situations, other than those referred to in Articles 4 and 8 of the ILC’s Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC’s Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent’s disposal by another State (Art. 6), nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art. 9); finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).

415. The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis.

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VIII. THE QUESTION OF RESPONSIBILITY, IN RESPECT OF SREBRENICA, FOR ACTS ENUMERATED IN ARTICLE III, PARAGRAPHS (b) TO (e), OF THE GENOCIDE CONVENTION

416. The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent’s possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. These are: conspiracy to

commit genocide (Art. III, para. (b)), direct and public incitement to commit genocide (Art. III, para. (c)), attempt to commit genocide (Art. III, para. (d)) — though no claim is made under this head in the Applicant's final submissions in the present case — and complicity in genocide (Art. III, para. (e)). For the reasons already stated (paragraph 380 above), the Court must make a finding on this matter inasmuch as it has replied in the negative to the previous question, that of the Respondent's responsibility in the commission of the genocide itself.

417. It is clear from an examination of the facts of the case that subparagraphs (b) and (c) of Article III are irrelevant in the present case. It has not been proved that organs of the FRY, or persons acting on the instructions or under the effective control of that State, committed acts that could be characterized as "[c]onspiracy to commit genocide" (Art. III, para. (b)), or as "[d]irect and public incitement to commit genocide" (Art. III, para. (c)), if one considers, as is appropriate, only the events in Srebrenica. As regards paragraph (b), what was said above regarding the attribution to the Respondent of acts of genocide, namely that the massacres were perpetrated by persons and groups of persons (the VRS in particular) who did not have the character of organs of the Respondent, and did not act on the instructions or under the effective control of the Respondent, is sufficient to exclude the latter's responsibility in this regard. As regards subparagraph (c), none of the information brought to the attention of the Court is sufficient to establish that organs of the Respondent, or persons acting on its instructions or under its effective control, directly and publicly incited the commission of the genocide in Srebrenica; nor is it proven, for that matter, that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina. In this respect, the Court must only accept precise and incontrovertible evidence, of which there is clearly none.

418. A more delicate question is whether it can be accepted that acts which could be characterized as "complicity in genocide", within the meaning of Article III, paragraph (e), can be attributed to organs of the Respondent or to persons acting under its instructions or under its effective control.

This question calls for some preliminary comment.

419. First, the question of "complicity" is to be distinguished from the question, already considered and answered in the negative, whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY. It is true that in certain national systems of criminal law, giving instructions or orders to persons to commit a criminal act is considered as the mark of complicity in the commission of that act. However, in the particular context of the application of the law of international responsibility in the domain of genocide, if it were established that a genocidal act had been committed on the instructions or under the direction of a

State, the necessary conclusion would be that the genocide was attributable to the State, which would be directly responsible for it, pursuant to the rule referred to above (paragraph 398), and no question of complicity would arise. But, as already stated, that is not the situation in the present case.

However there is no doubt that "complicity", in the sense of Article III, paragraph (e), of the Convention, includes the provision of means to enable or facilitate the commission of the crime; it is thus on this aspect that the Court must focus. In this respect, it is noteworthy that, although "complicity", as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the "aid or assistance" furnished by one State for the commission of a wrongful act by another State.

420. In this connection, reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule, which reads as follows:

*"Article 16*

*Aid or assistance in the commission of an internationally wrongful act*

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State."

Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between "complicity in genocide", within the meaning of Article III, paragraph (e), of the Convention, and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 — setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for "complicity in genocide" within the meaning of Article III, paragraph (e), which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished "aid or assistance" in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.

421. Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent (*dolus specialis*) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.

422. The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.

423. A point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken; the Court has found (paragraph 295 above) that that decision was taken shortly before it was actually carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established

that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.

424. The Court concludes from the above that the international responsibility of the Respondent is not engaged for acts of complicity in genocide mentioned in Article III, paragraph (e), of the Convention. In the light of this finding, and of the findings above relating to the other paragraphs of Article III, the international responsibility of the Respondent is not engaged under Article III as a whole.

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#### IX. THE QUESTION OF RESPONSIBILITY FOR BREACH OF THE OBLIGATIONS TO PREVENT AND PUNISH GENOCIDE

425. The Court now turns to the third and last of the questions set out in paragraph 379 above: has the respondent State complied with its obligations to prevent and punish genocide under Article I of the Convention?

Despite the clear links between the duty to prevent genocide and the duty to punish its perpetrators, these are, in the view of the Court, two distinct yet connected obligations, each of which must be considered in turn.

426. It is true that, simply by its wording, Article I of the Convention brings out the close link between prevention and punishment: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” It is also true that one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent. Lastly, it is true that, although in the subsequent Articles, the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a principle in Article I, only in Article VIII:

“Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.”

427. However, it is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the

obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court. The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.

This is the reason why the Court will first consider the manner in which the Respondent has performed its obligation to prevent before examining the situation as regards the obligation to punish.

#### (1) *The Obligation to Prevent Genocide*

428. As regards the obligation to prevent genocide, the Court thinks it necessary to begin with the following introductory remarks and clarifications, amplifying the observations already made above.

429. First, the Genocide Convention is not the only international instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit. Many other instruments include a similar obligation, in various forms: see, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Art. 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973 (Art. 4); the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (Art. 11); the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 (Art. 15). The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented.

The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law. The Court will therefore confine itself to determining the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a

determination is necessary to the decision to be given on the dispute before it. This will, of course, not absolve it of the need to refer, if need be, to the rules of law whose scope extends beyond the specific field covered by the Convention.

430. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of “due diligence”, which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State’s capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State’s capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.

431. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach

of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility:

“ . . . . .  
 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.

In consequence, in the present case the Court will have to consider the Respondent’s conduct, in the light of its duty to prevent, solely in connection with the massacres at Srebrenica, because these are the only acts in respect of which the Court has concluded in this case that genocide was committed.

432. Fourth and finally, the Court believes it especially important to lay stress on the differences between the requirements to be met before a State can be held to have violated the obligation to prevent genocide — within the meaning of Article I of the Convention — and those to be satisfied in order for a State to be held responsible for “complicity in genocide” — within the meaning of Article III, paragraph (e) — as previously discussed. There are two main differences; they are so significant as to make it impossible to treat the two types of violation in the same way.

In the first place, as noted above, complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent

results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.

In the second place, as also noted above, there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts. By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed. As will be seen below, this latter difference could prove decisive in the present case in determining the responsibility incurred by the Respondent.

433. In light of the foregoing, the Court will now consider the facts of the case. For the reasons stated above (paragraph 431), it will confine itself to the FRY’s conduct vis-à-vis the Srebrenica massacres.

434. The Court would first note that, during the period under consideration, the FRY was in a position of influence over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.

435. Secondly, the Court cannot but note that, on the relevant date, the FRY was bound by very specific obligations by virtue of the two Orders indicating provisional measures delivered by the Court in 1993. In particular, in its Order of 8 April 1993, the Court stated, *inter alia*, that although not able, at that early stage in the proceedings, to make “definitive findings of fact or of imputability” (*I.C.J. Reports 1993*, p. 22, para. 44) the FRY was required to ensure:

“that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide . . .” (*J.C.J. Reports 1993*, p. 24, para. 52 A (2)).

The Court’s use, in the above passage, of the term “influence” is particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the Respondent maintained close links and on which it could exert a certain influence. Although in principle the two issues are separate, and the second will be examined below, it is not possible, when considering the way the Respondent discharged its obligation of prevention under the Convention, to fail to take account of the obligation incumbent upon it, albeit on a different basis, to implement the provisional measures indicated by the Court.

436. Thirdly, the Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave. Among the documents containing information clearly suggesting that such an awareness existed, mention should be made of the above-mentioned report (see paragraphs 283 and 285 above) of the United Nations Secretary-General prepared pursuant to General Assembly resolution 53/35 on the “fall of Srebrenica” (United Nations doc. A/54/549), which recounts the visit to Belgrade on 14 July 1995 of the European Union negotiator Mr. Bildt to meet Mr. Milošević. Mr. Bildt, in substance, informed Mr. Milošević of his serious concern and

“pressed the President to arrange immediate access for the UNHCR to assist the people of Srebrenica, and for the ICRC to start to register those who were being treated by the BSA [Bosnian Serb Army] as prisoners of war”.

437. The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the *Milošević* case. General Clark referred to a conversation that he had had with Milošević during the negotiation of the Dayton Agreement. He stated that

“I went to Milošević and I asked him. I said, ‘If you have so much influence over these [Bosnian] Serbs, how could you have allowed

General Mladić to have killed all those people at Srebrenica?” And he looked to me — at me. His expression was very grave. He paused before he answered, and he said, ‘Well, General Clark, I warned him not to do this, but he didn’t listen to me.’ And it was in the context of all the publicity at the time about the Srebrenica massacre.” (*Milošević*, IT-02-54-T, Transcript, 16 December 2003, pp. 30494-30495).

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be “a military operation combined with a massacre” (*ibid.*, p. 30497). The ICTY record shows that Milošević denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark’s testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal (*Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 280).

438. In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević’s own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

Such is the case here. In view of the foregoing, the Court concludes that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.

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(2) *The Obligation to Punish Genocide*

439. The Court now turns to the question of the Respondent's compliance with its obligation to punish the crime of genocide stemming from Article I and the other relevant provisions of the Convention.

440. In its fifth final submission, Bosnia and Herzegovina requests the Court to adjudge and declare:

"5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal."

441. This submission implicitly refers to Article VI of the Convention, according to which:

"Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

442. The Court would first recall that the genocide in Srebrenica, the commission of which it has established above, was not carried out in the Respondent's territory. It concludes from this that the Respondent cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices, or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide. Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia's other international obligations, *inter alia* its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia's domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise

territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

443. It is thus to the obligation for States parties to co-operate with the "international penal tribunal" mentioned in the above provision that the Court must now turn its attention. For it is certain that once such a court has been established, Article VI obliges the Contracting Parties "which shall have accepted its jurisdiction" to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory — even if the crime of which they are accused was committed outside it — and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.

444. In order to determine whether the Respondent has fulfilled its obligations in this respect, the Court must first answer two preliminary questions: does the ICTY constitute an "international penal tribunal" within the meaning of Article VI? And must the Respondent be regarded as having "accepted the jurisdiction" of the tribunal within the meaning of that provision?

445. As regards the first question, the Court considers that the reply must definitely be in the affirmative. The notion of an "international penal tribunal" within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to "those Contracting Parties which shall have accepted [the] jurisdiction" of the international penal tribunal. Yet, it would be contrary to the object of the provision to interpret the notion of "international penal tribunal" restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter. The Court has found nothing to suggest that such a possibility was considered by the authors of the Convention, but no intention of seeking to exclude it can be imputed to them.

446. The question whether the Respondent must be regarded as having "accepted the jurisdiction" of the ICTY within the meaning of Article VI must consequently be formulated as follows: is the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of the Security Council resolution which established it, or of

some other rule of international law? If so, it would have to be concluded that, for the Respondent, co-operation with the ICTY constitutes both an obligation stemming from the resolution concerned and from the United Nations Charter, or from another norm of international law obliging the Respondent to co-operate, and an obligation arising from its status as a party to the Genocide Convention, this last clearly being the only one of direct relevance in the present case.

447. For the purposes of the present case, the Court only has to determine whether the FRY was under an obligation to co-operate with the ICTY, and if so, on what basis, from when the Srebrenica genocide was committed in July 1995. To that end, suffice it to note that the FRY was under an obligation to co-operate with the ICTY from 14 December 1995 at the latest, the date of the signing and entry into force of the Dayton Agreement between Bosnia and Herzegovina, Croatia and the FRY. Annex IA of that treaty, made binding on the parties by virtue of its Article II, provides that they must fully co-operate, notably with the ICTY. Thus, from 14 December 1995 at the latest, and at least on the basis of the Dayton Agreement, the FRY must be regarded as having “accepted [the] jurisdiction” of the ICTY within the meaning of Article VI of the Convention. This fact is sufficient for the Court in its consideration of the present case, since its task is to rule upon the Respondent’s compliance with the obligation resulting from Article VI of the Convention in relation to the Srebrenica genocide, from when it was perpetrated to the present day, and since the Applicant has not invoked any failure to respect the obligation to co-operate alleged to have occurred specifically between July and December 1995. Similarly, the Court is not required to decide whether, between 1995 and 2000, the FRY’s obligation to co-operate had any legal basis besides the Dayton Agreement. Needless to say, the admission of the FRY to the United Nations in 2000 provided a further basis for its obligation to co-operate: but while the legal basis concerned was thereby confirmed, that did not change the scope of the obligation. There is therefore no need, for the purposes of assessing how the Respondent has complied with its obligation under Article VI of the Convention, to distinguish between the period before and the period after its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.

448. Turning now to the facts of the case, the question the Court must answer is whether the Respondent has fully co-operated with the ICTY, in particular by arresting and handing over to the Tribunal any persons accused of genocide as a result of the Srebrenica genocide and finding themselves on its territory. In this connection, the Court would first observe that, during the oral proceedings, the Respondent asserted that the duty to co-operate had been complied with following the régime change in Belgrade in the year 2000, thus implicitly admitting that such had not been the case during the preceding period. The conduct of the

organs of the FRY before the régime change however engages the Respondent’s international responsibility just as much as it does that of its State authorities from that date. Further, the Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladić, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him. In particular, counsel for the Applicant referred during the hearings to recent statements made by the Respondent’s Minister for Foreign Affairs, reproduced in the national press in April 2006, and according to which the intelligence services of that State knew where Mladić was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive. The authenticity and accuracy of those statements has not been disputed by the Respondent at any time.

449. It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as a party to the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the Convention. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the “international penal tribunal”, the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have “accepted [the] jurisdiction” of that “international penal tribunal”; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty. On this point, the Applicant’s submissions relating to the violation by the Respondent of Articles I and VI of the Convention must therefore be upheld.

450. It follows from the foregoing considerations that the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged.

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X. THE QUESTION OF RESPONSIBILITY FOR BREACH OF THE COURT'S ORDERS INDICATING PROVISIONAL MEASURES

451. In its seventh submission Bosnia and Herzegovina requests the Court to adjudge and declare:

"7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

452. The Court observes that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109*). Although the Court only had occasion to make such a finding in a judgment subsequent to the Orders that it made in the present dispute, this does not affect the binding nature of those Orders, since in the Judgment referred to the Court did no more than give the provisions of the Statute the meaning and scope that they had possessed from the outset. It notes that provisional measures are aimed at preserving the rights of each of the parties pending the final decision of the Court. The Court's Orders of 8 April and 13 September 1993 indicating provisional measures created legal obligations which both Parties were required to satisfy.

453. The Court indicated the following provisional measures in the *dispositif*, paragraph 52, of its Order of 8 April 1993:

"A. (1). . . . The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;

(2). . . . The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;

B. . . . The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution."

454. The Court reaffirmed these measures in the *dispositif* of its Order of 13 September 1993.

455. From the Applicant's written and oral pleadings as a whole, it is clear that the Applicant is not accusing the Respondent of failing to respect measure B above, and that its submissions relate solely to the measures indicated in paragraph A, subparagraphs (1) and (2). It is therefore only to that extent that the Court will consider whether the Respondent has fully complied with its obligation to respect the measures ordered by the Court.

456. The answer to this question may be found in the reasoning in the present Judgment relating to the Applicant's other submissions to the Court. From these it is clear that in respect of the massacres at Srebrenica in July 1995 the Respondent failed to fulfil its obligation indicated in paragraph 52 A (1) of the Order of 8 April 1993 and reaffirmed in the Order of 13 September 1993 to "take all measures within its power to prevent commission of the crime of genocide". Nor did it comply with the measure indicated in paragraph 52 A (2) of the Order of 8 April 1993, reaffirmed in the Order of 13 September 1993, insofar as that measure required it to "ensure that any . . . organizations and persons which may be subject to its . . . influence . . . do not commit any acts of genocide".

457. However, the remainder of the Applicant's seventh submission claiming that the Respondent failed to comply with the provisional measures indicated must be rejected for the reasons set out above in respect of the Applicant's other submissions (paragraphs 415 and 424).

458. As for the request that the Court hold the Respondent to be under an obligation to the Applicant to provide symbolic compensation, in an amount to be determined by the Court, for the breach thus found, the Court observes that the question of compensation for the injury caused to the Applicant by the Respondent's breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations under the Genocide Convention. It will therefore be dealt with below, in connection with consideration of points (b) and (c) of the Respondent's sixth submission, which concern the financial compensation which the Applicant claims to be owed by the Respondent.

\* \* \*

## XI. THE QUESTION OF REPARATION

459. Having thus found that the Respondent has failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, the Court turns to the question of reparation. The Applicant, in its final submissions, has asked the Court to decide that the Respondent

“must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for . . . violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused” (submission 6 (b)).

The Applicant also asks the Court to decide that the Respondent

“shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal” (submission 6 (a)),

and that the Respondent “shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court” (submission 6 (d)). These submissions, and in particular that relating to compensation, were however predicated on the basis that the Court would have upheld, not merely that part of the Applicant’s claim as relates to the obligation of prevention and punishment, but also the claim that the Respondent has violated its substantive obligation not to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement, and the claim that the Respondent has aided and abetted genocide. The Court has now to consider what is the appropriate form of reparation for the other forms of violation of the Convention which have been alleged against the Respondent and which the Court has found to have been established, that is to say breaches of the obligations to prevent and punish.

460. The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that “reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” (*P.C.I.J., Series A, No. 17*, p. 47: see

also Article 31 of the ILC’s Articles on State Responsibility). In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, “[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it” (*I.C.J. Reports 1997*, p. 81, para. 152.; cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 198, paras. 152-153; see also Article 36 of the ILC’s Articles on State Responsibility). It is therefore appropriate to consider what were the consequences of the failure of the Respondent to comply with its obligations under the Genocide Convention to prevent and punish the crime of genocide, committed in Bosnia and Herzegovina, and what damage can be said to have been caused thereby.

461. The Court has found that the authorities of the Respondent could not have been unaware of the grave risk of genocide once the VRS forces had decided to take possession of the Srebrenica enclave, and that in view of its influence over the events, the Respondent must be held to have had the means of action by which it could seek to prevent genocide, and to have manifestly refrained from employing them (paragraph 438). To that extent therefore it failed to comply with its obligation of prevention under the Convention. The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. To make this finding, the Court did not have to decide whether the acts of genocide committed at Srebrenica would have occurred anyway even if the Respondent had done as it should have and employed the means available to it. This is because, as explained above, the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome. It therefore does not follow from the Court’s reasoning above in finding a violation by the Respondent of its obligation of prevention that the atrocious suffering caused by the genocide committed at Srebrenica would not have occurred had the violation not taken place.

462. The Court cannot however leave it at that. Since it now has to rule on the claim for reparation, it must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the

principle of customary international law stated above. In this context, the question just mentioned, whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant, for the definition of the extent of the obligation of reparation borne by the Respondent as a result of its wrongful conduct. The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.

463. It is however clear that the Applicant is entitled to reparation in the form of satisfaction, and this may take the most appropriate form, as the Applicant itself suggested, of a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide. As in the *Corfu Channel* (*United Kingdom v. Albania*) case, the Court considers that a declaration of this kind is "in itself appropriate satisfaction" (*Merits, Judgment, I.C.J. Reports 1949*, pp. 35, 36), and it will, as in that case, include such a declaration in the operative clause of the present Judgment. The Applicant acknowledges that this failure is no longer continuing, and accordingly has withdrawn the request made in the Reply that the Court declare that the Respondent "has violated *and is violating* the Convention" (emphasis added).

464. The Court now turns to the question of the appropriate reparation for the breach by the Respondent of its obligation under the Convention to punish acts of genocide; in this respect, the Applicant asserts the existence of a continuing breach, and therefore maintains (*inter alia*) its request for a declaration in that sense. As noted above (paragraph 440), the Applicant includes under this heading the failure "to transfer individuals accused of genocide or any other act prohibited by the Conven-

tion to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal"; and the Court has found that in that respect the Respondent is indeed in breach of Article VI of the Convention (paragraph 449 above). A declaration to that effect is therefore one appropriate form of satisfaction, in the same way as in relation to the breach of the obligation to prevent genocide. However, the Applicant asks the Court in this respect to decide more specifically that

"Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal."

465. It will be clear from the Court's findings above on the question of the obligation to punish under the Convention that it is satisfied that the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under Articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić (paragraph 448). The Court will therefore make a declaration in these terms in the operative clause of the present Judgment, which will in its view constitute appropriate satisfaction.

466. In its final submissions, the Applicant also requests the Court to decide "that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court". As presented, this submission relates to all the wrongful acts, i.e. breaches of the Genocide Convention, attributed by the Applicant to the Respondent, thus including alleged breaches of the Respondent's obligation not itself to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement. Insofar as the Court has not upheld these claims, the submission fails. There remains however the question whether it is appropriate to direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide. The Court notes the reasons advanced by counsel for the Applicant at the hearings in support of the submission, which relate for the most part to "recent events [which] cannot fail to cause concern as to whether movements in Serbia and Montenegro calling for genocide have disappeared". It considers that these indications do not constitute sufficient grounds for requiring guarantees of non-repetition. The Applicant also referred in this connection to the question of non-compliance with provisional measures, but this matter has already been examined above (paragraphs 451 to 458), and will be mentioned further below. In

the circumstances, the Court considers that the declaration referred to in paragraph 465 above is sufficient as regards the Respondent's continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate.

467. Finally, the Applicant has presented the following submission:

“That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court.”

The provisional measures indicated by the Court's Order of 8 April 1993, and reiterated by the Order of 13 September 1993, were addressed specifically to the Respondent's obligation “to prevent commission of the crime of genocide” and to certain measures which should “in particular” be taken to that end (*I.C.J. Reports 1993*, p. 24, para. 52 (A) (1) and (2)).

468. Provisional measures under Article 41 of the Statute are indicated “pending [the] final decision” in the case, and the measures indicated in 1993 will thus lapse on the delivery of the present Judgment (cf. *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *Preliminary Objections, Judgment, I.C.J. Reports 1952*, p. 114; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 112). However, as already observed (paragraph 452 above), orders made by the Court indicating provisional measures under Article 41 of the Statute have binding effect, and their purpose is to protect the rights of either party, pending the final decision in the case.

469. The Court has found above (paragraph 456) that, in respect of the massacres at Srebrenica in July 1995, the Respondent failed to take measures which would have satisfied the requirements of paragraphs 52 (A) (1) and (2) of the Court's Order of 8 April 1993 (reaffirmed in the Order of 13 September 1993). The Court however considers that, for purposes of reparation, the Respondent's non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention. The Court does not therefore find it appropriate to give effect to the Applicant's request for an order for symbolic compensation in this respect. The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court's Orders indicating provisional measures.

470. The Court further notes that one of the provisional measures indicated in the Order of 8 April and reaffirmed in that of 13 September 1993 was addressed to both Parties. The Court's findings in paragraphs 456 to 457 and 469 are without prejudice to the question whether the Applicant did not also fail to comply with the Orders indicating provisional measures.

\* \* \*

## XII. OPERATIVE CLAUSE

471. For these reasons,

THE COURT,

(1) by ten votes to five,

*Rejects* the objections contained in the final submissions made by the Respondent to the effect that the Court has no jurisdiction; and *affirms* that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to adjudicate upon the dispute brought before it on 20 March 1993 by the Republic of Bosnia and Herzegovina;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;*

AGAINST: *Judges Ranjeva, Shi, Koroma, Skotnikov; Judge ad hoc Kreća;*

(2) by thirteen votes to two,

*Finds* that Serbia has not committed genocide, through its organs or persons whose acts engage its responsibility under customary international law, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;*

AGAINST: *Vice-President Al-Khasawneh; Judge ad hoc Mahiou;*

(3) by thirteen votes to two,

*Finds* that Serbia has not conspired to commit genocide, nor incited the commission of genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;*

AGAINST: *Vice-President Al-Khasawneh; Judge ad hoc Mahiou;*

(4) by eleven votes to four,

*Findings* that Serbia has not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Sepúlveda-Amor, Skotnikov; Judge ad hoc Kreća;*

AGAINST: *Vice-President Al-Khasawneh; Judges Keith, Bennouna; Judge ad hoc Mahiou;*

(5) by twelve votes to three,

*Findings* that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;*

AGAINST: *Judges Tomka, Skotnikov; Judge ad hoc Kreća;*

(6) by fourteen votes to one,

*Findings* that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;*

AGAINST: *Judge ad hoc Kreća;*

(7) by thirteen votes to two,

*Findings* that Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;*

AGAINST: *Judge Skotnikov; Judge ad hoc Kreća;*

(8) by fourteen votes to one,

*Decides* that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention

and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;*

AGAINST: *Judge ad hoc Kreća;*

(9) by thirteen votes to two,

*Findings* that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court's findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate.

IN FAVOUR: *President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;*

AGAINST: *Vice-President Al-Khasawneh; Judge ad hoc Mahiou.*

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of February, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Bosnia and Herzegovina and the Government of Serbia, respectively.

(Signed) Rosalyn HIGGINS,  
President.

(Signed) Philippe COUVREUR,  
Registrar.

Vice-President AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judges RANJEVA, SHI and KOROMA append a joint dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a separate opinion to the Judgment of the Court; Judges SHI and KOROMA append a joint declaration to the Judgment of the Court; Judges OWADA and TOMKA append separate opinions to the Judgment of the Court; Judges KEITH, BENNOUNA and SKOTNIKOV append declarations

to the Judgment of the Court; Judge *ad hoc* МАИЮУ appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* КРЕЋА appends a separate opinion to the Judgment of the Court.

(*Initialled*) R.H.

(*Initialled*) Ph.C.

**International Criminal Tribunal for the former Yugoslavia**

**Prosecutor v. Duško Tadić  
Judgment**

*Appeals Chamber, 15 July 1999*



International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-94-1-A  
Date: 15 July 1999  
Original: English

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding  
Judge Antonio Cassese  
Judge Wang Tieya  
Judge Rafael Nieto-Navia  
Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 15 July 1999

PROSECUTOR

v.

DU[KO TADI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa  
Ms. Brenda J. Hollis  
Mr. William Fenrick  
Mr. Michael Keegan  
Ms. Ann Sutherland

Counsel for the Appellant:

Mr. William Clegg  
Mr. John Livingston

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## I. INTRODUCTION

### A. Procedural background

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal" or "Tribunal") is seized of three appeals in relation to the Opinion and Judgment rendered by Trial Chamber II<sup>1</sup> on 7 May 1997 in the case of *The Prosecutor v. Duško Tadic*, Case No.: IT-94-1-T ("Judgement")<sup>2</sup> and the subsequent Sentencing Judgment of 14 July 1997 ("Sentencing Judgement")<sup>3</sup>. With the exception of the Appeals Chamber's judgement in *The Prosecutor v. Dražen Erdemović*<sup>4</sup> where the accused had entered a plea of guilty, this is the first time that the Appeals Chamber is deciding an appeal from a final judgement of a Trial Chamber.

2. The Indictment (as amended) charged the accused, Duško Tadic, with 34 counts of crimes within the jurisdiction of the International Tribunal. At his initial appearance before the Trial Chamber on 26 April 1995, the accused pleaded not guilty to all counts. Three of the counts were subsequently withdrawn at trial. Of the remaining 31 counts, the Trial Chamber found the accused guilty on nine counts, guilty in part on two counts and not guilty on twenty counts.

3. Both Duško Tadic ("Defence" or "Appellant") and the Prosecutor ("Prosecution" or "Cross-Appellant") now appeal against separate aspects of the Judgement ("Appeal against Judgement" and "Cross-Appeal", respectively).<sup>5</sup> Additionally, the Defence appeals against the Sentencing Judgement ("Appeal against Sentencing Judgement"). Combined, these appeals are referred to as "the Appeals".

<sup>1</sup> Composed of Judge Gabrielle Kirk McDonald (Presiding), Judge Ninian Stephen and Judge Lal Chand Vohrah.

<sup>2</sup> "Opinion and Judgment", *The Prosecutor v. Duško Tadic*, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997. (For a list of designations and abbreviations used in this Judgement, see Annex A – Glossary of Terms).

<sup>3</sup> "Sentencing Judgment", *The Prosecutor v. Duško Tadic*, Case No.: IT-94-1-T, Trial Chamber II, 14 July 1997.

<sup>4</sup> "Judgement", *The Prosecutor v. Dražen Erdemović*, Case No.: IT-96-22-A, Appeals Chamber, 7 October 1997.

<sup>5</sup> It should be observed that Duško Tadić in the present proceedings is appellant and cross-respondent. Conversely, the Prosecutor is respondent and cross-appellant. In the interest of clarity of presentation,

4. Oral argument on the Appeals was heard by the Appeals Chamber on 19, 20 and 21 April 1999. On 21 April 1999, the Appeals Chamber reserved its judgement to a later date.

5. Having considered the written and oral submissions of the Prosecution and the Defence, the Appeals Chamber,

HEREBY RENDERS ITS JUDGEMENT.

#### 1. The Appeals

##### (a) Notices of Appeal

6. A notice of appeal against the Judgement was filed on behalf of Duško Tadic on 3 June 1997. Subsequently, on 8 January 1999, the Defence filed an amended notice of appeal ("Amended Notice of Appeal against Judgement").<sup>6</sup> Leave to amend the notice of appeal was granted, in part, by the Appeals Chamber in an oral order made on 25 January 1999.<sup>7</sup>

7. On 6 June 1997, the Prosecution filed a notice of appeal against the Judgement ("Notice of Cross-Appeal").<sup>8</sup>

8. After the notices of appeal against the Judgement were filed, proceedings continued before the Trial Chamber in relation to sentencing, and on 14 July 1997 the Trial Chamber delivered its Sentencing Judgement. Sentences were imposed for each of the 11 counts on which the Appellant had been found guilty or guilty in part, to be served concurrently. On 11 August 1997, the Defence filed a notice of appeal against the Sentencing Judgement. The Prosecution has not appealed against the Sentencing Judgement.

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however, the designations "Defence" or "Appellant" and "Prosecution" or "Cross-Appellant" will be employed throughout this Judgement.

<sup>6</sup> "Amended Notice of Appeal", Case No.: IT-94-1-A, 8 January 1999.

<sup>7</sup> Transcript of hearing in *The Prosecutor v. Duško Tadic*, Case No.: IT-94-1-A, 25 January 1999, p. 307 (T. 307 (25 January 1999)). (All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public).

<sup>8</sup> "Notice of Appeal", Case No.: IT-94-1-A, 6 June 1997.

(b) Filing of Briefs

9. As set out in further detail below, the present proceedings were significantly delayed by repeated applications for extension of time in relation to an application for admission of additional evidence first made by the Defence on 6 October 1997.<sup>9</sup> In January 1998, the Appeals Chamber suspended the timetable for filings in the Appeals until the determination of the Appellant's application.<sup>10</sup> Following the Appeals Chamber's decision of 15 October 1998 on the matter,<sup>11</sup> the normal appeals sequence resumed. In view of the rather complicated pattern formed by the parties' briefs on the Appeals, it is useful to refer to the written submissions filed by the parties.

10. The Defence filed separate briefs for the Appeal against Judgement ("Appellant's Brief on Judgement") and the Appeal against Sentencing Judgement ("Appellant's Brief on Sentencing Judgement"). These briefs were filed on 12 January 1998.<sup>12</sup> The Prosecution responded to the briefs of the Appellant on 16 and 17 November 1998 ("Prosecution's Response to Appellant's Brief on Judgement" and "Prosecution's Response to Appellant's Brief on Sentencing Judgement", respectively).<sup>13</sup>

11. As a consequence of filing an Amended Notice of Appeal against Judgement, the Defence filed an Amended Brief of Argument (with annexes) on 8 January 1999 ("Appellant's Amended Brief on Judgement").<sup>14</sup> This subsequent brief was accepted by order of the Appeals Chamber on 25 January 1999.<sup>15</sup>

12. Alongside the filings in relation to the Appellant's Appeal against Judgement and Appeal against Sentencing Judgement, both parties filed written submissions in relation to the Prosecution's Cross-Appeal. The Prosecution's brief in relation to the Cross-Appeal

<sup>9</sup> "Motion for the Extension of the Time Limit", Case No.: IT-94-1-A, 6 October 1997.  
<sup>10</sup> T. 105 (22 January 1998).

<sup>11</sup> "Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence", Case No.: IT-94-1-A, 15 October 1998.

<sup>12</sup> "Appellants Brief on Appeal Against Opinion and Judgement of 7 May 1997", Case No.: IT-94-1-A, 12 January 1998, with accompanying appendices separately filed; "Appellant's Brief on Appeal Against Sentencing Judgement" Case No.: IT-94-1-A, 12 January 1998.

<sup>13</sup> "Cross-Appellant's Response to Appellant's Brief on Appeal against Opinion and Judgement of May 7, 1997. Filed on 12 January 1998", Case No.: IT-94-1-A, 17 November 1998; "Response to Appellant's Brief on Appeal Against Sentencing Judgement filed on 12 January 1998", Case No.: IT-94-1-A, 16 November 1998.

<sup>14</sup> "Amended Brief of Argument on behalf of the Appellant", Case No.: IT-94-1-A, 8 January 1999.  
<sup>15</sup> T. 308 (25 January 1999).

was filed on 12 January 1998 ("Cross-Appellant's Brief").<sup>16</sup> A response to the Prosecution's brief was filed by the Defence on 24 July 1998.<sup>17</sup> The Prosecution filed a brief in reply on 1 December 1998 ("Cross-Appellant's Brief in Reply").<sup>18</sup> The Defence subsequently filed a further response to the Cross-Appellant's Brief ("Defence's Substituted Response to Cross-Appellant's Brief").<sup>19</sup> The filing of this further brief was accepted by order of the Appeals Chamber on 4 March 1999.<sup>20</sup>

13. Skeleton arguments consolidating and clarifying the parties' respective positions in relation to the Appeals were filed by both parties on 19 March 1999.<sup>21</sup>

2. Applications for Admission of Additional Evidence under Rule 115

14. A confidential motion for the admission of a significant amount of additional evidence was filed by the Defence on 6 October 1997.<sup>22</sup> In the motion, as supplemented by subsequent submissions, the Defence sought leave under Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") to present additional documentary material and to call more than 80 witnesses before the Appeals Chamber.<sup>23</sup> In addition, or in the alternative, the Defence requested that the motion be considered as a

<sup>16</sup> "Brief of Argument of the Prosecution (Cross-Appellant)", Case No.: IT-94-1-A, 12 January 1998 and accompanying "Book of Authorities", Case No.: IT-94-1-A, 22 January 1998. (See also "Corrigendum to Prosecutor's Brief of Argument filed on 12 January 1998 and Book of Authorities filed on 22 January 1998" Case No.: IT-94-1-A, 9 September 1998)

<sup>17</sup> "The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 12, 1998", Case No.: IT-94-1-A, 24 July 1998.

<sup>18</sup> "Prosecution (Cross-Appellant) Brief in Reply", Case No.: IT-94-1-A, 1 December 1998.

<sup>19</sup> "The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 19, 1999", Case No.: IT-94-1-A, 19 January 1999.

<sup>20</sup> "Order Accepting Filing of Substitute Brief", Case IT-94-1-A, 4 March 1999. (See also "Opposition to the Appellant's 19 January 1999 filing entitled 'The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of 19 January, 1999 (sic)'" Case No.: IT-94-1-A, 21 January 1999; "Submission in relation to Appellant's 'Substitute Brief' filed on 19 January 1999", Case No.: IT-94-1-A, 24 February 1999).

<sup>21</sup> "Skeleton Argument – Appellant's Appeal Against Conviction", Case No.: IT-94-1-A, 19 March 1999 ("Skeleton Argument – Appellant's Appeal Against Conviction"); "Skeleton Argument – Appeal Against Sentence", Case No.: IT-94-1-A, 19 March 1999; "Skeleton Argument of the Prosecution", Case No.: IT-94-1-A, 19 March 1999 ("Skeleton Argument of the Prosecution"). See also "Skeleton Argument – Prosecutor's Cross-Appeal", Case No.: IT-94-1-A, originally filed by the Defence on 19 March 1999 and subsequently re-filed on 20 April 1999 ("Defence's Skeleton Argument on the Cross-Appeal").

<sup>22</sup> "Motion for the Extension of the Time Limit", Case No.: IT-94-1-A, 6 October 1997.  
<sup>23</sup> Rule 115 provides:

"(A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the

motion for review of the Judgement on the basis of a "new fact" within the meaning of Rule 119 of the Rules.<sup>24</sup>

15. The proceedings in relation to the motion continued for just under twelve months. A substantial number of extensions of time was sought by both parties.<sup>25</sup>

16. By decision of the Appeals Chamber on 15 October 1998 and for the reasons stated therein, the Defence motion for the admission of additional evidence was dismissed ("Decision on Admissibility of Additional Evidence").<sup>26</sup> Considering the motion under Rule 115 of the Rules, the Appeals Chamber expressed its view that additional evidence should not be admitted lightly at the appellate stage. Construing the standard established by this Rule, it was noted that additional evidence is not admissible in the absence of a reasonable explanation as to why the evidence was not available at trial. The Appeals Chamber held that such unavailability must not result from the lack of due diligence on the part of counsel who undertook the defence of the accused before the Trial Chamber. Commenting further on the second criterion of admissibility under Rule 115, it was considered that for the purposes of the present case, the interests of justice required admission of additional evidence only if (a) the evidence was relevant to a material issue,

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Registrar not less than fifteen days before the date of the hearing. (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require."

<sup>24</sup> Rule 119 provides:

"Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement."

<sup>25</sup> "Motion to Extend the Time Limit", Case No.: IT-94-1-A, 10 September 1997; "Motion for the Extension of the Time Limit" (Confidential), Case No.: IT-94-1-A, 6 October 1997; "The Motion for the Extension of Evidence on Appeal", Case No.: IT-94-1-A, 17 March 1998; "Application for Extension of Time to File Additional Cross-Appellant's Response to Appellant's Submissions since 9<sup>th</sup> March 1998 on the Motion for the Presentation of Additional Evidence under Rule 115", Case No.: IT-94-1-A, 15 June 1998; "Request for an Extension of Time to File a Reply to the Appellant's Motion Entitled 'Motion for the Extension of the Time Limit'", Case No.: IT-94-1-A, 9 October 1997; "Request for a Modification of the Appeals Chamber Order of 22 January 1998", Case No.: IT-94-1-A, 13 February 1998; "Request for a Modification of the Appeals Chamber Order of 2 February 1998", Case No.: IT-94-1-A, 7 May 1998. The following orders were made in relation to these applications: "Scheduling Order", Case No.: IT-94-1-A, 24 November 1997; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 23 March 1998; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 13 May 1998; "Order Granting Extension of Time", Case No.: IT-94-1-A, 10 June 1998; "Order Granting Extension of Time", Case No.: IT-94-1-A, 17 June 1998; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 9 October 1997; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 19 February 1998; "Order Granting requests for Extension of Time", Case No.: IT-94-1-A, 13 May 1998.

<sup>26</sup> "Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence", Case No.: IT-94-1-A, 15 October 1998.

(b) the evidence was credible, and (c) the evidence was such that it would probably show that the conviction was unsafe. Applying these criteria to the evidence sought to be admitted, the Appeals Chamber was not satisfied that the interests of justice required that any material which was not available at trial be presented on appeal.

17. Further motions for the admission of additional evidence pursuant to Rule 115 were made by the Defence on 8 January and 19 April 1999.<sup>27</sup> By oral orders of 25 January and 19 April 1999, the motions were rejected by the Appeals Chamber.<sup>28</sup>

### 3. Contempt proceedings

18. In the course of the appeal process, proceedings were initiated by the Appeals Chamber against Mr. Milan Vujin, former lead counsel for the Appellant, relating to allegations of contempt of the International Tribunal.<sup>29</sup> These allegations are subject to proceedings separate from the Appeals.

19. A hearing on the contempt proceedings commenced on 26 April 1999. The matter is currently pending before the Appeals Chamber.

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<sup>27</sup> "Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115 of the Tribunal's Rules", Case No.: IT-94-1-A, 8 January 1999; "Motion (3) to Admit Additional Evidence on Appeal Pursuant to Rule 115 of the Rules of Procedure and Evidence", Case No.: IT-94-1, 19 April 1999. T. 307-308 (25 January 1999); T. 20 (19 April 1999).

<sup>28</sup> See "Scheduling Order Concerning Allegations against Prior Counsel", Case No.: IT-94-1-A, 10 February 1999. At the outset of the appellate process, Mr. Milan Vujin acted as lead counsel for the Defence, with the assistance of Mr. R. J. Livingston. By a decision of the Deputy Registrar on 19 November 1998, Mr. Milan Vujin was withdrawn as counsel for the accused and replaced by Mr. William Clegg as lead counsel (See "Decision of Deputy Registrar regarding the Assignment of Counsel and the Withdrawal of Lead Counsel for the Accused", Case No.: IT-94-1-A, 19 November 1998).

## B. Grounds of Appeal

### 1. The Appeal against Judgement

20. As set out in the Appellant's Amended Notice of Appeal against Judgement and Appellant's Amended Brief on Judgement, the Defence advances the following two grounds of appeal against Judgement:

Ground (1): The Appellant's right to a fair trial was prejudiced as there was no "equality of arms" between the Prosecution and the Defence due to the prevailing circumstances in which the trial was conducted.<sup>30</sup>

Ground (3): The Trial Chamber erred at paragraph 397 of the Judgement when it decided that it was satisfied beyond reasonable doubt that the Appellant was guilty of the murders of Osman Didovic and Edin Be{.}<sup>31</sup>

21. The Defence sought leave to amend its Notice of Appeal to include a further ground of appeal ("Ground 2"), alleging that the Appellant's right to a fair trial was gravely prejudiced by the conduct of his former counsel, Mr. Milan Vujin.<sup>32</sup> Leave to amend the Notice of Appeal to include this ground was denied by the Appeals Chamber on 25 January 1999,<sup>33</sup> thus leaving only Grounds 1 and 3 in the Appellant's Appeal against Judgement.

### 2. The Cross-Appeal

22. The Prosecution raises the following grounds of appeal against the Judgement:

Ground (1): The majority of the Trial Chamber erred when it decided that the victims of the acts ascribed to the accused in Section III of the Judgement did not enjoy the protection of

<sup>30</sup> Appellant's Amended Notice of Appeal against Judgement, paras. 1.1-1.4; Appellant's Amended Brief on Judgement, paras. 1.1-1.12.

<sup>31</sup> Appellant's Amended Notice of Appeal against Judgement, paras. 3.1-3.6; Appellant's Amended Brief on Judgement, paras. 3.1-3.11.

<sup>32</sup> Amended Notice of Appeal, paras. 2.1-2.4.

<sup>33</sup> T. 307 (25 January 1999).

the grave breaches regime of the Geneva Conventions of 12 August 1949 as recognised by Article 2 of the Statute of the International Tribunal ("Statute").<sup>34</sup>

Ground (2): The Trial Chamber erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had played any part in the killing of any of the five men from the village of Jaskici, as alleged in Counts 29, 30 and 31 of the Indictment.<sup>35</sup>

Ground (3): The Trial Chamber erred when it held that in order to be found guilty of a crime against humanity, the Prosecution must prove beyond reasonable doubt that the accused not only formed the intent to commit the underlying offence but also knew of the context of a widespread or systematic attack on the civilian population and that the act was not taken for purely personal reasons unrelated to the armed conflict.<sup>36</sup>

Ground (4): The Trial Chamber erred when it held that discriminatory intent is an element of all crimes against humanity under Article 5 of the Statute of the International Tribunal.<sup>37</sup>

Ground (5): The majority of the Trial Chamber erred in a decision of 27 November 1996 in which it denied a Prosecution motion for production of defence witness statements ("Witness Statements Decision").<sup>38</sup>

### 3. The Appeal against Sentencing Judgement

23. The Defence raises the following grounds of appeal against the Sentencing Judgement:

Ground (1): The total sentence of 20 years decided by the Trial Chamber is unfair.<sup>39</sup>

(i) The sentence is unfair as it was longer than the facts of the case required or demanded.<sup>40</sup>

<sup>34</sup> Notice of Cross-Appeal, p. 2; Cross-Appellant's Brief, paras. 2.1-2.88.

<sup>35</sup> Notice of Cross-Appeal, p. 2; Cross-Appellant's Brief, paras. 3.1-3.33.

<sup>36</sup> Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 4.1-4.23.

<sup>37</sup> Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 5.1-5.28.

<sup>38</sup> Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 6.1-6.32 with reference to "Decision on Prosecution Motion for Production of Defence Witness Statements", Case No.: IT-94-1-T, Trial Chamber II, 27 November 1996.

<sup>39</sup> T. 306 (21 April 1999).

(ii) The Trial Chamber erred by failing to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia, as required by Article 24 of the Statute of the International Tribunal. Under this practice, a 20-year sentence is the longest sentence that can be imposed, but only as an alternative to the death penalty.<sup>41</sup>

(iii) The Trial Chamber paid insufficient attention to the personal circumstances of Duško Tadić.<sup>42</sup>

Ground (2): The Trial Chamber erred by recommending that the calculation of the minimum sentence should commence “from the date of this Sentencing Judgement or of the final determination of any appeal, whichever is the latter”.<sup>43</sup>

Ground (3): The Trial Chamber erred in not giving the Appellant credit for the time spent in confinement in Germany before the International Tribunal requested deferral in this case.<sup>44</sup>

### C. Relief Requested

#### 1. The Appeal against Judgement

24. In the Appeal against Judgement the Defence seeks the following relief:<sup>45</sup>

(i) That the decision of the Trial Chamber that the Appellant is guilty of the crimes proved against him be set aside.

(ii) That a re-trial of the Appellant be ordered.

(iii) In the alternative to the relief sought under (i) and (ii) above, that the decision of the Trial Chamber at paragraph 397 of the Judgement that the Appellant is guilty of the murders of Osman Didovic and Edin Be(i) be reversed.

<sup>40</sup> T. 303 (21 April 1999).

<sup>41</sup> Appellant’s Brief on Sentencing Judgement, pp. 4–6; T. 304 (21 April 1999).

<sup>42</sup> Appellant’s Brief on Sentencing Judgement, pp. 9–10; T. 305 (21 April 1999).

<sup>43</sup> Sentencing Judgement, para. 76. See Appellant’s Brief on Sentencing Judgement, p. 10.

<sup>44</sup> *Ibid.*, p. 14.

<sup>45</sup> Appellant’s Amended Notice of Appeal against Judgement, p. 3.

(iv) That the sentence of the Appellant be reviewed in the light of the relief sought under (iii) above.

#### 2. The Cross-Appeal

25. In the Cross-Appeal the Prosecution seeks the following relief:

(i) That the majority decision of the Trial Chamber at page 227, paragraph 607 of the Judgement, holding that the victims of the acts ascribed to the Appellant in Section III of the Judgement did not enjoy the protection of the prohibitions prescribed by the grave breaches regime applicable to civilians in the hands of a party to an armed conflict of which they are not nationals (which falls under Article 2 of the Statute of the Tribunal), be reversed.<sup>46</sup>

(ii) That the finding of the Trial Chamber at page 132, paragraph 373 of the Judgement, that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the Appellant had played any part in the killing of any of the five men from the village of Jaskici, be reversed.<sup>47</sup>

(iii) That the decision of the Trial Chamber at pages 252–253, paragraph 656 of the Judgement, that in order to be found guilty of a crime against humanity the Prosecution must prove beyond reasonable doubt that the Appellant not only formed the intent to commit the underlying offence but also knew of the context of the widespread or systematic attack on the civilian population and that the act was not taken for purely personal reasons unrelated to the armed conflict, be reversed.<sup>48</sup>

(iv) That the decision of the Trial Chamber at page 250, paragraph 652 of the Judgement, that discriminatory intent is an ingredient of all crimes against humanity under Article 5 of the Statute, be reversed.<sup>49</sup>

(v) That the Witness Statements Decision be reviewed.<sup>50</sup>

<sup>46</sup> Notice of Cross-Appeal, p. 3.

<sup>47</sup> *Ibid.*, p. 4.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

3. The Appeal against Sentencing Judgement

26. By the Appeal against Sentencing Judgement, the Defence would appear to seek the following relief:
- (i) That the sentence imposed by the Trial Chamber be reduced.
  - (ii) That the calculation of the minimum sentence imposed by the Trial Chamber be altered to run from the commencement of the Appellant's detention.
  - (iii) That the Appellant be given credit for time spent in detention in Germany prior to the request for deferral made by the International Tribunal in this case.

D. Sentencing Procedure

27. The Appeal against Sentencing Judgement was the subject of oral argument by the parties. However, in the view of the Appeals Chamber, that appeal may be conveniently considered in connection with the appeal by the Prosecution relating to certain counts of the Indictment in respect of which the accused was acquitted. Both the Prosecution and the Appellant agreed that, if the Appellant were found guilty on those counts, there should be a separate sentencing procedure relating thereto. As will appear below, the Appellant is found guilty on those counts, with the consequence that there will have to be a separate sentencing procedure in relation to those counts. The Appeals Chamber considers that its decision on the Appeal against Sentencing Judgement should correspondingly be deferred to the stage of a separate sentencing procedure.

28. An earlier procedure provided for a sentencing hearing to take place subsequent to conviction; that procedure was replaced, in July 1998, by Sub-rule 87(C) of the Rules, which provides for sentence to be imposed when conviction is ordered. The earlier procedure was applied when the Appellant was originally sentenced and was in force when the Appeals were brought. In respect of the change, Sub-rule 6(D) provides as follows:

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<sup>50</sup> Ibid.

An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused in any pending case.

In the particular circumstances of the case, the Appeals Chamber considers that the rights of the Appellant would be prejudiced if his appeal were to be determined under the new Rule. The Appeals Chamber will therefore follow the previous procedure in respect of the counts on which the Appellant was acquitted by the Trial Chamber but on which he is now found guilty. Correspondingly, the Appeal against Sentencing Judgement will be determined at the separate sentencing stage.

## II. FIRST GROUND OF APPEAL BY THE DEFENCE: INEQUALITY OF ARMS LEADING TO DENIAL OF FAIR TRIAL

### A. Submissions of the Parties

#### 1. The Defence Case

29. In the first ground of the Appeal against Judgement, the Defence alleges that the Appellant's right to a fair trial was prejudiced by the circumstances in which the trial was conducted. Specifically, it alleges that the lack of cooperation and the obstruction by certain external entities -- the Government of the Republika Srpska and the civic authorities in Prijedor -- prevented it from properly presenting its case at trial.<sup>51</sup> The Defence contends that, whilst most Defence witnesses were Serbs still residing in the Republika Srpska, the majority of the witnesses appearing for the Prosecution were Muslims residing in countries in Western Europe and North America whose governments cooperated fully. It avers that the lack of cooperation displayed by the authorities in the Republika Srpska had a disproportionate impact on the Defence. It is accordingly submitted that there was no "equality of arms" between the Prosecution and the Defence at trial, and that the effect of this lack of cooperation was serious enough to frustrate the Appellant's right to a fair trial.<sup>52</sup> The Defence therefore, requests the Appeals Chamber to set aside the Trial Chamber's findings of guilt and to order a re-trial.<sup>53</sup>

30. Citing cases decided by both the European Commission of Human Rights ("Eur. Commission H. R.") and the European Court of Human Rights ("Eur. Court H. R.") under the provision in the European Convention on Human Rights ("ECHR") corresponding to Article 20(1) of the Statute, the Defence submits that the guarantee of a fair trial under the Statute incorporates the principle of equality of arms.<sup>54</sup> The Defence

<sup>51</sup> Appellant's Amended Brief on Judgement, paras. 1.1-1.3; T. pp. 35-40 (19 April 1999).

<sup>52</sup> Appellant's Amended Brief on Judgement, para 1.11.

<sup>53</sup> Appellant's Amended Notice of Appeal against Judgement, p. 6.

<sup>54</sup> *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274; *Neumeister v. Austria*, Eur. Court H. R., judgement of 27 June 1968, Series A, no. 8; *Delcourt v. Belgium*, Eur. Court H. R., judgement of 17 January 1970, Series A, no. 11; *Borgers v. Belgium*, Eur. Court H. R., judgement of 30 October 1991, Series A, no. 214; *Albert and Le Compte v. Belgium*, Eur. Court H. R., judgement of 10 February 1983, Series A, no. 58; *Bendenoun v. France*, Eur. Court H. R., judgement of 24 February 1994, Series A, no. 284; *Kaufman v. Belgium*, Application No. 10938/84, 50 Decisions and

accepts the Prosecution's submission that there is no case law which would support the inclusion of matters outside the control of the Prosecution or the Trial Chamber within the ambit of the principle of equality of arms.<sup>55</sup> However, the Defence argues that this principle ought to embrace not only procedural equality or parity of both parties before the Tribunal, but also substantive equality in the interests of ensuring a fair trial. It is accordingly submitted that the Appeals Chamber, when determining the scope of this principle, should be guided by the overriding right of the accused to a fair trial.<sup>56</sup>

31. Relying on the same cases decided under the ECHR, the Defence further claims that the principle of equality of arms embraces the minimum procedural guarantee, set down in Article 21(4)(b) of the Statute, to have adequate time and facilities for the preparation of the defence. It contends that the uncooperative stance of the authorities in the Republika Srpska had the effect of denying the Appellant adequate time and facilities to prepare for trial to which he was entitled under the Statute, resulting in denial of a fair trial.

32. In support of its submissions, the Defence cites paragraph 530 of the Judgement to show that the Trial Chamber was aware that both parties suffered from limited access to evidence in the territory of the former Yugoslavia. The Defence acknowledges that the Trial Chamber, recognising the difficulties faced by both parties in gaining access to evidence, exercised its powers under the Statute and Rules to alleviate the difficulties through a variety of means. However, it contends that the Trial Chamber recognised that its assistance did not resolve these difficulties but merely "alleviated" them. The Defence alleges that the inequality of arms persisted despite the assistance of the Trial Chamber and the exercise of due diligence by trial counsel, as the latter were unable to identify and trace relevant and material Defence witnesses, and potential witnesses that had been identified refused to testify out of fear. It submits that the lack of fault attributable to the Trial Chamber or the Prosecution did not serve to correct the inequality in arms, and that under these circumstances, a fair trial was impossible.<sup>57</sup>

Reports of the European Commission of Human Rights ("DR") 98: X and Y v. Austria, Application No. 7909/74, 15 DR 160.

<sup>55</sup> T. 30-31 (19 April 1999).

<sup>56</sup> T. 31 (19 April 1999).

<sup>57</sup> Appellant's Amended Brief on Judgement, paras. 1.4-1.6; T. 29-31, 40, 45-48 (19 April 1999).

33. The Defence contends that the Appeals Chamber should adopt the following two-fold test to determine whether, on the facts, a violation of the principle of equality of arms, broadly construed, has been established.

1) Did the Defence prove on the balance of probabilities that the failure of the civic authorities in Prijedor and the government of the Republika Srpska to cooperate with the Tribunal led to relevant and admissible evidence not being presented by trial counsel, despite their having acted with due diligence, because significant witnesses did not appear at trial?

2) If so, was the imbalance created between the parties sufficient to frustrate the Appellant's right to a fair trial?

34. With respect to the first branch of this test, the Defence asserts that the Appeals Chamber in its Decision on Admissibility of Additional Evidence recognised that certain Defence witnesses were intimidated into not appearing before the Trial Chamber. While acknowledging that the Appeals Chamber denied the admission of the evidence in question on the ground that it found that trial counsel did not act with due diligence to secure attendance of those witnesses at trial, it contends that what is important is that the Appeals Chamber accepted the allegations of intimidation. It adds that the Appeals Chamber in this decision also accepted that there were witnesses unknown to trial counsel during trial proceedings, despite counsel having acted with due diligence in looking for witnesses. From this the Defence draws the conclusion that, had there been some measure of cooperation, trial counsel could have called at least some of these witnesses. Thus, it is argued that relevant and admissible evidence helpful to the case for the Defence was not presented to the Trial Chamber. It is further asserted that the reason why so many witnesses could not be found was due to lack of cooperation on the part of the authorities in the Republika Srpska.<sup>58</sup>

35. As regards the second branch of the test, the Defence contends that this is a matter of weight and balance. While recognising that not every inability to ensure the production of evidence would render a trial unfair, it submits that, on the facts of the case, the volume

<sup>58</sup> T. 38-41 (19 April 1999).

and content of relevant and admissible evidence that could not be called at trial was such as to create an inequality of arms that served to frustrate a fair trial.<sup>59</sup>

36. Finally, the Defence contends that the fact that trial counsel did not file a motion seeking a stay of trial proceedings should not be held to prevent the Defence from raising the matter of denial of a fair trial on appeal. In this respect, the Defence maintains that trial counsel might have been unaware of the degree of obstruction by the Bosnian Serb authorities in preventing the discovery of witnesses helpful to the Defence case.<sup>60</sup> It is further pointed out that lead trial counsel in his opening statement emphasised that the prevailing conditions might frustrate the fairness of the trial. Defence counsel opined that trial counsel's decision not to seek an adjournment of the proceedings could be attributed to the wish not to prolong the extended period of the Appellant's pre-trial detention.<sup>61</sup>

## 2. The Prosecution Case

37. The Prosecution argues that equality of arms means procedural equality. According to the Prosecution, this principle entitles both parties to equality before the courts, giving them the same access to the powers of the court and the same right to present their cases. However, in its view, the principle does not call for equalising the material and practical circumstances of the two parties. Accordingly, it is contended that the claim of the Defence that it was unable to secure the attendance of important witnesses at trial does not demonstrate that there has been an inequality of arms, unless that inability was due to a relevant procedural disadvantage suffered by the Defence. It is asserted that while the obligation of the Trial Chamber is to place the parties on an equal footing as regards the presentation of the case, that Chamber cannot be responsible for factors which are beyond its capacity or competence.<sup>62</sup>

38. The Prosecution does not deny that in certain circumstances it could amount to a violation of fundamental fairness or "manifest injustice" to convict an accused who was unable to obtain and present certain significant evidence at trial. In its view, however, this

<sup>59</sup> T. 52-53 (19 April 1999).

<sup>60</sup> T. 50-51 (19 April 1999).

<sup>61</sup> T. 45-49(19 April 1999).

<sup>62</sup> Prosecution's Response to Appellant's Brief on Judgement, paras. 3.8-3.16, 3.30.

is a matter that goes beyond the concept of “equality of arms” as properly understood, and requires examination on a case-by-case basis. It is submitted that on the facts, no such injustice existed in the instant case.<sup>63</sup>

39. In the view of the Prosecution, the issue raised by the present ground of appeal is whether the degree of lack of cooperation and obstruction by the authorities in the Republika Srpska was such as to deny the Appellant a fair trial.<sup>64</sup> It submits that the Defence must prove that the result of such non-cooperation was to prevent the Defence from presenting its case at trial, and contends that the Defence has failed to meet this burden. It maintains that the Defence had a reasonable opportunity to defend the Appellant under the same procedural conditions and with the same procedural rights as were accorded to the Prosecution, and that it indeed put forward a vigorous defence by presenting the defences of alibi and mistaken identity.<sup>65</sup> In addition, it is noted that the Defence was helped by the broad disclosure obligation on the Prosecution under the Rules, which extends an obligation upon the Prosecution to disclose all exculpatory evidence of which it is aware. Furthermore, it is submitted that, whereas the Defence received some measure of cooperation from the authorities in the Republika Srpska, the Prosecution in fact received no such cooperation at all.<sup>66</sup> Finally, it is alleged that the Defence has not substantiated its claim that any lack of cooperation substantially disadvantaged the Defence as compared to the Prosecution.<sup>67</sup>

40. The Prosecution further argues that the standard which the Defence advocates for establishing a violation of the principle of equality of arms or the right to a fair trial is set too low. It claims that the Defence does not prove a violation of this principle merely by showing that relevant evidence was not presented at trial. In its view, a higher standard is called for, according to which the burden is on the Defence to prove an “abuse of discretion” by the Trial Chamber. The Prosecution maintains that the Defence has not satisfied this burden, as it has not shown that the Trial Chamber acted inappropriately in proceeding with the trial.<sup>68</sup>

<sup>63</sup> Prosecution’s Response to Appellant’s Brief on Judgement, paras. 3.21-3.23; T. 88-89 (20 April 1999).

<sup>64</sup> T. 90-91 (20 April 1999).

<sup>65</sup> T. 97 (20 April 1999).

<sup>66</sup> T. 90, 98-99 (20 April 1999).

<sup>67</sup> Skeleton Argument of the Prosecution, para. 10; Prosecution’s Response to Appellant’s Brief on Judgement, paras. 3.29, 6.9.

<sup>68</sup> Skeleton Argument of the Prosecution, para. 6.

41. In contrast to the view put forward by the Defence, the Prosecution denies that the Decision on Admissibility of Additional Evidence supports the position that the Appellant did not receive a fair trial. It notes that the majority of the proposed additional evidence was found by the Appeals Chamber to have been available to the Defence at trial. Furthermore, with respect to that portion of the proposed additional evidence which was found not to have been available at trial, it notes that the Appeals Chamber, after careful consideration, found that the interests of justice did not require it to be admitted on appeal. Thus, in the Prosecution’s view, rather than showing a denial of fair trial, this decision is consistent with the view that the rights of the Appellant in this respect were not violated by any lack of cooperation on the part of the authorities of the Republika Srpska.<sup>69</sup>

42. The Prosecution further emphasises that Defence counsel failed to make a motion for dismissal of the case on the basis that a fair trial was impossible because of lack of cooperation of the authorities of the Republika Srpska. It notes that, by not doing so, the Defence failed to give the Trial Chamber the opportunity to take additional measures to overcome the difficulties faced by the Defence. It is submitted that this omission by the Defence further provides an indication that it did not believe that the Appellant’s right to a fair trial had been violated.<sup>70</sup>

## B. Discussion

### 1. Applicability of Articles 20(1) and 21(4)(b) of the Statute

43. Article 20(1) of the Statute provides that “[t]he Trial Chambers shall ensure that a trial is fair and expeditious [...]”. This provision mirrors the corresponding guarantee provided for in international and regional human rights instruments: the International Covenant on Civil and Political Rights (1966) (“ICCPR”),<sup>71</sup> the European Convention on

<sup>69</sup> T. 96 (20 April 1999).

<sup>70</sup> T. 100 (20 April 1999).

<sup>71</sup> Article 14(1) of the ICCPR provides in part: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]”

Human Rights (1950),<sup>72</sup> and the American Convention on Human Rights (1969).<sup>73</sup> The right to a fair trial is central to the rule of law: it upholds the due process of law. The Defence submits that due process includes not only formal or procedural due process but also substantive due process.<sup>74</sup>

44. The parties do not dispute that the right to a fair trial guaranteed by the Statute covers the principle of equality of arms. This interpretation accords with findings of the Human Rights Committee (“HRC”) under the ICCPR. The HRC stated in *Moraël v. France*<sup>75</sup> that a fair hearing under Article 14(1) of the ICCPR must at a minimum include, *inter alia*, equality of arms. Similarly, in *Robinson v. Jamaica*<sup>76</sup> and *Wolf v. Panama*<sup>77</sup> the HRC found that there was inequality of arms in violation of the right to a fair trial under Article 14(1) of the ICCPR. Likewise, the case law under the ECHR cited by the Defence accepts that the principle is implicit in the fundamental right of the accused to a fair trial. The principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee. The Appeals Chamber finds that there is no reason to distinguish the notion of fair trial under Article 20(1) of the Statute from its equivalent in the ECHR and ICCPR, as interpreted by the relevant judicial and supervisory treaty bodies under those instruments. Consequently, the Chamber holds that the principle of equality of arms falls within the fair trial guarantee under the Statute.

45. What has to be decided in the present appeal is the scope of application of the principle. The Defence alleges that it should include not only procedural equality, but also substantive equality.<sup>78</sup> In its view, matters outside the control of the Trial Chamber can prejudice equality of arms if their effect is to disadvantage one party disproportionately. The Prosecution rejoins that equality of arms refers to the equality of the parties before the Trial Chamber. It argues that the obligation on the Trial Chamber is to ensure that the

<sup>72</sup> Article 6(1) of the ECHR provides in part: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

<sup>73</sup> Article 8(1) of the American Convention on Human Rights provides in part:

“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature.”

<sup>74</sup> T. 29-35 (19 April 1999).

<sup>75</sup> *Moraël v. France*, Communication No. 2077/1986, 28 July 1989, U.N. Doc. CCPR/8/Add.1, 416.

<sup>76</sup> *Robinson v. Jamaica*, Communication No. 223/1987, 30 March 1989, U.N. Doc. CCPR/8/Add.1, 426.

<sup>77</sup> *Wolf v. Panama*, Communication No. 289/1988, 26 March 1992, U.N. Doc. CCPR/11/Add.1, 399.

<sup>78</sup> T. 29-35 (19 April 1999).

parties before it are accorded the same procedural rights and operate under the same procedural conditions in court. According to the Prosecution, the lack of cooperation by the authorities in the Republika Srpska could not imperil the equality of arms enjoyed by the Defence at trial because the Trial Chamber had no control over the actions or the lack thereof of those authorities.

46. The Defence contends that the minimum guarantee in Article 21(4)(b) of the Statute to adequate time and facilities for the preparation of defence at trial forms part of the principle of equality of arms, implicit in Article 20(1). It argues that, since the authorities in the Republika Srpska failed to cooperate with the Defence, the Appellant did not have adequate facilities for the preparation of his defence, thereby prejudicing his enjoyment of equality of arms.

47. The Appeals Chamber accepts the argument of the Defence that, on this point, the relationship between Article 20(1) and Article 21(4)(b) is of the general to the particular. It also agrees that, as a minimum, a fair trial must entitle the accused to adequate time and facilities for his defence.

48. In deciding on the scope of application of the principle of equality of arms, account must be taken first of the international case law. In *Kaufman v. Belgium*,<sup>79</sup> a civil case, the Eur. Commission H. R. found that equality of arms means that each party must have a reasonable opportunity to defend its interests “under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent”.<sup>80</sup> In *Dombo Beheer B.V. v. The Netherlands*,<sup>81</sup> another civil proceeding, the Eur. Court H. R. adopted the view expressed by the Eur. Commission H. R. on equality of arms, holding that “as regards litigation involving opposing private interests, ‘equality of arms’ implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent”.<sup>82</sup> The Court decided in a criminal proceeding, *Delcourt v. Belgium*,<sup>83</sup> that the principle entitled both parties to full equality of treatment, maintaining that the conditions of trial must not “put the accused

<sup>79</sup> *Kaufman v. Belgium*, 50 DR 98.

<sup>80</sup> *Ibid.*, p. 115.

<sup>81</sup> *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274.

<sup>82</sup> *Ibid.*, para. 40.

<sup>83</sup> *Delcourt v. Belgium*, Eur. Court H. R., judgement of 17 January 1970, Series A, no. 11.

unfairly at a disadvantage.”<sup>84</sup> It can safely be concluded from the ECHR jurisprudence, as cited by the Defence, that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.

49. There is nothing in the ECHR case law that suggests that the principle is applicable to conditions, outside the control of a court, that prevented a party from securing the attendance of certain witnesses. All the cases considered applications that the judicial body had the power to grant.<sup>85</sup>

50. The HRC has interpreted the principle as designed to provide to a party rights and guarantees that are procedural in nature. The HRC observed in *B.d.B. et al. v. The Netherlands*,<sup>86</sup> a civil case, that Article 14 of the ICCPR “guarantees procedural equality” to ensure that the conduct of judicial proceedings is fair. Where applicants were sentenced to lengthy prison terms in judicial proceedings conducted in the absence of procedural guarantees, the HRC has found a violation of the right to fair trial under Article 14(1).<sup>87</sup> The communications decided under the ICCPR are silent as to whether the principle extends to cover a party’s inability to secure the attendance at trial of certain witnesses where fault is attributable, not to the court, but to an external, independent entity.

51. The case law mentioned so far relates to civil or criminal proceedings before domestic courts. These courts have the capacity, if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial. It is a different matter for the International Tribunal. The dilemma faced by this Tribunal is that, to hold trials, it must rely upon the cooperation of States

<sup>84</sup> *Ibid.*, para. 34.

<sup>85</sup> In *Kaufman v. Belgium*, 50 DR 98, the Eur. Commission H. R. held that equality of arms did not give the applicant a right to lodge a counter-memorial. In *Neumeister v. Austria*, Eur. Court of H. R., judgement of 27 June 1968, Series A, no. 8, the Court decided that the principle did not apply to the examination of the applicant’s request for provisional release, despite the prosecutor having been heard *ex parte*. In *Bendenoun v. France*, Eur. Court H. R., judgement of 24 February 1994, Series A, no. 284, the Court ruled that an applicant who did not receive a complete file from the tax authorities was not entitled thereto under the principle of equality of arms because he was aware of its contents and gave no reason for the request. In *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274, the Court held that there was a breach of equality of arms where the single first hand witness for the applicant company was barred from testifying whereas the defendant bank’s witness was heard.

<sup>86</sup> *B. d. B. et al. v. The Netherlands*, Communication No. 2737/1989, 30 March 1989, U.N. Doc. A/44/40, 442.  
<sup>87</sup> *Ngalula Mpandanjila et al. v. Zaire*, Communication No. 138/1983, 26 March 1986, U.N. Doc. A/41/40, 121.

without having the power to compel them to cooperate through enforcement measures.<sup>88</sup> The Tribunal must rely on the cooperation of States because evidence is often in the custody of a State and States can impede efforts made by counsel to find that evidence. Moreover, without a police force, indictees can only be arrested or transferred to the International Tribunal through the cooperation of States or, pursuant to Sub-rule 59bis, through action by the Prosecution or the appropriate international bodies. Lacking independent means of enforcement, the ultimate recourse available to the International Tribunal in the event of failure by a State to cooperate, in violation of its obligations under Article 29 of the Statute, is to report the non-compliance to the Security Council.<sup>89</sup>

52. In light of the above considerations, the Appeals Chamber is of the view that under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses. The Chambers are empowered to issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. This includes the power to:

- (1) adopt witness protection measures, ranging from partial to full protection;
- (2) take evidence by video-link or by way of deposition;
- (3) summon witnesses and order their attendance;

<sup>88</sup> See “Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997”, The Prosecutor v. Tihomir Blatki], Case No.: IT-95-14-AR108bis, Appeals Chamber, 29 October 1997, para. 26.  
<sup>89</sup> *Ibid.*, para. 33.

- (4) issue binding orders to States for, *inter alia*, the taking and production of evidence; and
- (5) issue binding orders to States to assist a party or to summon a witness and order his or her attendance under the Rules.

A further important measure available in such circumstances is:

- (6) for the President of the Tribunal to send, at the instance of the Trial Chamber, a request to the State authorities in question for their assistance in securing the attendance of a witness.

In addition, whenever the aforementioned measures have proved to be to no avail, a Chamber may, upon the request of a party or *proprio motu*:

- (7) order that proceedings be adjourned or, if the circumstances so require, that they be stayed.

53. Relying on the principle of equality of arms, the Defence is submitting that the Appellant did not receive a fair trial because relevant and admissible evidence was not presented due to lack of cooperation of the authorities in the Republika Srpska in securing the attendance of certain witnesses. The Defence is not complaining that the Trial Chamber was negligent in responding to a request for assistance. The Appeals Chamber finds that the Defence has not substantiated its claim that the Appellant was not given a reasonable opportunity to present his case. There is no evidence to show that the Trial Chamber failed to assist him when seized of a request to do so. Indeed, the Defence concedes that the Trial Chamber gave every assistance it could to the Defence when asked to do so, and even allowed a substantial adjournment at the close of the Prosecution's case to help Defence efforts in tracing witnesses.<sup>90</sup> Further, the Appellant acknowledges that the Trial Chamber did not deny the Defence attendance of any witness but, on the contrary, took virtually all steps requested and necessary within its authority to assist the Appellant in presenting witness testimony. Numerous instances of the granting of such motions and orders by the Trial Chamber, on matters such as protective measures for witnesses, approving the giving

<sup>90</sup> T. 47 (19 April 1999); Judgement, para. 32 ("Following a recess of three weeks after the close of the Prosecution case to permit the Defence to make its final preparations, the Defence case opened on 10 September 1996 [...]").

of evidence via video-conference link from Banja Luka in the Republika Srpska, and granting confidentiality and safe conduct to several Defence witnesses are set forth in the Judgement of the Trial Chamber.<sup>91</sup> Indeed, the Decision on Admissibility of Additional Evidence, by which the Defence was precluded from presenting additional evidence, was based on the fact that the Defence had failed to establish that it would have been in the interests of justice to admit such evidence. This indicates that the fact that it could not present such evidence did not detract from the fairness of the trial.

54. A further example of a measure of the Trial Chamber which was designed to assist in the preparation and presentation of the Defence case is that the Trial Chamber's Presiding Judge brought to the attention of the President of the International Tribunal certain difficulties concerning the possible attendance of three witnesses who had been summoned by the Defence.<sup>92</sup> She requested the President of the International Tribunal to send a letter to the Acting President of the Republika Srpska, Mrs. B. Plavsic, to urge her to assist the Defence in securing the presence and cooperation of these Defence witnesses. Consequently, on 19 September 1996, the President of the Tribunal sent a letter to Mrs. Plavsic. In this letter, he made reference to obstacles encountered by the Defence in securing the cooperation of these witnesses. In view, *inter alia*, of the accused's right to a fair trial, Mrs. Plavsic was therefore enjoined to "take whatever action is necessary immediately to resolve this matter so that the Defence may go forward with its case."<sup>93</sup>

55. The Appeals Chamber can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings. The Defence opined during the oral hearing that the reason why such action was not taken in the present case may have been due to trial counsel's concern regarding the long period of detention on remand. The Appeals Chamber notes that the Rules envision some relief in such a situation, in the form of provisional release, which, pursuant to Sub-rule 65(B), may be granted "in exceptional circumstances". It is not hard to imagine that a stay of proceedings occasioned by the frustration of a fair trial under prevailing trial conditions

<sup>91</sup> Judgement, paras. 29-35.

<sup>92</sup> T. 59, 60 (20 April 1999).

<sup>93</sup> Letter from President Cassese to Mrs. B. Plavsic of 19 September 1996, referred to by Judge Shahabuddeen during the hearing on 20 April 1999 (*ibid*).

would amount to exceptional circumstances under this rule. The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial de novo, as the Defence seeks to do in this case.

C. Conclusion

56. The Appeals Chamber finds that the Appellant has failed to show that the protection offered by the principle of equality of arms was not extended to him by the Trial Chamber. This ground of Appeal, accordingly, fails.

### III. THIRD GROUND OF APPEAL BY THE DEFENCE: ERROR OF FACT LEADING TO A MISCARRIAGE OF JUSTICE

A. Submissions of the Parties

1. The Defence

57. The Trial Chamber made the factual finding that the Appellant was guilty of the murder of two Muslim policemen, Edin Besi} and a man identified at trial by the name of Osman, based on the testimony of only one witness, Nihad Seferovi}. The Defence contends that the Trial Chamber erred in deciding that it was satisfied beyond reasonable doubt that he was guilty of the two murders because the Chamber relied on the uncorroborated evidence of Mr. Seferovi}. The Defence maintains that Mr. Seferovi} is an unreliable witness because he was introduced to the Prosecution by the government of Bosnia and Herzegovina, a source which the Defence alleges the Trial Chamber found to be tainted for having planted another Prosecution witness, Dragan Opaci}. The latter was found to be untruthful at trial and, consequently, withdrawn by the Prosecution.

58. The Defence argues that the Trial Chamber erred in relying on the evidence of Mr. Seferovi} because it is implausible. Mr. Seferovi}, a Muslim who lived in an area under bombardment by Serbian paramilitary forces, fled to the mountains for safety. He testified at trial that he was so concerned about the welfare of his pet pigeons that he returned to town to feed them while the Serbian paramilitaries were still there. On his return to town, he saw Mr. Tadi} kill two policemen. Defence counsel contended at trial that the witness was never in town at the time of the killings.

59. The Defence maintains that the Appeals Chamber, in reviewing the factual finding of the Trial Chamber, is entitled to consider all relevant evidence and can reverse the Chamber's finding if it is satisfied that no reasonable person could conclude that the evidence of Mr. Seferovi} proved that the Appellant was responsible for the killings.

60. The Defence asks the Appeals Chamber to reverse the Trial Chamber's finding that the Appellant is guilty of the murders of Edic Besi) and the man identified by the name of Osman.<sup>94</sup>

## 2. The Prosecution

61. The Prosecution argues that the Appeals Chamber, being an appellate body, cannot reverse the Trial Chamber's findings of fact unless it were to conclude that the Defence has proved that no reasonable person could have come to the conclusion reached by the Trial Chamber based on the evidence cited by it.<sup>95</sup>

62. The Prosecution claims that the Defence misrepresented the Trial Chamber's findings with respect to Dragan Opaci) in order to taint Mr. Seferovi) by association as an unreliable witness. Having lied about his family situation, Mr. Opaci) had clearly aroused the Prosecution's fears about his credibility. Consequently, he was withdrawn as a witness as a precautionary measure. The Trial Chamber asked the Prosecution to investigate this matter and, having examined the situation, the Prosecution found that the investigation did not support the Defence allegation that Mr. Opaci) was planted by the Bosnian government.

63. The Prosecution submits that the attempt to taint Mr. Seferovi)'s credibility by assimilating his position to that of Mr. Opaci) fails because the Trial Chamber concluded that the circumstances surrounding the testimony of the latter were unique to him. The situation of Mr. Seferovi) was not similar to that of Mr. Opaci). There was no need to require corroboration of his testimony because the Trial Chamber concluded that he was a reliable witness.

## B. Discussion

64. The two parties agree that the standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a

<sup>94</sup> In its submissions, the Defence refers to the victim identified by the Trial Chamber only as one "Osman", by the name "Osman Didovic". The Appeals Chamber is not here called upon to determine whether the name thus given by the Defence is accurate.

conclusion which no reasonable person could have reached. The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.

65. The Appeals Chamber notes that it has been the practice of this Tribunal and of the International Criminal Tribunal for Rwanda ("ICTR")<sup>96</sup> to accept as evidence the testimony of a single witness on a material fact without need for corroboration. The Defence does not dispute that corroboration is not required by law. As noted above, it submitted that, as a matter of fact, the evidence of Mr. Seferovi) cannot be relied on in the absence of corroboration because he was introduced to the Prosecution by the same source, the government of Bosnia and Herzegovina, which introduced another witness, Mr. Opaci), who was subsequently withdrawn as a witness by the Prosecution for being untruthful. The Appeals Chamber finds that Mr. Seferovi)'s association with the Bosnian government does not taint him. The circumstances of Mr. Seferovi) and Mr. Opaci) are different. Mr. Opaci) was made known to the Prosecution while he was still in the custody of the Bosnian authorities, whereas Mr. Seferovi)'s introduction was made through the Bosnian embassy in Brussels. Mr. Seferovi) was subjected to strenuous cross-examination by Defence counsel at trial. Defence counsel at trial did not recall him after learning of the withdrawal of Mr. Opaci) as a witness. Furthermore, Defence counsel at trial never asked that Mr. Seferovi)'s testimony be disregarded on the ground that he, like Mr. Opaci), was also a tainted witness. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in relying on the uncorroborated testimony of Mr. Seferovi).

66. The Defence alleges that the Trial Chamber erred in relying on the evidence of Mr. Seferovi) because it was implausible. Here, it is claimed that the Trial Chamber did not

<sup>95</sup> Prosecution's Response to Appellant's Brief on Judgement, para. 2.14.

<sup>96</sup> More fully, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

act reasonably in concluding from the evidence of Mr. Seferovi} that the Appellant was responsible for the killing of the two policemen. The Appeals Chamber does not accept as inherently implausible the witness' claim that the reason why he returned to the town where the Serbian paramilitary forces had been attacking, and from which he had escaped, was to feed his pet pigeons. It is conceivable that a person may do such a thing, even though one might think such action to be an irrational risk. The Trial Chamber, after seeing the witness, hearing his testimony, and observing him under cross-examination, chose to accept his testimony as reliable evidence. There is no basis for the Appeals Chamber to consider that the Trial Chamber acted unreasonably in relying on that evidence for its finding that the Appellant killed the two men.

#### C. Conclusion

67. The Appellant has failed to show that Nihad Seferovi}'s reliability as a witness is suspect, or that his testimony was inherently implausible. Since the Appellant did not establish that the Trial Chamber erred in relying on the evidence of Mr. Seferovi} for its factual finding that the Appellant killed the two men, the Appeals Chamber sees no reason to overturn the finding.

#### IV. THE FIRST GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT IT HAD NOT BEEN PROVED THAT THE VICTIMS WERE "PROTECTED PERSONS" UNDER ARTICLE 2 OF THE STATUTE (ON GRAVE BREACHES)

##### A. Submissions of the Parties

###### 1. The Prosecution Case

68. In the first ground of the Cross-Appeal, the Prosecution challenges the Appellant's acquittal on Counts 8, 9, 12, 15, 21 and 32 of the Indictment which charged the Appellant with grave breaches under Article 2 of the Statute. The Appellant was acquitted on these counts on the ground that the victims referred to in those counts had not been proved to be "protected persons" under the applicable provisions of the Fourth Geneva Convention.<sup>97</sup>

69. The Prosecution maintains that all relevant criteria under Article 2 of the Statute were met. Consequently, the Trial Chamber erred by relying exclusively upon the "effective control" test derived from the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)<sup>98</sup> in order to determine the applicability of the grave breach provisions of the relevant Geneva Convention. The Prosecution submits that the Chamber should have instead applied the provisions of the Geneva Conventions and the relevant principles and authorities of international humanitarian law which, in its view, apply a "demonstrable link" test.

70. In distinguishing the present situation from the facts in Nicaragua, the Prosecution notes that Nicaragua was concerned with State responsibility rather than individual criminal responsibility. Further, the Prosecution asserts that the International Court of Justice in Nicaragua deliberately avoided dealing with the question of which body of treaty rules was applicable. Instead the Court focused on the minimum yardstick of rules contained in

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<sup>97</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 ("Geneva Convention IV" or "Fourth Geneva Convention").

Common Article 3 of the Geneva Conventions, which in the Court's view applied to all conflicts in Nicaragua, thus obviating the need for the Court to decide which body of law was applicable in that case.

71. The Prosecution submits that the Trial Chamber erred by not applying the provisions of the Geneva Conventions and general principles of international humanitarian law to determine individual criminal responsibility for grave breaches of the Geneva Conventions. In the Prosecution's submission, these sources require that there be a "demonstrable link" between the perpetrator and a Party to an international armed conflict of which the victim is not a national.

72. The Prosecution submits that the "demonstrable link" test is satisfied on the facts of the case at hand. In its view, the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska ("VRS") had a "demonstrable link" with the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY") and the Army of the FRY ("VJ"); it was not a situation of mere logistical support by the FRY to the VRS.

73. In addition, the Prosecution submits that the Trial Chamber erred in finding that the only test relied upon in Nicaragua was the "effective control" test. The Court in Nicaragua also applied an "agency" test which, the Prosecution submits, is a more appropriate standard for determining the applicability of the grave breach provisions.

74. Were either the "effective control" test or the "agency" test to be adopted by the Appeals Chamber, the Prosecution submits that in any event both tests would be satisfied on the facts of this case. To support this contention, the Prosecution looks to the fact, *inter alia*, that after 19 May 1992, when the Yugoslav People's Army ("JNA") formally withdrew from Bosnia and Herzegovina, VRS soldiers continued to receive their salaries from the government of the FRY which also funded the pensions of retired VJ soldiers who had been serving with the VRS. The Prosecution looks to a number of additional factors in support of its contention that there was more than mere logistical support by the FRY after 19 May 1992. These factors include the structures and ranks of the VRS and VJ being identical, as well as the supervision of the VRS by the FRY after that date. From those

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<sup>98</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits), Judgment, ICJ Reports (1986), p. 14 ("Nicaragua").

facts, the Prosecution draws the inference that the FRY was exercising effective military control over the VRS.

## 2. The Defence Case

75. The Defence asserts that the Trial Chamber was correct in applying the "effective control" test derived from Nicaragua and submits that the "demonstrable link" test is incorrect. The Defence formulates the test which the Appeals Chamber should apply as "were the Bosnian Serbs acting as 'organs' of another State?"<sup>99</sup>

76. The Defence submits that it is misleading to distinguish Nicaragua on the basis that the decision is concerned only with State responsibility. The Defence further argues that the Court in Nicaragua was concerned with the broader question of which part of international humanitarian law should apply to the relevant conduct.

77. On the facts of the present case there is no evidential basis for concluding that after 19 May 1992, the VRS was either effectively controlled by or could be regarded as an agent of the FRY government. The Defence's submission is that the FRY and the Republika Srpska coordinated with each other, solely as allies. For this reason, the VRS was not an organ of the FRY.

78. The Defence submits that the "demonstrable link" test is not the correct test to be applied under Article 2 of the Statute. The Defence argues that the test has no authority in international law and submits that it should also be rejected for policy reasons. If the Appeals Chamber were to accept the "demonstrable link" test, this could result in the undesirable outcome of a State being held responsible for the actions of another State or entity over which the State did not have any effective control. Further, the Defence submits that the test at issue introduces uncertainty into international law as it is unclear what degree of link is necessary in order to satisfy the test.

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<sup>99</sup> See Defence's Substituted Response to Cross-Appellant's Brief, para. 2.6.

79. The Defence concedes that if the correct test were the “demonstrable link” test, on the facts of this case the test would be satisfied.<sup>100</sup>

#### B. Discussion

##### 1. The Requirements for the Applicability of Article 2 of the Statute

80. Article 2 of the Statute embraces various disparate classes of offences with their own specific legal ingredients. The general legal ingredients, however, may be categorised as follows.

(i) The nature of the conflict. According to the interpretation given by the Appeals Chamber in its decision on a Defence motion for interlocutory appeal on jurisdiction in the present case,<sup>101</sup> the international nature of the conflict is a prerequisite for the applicability of Article 2.

(ii) The status of the victim. Grave breaches must be perpetrated against persons or property defined as “protected” by any of the four Geneva Conventions of 1949. To establish whether a person is “protected”, reference must clearly be made to the relevant provisions of those Conventions.

81. In the instant case it therefore falls to the Appeals Chamber to establish first of all (i) on what legal conditions armed forces fighting in a *prima facie* internal armed conflict may be regarded as acting on behalf of a foreign Power and (ii) whether in the instant case the factual conditions which are required by law were satisfied.

82. Only if the Appeals Chamber finds that the conflict was international at all relevant times will it turn to the second question of whether the victims were to be regarded as “protected persons”.

<sup>100</sup> See Defence’s Substituted Response to Cross-Appellant’s Brief, paras. 2.1 – 2.18; T. 219-220 (21 April 1999).

<sup>101</sup> See “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction”, The Prosecutor v. Duško Tadić, Case No.: IT-94-1-AR72, Appeals Chamber, 2 October 1995 (“Tadić Decision on Jurisdiction”), paras. 79-84 (Tadić) (1995) ICTY JR 353).

##### 2. The Nature of the Conflict

83. The requirement that the conflict be international for the grave breaches regime to operate pursuant to Article 2 of the Statute has not been contested by the parties.

84. It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.

85. In the instant case, the Prosecution claims that at all relevant times, the conflict was an international armed conflict between two States, namely Bosnia and Herzegovina (“BH”) on the one hand, and the FRY on the other.<sup>102</sup> Judge McDonald, in her dissent, also found the conflict to be international at all relevant times.<sup>103</sup>

86. The Trial Chamber found the conflict to be an international armed conflict between BH and FRY until 19 May 1992, when the JNA formally withdrew from Bosnia and Herzegovina.<sup>104</sup> However, the Trial Chamber did not explicitly state what the nature of the conflict was after 19 May 1992. As the Prosecution points out, “[t]he Trial Chamber made no express finding on the classification of the armed conflict between the Bosnian Serb

<sup>102</sup> See para. 2.25 of the Cross-Appellant’s Brief.

<sup>103</sup> “The SFRY/FRY is a Party to an international armed conflict with [...] BH on the basis that the Trial Chamber found that until 19 May 1992 the JNA was involved in an international armed conflict with the BH, and that thereafter the VJ was directly involved in an armed conflict against the BH. Consequently it is submitted that the only conclusion that can be drawn is that an international armed conflict existed between the BH and the FRY during 1992.” (emphasis added).

<sup>104</sup> See para. 1 of Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, The Prosecutor v. Duško Tadić, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997 (“Separate and Dissenting Opinion of Judge McDonald”) where she held: “I find that at all times relevant to the Indictment, the armed conflict in opština Prijedor was international in character [...]”.

<sup>105</sup> “569. [...] It is clear from the evidence before the Trial Chamber that, from the beginning of 1992 until 19 May 1992, a state of international armed conflict existed in at least part of the territory of Bosnia and Herzegovina. This was an armed conflict between the forces of the Republic of Bosnia and Herzegovina on the one hand and those of the Federal Republic of Yugoslavia (Serbia and Montenegro), being the JNA (later the VJ), working with sundry paramilitary and Bosnian Serb forces, on the other. [...]”.

<sup>106</sup> For evidence of this it is enough to refer generally to the evidence presented as to the bombardment of Sarajevo, the seat of government of the Republic of Bosnia and Herzegovina, in April 1992 by Serb forces, their attack on towns along Bosnia and Herzegovina’s border with Serbia on the

Army (VRS) and the BH after the VRS was established in May 1992".<sup>105</sup> Nevertheless, it may be held that the Trial Chamber at least implicitly considered that after 19 May 1992 the conflict became internal in nature.<sup>106</sup>

87. In the instant case, there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict prior to 19 May 1992 was international in character.<sup>107</sup> The question whether after 19 May 1992 it continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces – in whose hands the Bosnian victims in this case found themselves – could be considered as *de iure* or *de facto* organs of a foreign Power, namely the FRY.

3. The Legal Criteria for Establishing When, in an Armed Conflict Which is Prima Facie Internal, Armed Forces May Be Regarded as Acting On Behalf of a Foreign Power, Thereby Rendering the Conflict International

(a) International Humanitarian Law

88. The Prosecution maintains that the alleged perpetrator of crimes must be "sufficiently linked to a Party to the conflict" in order to come under the jurisdiction of Article 2 of the Statute.<sup>108</sup> It further contends that "a showing of a demonstrable link between the VRS and the FRY or VJ" is sufficient.<sup>109</sup> According to the Prosecution, "such a link could, at most, be proven by a showing of a general form of control. This

Drina River and their invasion of south-eastern Herzegovina from Serbia and Montenegro [...]"] (emphasis added).

<sup>105</sup> Cross-Appellant's Brief, para. 2.5.

<sup>106</sup> See Judgement, paras. 607-608.

<sup>107</sup> In addition to the evidence referred to in para. 570 of the Judgement, reference may also be made to the facts cited by Judge Li in his Separate Opinion to the Tadić Decision on Jurisdiction (paras. 17-19), for example BH's Declaration that it was at war with the FRY and the reports of various expert bodies suggesting that the conflict was international. Moreover, in three Rule 61 Decisions involving the conflict between the Serbs and the BH Government (Nikolić, Vukovar Hospital, and Karadžić and Mladić), Trial Chambers have found the conflict to have been an international armed conflict. (See "Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", The Prosecutor v. Dragan Nikolić, Case No.: IT-94-2-R61, Trial Chamber I, 20 October 1995, para 30 (Nikolić) (1995) II ICTY JR 738); "Review of Indictment Pursuant to Rule 61", The Prosecutor v. Mile Mrksić et al., Case No.: IT-95-13-R61, Trial Chamber I, 3 April 1996, para. 25; "Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence", The Prosecutor v. Radovan Karadžić and Ratko Mladić, Case No.: IT-95-18-R61, Trial Chamber I, 11 July 1996, para 88).

<sup>108</sup> Cross-Appellant's Brief, para. 2.31.

legal standard finds support in the provisions of the Geneva Conventions, the jurisprudence of the trials that followed the Second World War, the Tribunal's decisions, the writings of leading publicists, and other authorities."<sup>110</sup>

89. The Prosecution also contends that the determination of the conditions for considering whether Article 2 of the Statute is applicable must be made in accordance with the provisions of the Geneva Conventions and the relevant principles of international humanitarian law. By contrast, in its opinion the international law of State responsibility has no bearing on the requirements on grave breaches laid down in the relevant Geneva provisions. According to the Prosecution "it would lead to absurd results to apply the rules relating to State responsibility to assist in determining such a question" (i.e. whether certain armed forces are sufficiently related to a High Contracting Party).<sup>111</sup>

90. Admittedly, the legal solution to the question under discussion might be found in the body of law that is more directly relevant to the question, namely, international humanitarian law. This corpus of rules and principles may indeed contain legal criteria for determining when armed forces fighting in an armed conflict which is *prima facie* internal may be regarded as acting on behalf of a foreign Power even if they do not formally possess the status of its organs. These criteria may differ from the standards laid down in general international law, that is in the law of State responsibility, for evaluating acts of individuals not having the status of State officials, but which are performed on behalf of a certain State.

91. The Appeals Chamber will therefore discuss the question at issue first from the viewpoint of international humanitarian law. In particular, the Appeals Chamber will consider the conditions under which armed forces fighting against the central authorities of the same State in which they live and operate may be deemed to act on behalf of another State. In other words, the Appeals Chamber will identify the conditions under which those forces may be assimilated to organs of a State other than that on whose territory they live and operate.

<sup>109</sup> *Ibid.*, para. 2.30.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, paras. 2.21-2.23.

92. A starting point for this discussion is provided by the criteria for lawful combatants laid down in the Third Geneva Convention of 1949.<sup>112</sup> Under this Convention, militias or paramilitary groups or units may be regarded as legitimate combatants if they form "part of [the] armed forces" of a Party to the conflict (Article 4A(1)) or "belong [...]" to a "Party to the conflict" (Article 4A(2)) and satisfy the other four requirements provided for in Article 4A(2).<sup>113</sup> It is clear that this provision is primarily directed toward establishing the requirements for the status of lawful combatants. Nevertheless, one of its logical consequences is that if, in an armed conflict, paramilitary units "belong" to a State other than the one against which they are fighting, the conflict is international and therefore serious violations of the Geneva Conventions may be classified as "grave breaches".

93. The content of the requirement of "belonging to a Party to the conflict" is far from clear or precise. The authoritative ICRC Commentary does not shed much light on the matter, for it too is rather vague.<sup>114</sup> The rationale behind Article 4 was that, in the wake of World War II, it was universally agreed that States should be legally responsible for the conduct of irregular forces they sponsor. As the Israeli military court sitting in Ramallah rightly stated in a decision of 13 April 1969 in Kassem et al.:

In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments

<sup>112</sup> Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ("Geneva Convention III" or "Third Geneva Convention").

<sup>113</sup> These four conditions are as follows:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognisable at a distance;
- (c) that of carrying arms openly; and
- (d) that of conducting their operations in accordance with the laws and customs of war.

It might be contended that these conditions, which undoubtedly had become part of customary international law, may now be considered to have been replaced by the different conditions set out in Article 44(3) and 43(1) of Additional Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1977). This contention should of course be premised on the assumption – for which proof is required – that these two Articles have already been transformed into customary international rules.

Be that as it may, the requirement in Article 43(1) of "being under a command responsible to [a] party to the conflict for the conduct of its subordinates" has not replaced that of "belonging to a Party to the conflict" provided for in Article 4A(2) of the Third Geneva Convention. See generally the International Committee of the Red Cross ("ICRC") Commentary on the Additional Protocols (Yves Sandoz et al. (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva 1987), pp. 506-517, paras. 1659-1681.

<sup>114</sup> Jean Pictet (ed.), Commentary: III: Geneva Convention Relative to the Treatment of Prisoners of War, International Committee of the Red Cross, Geneva, 1960, First reprint, Geneva, 1994, p. 57:

"There should be a de facto relationship between the resistance organisation or militia or volunteer corps and the party to the conflict which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organisation or militia or volunteer corps is fighting".

for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.<sup>115</sup>

94. In other words, States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars vis-à-vis that Party to the conflict. These then may be regarded as the ingredients of the term "belonging to a Party to the conflict".

95. The Appeals Chamber thus considers that the Third Geneva Convention, by providing in Article 4 the requirement of "belonging to a Party to the conflict", implicitly refers to a test of control.

96. This conclusion, based on the letter and the spirit of the Geneva Conventions, is borne out by the entire logic of international humanitarian law. This body of law is not grounded on formalistic postulates. It is not based on the notion that only those who have the formal status of State organs, i.e., are members of the armed forces of a State, are duty bound both to refrain from engaging in violations of humanitarian law as well as – if they are in a position of authority – to prevent or punish the commission of such crimes. Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible. It follows, amongst other things, that humanitarian law holds accountable not only those having formal positions of authority but also those who wield de facto power as well as those who exercise control over perpetrators of serious violations of international humanitarian law. Hence, in

<sup>115</sup> Military Prosecutor v. Omar Mahmud Kassem et al., 42 International Law Reports 1971, p. 470, at p. 477. The court consequently held that the accused, members of the PLO captured by Israeli forces in the territories occupied by Israel, did not belong to any Party to the conflict. As the court put it (ibid., pp. 477-478):

"In the present case [...] Government with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine. The Organisation itself, so far as we know, is not prepared to take orders from the Jordanian Government, witness[ed] by the fact that [the Organization] is illegal in Jordan and has been repeatedly harassed by the Jordanian authorities."

cases such as that currently under discussion, what is required for criminal responsibility to arise is some measure of control by a Party to the conflict over the perpetrators.<sup>116</sup>

97. It is nevertheless imperative to specify what degree of authority or control must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal. Indeed, the legal consequences of the characterisation of the conflict as either internal or international are extremely important. Should the conflict eventually be classified as international, it would inter alia follow that a foreign State may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf.

(b) The Notion of Control: The Need for International Humanitarian Law to Be Supplemented by General International Rules Concerning the Criteria for Considering Individuals to be Acting as De Facto State Organs

98. International humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is, as acting as *de facto* State officials.<sup>117</sup> Consequently, it is necessary to

<sup>116</sup> See also the ICRC Commentary to Article 29 of the Fourth Geneva Convention (Jean Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958, First Reprint, 1994, p. 212):

“It does not matter whether the person guilty of treatment contrary to the Convention is an agent of the Occupying Power or in the service of the occupied State; what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given. If the unlawful act was committed at the instigation of the Occupying Power, then the Occupying Power is responsible; if, on the other hand, it was the result of a truly independent decision on the part of the local authorities, the Occupying Power cannot be held responsible.”

<sup>117</sup> The Appeals Chamber is aware of another approach taken to the question of imputability in the area of international humanitarian law. The Appeals Chamber is referring to the view whereby by virtue of Article 3 of the IVth Hague Convention of 1907 and Article 91 of Additional Protocol I, international humanitarian law establishes a special regime of State responsibility; under this lex specialis States are responsible for all acts committed by their “armed forces” regardless of whether such forces acted as State officials or private persons. In other words, whether or not in an armed conflict individuals act in a private capacity, their acts are attributed to a State if such individuals are part of the “armed forces” of that State. This opinion was authoritatively set forth by some members of the International Law Commission (“ILC”) (Professor Reuter observed that “[i]t was now a principle of codified international law that States were responsible for all acts of their armed forces” (Yearbook of the International Law Commission, 1975, vol. I, p. 7, para. 5). Professor Ago stated that the IVth Hague Convention of 1907 “made provision for a verifiable guarantee covering all damage that might be caused by armed forces, whether they had acted as organs or as private persons” (ibid., p. 16, para. 4)). This view also has been forcefully advocated in the legal literature. As is clear from the reasoning the Appeals Chamber sets out further on in the text of this Judgement, even if this approach is adopted, the test of control as delineated by this Chamber remains indispensable for

examine the notion of control by a State over individuals, laid down in general international law, for the purpose of establishing whether those individuals may be regarded as acting as *de facto* State officials. This notion can be found in those general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials.

(c) The Notion of Control Set Out By the International Court of Justice in Nicaragua

99. In dealing with the question of the legal conditions required for individuals to be considered as acting on behalf of a State, i.e., as *de facto* State officials, a high degree of control has been authoritatively suggested by the International Court of Justice in Nicaragua.

100. The issue brought before the International Court of Justice was whether a foreign State, the United States, because of its financing, organising, training, equipping and planning of the operations of organised military and paramilitary groups of Nicaraguan rebels (the so-called *contras*) in Nicaragua, was responsible for violations of international humanitarian law committed by those rebels. The Court held that a high degree of control was necessary for this to be the case. It required that (i) a Party not only be in effective control of a military or paramilitary group, but that (ii) the control be exercised with respect to the specific operation in the course of which breaches may have been committed.<sup>118</sup> The Court went so far as to state that in order to establish that the United States was responsible for “acts contrary to human rights and humanitarian law” allegedly perpetrated by the Nicaraguan *contras*, it was necessary to prove that the United States had specifically “directed or enforced” the perpetration of those acts.<sup>119</sup>

determining when individuals who, formally speaking, are not military officials of a State may nevertheless be regarded as forming part of the armed forces of such a State.

<sup>118</sup> Nicaragua, para. 115. As the Court put it, there must be “effective control of the military or paramilitary operations in the course of which the alleged violations of international human rights and humanitarian law were committed”.

<sup>119</sup> *Ibid.*, para. 115.

“All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.”

101. As is apparent, and as was rightly stressed by Trial Chamber II in Rajic,<sup>120</sup> and restated by the Prosecution in the instant case,<sup>121</sup> the issue brought before the International Court of Justice revolved around State responsibility; what was at stake was not the criminal culpability of the contras for serious violations of international humanitarian law, but rather the question of whether or not the contras had acted as de facto organs of the United States on its request, thus generating the international responsibility of that State.

(i) Two Preliminary Issues

102. Before examining whether the Nicaragua test is persuasive, the Appeals Chamber must deal with two preliminary matters which are material to our discussion in the instant case.

103. First, with a view to limiting the scope of the test at issue, the Prosecution has contended that the criterion for ascertaining State responsibility is different from that necessary for establishing individual criminal responsibility. In the former case one would have to decide whether serious violations of international humanitarian law by private individuals may be attributed to a State because those individuals acted as de facto State officials. In the latter case, one would have instead to establish whether a private individual may be held criminally responsible for serious violations of international humanitarian law amounting to "grave breaches".<sup>122</sup> Consequently, it has been asserted, the Nicaragua test, while valid within the context of State responsibility, is immaterial to the issue of individual criminal responsibility for "grave breaches". The Appeals Chamber, with respect, does not share this view.

104. What is at issue is not the distinction between the two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a de facto organ of a State. Logically these conditions must be the same both in the case: (i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating

<sup>120</sup> See "Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", The Prosecutor v. Ivica Rajic, Case No.: IT-95-12-R61, Trial Chamber II, 13 September 1996, para. 25.  
<sup>121</sup> Cross-Appellant's Brief, paras. 2.14-2.17.  
<sup>122</sup> Cross-Appellant's Brief, paras. 2.16-2.17; Cross-Appellant's Brief in Reply, para. 2.19.

the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as de facto State officials, thereby rendering the conflict international and thus setting the necessary precondition for the "grave breaches" regime to apply. In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international.

105. As stated above, international humanitarian law does not include legal criteria regarding imputability specific to this body of law. Reliance must therefore be had upon the criteria established by general rules on State responsibility.

106. The second preliminary issue relates to the interpretation of the judgement delivered by the International Court of Justice in Nicaragua. According to the Prosecution, in that case the Court applied "both an 'agency' test and an 'effective control' test".<sup>123</sup> In the opinion of the Prosecution, the Court first applied the "agency" test when considering whether the contras could be equated with United States officials for legal purposes, in order to determine whether the United States could incur responsibility in general for the acts of the contras. According to the Prosecution this test was one of dependency, on the one side, and control, on the other.<sup>124</sup> In the opinion of the Prosecution, the Court then applied the "effective control" test to determine whether the United States could be held responsible for particular acts committed by the contras in violation of international humanitarian law. This test hinged on the issuance of specific directives or instructions concerning the breaches allegedly committed by the contras.<sup>125</sup>

<sup>123</sup> Cross-Appellant's Brief, para. 2.56.

<sup>124</sup> According to the Prosecution (Cross-Appellant's Brief, para. 2.58), the Court applied the "agency" test when considering whether the contras engaged the responsibility of the United States. The Prosecution has pointed out that in this regard the Court "did not refer to the need for effective control, but rather" – to quote the words of the Court cited by the Prosecution – "whether or not the relationship [...] was so much one of dependency on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government" (Nicaragua, para. 109).

<sup>125</sup> Cross-Appellant's Brief, paras. 2.57-2.58.

107. The Appeals Chamber considers that the Prosecution's submissions are based on a misreading of the judgement of the International Court of Justice and a misapprehension of the doctrine of State responsibility on which that judgement is grounded.

108. Clearly, the Court did use two tests, but in any case its tests were conceived in a manner different from what is contended by the Prosecution, and in addition they were to a large extent set out along the lines dictated by customary international law. Admittedly, in its judgement, the Court did not always follow a straight line of reasoning (whereas it would seem that a jurisprudential approach more consonant with customary international law was taken by Judge Ago in his Separate Opinion).<sup>126</sup> In substance, however, the Court first evaluated those acts which, "in the submission of Nicaragua, involved the responsibility of the United States in a more direct manner".<sup>127</sup> To this end it discussed two categories of individuals and their relative acts or transactions. First, the Court established whether the individuals concerned were officials of the United States, in which case their acts were indisputably imputable to the State. Almost in the same breath the Court then discussed the different question of whether individuals not having the status of United States officials but allegedly paid by and acting under the instructions of United States organs, could legally involve the responsibility of that State. These individuals were Latin American operatives, the so-called UCLAs ("Unilaterally Controlled Latino Assets"). The Court then moved to ascertain whether the responsibility of the United States could arise "in a less direct manner" (to borrow from the phraseology used by the Court). It therefore set out to determine whether other individuals, the so-called *contras*, although not formally officials of the United States, acted in such a way and were so closely linked to that State that their acts could be legally attributed to it.

109. It would therefore seem that in Nicaragua the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: the members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as "a well-established rule of international law",<sup>128</sup> that a State incurs responsibility for acts in breach of international obligations committed by individuals

<sup>126</sup> See Nicaragua, pp. 187-190.

<sup>127</sup> See Nicaragua, para. 75.

<sup>128</sup> See the Advisory Opinion delivered by the ICJ on 29 April 1999 in Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, para. 62.

who enjoy the status of organs under the national law of that State<sup>129</sup> or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.<sup>130</sup> The other two categories embraced individuals who, by contrast, were not formally organs or agents of the State. There were, first, those individuals not having United States nationality (the UCLAs) who acted while being in the pay, and on the direct instructions and under the supervision of United States military or intelligence personnel, to carry out specific tasks such as the mining of Nicaraguan ports or oil installations. The Court held that their acts were imputable to the United States, either on account of the fact that, in addition to being paid by United States agents or officials, they had been given specific instructions by these agents or officials and had acted under their supervision,<sup>131</sup> or because "agents of the United States" had "participated in the planning, direction, support and execution" of specific operations (such as the blowing up of underwater oil pipelines, attacks on oil and storage facilities, etc.).<sup>132</sup> The other category of individuals lacking the status of United States officials comprised the

<sup>129</sup> Customary international law on the matter is correctly restated in Article 5 of the Draft Articles on State Responsibility adopted in its first reading by the United Nations International Law Commission: "For the purposes of the present articles of Chapter II: The 'Act of the State' under International Law, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question" (Report of the International Law Commission on the work of its Forty-Eighth Session (6 May-26 July 1996), U.N. Doc. A/51/10, p. 126).

Article 5, as provisionally adopted by the ILC Drafting Committee in 1998, is even clearer. It provides (International Law Commission, Fiftieth Session, 1998, U.N. Doc. A/CN.4/L.569, p. 2):

"1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State." (emphasis added).

<sup>130</sup> See Article 7 of the ILC Draft Articles on State Responsibility adopted by the International Law Commission on first reading. It provides:

"1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question".

See the First Report on State Responsibility by the Special Rapporteur J. Crawford (22 July 1998) U.N. Doc. A/CN.4/490/Add.5, pp. 12-16. See also the text of the same provision as provisionally adopted by the ILC Drafting Committee in 1998 (U.N. Doc. A/CN.4/L.569, p. 2). The text of Article 7, as provisionally adopted by the ILC Drafting Committee in 1998, provides:

"The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question". (ibid.)

<sup>131</sup> See Nicaragua, paras. 75-80.

contras. It was primarily with regard to the contras that the Court asked itself on what conditions individuals without the status of State officials could nevertheless engage the responsibility of the United States as having acted as *de facto* State organs. It was with respect to the contras that the Court developed the doctrine of “effective control”.

110. At one stage in the judgement, when dealing with the contras, the Court appeared to lay down a “dependence and control” test:

What the Court has to determine at this point is whether or not the relationship of the contras to the United States government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States government, or as acting on behalf of that Government.<sup>133</sup>

111. The Prosecution, and Judge McDonald in her dissent, argue that by these words the Court set out an “agency test”. According to them, the Court only resorted to the “effective control” standard once it had found no agency relationship between the contras and the United States to exist, so that the contras could not be considered organs of the United States. The Court, according to this argument, then considered whether specific operations of the contras could be attributed to the United States, and the standard it adopted for this attribution was the “effective control” standard.

112. The Appeals Chamber does not subscribe to this interpretation. Admittedly, in paragraph 115 of the Nicaragua judgement, where “effective control” is mentioned, it is unclear whether the Court is propounding “effective control” as an alternative test to that of “dependence and control” set out earlier in paragraph 109, or is instead spelling out the requirements of the same test. The Appeals Chamber believes that the latter is the correct interpretation. In Nicaragua, in addition to the “agency” test (properly construed, as shall be seen in the next paragraph, as being designed to ascertain whether or not an individual has the formal status of a State official), the Court propounded only the “effective control” test. This conclusion is supported by the evidently stringent application of the “effective control” test which the Court used in finding that the acts of the contras were not imputable to the United States.

<sup>132</sup> *Ibid.*, para. 86.

<sup>133</sup> *Ibid.*, para. 109 (emphasis added).

113. In contrast with what the Prosecution, in following Judge McDonald’s dissent, has termed the “agency” test, the Court’s agency test amounts instead to a determination of the status of an individual as an organ or official (or member of a public entity exercising certain elements of governmental authority) within the domestic legal order of a particular State. In this regard, it would seem that the Separate Opinion of Judge Ago relied upon by Judge McDonald<sup>134</sup> and the Prosecution<sup>135</sup> does not actually support their interpretation.<sup>136</sup>

114. On close scrutiny, and although the distinctions made by the Court might at first sight seem somewhat unclear, the contention is warranted that in the event, the Court essentially set out two tests of State responsibility: (i) responsibility arising out of unlawful acts of State officials; and (ii) responsibility generated by acts performed by private individuals acting as *de facto* State organs. For State responsibility to arise under (ii), the Court required that private individuals not only be paid or financed by a State, and their action be coordinated or supervised by this State, but also that the State should issue specific instructions concerning the commission of the unlawful acts in question. Applying this test, the Court concluded that in the circumstances of the case it was met as far as the UCLAs were concerned (who were paid and supervised by the United States and in addition acted under their specific instructions). By contrast, the test was not met as far as the contras were concerned: in their case no specific instructions had been issued by the United States concerning the violations of international humanitarian law which they had allegedly perpetrated.

<sup>134</sup> Separate and Dissenting Opinion of Judge McDonald, para. 25.

<sup>135</sup> Cross-Appellant’s Brief, para. 2.58.

<sup>136</sup> See the Separate Opinion of Judge Ago in Nicaragua, paras. 14-17. Judge Ago correctly stated that it fell to the Court first to establish whether the individuals at issue had the status of national officials or officials of national public entities, and then, where necessary, to consider whether, lacking this status, they acted instead as *de facto* State officials, thereby engaging the responsibility of the State. For the purpose of establishing the international responsibility of a State, he therefore identified two broad classes of individuals: those having the status of officials of the State or of its autonomous bodies, and those lacking such a status. Clearly, for Judge Ago the issue of deciding whether an individual had acted as a *de facto* State organ arose only with respect to the latter category. Furthermore, Judge Ago characterised the CIA and the so-called UCLAs in a manner different from the Court (see para. 15).

(ii) The Grounds On Which the Nicaragua Test Does Not Seem To Be Persuasive

115. The “effective control” test enunciated by the International Court of Justice was regarded as correct and upheld by Trial Chamber II in the Judgement.<sup>137</sup> The Appeals Chamber, with respect, does not hold the Nicaragua test to be persuasive. There are two grounds supporting this conclusion.

a. The Nicaragua Test Would Not Seem to Be Consonant With the Logic of the Law of State Responsibility

116. A first ground on which the Nicaragua test as such may be held to be unconvincing is based on the very logic of the entire system of international law on State responsibility.

117. The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. These principles are reflected in Article 8 of the Draft on State Responsibility adopted on first reading by the United Nations International Law Commission and, even more clearly, in the text of the same provisions as provisionally adopted in 1998 by the ILC Drafting Committee.<sup>138</sup> Under this Article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may

<sup>137</sup> Judgement, paras. 584-588.

<sup>138</sup> Article 8 of the Draft provides:

“The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

- a) it is established that such person or group of persons was in fact acting on behalf of that State; or
- b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority” (U.N. Doc A/35/10, para. 34, in Yearbook of the International Law Commission, 1980, vol. II (2)).

See also the First Report on State Responsibility by the Special Rapporteur J. Crawford (U.N. Doc. A/CN.4/490/Add.5, pp. 16-24).

The text of Article 8 as provisionally adopted by the ILC Drafting Committee in 1998 provides:

“The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct” (A/CN.4/L.569, p. 3).

not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.

118. One situation is the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State (for instance, kidnapping a State official, murdering a dignitary or a high-ranking State official, blowing up a power station or, especially in times of war, carrying out acts of sabotage). In such a case, it would be necessary to show that the State issued specific instructions concerning the commission of the breach in order to prove – if only by necessary implication – that the individual acted as a de facto State agent. Alternatively it would be necessary to show that the State has publicly given retroactive approval to the action of that individual. A generic authority over the individual would not be sufficient to engage the international responsibility of the State. A similar situation may come about when an unorganised group of individuals commits acts contrary to international law. For these acts to be attributed to the State it would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue, or that it ex post facto publicly endorsed those acts.

119. To these situations another one may be added, which arises when a State entrusts a private individual (or group of individuals) with the specific task of performing lawful actions on its behalf, but then the individuals, in discharging that task, breach an international obligation of the State (for instance, a private detective is requested by State authorities to protect a senior foreign diplomat but he instead seriously mistreats him while performing that task). In this case, by analogy with the rules concerning State responsibility for acts of State officials acting ultra vires, it can be held that the State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf.

120. One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.

121. This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper. Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission,<sup>139</sup> a State is internationally accountable for ultra vires acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to

<sup>139</sup> Article 10, as adopted on first reading by the International Law Commission, provides:

"The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity". (Report of the International Law Commission on the work of its thirty-second session (5 May–25 July 1980), U.N. Doc. A/35/10, p.31).

See also the First Report on State Responsibility by the Special Rapporteur J. Crawford, U.N. Doc. A/CN.4/490/Add.5, pp. 29-31. The text of article 10, as provisionally adopted in 1998 by the ILC Drafting Committee, provides:

"The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise" (U.N. Doc. A/CN.4/L.569, p. 3).

individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.<sup>140</sup>

122. The same logic should apply to the situation under discussion. As noted above, the situation of an organised group is different from that of a single private individual performing a specific act on behalf of a State. In the case of an organised group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perform the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State. To a large extent the wise words used by the United States-Mexico General Claims Commission in the Youmans case with regard to State responsibility for acts of State military officials should hold true for acts of organised groups over which a State exercises overall control.<sup>141</sup>

123. What has just been said should not, of course, blur the necessary distinction between the various legal situations described. In the case envisaged by Article 10 of the Draft on State Responsibility (as well as in the situation envisaged in Article 7 of the same Draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity. In the case under discussion here, that of organised groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. Despite these legal differences, the fact

<sup>140</sup> This sort of "objective" State responsibility also arises in a different case. Under the relevant rules on State responsibility as laid down in Article 7 of the International Law Commission Draft, a State incurs responsibility for acts of organs of its territorial governmental entities (regions, Länder, provinces, member States of Federal States, etc.) even if under the national Constitution these organs enjoy broad independence or complete autonomy. (See footnote 130 above).

<sup>141</sup> The United States claimed that Mexico was responsible for the killing of United States nationals at the hands of a mob with the participation of Mexican soldiers. Mexico objected that, even if it were assumed that the soldiers were guilty of such participation, Mexico should not be held responsible for the wrongful acts of the soldiers, on the grounds that they had been ordered by the highest official in the locality to protect American citizens. Instead of carrying out these orders, however, they had acted in violation of them, in consequence of which the Americans had been killed. The Mexico/United States General Claims Commission dismissed the Mexican objection and held Mexico responsible. It stated that if international law were not to impute to a State wrongful acts committed by its officials outside their competence or contrary to instructions, "it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable". It then added that:

"[s]oldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no [international State] liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts". (Thomas H. Youmans (U.S.A.) v. United Mexican States, Decision of 23 November 1926, *Reports of International Arbitral Awards*, vol. IV, p. 116).

nevertheless remains that international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*), or (ii) by individuals who make up organised groups subject to the State's control. International law does so regardless of whether or not the State has issued specific instructions to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.

b. The Nicaragua Test is at Variance With Judicial and State Practice

124. There is a second ground – of a similarly general nature as the one just expounded – on which the Nicaragua test as such may be held to be unpersuasive. This ground is determinative of the issue. The “effective control” test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised. In short, as shall be seen, this practice has upheld the Nicaragua test with regard to individuals or unorganised groups of individuals acting on behalf of States. By contrast, it has applied a different test with regard to military or paramilitary groups.

125. In cases dealing with members of military or paramilitary groups, courts have clearly departed from the notion of “effective control” set out by the International Court of Justice (i.e., control that extends to the issuance of specific instructions concerning the various activities of the individuals in question). Thus, for instance, in the Stephens case, the Mexico-United States General Claims Commission attributed to Mexico acts committed during a civil war by a member of the Mexican “irregular auxiliary” of the army, which among other things lacked both uniforms and insignia.<sup>142</sup> In this case the Commission did not enquire as to whether or not specific instructions had been issued concerning the killing of the United States national by that guard.

<sup>142</sup> See United States v. Mexico (Stephens Case), Reports of International Arbitral Awards, vol. IV, pp. 266-267.

126. Similarly, in the Kenneth P. Yeager case,<sup>143</sup> the Iran-United States Claims Tribunal (“Claims Tribunal”) held that wrongful acts of the Iranian “revolutionary guards” or “revolutionary Komitehs” *vis-à-vis* American nationals carried out between 13 and 17 February 1979 were attributable to Iran (the Claims Tribunal referred in particular to the fact that two members of the “Guards” had forced the Americans to leave their house in order to depart from Iran, that the Americans had then been kept inside the Hilton Hotel for three days while the “Guards” manned the exits, and had subsequently been searched at the airport by other “Guards” who had taken their money). Iran, the respondent State, had argued that the conduct of those “Guards” was not attributable to it. It had admitted that “revolutionary guards and Komiteh personnel were engaged in the maintenance of law and order from January 1979 to months after February 1979 as government police forces rapidly lost control over the situation.” It had asserted, however, that “these revolutionaries did not operate under the name ‘Revolutionary Komitehs’ or ‘Revolutionary Guards’, and that they were not affiliated with the Provisional Government”.<sup>144</sup> In other words, the “Guards” were “not authentic”,<sup>145</sup> hence, their conduct was not attributable to Iran. The Claims Tribunal considered instead that the acts were attributable to Iran because the “Guards” or “Komitehs” had acted as *de facto* State organs of Iran. On this point the Claims Tribunal noted that:

[m]any of Ayatollah Khomeini's supporters were organised in local revolutionary committees, so-called Komitehs, which often emerged from the ‘neighbourhood committees’ formed before the victory of the revolution. These Komitehs served as local security forces in the immediate aftermath of the revolution. It is reported that they made arrests, confiscated property, and took people to prisons. [...]

Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary ‘Komitehs’ or ‘Guards’ and at the same time deny responsibility for wrongful acts committed by them.<sup>146</sup>

127. With specific reference to the action of the “Guards” in the case at issue, the Claims Tribunal emphasised that the two guards who had forced the Americans to leave their house

<sup>143</sup> See Kenneth P. Yeager v. Islamic Republic of Iran, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV, p. 92).

<sup>144</sup> *Ibid.*, para. 23.

<sup>145</sup> *Ibid.*, para. 37.

<sup>146</sup> *Ibid.*, paras 39, 45. The Claims Tribunal went on to note that:

“[w]hile there were complaints about a lack of discipline among the numerous Komitehs, Ayatollah Khomeini stood behind them, and the Komitehs, in general, were loyal to him and the clergy. Soon after the victory of the Revolution, the Komitehs, contrary to other groups, obtained a firm position within the State structure and were eventually conferred a permanent place in the State budget” (*ibid.*, para. 39; emphasis added).

were "dressed in everyday clothes, but wore distinctive arm bands indicating association with the new Government, and were armed with rifles".<sup>147</sup> With reference to those who had searched the Americans at the airport, the Claims Tribunal stressed that "they were performing the functions of customs, immigration and security officers".<sup>148</sup> Clearly, those "Guards" made up organised armed groups performing de facto official functions. They were therefore different from the Iranian militants who had stormed the United States Embassy in Tehran on 4 November 1979, with regard to which the International Court of Justice noted that after the invasion of the Embassy they described themselves as "Muslim Student Followers of the Imam's Policy".<sup>149</sup> Be that as it may, what is notable is that the Iran-United States Claims Tribunal did not enquire as to whether specific instructions had been issued to the "Guards" with regard to the forced expulsion of Americans.<sup>150</sup> The Claims Tribunal took the same stance in other cases.<sup>151</sup>

<sup>147</sup> *Ibid.*, paras. 12, 41.

<sup>148</sup> *Ibid.*, para. 61.

<sup>149</sup> United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports (1980), p. 13, para. 17.

<sup>150</sup> The Claims Tribunal stated the following:

"The Tribunal finds sufficient evidence in the record to establish a presumption that revolutionary 'Komitehs' or 'Guards' after 11 February 1979 were acting in fact on behalf of the new government, or at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object. Under those circumstances, and for the kind of measures involved here, the Respondent has the burden of coming forward with evidence showing that members of 'Komitehs' or 'Guards' were in fact not acting on its behalf, or were not exercising elements of government authority, or that it could not control them". (Kenneth P. Yeager v. Islamic Republic of Iran, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV, p. 92, at para. 43).

The Claims Tribunal went on to say:

"[...] Rather, the evidence suggests that the new government, despite occasional complaints about a lack of discipline, stood behind them [the Komitehs]. The Tribunal is persuaded, therefore, that the revolutionary 'Komitehs' or 'Guards' involved in this Case, were acting 'for' Iran." (para. 44).

The Tribunal then concluded that:

"[n]or has the Respondent established that it could not control the revolutionary 'Komitehs' or 'Guards' in this operation [namely, forcing foreigners to leave the country]. Because the new government accepted their activity in principle and their role in the maintenance of public security, calls for more discipline, phrased in general rather than specific terms, do not meet the standard of control required in order to effectively prevent these groups from committing wrongful acts against United States nationals. Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary 'Komitehs' or 'Guards' and at the same time deny responsibility for wrongful acts committed by them" (para. 45).

<sup>151</sup> See William L. Pereira Associates, Iran v. Islamic Republic of Iran, Award No. 116-1-3, 5 Iran-U.S. Claims Tribunal 1984, p. 198 at p. 226. See also Arthur Young and Company v. Islamic Republic of Iran, Telecommunications Company of Iran, Social Security Organization of Iran, Award No. 338-484-1, 17 Iran-U.S. Claims Tribunal Reports, 1987, p. 245). Here the Claims Tribunal found that in the circumstances of the case Iran was not responsible because there was no causal link between the action of the revolutionary guards and the alleged breach of international law. However, the Claims Tribunal held that otherwise Iran might have incurred international responsibility for acts of "armed men wearing patches on their pockets identifying them as members of the revolutionary guards" (para. 53). A similar stand was taken in Schott v. Islamic Republic of Iran, Award No. 474-268-1, 24 Iran-U.S. Claims Tribunal Reports, 1990, p. 203 at para. 59.

128. A similar approach was adopted by the European Court of Human Rights in *Loizidou v. Turkey*<sup>152</sup> (although in this case the question revolved around the possible control of a sovereign State over a State entity, rather than control by a State over armed forces operating in the territory of another State). The Court had to determine whether Turkey was responsible for the continuous denial to the applicant of access to her property in northern Cyprus and the ensuing loss of control over the property. The respondent State, Turkey, denied that the Court had jurisdiction, on the grounds that the act complained of was not committed by one of its authorities but, rather, was attributable to the authorities of the Turkish Republic of Northern Cyprus ("TRNC"). The Court dismissed these arguments and found that Turkey was responsible. In reaching the conclusion that the restrictions on the right to property complained of by the applicant were attributable to Turkey, the Court did not find it necessary to ascertain whether the Turkish authorities had exercised "detailed" control over the specific "policies and actions" of the authorities of the "TRNC". The Court was satisfied by the showing that the local authorities were under the "effective overall control" of Turkey.<sup>153</sup>

129. A substantially similar stand was recently taken in the Jorgic case by the Oberlandesgericht of Düsseldorf in a decision of 26 September 1997.<sup>154</sup> With regard to crimes committed in Bosnia and Herzegovina by Bosnian Serbs, the Court held that the Bosnian Serbs fighting against the central authorities of Sarajevo had acted on behalf of the FRY. To support this finding, the court emphasised that Belgrade financed, organised and equipped the Bosnian Serb army and paramilitary units and that there existed between the JNA and the Bosnian Serbs "a close personal, organisational and logistical interconnection and cooperation", which was considered to be a sufficient basis for regarding the conflict as

In *Daley*, on the other hand, the Claims Tribunal held Iran responsible for the expropriation of a car, for the five Iranian "Revolutionary Guards" who had taken the car were "in army-type uniforms" at the entrance of a hotel which had come "under the control of Revolutionary Guards" a few days before. (*Daley v. Islamic Republic of Iran*, Award No. 360-1-514-1, 18 Iran-U.S. Claims Tribunal Reports, 1988, 232 at paras. 19-20).

<sup>152</sup> *Loizidou v. Turkey* (Merits), Eur. Court of H. R., Judgment of 18 December 1996 (40/1993/435/514).

<sup>153</sup> In its judgement, the Court stated the following on the point at issue here:

"It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus [...] that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC: [...]'" (*ibid.*, para. 56).

<sup>154</sup> 2 SIE 8/96 (unpublished typescript; kindly provided by the German Embassy to the Netherlands and on file with the International Tribunal's Library).

international.<sup>155</sup> The court did not enquire as to whether or not the specific acts committed by the accused or other Bosnian Serbs had been ordered by the authorities of the FRY.<sup>156</sup>

130. Precisely what measure of State control does international law require for organised military groups? Judging from international case law and State practice, it would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State. This proposition is confirmed by the international practice concerning national liberation movements. Although some States provided movements such as the PLO, SWAPO or the ANC with a territorial base or with economic and military assistance (short of sending their own troops to aid them), other States, including those against which these movements were fighting, did not attribute international responsibility for the acts of the movements to the assisting States.<sup>157</sup> Nicaragua also supports this

<sup>155</sup> The Court stated the following:

"The conflict in Bosnia-Herzegovina was an international conflict for the purposes of Article 2 of the Fourth Geneva Convention. Owing to the declaration of independence and the referendum of 29 February and 1 March 1992 and to international recognition on 6 April 1992, Bosnia-Herzegovina had become an autonomous State, independent from Yugoslavia. The armed conflict that took place on its territory in the following period was not an internal clash (conflict, in which an ethnic group was trying to break with the existing State of Bosnia-Herzegovina and which [as a consequence] had no international character. The expert witness Fischer pointed out that, by using the term international humanitarian law applicable to this conflict, the United Nations Security Council has used the term usual in international terminology to refer to the law applicable to international armed conflicts. This [according to the expert witness] showed that the Security-Council considered the conflict to be international. The expert witness Fischer cited the following circumstances as indicia of an international conflict according to the prevailing view in international law: the participation of organs of a State in a conflict on the territory of another State, e.g. the participation of officers in the clashes, or the financing of and provision of technical equipment to one party to the conflict by another State; the latter at least when it is combined with the aforementioned interconnection [Verflechtung] between personnel. According to this Chamber's findings, these criteria are met in the case at hand. The Chamber has found that at the beginning of May officers of the JNA, which at that time was purely Serb, began taking Doboï and the surrounding villages. There can, therefore, be no doubt regarding the existence of an international armed conflict at that point in time. However, this Chamber has further found that after 19 May 1992, when the JNA officially withdrew from Bosnia-Herzegovina, officers of the JNA continued to be employed in Bosnia-Herzegovina and paid by Belgrade, and that at the end of May matériel, weapons and vehicles were still being brought from Belgrade to Bosnia-Herzegovina. As a consequence, a close personal, organisational and logistical interconnection [Verflechtung] of the Bosnian-Serb army, paramilitary groups and the JNA persisted. The headquarters of the Bosnian-Serb army maintained a liaison office in Belgrade." (ibid., pp. 158-160 of the unpublished typescript; unofficial translation).

<sup>156</sup> The judgement of the Dusseldorf Court of Appeal was upheld on appeal by the Federal Court of Justice (Bundesgerichtshof) by a judgement of 30 April 1999 (unpublished). The appeal was based, *inter alia*, on a misapplication of substantive law. This ground also included the question of whether the conflict was international in character. The Bundesgerichtshof did not address the matter specifically, thus implicitly upholding the judgement of the Dusseldorf Court. See, in particular, pp. 19-20 and 23 of the German typescript (3 StR 215/98), on file with the International Tribunal Library.

<sup>157</sup> See e.g., the debates in the U.N. Security Council in 1976, on the raids of South Africa into Zambia to destroy bases of the SWAPO (see in particular the statements of Zambia (SCOR, 1944th Meeting of 27 July 1976, paras. 10-45) and South Africa (ibid., paras. 47-69); see also SC resolution no. 393 (1976) of 30 July 1976); see also the debates on the Israeli raids in Lebanon in June 1982 (in particular the statements of

proposition, since the United States, although it aided the contras financially, and otherwise, was not held responsible for their acts (whereas on account of this financial and other assistance to the contras, the United States was held by the Court to be responsible for breaching the principle of non-intervention as well as "its obligation ... not to use force against another State."<sup>158</sup> This was clearly a case of responsibility for the acts of its own organs).

131. In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

132. It should be added that courts have taken a different approach with regard to individuals or groups not organised into military structures. With regard to such individuals or groups, courts have not considered an overall or general level of control to be sufficient, but have instead insisted upon specific instructions or directives aimed at the commission of specific acts, or have required public approval of those acts following their commission.

133. The Appeals Chamber will mention, first of all, the United States Diplomatic and Consular Staff in Tehran case.<sup>159</sup> There, the International Court of Justice rightly found that the Iranian students (who did not comprise an organised armed group) who had stormed the United States embassy and taken hostage 52 United States nationals, had not initially acted

Ireland (SCOR, 2374th Meeting of 5 June 1982, paras. 35-36) and of Israel (ibid., paras. 74-78 and SCOR, 2375th Meeting of 6 June 1982, paras. 22-67) and in July-August 1982 (see the statement of Israel, SCOR, 2385th Meeting of 29 July 1982, paras. 144-169); see also the debates on the South African raid in Lesotho in December 1982 (see in particular the statements of France (SCOR, 2407th Meeting of 15 December 1982, paras. 69-80), of Japan (ibid., paras. 98-107), of South Africa (SCOR, 2409th Meeting of 16 December 1982, paras. 126-160) and of Lesotho (ibid., paras. 219-227)).

Although there does not seem to exist any international practice in this area, it may happen that a State simply providing economic and military assistance to a military group (hence not necessarily exercising effective control over the group) directs a member of the group or the whole group to perform a specific internationally wrongful act, e.g. an international crime such as genocide. In this case one would face a situation similar to that described above, in the text, of a State issuing specific instructions to an individual.

<sup>158</sup> See Nicaragua, paras. 239-249, 292(3) and 292(4).

on behalf of Iran, for the Iranian authorities had not specifically instructed them to perform those acts.<sup>160</sup> Nevertheless, Iran was held internationally responsible for failing to prevent the attack on the United States' diplomatic premises and subsequently to put an end to that attack.<sup>161</sup> Later on, the Iranian authorities formally approved and endorsed the occupation of the Embassy and the detention of the United States nationals by the militants and even went so far as to order the students not to put an end to that occupation. At this stage, according to the Court, the militants became *de facto* agents of the Iranian State and their acts became internationally attributable to that State.<sup>162</sup>

134. The same approach was adopted in 1986 by the International Court itself in Nicaragua with regard to the UCLAs (which the Court defined as "persons of the nationality of unidentified Latin American countries").<sup>163</sup> For specific internationally wrongful acts of these "persons" to be imputable to the United States, it was deemed necessary by the Court that these persons not only be paid by United States organs but also act "on the instructions" of those organs (in addition to their being supervised and receiving logistical support from them).<sup>164</sup>

135. Similar views were propounded in 1987 by the Iran-United States Claims Tribunal in Short.<sup>165</sup> Iran was not held internationally responsible for the allegedly wrongful expulsion of the claimant. The Claims Tribunal found that the Iranian "revolutionaries" (armed but not comprising an organised group) who ordered the claimant's departure from Iran were not State organs, nor did Ayatollah Khomeini's declarations amount to specific incitement to the "revolutionaries" to expel foreigners.<sup>166</sup>

136. It should be added that State practice also seems to clearly support the approach under discussion.<sup>167</sup>

137. In sum, the Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies. Where the question at issue is whether a single private individual or a group that is not militarily organised has acted as a *de facto* State organ when performing a

<sup>165</sup> Alfred W. Short v. Islamic Republic of Iran, Award No. 312-11135-3, 16 Iran-U.S. Claims Tribunal Reports 1987, p. 76).

<sup>166</sup> After finding that the acts of the revolutionaries could not be attributed to Iran, the Claims Tribunal noted the following:

"The Claimant's reliance on the declarations made by the leader of the Revolution, Ayatollah Khomeini, and other spokesmen of the revolutionary movement, also lack the essential ingredient as being the cause for the Claimant's departure in circumstances amounting to an expulsion. While these statements are of anti-foreign and in particular anti-American sentiment, the Tribunal notes that these pronouncements were of a general nature and did not specify that Americans should be expelled en masse." (*ibid.*, para. 35).

<sup>167</sup> For examples of State practice apparently adopting this approach to the question of attribution, see for instance the relevant documents in the Cesare Rossi case (an Italian antifascist staying in Switzerland who was lured by two other Italians acting on behalf of the Italian authorities into crossing the border with Italy, where he was arrested: see 1 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1929, pp. 280-294); the Jacob Salomon case (a German national was kidnapped by another German national in Switzerland and taken to Germany: see the relevant documents mentioned in 29 American Journal of International Law 1935, pp. 502-507, 36 American Journal of International Law 1936, pp. 123-124). See further the Sabotage cases decided by the United States-Germany Mixed Claims Commission (Lehigh Valley Railroad Co., Agency of Canadian Can and Foundry Co., Ltd., and various underwriters (United States) v. Germany, Reports of International Arbitral Awards, vol. VIII, pp. 84ff. (especially pp. 84-87) and pp. 225 ff. (especially 457-460)). In these cases, in July 1916 some individuals, at the request of the German authorities intent on bringing about sabotage in the United States, had set fire to a terminal in New York harbour and to a plant of a company in New Jersey.

Mention can also be made of the Eichmann case (Attorney-General of the Government of Israel v. Adolf Eichmann, 36 International Law Reports 1968, pp. 277-344): see for instance Security Council resolution 4349 of 23 June 1960 and the debates in the Security Council; see in particular the statements of Argentina (SCOR, 865th Meeting of 22 June 1960, paras. 25-27) of Israel (SCOR of the 866th Meeting on 22 June 1960, para. 41) of Italy (SCOR of the 867th Meeting of 23 June 1960, paras. 32-34), of Ecuador (*ibid.*, paras. 47-49), of Tunisia (*ibid.*, para. 73) and of Ceylon (SCOR of the 868th Meeting of 23 June 1960, paras. 12-13).

<sup>159</sup> United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports (1980), pp. 3 ff.

<sup>160</sup> The Court stated the following:

"No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognised 'agents' or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State" (*ibid.*, p. 30, para. 58; emphasis added).

<sup>161</sup> *Ibid.*, pp. 30-33 (paras. 60-68).

<sup>162</sup> The Court stated the following:

"The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible [...]" (*ibid.*, p. 35, para. 74; emphasis added).

<sup>163</sup> See Nicaragua, para. 75.

<sup>164</sup> *Ibid.*, para. 80.

specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue. By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

138. Of course, if, as in Nicaragua, the controlling State is not the territorial State where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.

139. The same substantial evidence is required when, although the State in question is the territorial State where armed clashes occur, the general situation is one of turmoil, civil strife and weakened State authority.

140. Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to

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In many of these cases, the need for specific instructions by the State concerning the commission of the specific act with which the individual had been charged, or the *ex post facto* public endorsement of that act, can be inferred from the facts of the case.

achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.

141. It should be added that international law does not provide only for a test of overall control applying to armed groups and that of specific instructions (or subsequent public approval), applying to single individuals or militarily unorganised groups. The Appeals Chamber holds the view that international law also embraces a third test. This test is the assimilation of individuals to State organs on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions). Such a test is best illustrated by reference to certain cases that deserve to be mentioned, if only briefly.<sup>168</sup>

142. The first case is Joseph Kramer et al. (also called the Belsen case), brought before a British military court sitting at Luneburg (Germany).<sup>169</sup> The Defendants comprised not only some German staff members of the Belsen and Auschwitz concentration camps but also a number of camp inmates of Polish nationality and an Austrian Jew "elevated by the camp administrators to positions of authority over the other internees". They were *inter alia* accused of murder and other offences against the camp inmates. According to the official report on this case:

In meeting the argument that no war crime could be committed by Poles against other Allied nationals, the Prosecutor said that by identifying themselves with the authorities the Polish accused had made themselves as much responsible as the S.S. themselves. Perhaps it could be claimed that by the same process they could be regarded as having approximated to membership of the armed forces of Germany.<sup>170</sup>

143. Another case is more recent. This is the judgement handed down by the Dutch Court of Cassation on 29 May 1978 in the Menten case.<sup>171</sup> Menten, a Dutch national who was not formally a member of the German forces, had been accused of war crimes and crimes against humanity for having killed a number of civilians, mostly Jews, in Poland, on

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<sup>168</sup> These cases, although they concern war crimes (the notion of "grave breaches" had not yet come into existence at the time), are nevertheless relevant to our discussion. Indeed, they provide useful indications concerning the conditions on which civilians may be assimilated to State officials.  
<sup>169</sup> Trial of Joseph Kramer and 44 Others, British Military Court, Luneberg, 17<sup>th</sup> September-17<sup>th</sup> November, 1945, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, London 1947 ("UNWCC"), vol. II, p. 1.  
<sup>170</sup> *Ibid.*, p. 152 (emphasis added) (the Austrian civilian, Schlomowicz, was not found guilty). See also *ibid.*, p. 109. Most of the accused civilians were found guilty and sentenced to imprisonment. It is clear from this case that according to the court, by acting as *de facto* members of the German apparatus running the Belsen concentration camp, the Polish civilians could be assimilated to German State officials.

behalf of German special forces (SD or Einsatzkommandos). The court found<sup>172</sup> that Menten in fact behaved as a member of the German forces and consequently was criminally liable for these crimes.<sup>173</sup>

144. Other cases also prove that private individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as de facto State organs.<sup>174</sup> In these cases it follows that the acts of such individuals are attributed to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility.<sup>175</sup>

<sup>171</sup> Public Prosecutor v. Menten, 75 International Law Reports 1987, pp. 331 ff.

<sup>172</sup> The court stated the following:

“Since Menten, on the orders of the Befehlshaber of the Sicherheitspolizei in Poland, was dressed in the uniform of an under-officer of this branch of the [German] police when he was dem Einsatzkommando als Dolmetscher zugeteilt [assigned to the Special forces as interpreter], the [District] Court [of Amsterdam in its judgement of 14 December 1977] was justified in assuming that his position in the Einsatzkommando and his performance in within it of a more or less official character. Thus the relationship to the enemy in which Menten rendered incidental services was of such a nature that he could be regarded as a functionary of the enemy.” (ibid., p. 347. The English translation has been slightly corrected by the Appeals Chamber to bring it into line with the Dutch original, which can be found in *Nederlandse Jurisprudentie*, 1978, no. 358, p. 1236).

The court concluded that:

“From the above-mentioned evidence, taken together with the other evidence that in July 1941 Menten, dressed in a German uniform and in company with a number of other persons also so dressed, came to Podhorode [...] and was present at the killings, [it can be inferred] that he was there with members of the German Staff and that he rendered services to this Staff at the time of and in connection with these killings.” (ibid., p. 348).

<sup>173</sup> Menten was sentenced to ten years' imprisonment by the District Court of Rotterdam (Judgement of 9 July 1980, ibid., p. 361). It should be pointed out that the Dutch Court of Cassation had been obliged to investigate whether Menten was “in military, state or public service of or with the enemy” as this was an ingredient of the relevant Dutch law (ibid., p. 346). The Appeals Chamber holds, however, that the Menten case is in line with the rules of general international law concerning the assimilation of private individuals to State officials.

<sup>174</sup> See, e.g., the Daley case, where the Iran U.S. Claims Tribunal attributed international responsibility to Iran for acts of five Iranian “Revolutionary Guards” in “army type uniforms” (18 Iran-U.S. Claims Tribunal Reports, 1988, p. 238, at para. 19).

<sup>175</sup> In this connection mention can be made of the Stocké case brought before the European Commission of Human Rights. A German national fled from Germany to Switzerland and then to France to avoid arrest in Germany for alleged tax offences. He was then tricked into re-entering Germany by a police informant and was arrested. He then claimed before the European Commission of Human Rights that he had been arrested in violation of Article 5(1) of the ECHR. The Commission held that:

“[I]n the case of collusion between State authorities, i.e. any State official irrespective of his hierarchical position, and a private individual for the purpose of returning against his will a person living abroad, without consent of his State of residence, to the territory where he is prosecuted, the High Contracting Party concerned incurs responsibility for the acts of the private individual who de facto acts on its behalf. The Commission considers that such circumstances may render this person's arrest and detention unlawful within the meaning of article 5(1) of the Convention” (Stocké v. Federal Republic of Germany, Eur. Court H. R., judgement of 19 March 1991, Series A, no 199, para. 168 (Opinion of the Commission)).

145. In the light of the above discussion, the following conclusion may be safely reached. In the case at issue, given that the Bosnian Serb armed forces constituted a “military organization”, the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.

#### 4. The Factual Relationship Between the Bosnian Serb Army and the Army of the FRY

146. The Appeals Chamber has concluded that in general international law, three tests may be applied for determining whether an individual is acting as a de facto State organ. In the case of individuals forming part of armed forces or military units, as in the case of any other hierarchically organised group, the test is that of overall control by the State.

147. It now falls to the Appeals Chamber to establish whether, in the circumstances of the case, the Yugoslav Army exercised in 1992 the requisite measure of control over the Bosnian Serb Army. The answer must be in the affirmative.

148. The Appeals Chamber does not see any ground for overturning the factual findings made in this case by the Trial Chamber and relies on the facts as stated in the Judgement. The majority and Judge McDonald do not appear to disagree on the facts, which Judge McDonald also takes as stated in the Judgement,<sup>176</sup> but only on the legal interpretation to be given to those facts.

149. Since, however, the Appeals Chamber considers that the Trial Chamber applied an incorrect standard in evaluating the legal consequences of the relationship between the FRY

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Although these cases concerned State responsibility, they may be relevant to the question of the criminal responsibility of individuals perpetrating grave breaches of the Geneva Conventions, inasmuch as they set out the conditions necessary for individuals to be considered as de facto State organs.  
<sup>176</sup> See Separate and Dissenting Opinion of Judge McDonald, para. 1: “I completely agree with and share in the Opinion and Judgment with the exception of the determination that Article 2 of the Statute is inapplicable to the charges against the accused.”

and Bosnian Serb forces, the Appeals Chamber must now apply its foregoing analysis to the facts and draw the necessary legal conclusions therefrom.

150. The Trial Chamber clearly found that even after 19 May 1992, the command structure of the JNA did not change after it was renamed and redesignated as the VJ. Furthermore, and more importantly, it is apparent from the decision of the Trial Chamber and more particularly from the evidence as evaluated by Judge McDonald in her Separate and Dissenting Opinion, that even after that date the VJ continued to control the Bosnian Serb Army in Bosnia and Herzegovina, that is the VRS. The VJ controlled the political and military objectives, as well as the military operations, of the VRS. Two "factors" emphasised in the Judgement need to be recalled: first, "the transfer to the 1st Krajina Corps, as with other units of the VRS, of former JNA Officers who were not of Bosnian Serb extraction from their equivalent postings in the relevant VRS unit's JNA predecessor"<sup>177</sup> and second, with respect to the VRS, "the continuing payment of salaries, to Bosnian Serb and non-Bosnian Serb officers alike, by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)".<sup>178</sup> According to the Trial Chamber, these two factors did not amount to, or were not indicative of, effective control by Belgrade over the Bosnian Serb forces.<sup>179</sup> The Appeals Chamber shares instead the views set out by Judge McDonald in her Separate and Dissenting Opinion, whereby these two factors, in addition to others shown by the Prosecution, did indicate control.<sup>180</sup>

151. What emerges from the facts which are both uncontested by the Trial Chamber and mentioned by Judge McDonald (concerning the command and control structure that

<sup>177</sup> Judgement, para. 601.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*, paras. 601-602.

<sup>180</sup> As Judge McDonald noted:

"[T]he creation of the VRS [after 19 May 1992] was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations. Importantly, the objective remained the same [...] The VRS clearly continued to operate as an integrated and instrumental part of the Serbian war effort. [...] The VRS Main Staff, the members of which had all been generals in the JNA and many of whom were appointed to their positions by the JNA General Staff, maintained direct communications with the VJ General Staff via a communications link from Belgrade. [...] Moreover, the VRS continued to receive supplies from the same suppliers in the Federal Republic of Yugoslavia (Serbia and Montenegro) who had contracted with the JNA, although the requests after 19 May 1992 went through the Chief of Staff of the VRS who then sent them onto Belgrade." (Separate and Dissenting Opinion of Judge McDonald, paras. 7-8).

persisted after the redesignation of the VRS and the continuous payment of salaries to officers of the Bosnian Serb army by the FRY) is that the VRS and VJ did not, after May 1992, comprise two separate armies in any genuine sense. This is further evidenced by the following factors:

(i) The re-organization of the JNA and the change of name did not point to an alteration of military objectives and strategies. The command structure of the JNA and the re-designation of a part of the JNA as the VRS, while undertaken to create the appearance of compliance with international demands, was in fact designed to ensure that a large number of ethnic Serb armed forces were retained in Bosnia and Herzegovina.<sup>181</sup>

(ii) Over and above the extensive financial, logistical and other assistance and support which were acknowledged to have been provided by the VJ to the VRS, it was also uncontested by the Trial Chamber that as a creation of the FRY/VJ, the structures and ranks of the VJ and VRS were identical, and also that the FRY/VJ directed and supervised the activities and operations of the VRS.<sup>182</sup> As a result, the VRS reflected the strategies and tactics devised by the FRY/JNA/VJ.

<sup>181</sup> In the light of the demand of the Security Council on 15 May 1992 that all interference from outside Bosnia and Herzegovina by units of the JNA cease immediately, the Trial Chamber characterised the dilemma posed for the JNA by increasing international scrutiny from 1991 onwards in terms of the way in which the JNA could:

"be converted into an army of what remained of Yugoslavia, namely Serbia and Montenegro, yet continue to retain in Serb hands control of substantial portions of Bosnia and Herzegovina while appearing to comply with international demands that the JNA quit Bosnia and Herzegovina. [...] The solution as far as Serbia was concerned was found by transferring to Bosnia and Herzegovina all Bosnian Serb soldiers serving in JNA units elsewhere while sending all non-Bosnian soldiers out of Bosnia and Herzegovina. This ensured seeming compliance with international demands while effectively retaining large ethnic Serb armed forces in Bosnia and Herzegovina" (Judgement, paras. 113-114).

Additionally, the U.N. Secretary-General, in commenting on its purported withdrawal from Bosnia and Herzegovina, concluded in his report of 3 December 1992 that "[t]hrough JNA has withdrawn completely from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the 'Serb Republic'" (Report of the Secretary-General concerning the situation in Bosnia and Herzegovina, U.N. Doc. A/47/747, para. 10).

<sup>182</sup> Judgement, para. 115.

"The VRS was in effect a product of the dissolution of the old JNA and the withdrawal of its non-Bosnian elements into Serbia. However, most, if not all, of the commanding officers of units of the old JNA who found themselves stationed with their units in Bosnia and Herzegovina on 18 May 1992, nearly all Serbs, remained in command of those units throughout 1992 and 1993 [...]"

See further *ibid.*, para. 590: "The attack on Kozarac was carried out by elements of an army Corps based in Banja Luka. This Corps, previously a Corps of the old JNA, became part of the VRS and was renamed the 'Banja Luka' or '1st Krajina' Corps after 19 May 1992 but retained the same commander." See also *ibid.*, paras. 114-116, 118-121, 594.

(iii) Elements of the FRY/VJ continued to directly intervene in the conflict in Bosnia and Herzegovina after 19 May 1992, and were fighting with the VRS and providing critical combat support to the VRS. While an armed conflict of an international character was held to have existed only up until 19 May 1992, the Trial Chamber did nevertheless accept that thereafter "active elements" of the FRY's armed forces, the Yugoslav Army (VJ), continued to be involved in an armed conflict with Bosnia and Herzegovina.<sup>183</sup> Much de facto continuity, in terms of the ongoing hostilities,<sup>184</sup> was therefore observable and there seems to have been little factual basis for the Trial Chamber's finding that by 19 May 1992, the FRY/VJ had lost control over the VRS.<sup>185</sup>

(iv) JNA military operations under the command of Belgrade that had already commenced by 19 May 1992 did not cease immediately and, from a purely practical point of view, it is highly unlikely that they would have been able to cease overnight in any event.<sup>186</sup>

<sup>183</sup> Ibid., para. 118 ("Despite the announced JNA withdrawal from Bosnia and Herzegovina in May 1992, active elements of what had been the JNA, now rechristened as the VJ [...] remained in Bosnia and Herzegovina after the May withdrawal and worked with the VRS throughout 1992 and 1993") and para. 569 ("[...] the forces of the VJ continued to be involved in the armed conflict after that date").

<sup>184</sup> See in particular *ibid.*, para. 566:

"The ongoing conflicts before, during and after the time of the attack on Kozarac on 24 May 1992 were taking place and continued to take place throughout the territory of Bosnia and Herzegovina between the government of the Republic of Bosnia and Herzegovina, on the one hand, and, on the other hand, the Bosnian Serb forces, elements of the VJ operating from time to time in the territory of Bosnia and Herzegovina, and various paramilitary groups, all of which occupied or were proceeding to occupy a significant portion of the territory of that State."

See also para. 579: "The take-over of opština Prijedor began before the JNA withdrawal on 19 May 1992 and was not completed until after that date". See also the Dissenting Opinion of Judge McDonald who noted "The continuity between the JNA and the VRS particularly as it relates to the military operations in the Opština Prijedor area [...]" (Separate and Dissenting Opinion of Judge McDonald, para. 15).

<sup>185</sup> Moreover, it is interesting to observe that while concluding that by 19 May 1992 effective control over the VRS had been lost by the JNA/VJ, the Trial Chamber simultaneously observed that such control nevertheless did not appear to have been regained by the Bosnian authorities. In particular, the Trial Chamber found that the "Government of the Republic of Bosnia and Herzegovina [...] faced [...] major problems [...] of defence, involving control over the mobilization and operations of the armed forces" (Judgement, para. 124, emphasis added).

<sup>186</sup> In and of itself, the logistical difficulties of disengaging from the conflict and withdrawing such a large force would have been considerable. With regard to the extent and depth of the involvement of the large number of JNA forces engaged in Bosnia and Herzegovina and the ongoing nature of their activities beyond 19 May 1992, see *ibid.*, paras. 124-125: "By early 1992 there were some 100,000 JNA troops in Bosnia and Herzegovina with over 700 tanks, 1,000 armoured personnel carriers, much heavy weaponry, 100 planes and 500 helicopters, all under the command of the General Staff of the JNA in Belgrade. [...] On 19 May 1992 the withdrawal of JNA forces from Bosnia and Herzegovina was announced but the attacks were continued by the VRS."

The creation of the VRS by the FRY/VJ, therefore, did not indicate an intention by Belgrade to relinquish the control held by the FRY/VJ over the Bosnian Serb army. To the contrary, in fact, the establishment of the VRS was undertaken to continue the pursuit of the FRY's own political and military objectives, and the evidence demonstrates that these objectives were implemented by military and political operations that were controlled by Belgrade and the JNAVJ. There is no evidence to suggest that these objectives changed on 19 May 1992.<sup>187</sup>

152. Taken together, these factors suggest that the relationship between the VJ and VRS cannot be characterised as one of merely coordinating political and military activities. Even if less explicit forms of command over military operations were practised and adopted in response to increased international scrutiny, the link between the VJ and VRS clearly went far beyond mere coordination or cooperation between allies and in effect, the renamed Bosnian Serb army still comprised one army under the command of the General Staff of the VJ in Belgrade.<sup>188</sup> It was apparent that even after 19 May 1992 the Bosnian Serb army continued to act in pursuance of the military goals formulated in Belgrade. In this regard, clear evidence of a chain of military command between Belgrade and Pale was presented to the Trial Chamber and the Trial Chamber accepted that the VRS Main Staff had links and regular communications with Belgrade.<sup>189</sup> In spite of this, and although the Trial Chamber acknowledged the possibility that certain members of the VRS may have been specifically

<sup>187</sup> See in particular *ibid.*, para. 116 (citing the 1993 publication of the former Yugoslav Federal Secretary for Defence, General Veljko Kadijević, entitled *My view of the Break-up: an Army without a State* (Prosecution Exhibit 30)):

"The units and headquarters of the JNA formed the backbone of the army of the Serb Republic (Republic of Srpska) complete with weaponry and equipment [...] First the JNA and later the army of the Republic of Srpska, which the JNA put on its feet, helped to liberate Serb territory, protect the Serb nation and create the favourable military preconditions for achieving the interests and rights of the Serb nation in Bosnia and Herzegovina...."

See also para. 590:

"The occupation of Kozarac and of the surrounding villages was part of a military and political operation, begun before 19 May 1992 with the take-over of the town of Prijedor on 29 April 1992, aimed at establishing control over the opština which formed part of the land corridor of Bosnian territory linking the Federal Republic of Yugoslavia (Serbia and Montenegro) with the so-called Republic of Serbian Krajina in Croatia."

<sup>188</sup> While the relationship between the JNA and VRS may have included coordination and cooperation, it cannot be seen as limited to this. As the Trial Chamber itself noted: "In 1991 and on into 1992 the Bosnian Serb and Croatian Serb paramilitary forces cooperated with and acted under the command and within the framework of the JNA." (*ibid.*, para. 593; emphasis added).

<sup>189</sup> *Ibid.*, para. 598: "The Trial Chamber has already considered the overwhelming importance of the logistical support provided by the Federal Republic of Yugoslavia (Serbia and Montenegro) to the VRS. [...] [I]n addition to routing all high-level VRS communications through secure links in Belgrade, a

charged by the FRY authorities to commit particular acts or to carry out particular tasks of some kind, it concluded that “without evidence of orders having been received from Belgrade which circumvented or overrode the authority of the Corps Commander, those acts cannot be said to have been carried out ‘on behalf of’ the Federal Republic of Yugoslavia (Serbia and Montenegro).”<sup>190</sup>

153. The Appeals Chamber holds that to have required proof of specific orders circumventing or overriding superior orders not only applies the wrong test but is also questionable in this context. A distinguishing feature of the VJ and the VRS was that they possessed shared military objectives. As a result, it is inherently unlikely that orders from Belgrade circumventing or overriding the authority of local Corps commanders would have ever been necessary as these forces were of the same mind: a point that appears to have been virtually conceded by the Trial Chamber.<sup>191</sup>

154. Furthermore, the Trial Chamber, noting that the pay of all 1<sup>st</sup> Krajina Corps officers and presumably of all senior VRS Commanders as former JNA officers continued to be received from Belgrade after 19 May 1992, acknowledged that a possible conclusion with regard to individuals, is that payment could well “be equated with control”.<sup>192</sup> The Trial Chamber nevertheless dismissed such continuity of command structures, logistical organization, strategy and tactics as being “as much matters of convenience as military

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communications link for everyday use was established and maintained between VRS Main Staff Headquarters and the VJ Main Staff in Belgrade [...]”

<sup>190</sup> *Ibid.*, para. 601.

<sup>191</sup> The Trial Chamber noted that:

“It is clear from the evidence that the military and political objectives of the Republika Srpska and of the Federal Republic of Yugoslavia (Serbia and Montenegro) were largely complementary. [...] The [...] political leadership of the Republika Srpska and their senior military commanders no doubt considered the success of the overall Serbian war effort as a prerequisite to their stated political aim of joining with Serbia and Montenegro as part of a Greater Serbia. [...] In that sense, there was little need for the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to attempt to exercise any real degree of control over, as distinct from coordination with, the VRS. So long as the Republika Srpska and the VRS remained committed to the shared strategic objectives of the war, and the Main Staffs of the two armies could coordinate their activities at the highest levels, it was sufficient for the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ to provide the VRS with logistical supplies and, where necessary, to supplement the Bosnian elements of the VRS officer corps with non-Bosnian VJ or former JNA officers, to ensure that this process was continued” (*ibid.*, paras. 603-604).

<sup>192</sup> *Ibid.*, para. 602. On this point, the Trial Chamber noted, further, that:

“given that the Federal Republic of Yugoslavia (Serbia and Montenegro) had taken responsibility for the financing of the VRS, most of which consisted of former JNA soldiers and officers, it is a fact not to be wondered at that such financing would not only include payments to soldiers and officers but that

necessity” and noted that such evidence “establishes nothing more than the potential for control inherent in the relationship of dependency which such financing produced.”<sup>193</sup> In the Appeals Chamber’s view, however, and while the evidence may not have disclosed the exact details of how the VRS related to the main command in Belgrade, it is nevertheless important to bear in mind that a clear intention existed to mask the commanding role of the FRY; a point which was amply demonstrated by the Prosecution.<sup>194</sup> In the view of the Appeals Chamber, the finding of the Trial Chamber that the relationship between the FRY/VJ and VRS amounted to cooperation and coordination rather than overall control suffered from having taken largely at face value those features which had been put in place intentionally by Belgrade to make it seem as if their links with Pale were as partners acting only in cooperation with each other. Such an approach is not only flawed in the specific circumstances of this case, but also potentially harmful in the generality of cases. Undue emphasis upon the ostensible structures and overt declarations of the belligerents, as opposed to a nuanced analysis of the reality of their relationship, may tacitly suggest to groups who are in de facto control of military forces that responsibility for the acts of such forces can be evaded merely by resort to a superficial restructuring of such forces or by a facile declaration that the reconstituted forces are henceforth independent of their erstwhile sponsors.

155. Finally, it must be noted that the Trial Chamber found the various forms of assistance provided to the armed forces of the Republika Srpska by the Government of the FRY to have been “crucial” to the pursuit of their activities and that “those forces were almost completely dependent on the supplies of the VJ to carry out offensive operations.”<sup>195</sup> Despite this finding, the Trial Chamber declined to make a finding of overall control. Much was made of the lack of concrete evidence of specific instructions. Proof of “effective” control was also held to be insufficient,<sup>196</sup> on the grounds, once again, that the Trial Chamber lacked explicit evidence of direct instructions having been issued from

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existing administrative mechanisms for financing those soldiers and their operations would be relied on after 19 May 1992[...].” (*ibid.*)

<sup>193</sup> *Ibid.*

<sup>194</sup> See in this regard the testimony of the expert witness Dr. James Gow, transcript of hearing in *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-T, 10 May 1996, pp. 308-309; *ibid.*, 13 May 1996, pp. 330-338. <sup>195</sup> *Judgement*, para. 605.

<sup>196</sup> It was deemed insufficient by the Trial Chamber that the VJ “made use of the potential for control inherent in that dependence”, or was otherwise given effective control over those forces [...]” (*ibid.*; emphasis added).

Belgrade.<sup>197</sup> However, this finding was based upon the Trial Chamber having applied the wrong test.

156. As the Appeals Chamber has already pointed out, international law does not require that the particular acts in question should be the subject of specific instructions or directives by a foreign State to certain armed forces in order for these armed forces to be held to be acting as *de facto* organs of that State. It follows that in the circumstances of the case it was not necessary to show that those specific operations carried out by the Bosnian Serb forces which were the object of the trial (the attacks on Kozarac and more generally within opština Prijedor) had been specifically ordered or planned by the Yugoslav Army. It is sufficient to show that this Army exercised overall control over the Bosnian Serb Forces. This showing has been made by the Prosecution before the Trial Chamber. Such control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS. This sort of control is sufficient for the purposes of the legal criteria required by international law.

157. An *ex post facto* confirmation of the fact that over the years (and in any event between 1992 and 1995) the FRY wielded general control over the Republika Srpska in the political and military spheres can be found in the process of negotiation and conclusion of the Dayton-Paris Accord of 1995. Of course, the conclusion of the Dayton-Paris Accord in 1995 cannot constitute direct proof of the nature of the link that existed between the Bosnian Serb and FRY armies after May 1992 and hence it is by no means decisive as to the issue of control in this period. Nevertheless, the Dayton-Paris Accord may be seen as the culmination of a long process. This process necessitated a dialogue with all political and military forces wielding actual power on the ground (whether *de facto* or *de iure*) and a continuous response to the shifting military and political fortunes of these forces. The political process leading up to Dayton commenced soon after the outbreak of hostilities and was ongoing during the key period under examination. To the extent that its contours were shaped by, and thus reflect, the actual power structures which persisted in Bosnia and

<sup>197</sup> The Trial Chamber noted that:

“the Federal Republic of Yugoslavia (Serbia and Montenegro), through the dependence of the VRS on the supply of matériel by the VJ, had the capability to exercise great influence and perhaps even control over the VRS [...] ?Howevertg there is no evidence on which this Trial Chamber can conclude that the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ ever directed or, for that matter, ever felt the need to attempt to direct, the actual military operations of the VRS [...]” (*ibid.*).

Herzegovina over the course of the conflict, the Dayton-Paris Accord provides a particular insight into the political, strategic and military realities which prevailed in Bosnia and Herzegovina up to 1995, and including May 1992. The fact that from 4 August 1994 the FRY appeared to cut off its support to the Republika Srpska because the leadership of the former had misgivings about the authorities in the latter is not insignificant.<sup>198</sup> Indeed, this “delinking” served to emphasise the high degree of overall control exercised over the Republika Srpska by the FRY, for, soon after this cessation of support from the FRY, the Republika Srpska realised that it had little choice but to succumb to the authority of the FRY.<sup>199</sup> Thus, the Dayton-Paris Accord may indirectly shed light upon the realities of the command and control structure that existed over the Bosnian Serb army at the time the VRS and the VJ were ostensibly delinked, and may also assist the evaluation of whether or not control continued to be exercised over the Bosnian Serb army by the FRY army thereafter.

158. The Appeals Chamber will now turn to examine the specific features of the Dayton Accord that are of relevance to this inquiry.

159. By an agreement concluded on 29 August 1995 between the FRY and the Republika Srpska and referred to in the preamble of the Dayton-Paris Accord, it was provided that a unified delegation would negotiate at Dayton. This delegation would consist of six persons, three from the FRY and three from the Republika Srpska. The Delegation was to be chaired

<sup>198</sup> See Report of the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia on the establishment and commencement of operations of an International Conference on the Former Yugoslavia Mission to the Federal Republic of Yugoslavia (Serbia and Montenegro), S/1994/1074, 19 September 1996, p. 3, where it is noted that as of 4 August 1994, the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) ordered, *inter alia*, the breaking off of political and economic relations with the Republika Srpska and the closure of the border between the Republika Srpska and the FRY to all transport towards the Republika Srpska, except food, clothing and medicine. International observers were deployed to monitor compliance with these measures, and it was reported by the Co-Chairmen that the Government of the FRY appeared to be “meeting its commitment to close the border between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the areas of the Republic of Bosnia and Herzegovina under the control of the Bosnian Serb forces.” (Report of the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia on the state of implementation of the border closure measures taken by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro), S/1994/1124, 3 October 1994, pp. 2-3).

<sup>199</sup> As outlined below, this process culminated in the agreement of the Republika Srpska to be represented at the Dayton conference by the FRY (below, at paragraph 159). This appears to have been in spite of intense opposition, within the Republika Srpska, to the peace settlements proposed by the international community, as is evidenced by the overwhelming rejection by the Bosnian Serbs of the international community’s peace plan for Bosnia and Herzegovina in a referendum which took place in Bosnian Serb-held territory on 27 – 28 August 1994 (See Report of the Secretary-General on the Work of the Organization, UNGAOR, 49<sup>th</sup> sess., supp. no. 1 (A/49/1), 2 September 1994, p. 95).

by President Milošević, who would have a casting vote in case of divided votes.<sup>200</sup> Later on, when it came to the signing of the various agreements made at Dayton, it emerged again that it was the FRY that in many respects acted as the international subject wielding authority over the Republika Srpska. The General Framework Agreement, by which Bosnia and Herzegovina, Croatia and the FRY endorsed the various annexed Agreements and undertook to respect and promote the fulfilment of their provisions, was signed by President Milošević. This signature had the effect of guaranteeing respect for these commitments by the Republika Srpska. Furthermore, by a letter of 21 November 1995 addressed to various States (the United States, Russia, Germany, France and the United Kingdom), the FRY pledged to take "all necessary steps, consistent with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, to ensure that the Republika Srpska fully respects and complies with the provisions" of the Agreement on Military Aspects of the Peace Settlement (Annex 1A to the Dayton-Paris Accord).<sup>201</sup> In addition, the letter by which the Republika Srpska undertook to comply with the aforementioned Agreement was signed on 21 November 1995 by the Foreign Minister of the FRY, Mr. Milutinović, for the Republika Srpska.<sup>202</sup>

160. All this would seem to bear out the proposition that in actual fact, at least between 1992 and 1995, overall political and military authority over the Republika Srpska was held by the FRY (control in this context included participation in the planning and supervision of ongoing military operations). Indeed, the fact that it was the FRY that had the final say regarding the undertaking of international commitments by the Republika Srpska, and in addition pledged, at the end of the conflict, to ensure respect for those international commitments by the Republika Srpska, confirms that (i) during the armed conflict the FRY exercised control over that entity, and (ii) such control persisted until the end of the conflict.

<sup>200</sup> This agreement stipulated that the delegation of the Republika Srpska was to be "headed by the President of the Republic of Serbia Mr. Slobodan Milošević" (Article 2). Pursuant to this agreement, the leadership of the Republika Srpska agreed "to adopt the binding decisions of the delegation, regarding the Peace Plan, in plenary sessions, by simple majority. In the case of divided votes, the vote of the President, Mr. Slobodan Milošević, shall be decisive" (Article 3). That Mr. Milošević was head of the joint delegation was confirmed by Mr. Milošević himself in his letter of 21 November 1995 to President Izetbegović concerning Annex 9 to the Dayton-Paris Accord. (Agreement on file with the International Tribunal's Library).

<sup>201</sup> This letter had been signed by Mr. Milutinović, Foreign Minister of the FRY, following a request of 20 November 1995 of the three members of the "Delegation of Republika Srpska" to Mr. Milošević.  
<sup>202</sup> See the texts of the Dayton-Paris Accord (General Framework Agreement for Peace in Bosnia and Herzegovina, initialled by the parties on 21 November 1995, U.N. Doc. A/50/790, S/1995/999, 30 November 1995).

161. This would therefore constitute yet another (albeit indirect) indication of the subordinate role played vis-à-vis the FRY by the Republika Srpska and its officials in the aforementioned period, including 1992.

162. The Appeals Chamber therefore concludes that, for the period material to this case (1992), the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY. Hence, even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an international armed conflict.

##### 5. The Status of the Victims

163. Having established that in the circumstances of the case the first of the two requirements set out in Article 2 of the Statute for the grave breaches provisions to be applicable, namely, that the armed conflict be international, was fulfilled, the Appeals Chamber now turns to the second requirement, that is, whether the victims of the alleged offences were "protected persons".

##### (a) The Relevant Rules

164. Article 4(1) of Geneva Convention IV (protection of civilians), applicable to the case at issue, defines "protected persons" - hence possible victims of grave breaches - as those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals". In other words, subject to the provisions of Article 4(2),<sup>203</sup> the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In addition, as is apparent from the preparatory work,<sup>204</sup> the

<sup>203</sup> Article 4(2) of Geneva Convention IV provides as follows:

"Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are".

<sup>204</sup> The preparatory works of the Convention suggests an intent on the part of the drafters to extend its application, *inter alia*, to persons having the nationality of a Party to the conflict who have been expelled by that Party or who have fled abroad, acquiring the status of refugees. If these persons subsequently happen to

Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection (consider, for instance, a situation similar to that of German Jews who had fled to France before 1940, and thereafter found themselves in the hands of German forces occupying French territory).

165. Thus already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases. In the aforementioned case of refugees, the lack of both allegiance to a State and diplomatic protection by this State was regarded as more important than the formal link of nationality.<sup>205</sup> In the cases provided for in Article 4(2), in addition to nationality, account was taken of the existence or non-existence of diplomatic protection: nationals of a neutral State or a co-belligerent State are not treated as “protected persons” unless they are deprived of or do not enjoy diplomatic protection. In other words, those nationals are not “protected persons” as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of “protected persons”.

166. This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected

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find themselves on the territory of the other Party to the conflict occupied by their national State, they nevertheless do not lose the status of “protected persons” (see Final Record of the Diplomatic Conference of Geneva of 1949, vol. II, pp. 561-562, 793-796, 813-814).

<sup>205</sup> See also Article 44 of Geneva Convention IV:

“In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government.”

In addition, see Article 70(2):

“Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for the offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.”

persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.

(b) Factual Findings

167. In the instant case the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina. However, it has been shown above that the Bosnian Serb forces acted as *de facto* organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were “protected persons” as they found themselves in the hands of armed forces of a State of which they were not nationals.

168. It might be argued that before 6 October 1992, when a “Citizenship Act” was passed in Bosnia and Herzegovina, the nationals of the FRY had the same nationality as the citizens of Bosnia and Herzegovina, namely the nationality of the Socialist Federal Republic of Yugoslavia. Even assuming that this proposition is correct, the position would not alter from a legal point of view. As the Appeals Chamber has stated above, Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.

169. Hence, even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable. Indeed, the victims did not owe allegiance to (and did not receive the diplomatic protection of) the State (the FRY) on whose behalf the Bosnian Serb armed forces had been fighting.

C. Conclusion

170. It follows from the above that the Trial Chamber erred in so far as it acquitted the Appellant on the sole ground that the grave breaches regime of the Geneva Conventions of 1949 did not apply.

171. The Appeals Chamber accordingly finds that the Appellant was guilty of grave breaches of the Geneva Conventions on Counts 8, 9, 12, 15, 21 and 32.

V. THE SECOND GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE FINDING OF INSUFFICIENT EVIDENCE OF PARTICIPATION IN THE KILLINGS IN JASKI I

A. Submissions of the Parties

1. The Prosecution case

172. The Prosecution's second ground of cross-appeal is:

The Trial Chamber, at page 132 para 373 [of the Judgement], erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part of the killing of the five men or any of them, from the village of Jaski}].<sup>206</sup>

173. The Prosecution fully accepts the findings of fact of the Trial Chamber,<sup>207</sup> but makes two submissions. First, it submits that, on the basis of the said facts, the Trial Chamber has misdirected itself on the application of the law on the standard of proof beyond reasonable doubt. Secondly, it contends that in determining that the Prosecution did not meet the burden of proof, the Trial Chamber misdirected itself on the application of the common purpose doctrine.<sup>208</sup>

174. In relation to the first error, the Prosecution submits that the only reasonable conclusion to be drawn from the facts found by the Trial Chamber is that of guilt.<sup>209</sup> The test for proof beyond reasonable doubt is that "the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt."<sup>210</sup> According to the Prosecution, the Trial Chamber's hypothesis that it was a "distinct possibility that the killing of the five victims may have been the act of a quite distinct group of armed men"<sup>211</sup> is not fair or

<sup>206</sup> Cross-Appellant's Brief, para. 3.6.

<sup>207</sup> T. 169 (20 April 1999).

<sup>208</sup> T. 170 (20 April 1999).

<sup>209</sup> T. 176 (20 April 1999).

<sup>210</sup> Cross-Appellant's Brief, para. 3.12.

<sup>211</sup> Judgement, para. 373.

rational.<sup>212</sup> The use of such terms as “bare possibility”<sup>213</sup> and “could suggest”<sup>214</sup> indicates the misapplication of the test of proof beyond reasonable doubt.<sup>215</sup>

175. As to the second error, the Prosecution submits that the gist of the common purpose doctrine is that if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose.<sup>216</sup> The Trial Chamber found that the Appellant’s participation in the attack on Sivci and Jaski}i was part of the armed conflict in the territory of Prijedor municipality between May and December 1992. A central aspect of the attack was a policy to rid the region of the non-Serb population by committing inhumane and violent acts against them in order to achieve the creation of a Greater Serbia. According to the Prosecution, the only conclusion reasonably open from all the evidence is that the killing of the five victims was entirely predictable as part of the natural and probable consequences of the attack on the villages of Sivci and Jaski}i on 14 June 1992.<sup>217</sup> It is the Prosecution’s submission that this policy of ethnic cleansing was carried out throughout opština Prijedor against non-Serbs by various illegal means, including killings.<sup>218</sup> In this regard, the Appellant’s actions and presence did directly and substantially assist that policy. It follows that, regardless of which member or members of the Serb forces actually killed the five victims, the Appellant should have been found guilty under Article 7(1) of the Statute.<sup>219</sup>

## 2. The Defence Case

176. The Defence submits that, in light of its finding that nobody was killed in Sivci on 14 June 1992, the Trial Chamber correctly found that it was a possibility that the five victims in Jaski}i were killed by another, distinct group of armed men, especially as nothing

<sup>212</sup> Skeleton Argument of the Prosecution, para. 42.

<sup>213</sup> Judgement, para. 373: “The bare possibility that the deaths of the Jaski}i villagers were the result of encountering a part of that large force would be enough [...] to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths.”

<sup>214</sup> *Ibid.*, para. 373: “The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part [...]”

<sup>215</sup> T. 172 (20 April 1999).

<sup>216</sup> Cross-Appellant’s Brief, para. 3.19.

<sup>217</sup> *Ibid.*, paras. 3.24, 3.27.

<sup>218</sup> Cross-Appellant’s Brief, paras. 3.27-3.29; T. 179-180 (20 April 1999).

is known as to who shot the victims or in what circumstances.<sup>220</sup> Accordingly, the standard of proof beyond reasonable doubt was correctly applied.<sup>221</sup>

177. In relation to the Prosecution’s common purpose submission, the Defence contends that it would have to be shown that the common purpose in which the Appellant allegedly took part included killing as opposed to ethnic cleansing by other means.<sup>222</sup> On the basis of the distinction between the operation in Jaski}i and the operation in Sivci where nobody was killed, the Trial Chamber was correct in concluding that it was not possible to find beyond reasonable doubt that the Appellant was involved in a criminal enterprise with the design of killing.<sup>223</sup>

## B. Discussion

### 1. The Armed Group to Which the Appellant Belonged Committed the Killings

178. The Trial Chamber found, amongst other facts, that on 14 June 1992, the Appellant, with other armed men, participated in the removal of men, who had been separated from women and children, from the village of Sivci to the Keraterm camp, and also participated in the calling-out of residents, the separation of men from women and children, and the beating and taking away of men in the village of Jaski}i.<sup>224</sup> It also found that five men were killed in the latter village.<sup>225</sup>

179. In support of its finding that there was no proof beyond reasonable doubt that the Appellant had any part in the killing of the five men, the Trial Chamber stated:

The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in

<sup>219</sup> Cross-Appellant’s Brief, para. 3.29.

<sup>220</sup> Defence’s Substituted Response to Cross-Appellant’s Brief, paras. 3.8-3.10; Defence’s Skeleton Argument on the Cross-Appeal, para. 2(c).

<sup>221</sup> T. 251 (21 April 1999).

<sup>222</sup> Defence’s Substituted Response to Cross-Appellant’s Brief, para. 3.19; Defence’s Skeleton Argument on the Cross-Appeal, para. 2(d).

<sup>223</sup> Defence’s Substituted Response to Cross-Appellant’s Brief, paras. 3.9-3.10; Defence’s Skeleton Argument on the Cross-Appeal, para. 2(d).

<sup>224</sup> Judgement, paras. 369, 373.

<sup>225</sup> *Ibid.*, paras. 370-373.

which the accused took part; it is accordingly a distinct possibility that it may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible, that caused their death.<sup>226</sup>

180. In relation to the possibility that the killings may have been carried out by another armed group, the Trial Chamber found the following. An armed group of men, including the Appellant, entered Jaski̇ji. The group separated most of the men from the rest of the villagers, beat and then forcibly removed the men to an unknown location. The Appellant played an active role in the activities of this violent group. The group fired shots as they approached and left the village.

181. It has already been pointed out that the Trial Chamber also found that five men were found killed in Jaski̇ji after the armed group had left; four of them were shot in the head. Nothing else as to who might have killed them or in what circumstances was known. The Trial Chamber referred, however, to the large force of Serb soldiers, of which the Appellant was a member, that invaded the nearby village of Sivci on the same day, without any villager there being killed. It then stated that the:

[bare possibility that the deaths of the Jaski̇ji villagers were the result of encountering a part of that large force [of Serb soldiers that invaded Sivci] would be enough, in the state of the evidence, or rather, the lack of it, relating to their deaths, to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths.<sup>227</sup>

182. The Trial Chamber did not allude to any witness suggesting that another group of armed men might have been responsible for the killing of the five men. In fact, none of the witnesses suggested anything to that effect.

183. In the light of the facts found by the Trial Chamber, the Appeals Chamber holds that, in relation to the possibility that another armed group killed the five men, the Trial Chamber misapplied the test of proof beyond reasonable doubt. On the facts found, the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which the Appellant belonged killed the five men in Jaski̇ji.

184. In the light of the above finding, the Appeals Chamber need not consider the second possibility advanced by the Trial Chamber, namely, that the killing of the five men in

<sup>226</sup> Ibid., para. 373.

<sup>227</sup> Ibid.

Jaski̇ji could have been the “unauthorized and unforeseen act of one of the force that entered Sivci”.

2. The Individual Criminal Responsibility of the Appellant for the Killings

(a) Article 7(1) of the Statute and the Notion of Common Purpose

185. The question therefore arises whether under international criminal law the Appellant can be held criminally responsible for the killing of the five men from Jaski̇ji even though there is no evidence that he personally killed any of them. The two central issues are:

- (i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and
- (ii) what degree of *mens rea* is required in such a case.

186. The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*). In national legal systems this principle is laid down in Constitutions,<sup>228</sup> in laws,<sup>229</sup> or in judicial decisions.<sup>230</sup> In international criminal law the principle is laid down, *inter alia*, in Article 7(1) of the Statute of the International Tribunal which states that:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime. (emphasis added)

This provision is aptly explained by the Report of the Secretary-General on the establishment of the International Tribunal, which states the following:

<sup>228</sup> An example is provided by Article 27 para. 1 of the Italian Constitution (“La responsabilità penale è personale.” (“Criminal responsibility is personal.”) (unofficial translation)).

<sup>229</sup> See for instance Article 121-1 of the French Code pénal (“Nul n’est responsable pénalement que de son propre fait”), para. 4 of the Austrian Strafgesetzbuch (“Strafbar ist nur, wer schuldhaft handelt.” (“Only he who is culpable may be punished.”) (unofficial translation)).

<sup>230</sup> This rather basic proposition is usually tacitly assumed rather than explicitly acknowledged. For an example of where it was expressly stated, however, see, for Great Britain, R. v. Dalloway (1847) 3 Cox CC 273. See also the various decisions of the German Constitutional Court, e.g., BVerfGE 6, 389 (439) and 50, 125 (133), as well as decisions of the German Federal Court of Justice (e.g., BGHSt 2, 194 (200)).

An important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility. As noted above, the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.<sup>231</sup>

Article 7(1) also sets out the parameters of personal criminal responsibility under the Statute. Any act falling under one of the five categories contained in the provision may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the same provision of the Statute.

187. Bearing in mind the preceding general propositions, it must be ascertained whether criminal responsibility for participating in a common criminal purpose falls within the ambit of Article 7(1) of the Statute.

188. This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.

189. An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to all those “responsible for serious violations of international humanitarian law” committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or *ordering* to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy, incitement, attempt and complicity*).

<sup>231</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993 (“Report of the Secretary-General”), para. 53 (emphasis added).

190. It should be noted that this notion is spelled out in the Secretary General’s Report, according to which:

The Secretary-General believes that *all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.<sup>232</sup>

Thus, all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions, which are specified below.

191. The above interpretation is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all

<sup>232</sup> *Ibid.*, para 54 (emphasis added).

those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.

193. This interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design. It may also be noted that – as will be mentioned below – international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems.

194. However, the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (*actus reus* and *mens rea*) of this category of collective criminality. To identify these elements one must turn to customary international law. Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation.

195. Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. Close scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.

196. The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

197. With regard to this category, reference can be made to the *Georg Otto Sandrock et al.* case (also known as the *Almelo Trial*).<sup>233</sup> There a British court found that three Germans who had killed a British prisoner of war were guilty under the doctrine of “common enterprise”. It was clear that they all had had the intention of killing the British soldier, although each of them played a different role. They therefore were all co-perpetrators of the crime of murder.<sup>234</sup> Similarly, in the *Hoelzer et al.* case, brought before a Canadian military court, in his summing up the Judge Advocate spoke of a “common enterprise” with regard to the murder of a Canadian prisoner of war by three Germans, and emphasised that the three all knew that the purpose of taking the Canadian to a particular area was to kill him.<sup>235</sup>

198. Another instance of co-perpetratorship of this nature is provided by the case of *Jepsen and others*.<sup>236</sup> A British court had to pronounce upon the responsibility of Jepsen (one of several accused) for the deaths of concentration camp internees who, in the few weeks leading up to the capitulation of Germany in 1945, were in transit to another concentration camp. In this regard, the Prosecutor submitted (and this was not rebutted by the Judge Advocate) that:

[I]f Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act.

<sup>233</sup> Trial of Otto Sandrock and three others, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24<sup>th</sup>, 26<sup>th</sup> November, 1945, UNWCC, vol. 1, p. 35).

<sup>234</sup> The accused were German non-commissioned officers who had executed a British prisoner of war and a Dutch civilian in the house of whom the British airman was hiding. On the occasion of each execution one of the Germans had fired the lethal shot, another had given the order and a third had remained by the car used to go to a wood on the outskirts of the Dutch town of Almelo, to prevent people from coming near while the shooting took place. The Prosecutor stated that “the analogy which seemed to him most fitting in this case was that of a gangster crime, every member of the gang being equally responsible with the man who fired the actual shot” (ibid., p. 37). In his summing up the Judge Advocate pointed out that:

“There is no dispute, as I understand it, that all three [Germans] knew what they were doing and had gone there for the very purpose of having this officer killed; and, as you know, if people are all present together at the same time taking part in a common enterprise which is unlawful, each one in their (sic) own way assisting the common purpose of all, they are all equally guilty in point of law” (see official transcript, Public Record Office, London, WO 235/8, p. 70; copy on file with the International Tribunal's Library; the report in the UNWCC, vol. 1, p. 40 is slightly different).

All the accused were found guilty, but those who had ordered the shooting or carried out the shooting were sentenced to death, whereas the others were sentenced to fifteen years imprisonment (ibid., p. 41).

<sup>235</sup> Hoelzer et al., Canadian Military Court, Aurich, Germany, Record of Proceedings 25 March-6 April 1946, vol. 1, pp. 341, 347, 349 (RCAF Binder 181.009 (D2474); copy on file with the International Tribunal's Library).

<sup>236</sup> Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany (13-23 August, 1946), Judgement of 24 August 1946 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library).

In a similar vein, the Judge Advocate noted in *Schonfeld* that:

if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present [...] provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly.<sup>238</sup>

199. It can be noted that some cases appear broadly to link the notion of common purpose to that of causation. In this regard, the *Ponzano* case,<sup>239</sup> which concerned the killing of four British prisoners of war in violation of the rules of warfare, can be mentioned. Here, the Judge Advocate adopted the approach suggested by the Prosecutor,<sup>240</sup> and stressed:

[...] the requirement that an accused, before he can be found guilty, must have been concerned in the offence. [...] to be concerned in the commission of a criminal offence [...] does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation [...]. [...] In other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means [...].<sup>241</sup>

Further on, the Judge Advocate submitted that while the defendant's involvement in the criminal acts must form a link in the chain of causation, it was not necessary that his participation be a *sine qua non*, or that the offence would not have occurred but for his participation.<sup>242</sup> Consonant with the twin requirements of criminal responsibility under this category, however, the Judge Advocate stressed the necessity of knowledge on the part of the accused as to the intended purpose of the criminal enterprise.<sup>243</sup>

<sup>238</sup> Trial of Franz Schonfeld and others, British Military Court, Essen, June 11<sup>th</sup>-26<sup>th</sup>, 1946, UNWCC, vol. XI, p. 68 (summing up of the Judge Advocate).

<sup>239</sup> Trial of Fourstein and others, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), Judgement of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond: on file with the International Tribunal's Library).

<sup>240</sup> The Prosecutor had stated the following:  
"It is an opening principle of English law, and indeed of all law, that a man is responsible for his acts and is taken to intend the natural and normal consequences of his acts and if these men [...] set the machinery in motion by which the four men were shot, then they are guilty of the crime of killing these men. It does not – it never has been essential for any one of these men to have taken those soldiers out themselves and to have personally executed them or personally dispatched them. That is not at all necessary: all that is necessary to make them responsible is that they set the machinery in motion which ended in the volleys that killed the four men we are concerned with" (ibid., p. 4).

<sup>241</sup> Ibid., summing up of the Judge Advocate, p. 7.

<sup>242</sup> In this regard, the Judge Advocate noted that: "[o]f course, it is quite possible that it [the criminal offence] might have taken place in the absence of all these accused here, but that does not mean the same thing as saying [...] that [the accused] could not be a chain in the link of causation [...]" (ibid., pp. 7-8).

<sup>243</sup> In particular, it was held that in order to be "concerned in the commission of a criminal offence," it was necessary to prove:

200. A final case worthy of mention with regard to this first category is the *Einsatzgruppen* case.<sup>244</sup> With regard to common design, a United States Tribunal sitting at Nuremberg noted that:

the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, paragraph 2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility [...].<sup>245</sup>

"that when he did take part in it he knew the intended purpose of it. If any accused were to have given an order for this execution, believing that it was a perfectly legal execution, that these four soldiers had been sentenced to death by a properly constituted court and that therefore an order for the execution was no more than an order to carry out the decision of the court, then that accused would not be guilty because he would not have any guilty knowledge. But where [...] a person was in fact concerned, and [...] he knew the intended purpose of these acts, then that accused is guilty of the offence in the charge" (ibid., p. 8).

The requisite knowledge of each participant, even if deducible only by implication, was also stressed in the Stalag Luft III case, Trial of Max Ernst Friedrich Gustav Wielen and Others, Proceedings of the Military Court at Hamburg, (1-3 July 1947) (original transcripts in Public Record Office, Kew, Richmond: on file with the International Tribunal's Library), which concerned the killing of fifty officers of the allied air force who had escaped from the Stalag Luft III camp in Silesia. The Prosecutor in his opening remarks stressed that:

"everybody, particularly every policeman of whatever sort it may be, knew quite well that there had been a mass escape of prisoners of war on the 25<sup>th</sup> March 1944 [...] [such] that every policeman knew that prisoners of war were at large. I think that is important to remember, and particularly with regard to some of the minor members of the Gestapo who are charged before you that is important to remember because they may say they did not know who these people were. They may say they did not know they were escaped prisoners of war but [in fact] they all knew [...]" (ibid., p. 276).

Furthermore, in two cases concerning an accused's participation in the Kristallnacht riots, the Supreme Court for the British zone stressed that it was not required that the accused knew about the rioting in the entire Reich. It was sufficient that he was aware of the local action, that he approved it, and that he wanted it "as his own" (unofficial translation). The fact that the accused participated consciously in the arbitrary measures directed against the Jews was sufficient to hold him responsible for a crime against humanity (Case no. 66, Strafsenat Urteil vom 8 Februar 1949 gegen S. SIS 120/48, p. 284-290, 286, vol. II). See also Case no. 17, vol. I, 94-98, 96, where the Supreme Court held that it was irrelevant that the scale of ill-treatment, deportation and destruction that happened in other parts of the country on that night were not undertaken in this village. It sufficed that the accused participated intentionally in the action and that he was "not unaware of the fact that the local action was a measure designed to instil terror which formed a part of the nation-wide persecution of the Jews" (unofficial translation).

<sup>244</sup> The United States of America v. Otto Ohlenforf et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol. IV, p. 3.

<sup>245</sup> The tribunal went on to say:

"Even though these men [Radeisky, Ruehl, Schubert and Graf] were not in command, they cannot escape the fact that they were members of Einsatz units whose express mission, well known to all the members, was to carry out a large scale program of murder. Any member who assisted in enabling these units to function, knowing what was afoot, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not

201. It should be noted that in many post-World War II trials held in other countries, courts took the same approach to instances of crimes in which two or more persons participated with a different degree of involvement. However, they did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration. This applies in particular to Italian<sup>246</sup> and German<sup>247</sup> cases.

202. The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called “concentration camp” cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are *Dachau Concentration Camp*,<sup>248</sup> decided by a United States court sitting in Germany and *Belsen*,<sup>249</sup> decided by a British military court sitting in Germany. In these cases the accused held some position of authority within the hierarchy of

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brandish a cutlass. The man who stands at the door of a bank and scans the environs may appear to be the most peaceable of citizens, but if his purpose is to warn his robber confederates inside the bank of the approach of the police, his guilt is clear enough. And if we assume, for the purposes of argument, that the defendants such as Schubert and Graf have succeeded in establishing that their role was an auxiliary one, they are still in no better position than the cook or the robbers’ watchman” (ibid., p. 373; emphasis added).

In this connection, the tribunal also addressed the contention that certain of the commanders did not participate directly in the crimes committed, noting that:

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“[w]ith respect to the defendants such as Jost and Naumann, [...] it is [...] highly probable that these defendants did not, at least very often, participate personally in executions. And it would indeed be strange had they ?who were persons in authority done so. [...] Far from being a defense or even a circumstance in mitigation, the fact that ?these defendants did not personally shoot a great many people, but rather devoted themselves to directing the over-all operations of the Einsatzgruppen, only serves to establish their deeper responsibility for the crimes of the men under their command” (ibid.)

<sup>246</sup> See for instance the following decisions of the Italian Court of Cassation relating to crimes committed by militias or forces of the “Repubblica Sociale Italiana” against Italian partisans or armed forces: Annalberti et al., 18 June 1949, in *Giustizia penale* 1949, Part II, col. 732, no. 440; Rigardo et al. case, 6 July 1949, ibid., cols. 733 and 735, no. 443; P.M. v. Castoldi, 11 July 1949, ibid., no. 444; Imolesi et al., 5 May 1949, ibid., col. 734, no. 445. See also Ballestra, 10 July 1949, ibid., cols. 732-733, no. 442.

<sup>247</sup> See for instance the decision of 10 August 1948 of the German Supreme Court for the British Zone in K. and A., in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. I, pp. 53-56; the decision of 22 February 1949 in J. and A., ibid., pp. 310-315; the decision of the District Court (Landgericht) of Cologne of 22 and 23 January 1946 in Hessmer et al., in *Justiz und NS-Verbrechen*, vol. I, pp. 13-23, at pp. 13, 20; the decision of 21 December 1946 of the District Court (Landgericht) of Frankfurt am Main in M. et al. (ibid., pp. 135-165, 154) and the judgement of the Court of Appeal (Oberlandesgericht) of 12 August 1947 in the same case (ibid., pp. 166-186, 180); as well as the decision of the District Court of Braunschweig of 7 May 1947 in *Affeldt*, ibid., p. 383-391, 389.

<sup>248</sup> Trial of Martin Gottfried Weis and thirty-nine others, General Military Government Court of the United States Zone, Dachau, Germany, 15<sup>th</sup> November-13<sup>th</sup> December, 1945, UNWCC, vol. XI, p. 5.

<sup>249</sup> Trial of Josef Kramer and 44 others, British Military Court, Lüneberg, 17<sup>th</sup> September-17<sup>th</sup> November, 1945, UNWCC, vol. II, p. 1.

the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.<sup>250</sup> In his summing up in the *Belsen* case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused’s awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design.<sup>251</sup> The convictions of several of the accused appear to have been explicitly based upon these criteria.<sup>252</sup>

203. This category of cases (which obviously is not applicable to the facts of the present case) is really a variant of the first category, considered above. The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective “position of authority” within the concentration camp system and because they had “the power to look after the inmates and make their life satisfactory”<sup>253</sup> but failed to do so.<sup>254</sup> It would seem that in these cases the required *actus reus* was the active

<sup>250</sup> See *Dachau Concentration Camp case*, UNWCC, vol. XI, p. 14.

<sup>251</sup> “It seems, therefore, that what runs throughout the whole of this case, like a thread, is this: that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute ‘acting in pursuance of a common design to violate the laws and usages of war’. Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary”.

<sup>252</sup> The Judge Advocate summarised with approval the legal argument of the Prosecutor in the following terms:

“The case for the Prosecution is that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened.” (Belsen case, UNWCC, vol. II, p. 121.)

<sup>253</sup> In particular, the accused Kramer appears to have been convicted on this basis. (See *ibid.*, p. 121: “The Judge Advocate reminded the Court that when they considered the question of guilt and responsibility, the strongest case must surely be against Kramer, and then down the list of accused according to the positions they held.” (emphasis added).)

<sup>254</sup> *ibid.*, p. 121.

In a similar vein, the Case against R. Mulka et al. (“Auschwitz concentration camp case”) can be mentioned. Although the court reached the same result, it nevertheless did not apply the doctrine of common design but instead tended to treat the defendants as aiders and abettors as long as they remained within the framework provided by their orders and as principal offenders if they acted outside this framework. This meant that if it could not be proved that the accused actually identified himself with the aims of the Nazi

participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime.

204. The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this

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regime, then the court would treat him as an aider and abettor because he lacked the specific intent to "want the offence as his own" (see in particular the Bundesgerichtshof in Justiz und NS-Verbrechen, vol. XXI, pp. 838 ff., and especially pp. 881 ff). The BGH stated, p. 882:

"[The view] that everybody who had been involved in the destruction program of the [KZ] Auschwitz and acted in any manner whatsoever in connection with this program participated in the murders and is responsible for all that happened is not correct. It would mean that even acts which did not further the main offence in any concrete manner would be punishable. In consequence even the physician who was in charge of taking care of the guard personnel and who restricted himself to doing only that, would be guilty of aiding and abetting murder. The same would even apply to the doctor who treated prisoners in the camp and saved their lives. Not even those who in their place put little obstacles in the

plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable.

205. The case-law in this category has concerned first of all cases of mob violence, that is, situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim, but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate. Cases illustrative of this category are *Essen Lynching* and *Borkum Island*.

206. As is set forth in more detail below, the requirements which are established by these authorities are two-fold: that of a criminal intention to participate in a common criminal design and the foreseeability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.

207. The *Essen Lynching* (also called *Essen West*) case was brought before a British military court, although, as was stated by the court, it "was not a trial under English law".<sup>255</sup> Given the importance of this case, it is worth reviewing it at some length. Three British prisoners of war had been lynched by a mob of Germans in the town of Essen-West on 13 December 1944. Seven persons (two servicemen and five civilians) were charged with committing a war crime in that they were concerned in the killing of the three prisoners of war. They included a German captain, Heyer, who had placed the three British airmen under the escort of a German soldier who was to take the prisoners to a *Luftwaffe* unit for interrogation. While the escort with the prisoners was leaving, the captain had ordered that the escort should not interfere if German civilians should molest the prisoners, adding that they ought to be shot, or would be shot. This order had been given to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. According to the summary given by the United Nations War Crimes Commission:

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way of this program of murder, albeit in a subordinate position and without success, would escape punishment. That cannot be right." (unofficial translation).  
<sup>255</sup> Trial of Erich Heyer and six others, British Military Court for the Trial of War Criminals, Essen, 18<sup>th</sup>-19<sup>th</sup> and 21<sup>st</sup>-22<sup>nd</sup> December, 1945, UNWCC, vol. I, p. 88, at p. 91.

[w]hen the prisoners of war were marched through one of the main streets of Essen, the crowd around grew bigger, started hitting them and throwing sticks and stones at them. An unknown German corporal actually fired a revolver at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge; one of the airmen was killed by the fall; the others were not dead when they landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.<sup>256</sup>

208. The Defence laid stress on the need to prove that each of the accused had the intent to kill. The Prosecution took a contrary view. Major Tayleur, the Prosecutor, stated the following:

My friend [the Defence Counsel] has spoken to you about the intent which is necessary and he says that no evidence of intent to kill has been brought before you. In my submission there has been considerable evidence of intent to kill; but even if there were not, in my submission *to prove this charge you do not have to prove an intent to kill*. If you prove an intent to kill you would prove murder; but you can have an unlawful killing, which would be manslaughter, where there is *not an intent to kill but merely the doing of an unlawful act of violence*. A person might slap another's face with no intent to kill at all but if through some misfortune, for example that person having a weak skull, that person died, in my submission the person striking the blow would be guilty of manslaughter and that would be such killing as would come within the words of this charge. In my submission therefore what you have to be satisfied of – and the onus of proof is of course on the prosecution – is that *each and everyone of the accused, before you can convict him, was concerned in the killing of these three unidentified airmen in circumstances, which the British law would have amounted to either murder or manslaughter*.<sup>257</sup>

The Prosecutor then went on to add:

the allegation of the prosecution is that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen is *guilty in that he is concerned in the killing*. It is impossible to separate any one of these from another; they all make up what is known as lynching. In my submission from the moment they left those barracks those men were doomed and the crowd knew they were doomed and *every person in that crowd who struck a blow is both morally and criminally responsible for the deaths of those three men*.<sup>258</sup>

Since Heyer was convicted, it may be assumed that the court accepted the Prosecution arguments as to the criminal liability of Heyer (no Judge Advocate had been appointed in this case). As for the soldier escorting the airmen, he had a duty not only to prevent the prisoners from escaping but also of seeing that they were not molested; he was sentenced to imprisonment for five years (even though the Prosecutor had suggested that he was not criminally liable). According to the Report of the United Nations War Crimes Commission,

<sup>256</sup> *Ibid.*, p. 89.

<sup>257</sup> See transcript in Public Record Office, London, WO 235/58, p. 65 (emphasis added; copy on file with the International Tribunal's Library).

<sup>258</sup> *Ibid.*, p. 66 (emphasis added).

three civilians “were found guilty [of murder] because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been exactly proved that they had individually shot nor given the blows which caused the death”.<sup>259</sup>

209. It would seem warranted to infer from the arguments of the parties and the verdict that the court upheld the notion that all the accused who were found guilty took part, in various degrees, in the killing; not all of them intended to kill but all intended to participate in the unlawful ill-treatment of the prisoners of war. Nevertheless they were all found guilty of murder, because they were all “concerned in the killing”. The inference seems therefore justified that the court assumed that the convicted persons who simply struck a blow or implicitly incited the murder could have foreseen that others would kill the prisoners; hence they too were found guilty of murder.<sup>260</sup>

210. A similar position was taken by a United States military court in *Kurt Goebell et al.* (also called the *Borkum Island* case). On 4 August 1944, a United States Flying Fortress was forced down on the German island of Borkum. Its seven crew members were taken prisoner and then forced to march, under military guard, through the streets of Borkum. They were first made to pass between members of the Reich's Labour Corps, who beat them with shovels, upon the order of a German officer of the *Reichsarbeitsdienst*. They were then struck by civilians on the street. Later on, while passing through another street, the mayor of Borkum shouted at them inciting the mob to kill them “like dogs”. They were

<sup>259</sup> UNWCC, vol. 1, p. 91. In addition to Heyer and the escort (Koenen), three civilians were also convicted. The first of the accused civilians, Boddenberg, admitted to have struck one of the airmen on the bridge, after one of them had already been thrown over the bridge, knowing “that the motives of the crowd against them [the airmen] were deadly, and yet he joined in” (Transcript in Public Record Office, London, WO 235/58, p. 67; copy on file with International Tribunal's Library); the second, Kauter, was found to have “beaten the airmen” and taken “an active part” in the mob violence against them. Additionally, it was alleged that he tried to pull the rifle away from a subordinate officer to shoot the airmen below the bridge and that he called out words to the effect that the airmen deserved to be shot (*ibid.*, pp. 67-68). The third, Braschoss, was seen hitting one of the airmen on the bridge, descending beneath the bridge to throw the airmen, who was still alive, into the stream. He and an accomplice were further alleged to have thrown another of the airmen from the bridge (*ibid.*, p. 68). Two of the accused civilians, Sambol and Hartung, were acquitted; the former because the blows he was alleged to have inflicted were neither particularly severe nor proximate to the airmen's death (comprising one of the earliest to be inflicted) and the latter because it was not proved beyond reasonable doubt that he actually took part in the affray (*ibid.*, pp. 66-67, UNWCC, vol. 1, p. 91).

<sup>260</sup> The charge, in a strict legal sense, was the commission of a war crime in violation of the laws and usages of war for being “concerned in the killing” of the airmen rather than murder as this was “not a trial under English law” (*ibid.*, at p. 91). For all intents and purposes, however, the charge appeared to be treated as a murder charge, as it appeared to have been accepted in the course of the proceedings that “as long as everyone realised

then beaten by civilians while the escorting guards, far from protecting them, fostered the assault and took part in the beating. When the airmen reached the city hall one was shot and killed by a German soldier, followed by the others a few minutes later, all shot by German soldiers. The accused included a few senior officers, some privates, the mayor of Borkum, some policemen, a civilian and the leader of the Reich Labour Corps. All were charged with war crimes, in particular both with “wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the killing” of the airmen and with “wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in assaults upon” the airmen.<sup>261</sup> In his opening statement the Prosecutor developed the doctrine of common design. He stated the following:

[I]t is important, as I see it, to determine the guilt of each of these accused in the light of the particular role that each one played. *They did not all participate in exactly the same manner.* Members of mobs seldom do. One will undertake one special or particular action and another will perform another particular action. It is the composite of the actions of all that results in the commission of the crime. Now, all legal authorities agree that where a common design of a mob exists and the mob has carried out its purpose, then no distinction can be drawn between the finger man and the trigger man (*sic*). *No distinction is drawn between the one who, by his acts, caused the victims to be subjected to the pleasure of the mob or the one who incited the mob, or the ones who dealt the fatal blows.* This rule of law and common sense must, of necessity, be so. Otherwise, many of the true instigators of crime would never be punished.

Who can tell which particular act was the most responsible for the final shooting of these flyers? Can it be truly said that any one of the acts of any one of these accused may have been the very act that produced the ultimate result? Although the ultimate act might have been something in which the former actor did not directly participate [, e]very time a member of a mob takes any action that is inclined to encourage, that is inclined to give heart to someone else who is present, to participate, then that person has lent his aid to the accomplishment of the final result.<sup>262</sup>

In short, noted the Prosecutor, the accused were “cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs”.<sup>263</sup> As a consequence, according to the Prosecutor, if it were proved beyond a reasonable doubt “that each one of these accused

what was meant by the word ‘murder’ for the purposes of this trial, [there ...] was ?nog difficulty” (ibid., pp. 91-92).

<sup>261</sup> See Charge Sheet, in U.S. National Archives Microfilm Publications, I (on file with the International Tribunal’s Library).

<sup>262</sup> Ibid., p. 1186 (emphasis added). See also p. 1187.

<sup>263</sup> Ibid., p. 1188. See, further note 240 and accompanying text, with regard to the comments made regarding causation in the Pontzano case.

played *his part* in mob violence which led to the unlawful killing of the seven American flyers, [...] under the law *each and every one of the accused [was] guilty of murder*”.<sup>264</sup>

211. It bears emphasising that by taking the approach just summarised, the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder. In other words, the Prosecutor adhered to the doctrine of common purpose mentioned above with regard to the first category of cases. It is interesting to note that the various defence counsel denied the applicability of this common design doctrine, not, however, on principle, but merely on the facts of the case. For instance, some denied the existence of a criminal intent to participate in the common design, claiming that mere presence was not sufficient for the determination of the intent to take part in the killings.<sup>265</sup> Other defence counsel claimed that there was no evidence that there was a conspiracy among the German officers,<sup>266</sup> or they argued that, if there had been such a plot, it did not involve the killing of the airmen.<sup>267</sup>

212. In this case too, no Judge Advocate stated the law. However, it may be fairly assumed that in the event, the court upheld the common design doctrine, but in a different form, for it found some defendants guilty of both the killing and assault charges<sup>268</sup> while others were only found guilty of assault.<sup>269</sup>

213. It may be inferred from this case that all the accused found guilty were held responsible for pursuing a criminal common design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even where there was no evidence that they had actually killed the prisoners. Presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault.

<sup>264</sup> Ibid., p. 1190 (emphasis added). See also pp. 1191-1194.

<sup>265</sup> See e.g. ibid., pp. 1201, 1203-1206.

<sup>266</sup> See ibid., pp. 1234, 1241, 1243.

<sup>267</sup> See ibid., pp. 1268-1270.

<sup>268</sup> The accused Akkerman, Krolikovski, Schmitz, Wentzel, Seiler and Goebel were all found guilty on both the killing and assault charges and were sentenced to death, with the exception of Krolikovski, who was sentenced to life imprisonment (ibid., pp. 1280-1286).

<sup>269</sup> The accused Pointner, Witzke, Geyer, Albrecht, Weber, Rommel, Mammenga and Heinemann were found guilty only of assault and received terms of imprisonment ranging between 2 and 25 years (ibid.).

214. Mention must now be made of some cases brought before Italian courts after World War II concerning war crimes committed either by civilians or by military personnel belonging to the armed forces of the so-called “*Repubblica Sociale Italiana*” (“RSI”), a *de facto* government under German control established by the Fascist leadership in central and northern Italy, following the declaration of war by Italy against Germany on 13 October 1943. After the war several persons were brought to trial for crimes committed between 1943 and 1945 against prisoners of war, Italian partisans or members of the Italian army fighting against the Germans and the RSI. Some of these trials concerned the question of criminal culpability for acts perpetrated by groups of persons where only one member of the group had actually committed the crime.

215. In *D'Ottavio et al.*, on appeal from the Assize Court of Teramo, the Court of Cassation on 12 March 1947 pronounced upon one of these cases. Some armed civilians had given unlawful pursuit to two prisoners of war who had escaped from a concentration camp, in order to capture them. One member of the group had shot at the prisoners without intending to kill them, but one had been wounded and had subsequently died as a result. The trial court held that all the other members of the group were accountable not only for “illegal restraint” (*sequestro di persona*) but also for manslaughter (*omicidio preterintenzionale*). The Court of Cassation upheld this finding. It held that for this type of criminal liability to arise, it was necessary that there exist not only a material but also a psychological “causal nexus” between the result all the members of the group intended to bring about and the different actions carried out by an individual member of that group. The court went on to point out that:

[I]ndeed the responsibility of the participant (*concorrente*) [...] is not founded on the notion of objective responsibility [...], but on the fundamental principle of the concurrence of interdependent causes [...]; by virtue of this principle all the participants are accountable for the crime both where they directly cause it and where they indirectly cause it, in keeping with the well-known canon *causa causae est causa causati*.<sup>270</sup>

<sup>270</sup> See handwritten text of the (unpublished) judgement, p. 6 (unofficial translation: kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal’s Library). See also Giustizia penale, 1948, Part II, col. 66, no. 71 (containing a headnote on the judgement).

The court then noted that in the case at issue:

[t]here existed a nexus of material causality, as all the participants had directly cooperated in the crime of attempted “illegal restraint” [...] by surrounding and pursuing two prisoners of war on the run, armed with a gun and a rifle, with a view to illegally capturing them. This crime was the indirect cause of a subsequent and different event, namely the shooting (by d'Ottavio alone) at one of the fugitives, resulting in wounding followed by death. Furthermore, there existed psychological causality, as all the participants had the intent to perpetrate and knowledge of the actual perpetration of an attempted illegal restraint, and *per se* the possible commission of a different crime. This foresight (*previsione*) necessarily followed from the use of weapons: it being predictable (*lovedo prevedersi*) that one of the participants might shoot at the fugitives to attain the common purpose (*lo scopo comune*) of capturing them.<sup>271</sup>

216. In another case (*Aratano et al.*) the Court of Cassation dealt with the following circumstances: a group of RSI militiamen had planned to arrest some partisans, without intending to kill them; however, to frighten the partisans, one of the militiamen fired a few shots into the air. As a result the partisans shot back; a shoot-out ensued and in the event one of the partisans was killed by a member of the RSI militia. The court held that the trial court had erred in convicting all members of the militia of murder. In its view, as the trial court had found that the militiamen had not intended to kill the partisans:

[I]t was clear that [the murder of one of the partisans] was an unintended event (*evento non voluto*) and consequently could not be attributed to all the participants: the crime committed was more serious than that intended and it proves necessary to resort to categories other than that of voluntary homicide. This Supreme Court has already had the opportunity to state the same principle, where it noted that in order to find a person responsible for a homicide perpetrated in the course of a mopping-up operation carried out by many persons, it was necessary to establish that, in participating in this operation, a voluntary activity also concerning homicide had been brought into being (*fosse stata spiegata un'attività volontaria in relazione anche all'omicidio*) (judgement of 27 August 1947 *in re: Beraschi*).<sup>272</sup>

217. Other cases relate to the applicability of the amnesty law passed by the Presidential Decree of 22 June 1946 no. 4. The amnesty applied among other things to crimes of “collaboration with the occupying Germans” but excluded offences involving murder. In *Tossani* the question was whether the law on amnesty covered a person who had taken part in a mopping-up operation against civilians in the course of which a German soldier had killed a partisan. The Court of Cassation found that the amnesty should apply. It emphasised that the appellant participating in the operation had not taken any active part in it and did not carry weapons; in addition, the killing was found to have been “an exceptional and

<sup>271</sup> See handwritten text of the (unpublished) judgement, pp. 6-7 (unofficial translation; emphasis added).

<sup>272</sup> See handwritten text of the (unpublished) judgement, pp. 13-14 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal’s Library). For a headnote on this case see Archivio penale, 1949, p. 472.

unforeseen (*imprevisto*) event”, for during a search a civilian had escaped to avoid being detained and had been shot at by the German soldier.<sup>273</sup> A similar position was taken by the same court in *Ferrida*. The appellant had participated, “only in his capacity as a nurse,” in a mopping-up operation in the course of which some partisans had been killed. The court found that he was not guilty of murder; the law on amnesty was therefore applicable to him.<sup>274</sup> In *Bonati et al.* the appellant argued that the crime of murder, not envisaged by the group of persons concerned, had been perpetrated by another member of that group. The Court of Cassation rejected the appeal, holding that the appellant was also guilty of murder. Although this crime was more grave than that intended by some of the participants (*concorrenti*), it “was in any case a consequence, albeit indirect, of his participation”.<sup>275</sup>

218. In these cases courts indisputably applied the notion that a person may be held criminally responsible for a crime committed by another member of a group and not envisaged in the criminal plan. Admittedly, in some of the cases the *mens rea* required for a member of the group to be held responsible for such an action was not clearly spelled out. However, in light of other judgements handed down in the same period on the same matter, although not relating to war crimes, it may nevertheless be assumed that courts required that the event must have been predictable. In this connection it suffices to mention the judgement of the Court of Cassation of 20 July 1949 in *Mannelli*, where the court explained the required causal nexus as follows:

The relationship of material causality by virtue of which the law makes some of the participants liable for the crime other than that envisaged, must be correctly understood from the viewpoint of logic and law and be strictly differentiated from an incidental relationship (rapporto di occasionalità). Indeed, the cause, whether immediate or mediate, direct or indirect, simultaneous or successive, can never be confused with mere coincidence. For there to be a relationship of material causality between the crime willed by one of the participants and the different crime committed by another, it is necessary that the latter crime should constitute the logical and predictable development of the former (il logico e prevedibile sviluppo del primo). Instead, where there exists full independence between the two crimes, one may find, depending upon the specific circumstances, a merely incidental relationship (un rapporto di mera occasionalità), but not a causal relationship. In the light of these criteria, he who requests somebody else to wound or kill cannot answer for a robbery perpetrated by the other person, for this crime does not constitute the logical development of

<sup>273</sup> Judgement of 12 September 1946, in Archivio penale, 1947, Part II, pp. 88-89.

<sup>274</sup> Judgement of 25 July 1946, in Archivio penale, 1947, Part II, p. 88.

<sup>275</sup> See handwritten text of the (unpublished) judgement of 5 July 1946, p. 19 (kindly provided by the Italian Public Record Office, Rome: on file with the International Tribunal's Library). See also Giustizia penale, 1945-46, Part II, cols. 530-532. For cases where the Court of Cassation concluded that the participant was guilty of the more serious crime not envisaged in the common criminal design, see Torrazzini, judgement of 18 August 1946, in Archivio penale 1947, Part II, p. 89; Palma, judgement of 20 September 1946, *ibid.*

the intended offence, but a new fact, having its own causal autonomy, and linked to the conduct willed by the instigator (mandante) by a merely incidental relationship (emphasis added).<sup>276</sup>

219. The same notion was enunciated by the same Court of Cassation in many other cases.<sup>277</sup> That this was the basic notion upheld by the court seems to be borne out by the fact that the one instance where the same court adopted a different approach is somewhat conspicuous.<sup>278</sup> Accordingly, it would seem that, with regard to the *mens rea* element required for the criminal responsibility of a person for acts committed within a common purpose but not envisaged in the criminal design, that court either applied the notion of an attenuated form of intent (*colus eventualis*) or required a high degree of carelessness (*culpa*).

220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called “concentration camp” cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused’s authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of “common purpose” only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to

<sup>276</sup> See Giustizia penale, 1950, Part II, cols. 696-697 (emphasis added).

<sup>277</sup> See e.g. Court of Cassation, 15 March 1948, *Peveri* case, in Archivio penale, 1948, pp. 431-432; Court of Cassation, 20 July 1949, *Mannelli* case, in Giustizia penale, 1949, Part II, col. 906, no. 599; Court of Cassation, 27 October 1949, *P. M. v. Minafò*, in Giustizia penale, 1950, Part II, col. 252, no. 202; 24 February 1950, *Montagnino*, *ibid.*, col. 821; 19 April 1950, *Solesio et al.*, *ibid.*, col. 822. By contrast, in a judgement of 23 October 1946 the same Court of Cassation, in *Minapò et al.*, held that it was immaterial that the participant in a crime had or had not foreseen the criminal conduct carried out by another member of the criminal group (Giustizia penale, 1947, Part II, col. 483, no. 382).

<sup>278</sup> In the Antonini case (Judgement of the Court of Cassation of 29 March 1949), the trial court had found the accused guilty not only of illegally arresting some civilians but also of their subsequent shooting by the Germans, as a “reprisal” for an attack on German troops in Via Rasella, in Rome. According to the trial court the accused, in arresting the civilians, had not intended to bring about their killing, but knew that he thus brought into being a situation likely to lead to their killing. The Court of Cassation reversed this finding,

take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called “advertent recklessness” in some national legal systems).

221. In addition to the aforementioned case law, the notion of common plan has been upheld in at least two international treaties. The first of these is the International Convention for the Suppression of Terrorist Bombing, adopted by consensus by the United Nations General Assembly through resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998. Pursuant to Article 2(3)(c) of the Convention, offences envisaged in the Convention may be committed by any person who:

[i]n any other way [other than participating as an accomplice, or organising or directing others to commit an offence] contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

The negotiating process does not shed any light on the reasons behind the adoption of this text.<sup>279</sup> This Convention would seem to be significant because it upholds the notion of a

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holding that for the accused to be found guilty, it was necessary that he had not only foreseen but also willed the killing (see text of the judgement in *Giustizia penale*, 1949, Part II, cols. 740-742).  
<sup>279</sup> The Report of the Sixth Committee (25 November 1997, A/52/653) and the Official Records of the General Assembly session in which this Convention was adopted made scant reference to Article 2 and did not elaborate upon the doctrine of common purpose (see UNGAOR, 72<sup>nd</sup> plenary meeting, 52<sup>nd</sup> sess., Mon. 15 December 1997, U.N. Doc. A/52/PV.72). The Japanese delegate during the 33<sup>rd</sup> meeting of the Sixth Committee nevertheless noted that “some terms used ?in the Convention such as [...] ‘such contribution’ (Article 2, para. 3(c)) were ambiguous” (33<sup>rd</sup> Meeting of the Sixth Committee, 2 December 1997, UNGAOR A/C.6/52/SR.33, p. 8, para. 77). He concluded that his Government would therefore “interpret ‘such contribution’ [...] to mean abetment, assistance or other similar acts as defined by Japanese legislation” (*ibid.*).

“common criminal purpose” as distinct from that of aiding and abetting (couched in the terms of “participating as an accomplice [in] an offence”). Although the Convention is not yet in force, one should not underestimate the fact that it was adopted by consensus by all the members of the General Assembly. It may therefore be taken to constitute significant evidence of the legal views of a large number of States.

222. A substantially similar notion was subsequently laid down in Article 25 of the Statute of the International Criminal Court, adopted by a Diplomatic Conference in Rome on 17 July 1998 (“Rome Statute”).<sup>280</sup> At paragraph 3(d), this provision upholds the doctrine under discussion as follows:

[I]n accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ...]

(d) In any other way [other than aiding and abetting or otherwise assisting in the commission or attempted commission of a crime] contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

ii. Be made in the knowledge of the intention of the group to commit the crime.

223. The legal weight to be currently attributed to the provisions of the Rome Statute has been correctly set out by Trial Chamber II in *Furund'ija*.<sup>281</sup> There the Trial Chamber pointed out that the Statute is still a non-binding international treaty, for it has not yet entered into force. Nevertheless, it already possesses significant legal value. The Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position *i.e. opinio iuris* of those States. This is consistent

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See also Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UNGAOR, 52<sup>nd</sup> sess., 37<sup>th</sup> supp., A/52/37.

<sup>280</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.  
<sup>281</sup> “Judgement”, Prosecutor v. Anto Furundžija, Case No.: IT-95-17/1-T, Trial Chamber II, 10 December 1998, para. 227.

with the view that the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting.<sup>282</sup>

224. As pointed out above, the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States. Some countries act upon the principle that where multiple persons participate in a common purpose or common design, all are responsible for the ensuing criminal conduct, whatever their degree or form of participation, provided all had the intent to perpetrate the crime envisaged in the common purpose. If one of the participants commits a crime not envisaged in the common purpose or common design, he alone will incur criminal responsibility for such a crime. These countries include Germany<sup>283</sup> and the Netherlands.<sup>284</sup> Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally responsible for the crime, whatever the role played by each of them. However, in these countries, if one of the persons taking part in a common criminal plan or enterprise perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all fully liable for that offence. These countries include civil law systems, such as that of France<sup>285</sup> and Italy.<sup>286</sup>

<sup>282</sup> Even should it be argued that the objective and subjective elements of the crime, laid down in Article 25 (3) of the Rome Statute differ to some extent from those required by the case law cited above, the consequences of this departure may only be appreciable in the long run, once the Court is established. This is due to the inapplicability to Article 25(3) of Article 10 of the Statute, which provides that "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute". This provision does not embrace Article 25, as this Article appears in Part 2 of the Statute, whereas Article 25 is included in Part 3.

<sup>283</sup> See Para. 25(2) of the Strafgesetzbuch: "Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)". ("If several persons commit a crime as co-perpetrators, each is liable to punishment as a principal perpetrator." (unofficial translation)). The German case law has clearly established the principle whereby if an offence is perpetrated that had not been envisaged in the common criminal plan, only the author of this offence is criminally responsible for it. See BGH GA 85, 270. According to the German Federal Court (in BGH GA 85, 270):

"Mittäterschaft ist anzunehmen, wenn und soweit das Zusammenwirken der mehreren Beteiligten auf gegenseitigem Einverständnis beruht, während jede rechtsverletzende Handlung eines Mittäters, die über dieses Einverständnis hinausgeht, nur diesem allein zuzurechnen ist". ("There is co-perpetration (Mittäterschaft) when and to the extent that the joint action of the several participants is founded on a reciprocal agreement (Einverständnis), whereas any criminal action of a participant (Mittäter) going beyond this agreement can only be attributed to that participant." (unofficial translation)).

<sup>284</sup> In the Netherlands, the term designated for this form of criminal liability is "medeplegen". (See HR 6 December 1943, NJ 1944, 245; HR 17 May 1943, NJ 1943, 576; and HR 6 April 1925, NJ 1925, 723, W 11393).

<sup>285</sup> See Article 121-7 of the Code pénal, which reads:

"Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation. Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre". ("Any person who knowingly has assisted in planning or committing a crime or

They also embrace common law jurisdictions such as England and Wales,<sup>287</sup> Canada,<sup>288</sup> the United States,<sup>289</sup> Australia<sup>290</sup> and Zambia.<sup>291</sup>

offence, whether by aiding or abetting, is party to it. Furthermore, any person who offers gifts, makes promises, gives orders or abuses his position of authority or power to instigate a criminal act or gives instructions for its commission is equally party to it." (unofficial translation)).

In addition to responsibility for crimes committed by more persons, the Court of Cassation has envisaged criminal responsibility for acts committed by an accomplice going beyond the criminal plan. In this connection the Court has distinguished between crimes bearing no relationship to the crime envisaged (e.g. a person hands a gun to an accomplice in the context of a hold-up, but the accomplice uses the gun to kill one of his relatives), and crimes where the conduct bears some relationship to the planned crime (e.g. theft is carried out in the form of robbery). In the former category of cases French case law does not hold the person concerned responsible, while in the latter it does, under certain conditions (as held in a judgement of 31 December 1947, Bulletin des arrêts criminels de la Cour de Cassation 1947, no. 270, the accomplice "devait accompagner" ("should expect to be charged on all counts that the law allows for and all consequences that might result from the crime" (unofficial translation))). See also the decision of 19 June 1984, Bulletin, *ibid.*, 1984, no. 231.

<sup>286</sup> The principles of common purpose are delineated, in substance, in the following provisions of the Codice Penale:

"Article 110: Pena per coloro che concorrono nel reato.- Quando piu persone concorrono nel medesimo reato, ciascuna di esse soggiace alla pena per questo stabilita, salvo le disposizioni degli articoli seguenti." ("Penalties for those who take part in a crime.- Where multiple persons participate in the same crime, each of them is liable to the penalty established for that crime, subject to the provisions of the following Articles." (unofficial translation)); and

"Article 116: Reato diverso da quello voluto da taluno dei concorrenti.- Qualora il reato commesso sia diverso da quello voluto da taluno dei concorrenti, anche questi ne risponde, se l'evento e conseguenza della sua azione od omissione." ("Crimes other than that intended by some of the participants.- Where the crime committed is different from that intended by one of the participants, he too shall answer for that crime if the event is a consequence of his act or omission." (unofficial translation)).

It should be noted that Italian courts have increasingly interpreted Article 116 as providing for criminal responsibility in cases of foreseeability. See in particular the judgement of the Constitutional Court of 13 May 1965, no. 42, Archivio Penale 1965, part II, pp. 430 ff. In some cases courts require so-called abstract foreseeability (prevedibilità astratta) (see e.g., instance, Court of Cassation, 3 March 1978, Cassazione penale, 1980, pp. 45 ff; Court of Cassation, 4 March 1988, Cassazione penale, 1990, pp. 35 ff); others require concrete (or specific) foreseeability (prevedibilità concreta) (see e.g., Court of Cassation, 11 October 1985, Rivista penale, 1986, p. 421; and Court of Cassation, 18 February 1998, Rivista penale, 1988, p. 1200).

<sup>287</sup> See R. v. Hyde 71991g 1 QB 134; R. v. Anderson; R. v. Morris [1966] 2 QB 110, in which Lord Parker CJ held that "where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of the joint enterprise, than that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise". However, liability for such unusual consequences is limited to those offences that the accused foresaw that the principal might commit as a possible incident of the common unlawful enterprise, and further, the accused, with such foresight, must have continued to participate in the enterprise (see *Hui Chi-Ming v. R.* [1992] 3 All ER 897 at 910-911).

<sup>288</sup> Criminal Code, Section 21(2) reads that where:

"two or more persons form an intention to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each one of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."

It should be noted that despite the fact that the section refers to an objective foreseeability requirement, this has been modified by the Supreme Court of Canada which held that: "[I]n those instances where the principal is held to a mens rea standard of subjective foresight, the party cannot constitutionally be convicted for the same crime on the basis of an objective foreseeability standard" (*R. v. Logan* [1990] 2 SCR 731 at 735). Hence, a subjective standard is applied in the case of offences such as murder. See also *R. v. Rodney* [1990] 2 SCR 687.

225. It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. Nor can reference to national law have, in this case, the scope and purport adumbrated in general terms by the United Nations Secretary-General in his Report, where it is pointed out that “suggestions have been made that the international tribunal should apply *domestic law* in so far as it *incorporates* customary international humanitarian law”.<sup>292</sup> In the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation.

226. The Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law

<sup>289</sup> E.g., in Maine (17 Maine Criminal Code § 57 (1997)), Minnesota (Minnesota Statutes § 609.05 (1998)), Iowa (Iowa Code § 703.2 (1997)), Kansas (Kansas Statutes § 21-3205 (1999)), Wisconsin (Wisconsin Statutes § 939.05 (West 1995)). Although there is no clearly defined doctrine of common purpose under the United States’ Federal common law, similar principles are promulgated by the Pinkerton doctrine. This doctrine imposes criminal liability for acts committed in furtherance of a common criminal purpose, whether the acts are explicitly planned or not, provided that such acts might have been reasonably contemplated as a probable consequence or likely result of the common criminal purpose (see Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946)); State v. Walton, 227 Conn. 32; 630 A.2d 990 (1993); State of Connecticut v. Diaz, 237 Conn. 518, 679 A.2d 902 (1996)).

<sup>290</sup> Under Australian law, when two parties embark on a joint criminal enterprise, a party will be liable for an act which he contemplates may be carried out by the other party in the course of the enterprise, even if he has not explicitly or tacitly agreed to the commission of that act (McAuliffe v. R. (1995) 183 CLR 108 at 114). The test for determining whether a crime falls within the scope of the relevant joint enterprise is the subjective test of contemplation: “in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one, and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose” (ibid.).

<sup>291</sup> Article 22 of the Penal Code states:  
 “When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

<sup>292</sup> See Report of the Secretary-General, para. 36 (emphasis added).

and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law.

227. In sum, the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

- i. *A plurality of persons.* They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases.
- ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
- iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.

228. By contrast, the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused’s position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the

circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.

229. In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.

(b) The Culpability of the Appellant in the Present Case

230. In the present case, the Trial Chamber found that the Appellant participated in the armed conflict taking place between May and December 1992 in the Prijedor region. An aspect of this conflict was a policy to commit inhumane acts against the non-Serb civilian population of the territory in the attempt to achieve the creation of a Greater Serbia.<sup>293</sup> It was also found that, in furtherance of this policy, inhumane acts were committed against numerous victims and "pursuant to a recognisable plan".<sup>294</sup> The attacks on Sivići and Jaskići on 14 June 1992 formed part of this armed conflict raging in the Prijedor region.

231. The Appellant actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts. The common criminal purpose was not to kill all non-Serb men; from the evidence adduced and accepted, it is clear that killings frequently occurred in the effort to rid the Prijedor region of the non-Serb population. That the Appellant had been aware of the killings accompanying the commission of inhumane acts against the non-Serb population is beyond doubt. That is the context in which the attack on Jaskići and his participation therein, as found by the Trial Chamber as well as the Appeals Chamber above, should be seen. That nobody was killed in the attack on Sivići on the same day does not represent a change of the common criminal purpose.

232. The Appellant was an armed member of an armed group that, in the context of the conflict in the Prijedor region, attacked Jaskići on 14 June 1992. The Trial Chamber found the following:

Of the killing of the five men in Jaskići, the witnesses Draguna Jaskić, Zemka [anbaz and Senija Elkasovi] saw their five dead bodies lying in the village when the women were able to leave their houses after the armed men had gone; Senija Elkasovi saw that four of them had been shot in the head. She had heard shooting after the men from her house were taken away.<sup>295</sup>

The Appellant actively took part in this attack, rounding up and severely beating some of the men from Jaskići. As the Trial Chamber further noted:

<sup>293</sup> See Judgement, paras. 127-179, which outlines the background to the conflict in the opština Prijedor.

[t]hat the armed men were violent was not in doubt, a number of these witnesses were themselves threatened with death by the armed men as the men of the village were being taken away. Apart from that, their beating of the men from the village, in some cases beating them into insensibility, as they lay on the road, is further evidence of their violence.<sup>296</sup>

Accordingly, the only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk.

### 3. The Finding of the Appeals Chamber

233. The Trial Chamber erred in holding that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the Appellant had any part in the killing of the five men from the village of Jaskji. The Appeals Chamber finds that the Appellant participated in the killings of the five men in Jaskji, which were committed during an armed conflict as part of a widespread or systematic attack on a civilian population. The Appeals Chamber therefore holds that under the provisions of Article 7(1) of the Statute, the Trial Chamber should have found the Appellant guilty.

234. The Appeals Chamber finds that this ground of the Prosecution's Cross-Appeal succeeds.

<sup>294</sup> Judgement, para. 660.

<sup>295</sup> *Ibid.*, para. 370.

<sup>296</sup> *Ibid.*

### C. Conclusion

235. In light of the Appeals Chamber's finding that Article 2 of the Statute is applicable, the Appellant is found guilty on Count 29 (grave breach in terms of Article 2(a) (wilful killing) of the Statute) and Article 7(1) of the Statute.

236. The Trial Chamber's finding on Count 30 is set aside. The Appellant is found guilty on Count 30 (violation of the laws or customs of war in terms of Article 3(1)(a) (murder) of the Statute) and Article 7(1) of the Statute.

237. The Trial Chamber's finding on Count 31 is set aside. The Appellant is found guilty on Count 31 (crime against humanity in terms of Article 5(a) (murder) of the Statute) and Article 7(1) of the Statute.

VI. THE THIRD GROUND OF CROSS-APPEAL BY THE  
PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT CRIMES  
AGAINST HUMANITY CANNOT BE COMMITTED FOR PURELY  
PERSONAL MOTIVES

238. In the Judgement, the Trial Chamber identified, from among the elements which had to be satisfied before a conviction for crimes against humanity could be recorded, the need to prove the existence of an armed conflict and a nexus between the acts in question and the armed conflict.

239. As to the nature of the nexus required, the Trial Chamber found that, subject to two caveats, it is sufficient for the purposes of crimes against humanity that the act occurred "in the course or duration of an armed conflict".<sup>297</sup> The first caveat was "that the act be linked geographically as well as temporally with the armed conflict".<sup>298</sup> The second caveat was that the act and the conflict must be related or, at least, that the act must "not be unrelated to the armed conflict".<sup>299</sup> The Trial Chamber further held that the requirement that the act must "not be unrelated" to the armed conflict involved two aspects. First, the perpetrator must know of the broader context in which the act occurs.<sup>300</sup> Secondly, the act must not have been carried out for the purely personal motives of the perpetrator.<sup>301</sup>

A. Submissions of the Parties

1. The Prosecution Case

240. The Prosecution submits that there is nothing in Article 5 of the Statute which suggests that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. In the submission of the Prosecution, no such requirement can be inferred from the requirement that the crime must have a nexus to the armed conflict. In

<sup>297</sup> Judgement, para. 633.

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.*, para. 634.

<sup>300</sup> *Ibid.*, paras. 656-657.

fact, to read the armed conflict requirement as requiring that the perpetrator's motives not be purely personal "would?...g transform this merely jurisdictional limitation under Article 5 into a substantive element of the mens rea of crimes against humanity".<sup>302</sup>

241. The Prosecution concedes that this finding did not affect the verdict against the Appellant. However, it submits that the finding involves a significant question of law that is of general importance to the Tribunal's jurisprudence and should therefore be corrected on appeal.<sup>303</sup>

242. The Prosecution argues that the weight of authority supports the proposition that crimes against humanity can be committed for purely personal reasons and that the sole authority relied on by the Trial Chamber in support of its finding in fact suggests that, even where perpetrators may have been personally motivated to commit the acts in question, their conduct can still be characterised as a crime against humanity.<sup>304</sup> Subsequent decisions of the United States military tribunals under Control Council Law No.10 and of national courts are also consistent with the view that a perpetrator of crimes against humanity may act out of purely personal motives.<sup>305</sup>

243. Finally, the Prosecution contends that the object and purpose of the Tribunal's Statute support the interpretation that crimes against humanity may be committed for purely personal reasons, arguing that the objective of the Statute in providing a broad scope for humanitarian law would be defeated by a narrow interpretation of the category of offences falling within the ambit of Article 5. Furthermore, if proof of a non-personal motive was required, many perpetrators of crimes against humanity could evade conviction by the International Tribunal simply by invoking purely personal motives in defence of their conduct.<sup>306</sup>

<sup>301</sup> *Ibid.*, paras. 658-659.

<sup>302</sup> Cross-Appellant's Brief, para. 4.9.

<sup>303</sup> Skeleton Argument of the Prosecution, para. 26.

<sup>304</sup> Cross-Appellant's Brief, para. 4.11; T. 150 (20 April 1999).

<sup>305</sup> Cross-Appellant's Brief, paras. 4.15 – 4.18.

<sup>306</sup> *Ibid.*, paras. 4.22; T. 152 (20 April 1999).

## 2. The Defence Case

244. In contrast to the Prosecution's Cross-Appeal, the Defence argues that the Trial Chamber's ruling that a crime against humanity cannot be committed for purely personal reasons is correct. Although it concedes that Article 5 of the Statute does not expressly stipulate that crimes against humanity cannot be committed for purely personal reasons, in its submission, the Trial Chamber nevertheless interpreted Article 5 correctly when it found that crimes against humanity cannot be committed for purely personal motives.<sup>307</sup>

245. The Defence contests the interpretation given to the applicable case law by the Prosecution, arguing that in all the cases cited, the defendants were linked to the system of extermination which formed the underlying predicate of crimes against humanity, and therefore did not commit their crimes for purely personal motives.<sup>308</sup> In other words, the activities of the defendants were linked to the general activities comprising the pogroms against the Jews and thus the Defence submits that the acts of the defendants were not acts committed for purely personal reasons.

246. The Defence also contests the Prosecution's submissions regarding the object and purpose of the Statute of the International Tribunal, arguing, to the contrary, that policy suggests that it would be unjust if a perpetrator of a criminal act guided solely by personal motives was instead to be prosecuted for a crime against humanity.<sup>309</sup>

### B. Discussion

247. Neither Party asserts that the Trial Chamber's finding that crimes against humanity cannot be committed for purely personal motives had a bearing on the verdict in terms of Article 25(1) of the Tribunal Statute.<sup>310</sup> Nevertheless this is a matter of general significance for the Tribunal's jurisprudence. It is therefore appropriate for the Appeals Chamber to set forth its views on this matter.

<sup>307</sup> Appellant's Amended Brief on Judgement, para. 4.9; T. 227 (20 April 1999).

<sup>308</sup> Appellant's Amended Brief on Judgement, para. 4.12; T. 229 (20 April 1999).

<sup>309</sup> Appellant's Amended Brief on Judgement, paras. 4.17 – 4.18.

## 1. Article 5 of the Statute

248. The Appeals Chamber agrees with the Prosecution that there is nothing in Article 5 to suggest that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. The Appeals Chamber agrees that it may be inferred from the words "directed against any civilian population" in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population<sup>311</sup> and that the accused must have known that his acts fit into such a pattern. There is nothing in the Statute, however, which mandates the imposition of a further condition that the acts in question must not be committed for purely personal reasons, except to the extent that this condition is a consequence or a re-statement of the other two conditions mentioned.

249. The Appeals Chamber would also agree with the Prosecution that the words "committed in armed conflict" in Article 5 of the Statute require nothing more than the existence of an armed conflict at the relevant time and place. The Prosecution is, moreover, correct in asserting that the armed conflict requirement is a jurisdictional element, not "a substantive element of the mens rea of crimes against humanity"<sup>312</sup> (i.e., not a legal ingredient of the subjective element of the crime).

250. This distinction is important because, as stated above, if the exclusion of "purely personal" behaviour is understood simply as a re-statement of the two-fold requirement that the acts of the accused form part of a context of mass crimes and that the accused be aware of this fact, then there is nothing objectionable about it; indeed it is a correct statement of the law. It is only if this phrase is understood as requiring that the motives of the accused ("personal reasons", in the terminology of the Trial Chamber) not be unrelated to the armed

<sup>310</sup> Article 25(1) of the Statute reads as follows: "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice".

<sup>311</sup> This requirement had already been recognised by this Tribunal in the Vukovar Hospital Rule 61 Decision: "Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above." ("Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", The Prosecutor v. Mile Mrkšić et al., Case No.: IT-95-13-R61, Trial Chamber I, 3 April 1996, para. 30).

conflict that it is erroneous. Similarly, that phrase is unsound if it is taken to require proof of the accused's motives, as distinct from the intent to commit the crime and the knowledge of the context into which the crime fits.

251. As to what the Trial Chamber understood by the phrase "purely personal motives", it is clear that it conflated two interpretations of the phrase: first, that the act is unrelated to the armed conflict, and, secondly, that the act is unrelated to the attack on the civilian population. In this regard, paragraph 659 of the Judgement held:

659. Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict. (emphasis added)

Thus the "attack on the civilian population" is here equated to "the armed conflict". The two concepts cannot, however, be identical because then crimes against humanity would, by definition, always take place in armed conflict, whereas under customary international law these crimes may also be committed in times of peace.<sup>313</sup> So the two – the "attack on the civilian population" and "the armed conflict" – must be separate notions, although of course under Article 5 of the Statute the attack on "any civilian population" may be part of an "armed conflict". A nexus with the accused's acts is required, however, only for the attack on "any civilian population". A nexus between the accused's acts and the armed conflict is not required, as is instead suggested by the Judgement. The armed conflict requirement is satisfied by proof that there was an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law.

252. The Trial Chamber seems additionally to have conflated the notion of committing an act for purely personal motives and the notion that the act must not be unrelated to the armed conflict. The Trial Chamber appears to have viewed the proposition that "the act must not be unrelated to the armed conflict"<sup>314</sup> as being synonymous with the statement that

<sup>312</sup> Cross-Appellant's Brief, para. 4.9.

<sup>313</sup> On the issue of whether the Statute exceeds customary international law in requiring that there be an armed conflict, see the Tadić Decision on Jurisdiction, para. 141.

<sup>314</sup> Judgement, para. 634.

the act must "not be done for the purely personal motives of the perpetrator".<sup>315</sup> These two concepts, neither of which is a prerequisite for criminal culpability under Article 5 of the Statute, are, in any case, not coextensive. It may be true that if the act is related to the armed conflict, then it is not being committed for purely personal motives. But it does not follow from this that, if the act is unrelated to the armed conflict, it is being committed for purely personal reasons. The act may be intimately related to the attack on a civilian population, that is, it may fit precisely into a context of persecution of a particular group, and yet be unrelated to the armed conflict. It would be wrong to conclude in these circumstances that, since the act is unrelated to the armed conflict, it is being committed for purely personal reasons. The converse is also true; that is, merely because personal motivations can be identified in the defendant's carrying out of an act, it does not necessarily follow that the required nexus with the attack on a civilian population must also inevitably be lacking.

## 2. The Object and Purpose of the Statute

253. The Prosecution has submitted that "the object and purpose of the Statute support the interpretation that crimes against humanity can be committed for purely personal reasons". The Prosecution cites the Tadić Decision on Jurisdiction, to the effect that "the 'primary purpose' of the establishment of the International Tribunal 'is not to leave unpunished any person guilty of [a] serious violation [of international humanitarian law], whatever the context within which it may have been committed'".<sup>316</sup> This begs the question, however, whether a crime committed for purely personal reasons is a crime against humanity, and therefore a serious violation of international humanitarian law under Article 5 of the Statute.

254. The Appeals Chamber would also reject the Prosecution's submission concerning the onerous evidentiary burden which would be imposed on it in having to prove that the accused did not act from personal motives,<sup>317</sup> as equally question-begging and inapposite. It is question-begging because if, arguendo, under international criminal law, the fact that

<sup>315</sup> Ibid.

<sup>316</sup> Cross-Appellant's Brief, para. 4.20.

<sup>317</sup> Ibid., para. 4.23.

the accused did not act from purely personal motives was a requirement of crimes against humanity, then the Prosecution would have to prove that element, whether it was onerous for it to do so or not. The question is simply whether or not there is such a requirement under international criminal law.

### 3. Case-law as Evidence of Customary International Law

255. Turning to the further submission of the Prosecution, the Appeals Chamber agrees that the weight of authority supports the proposition that crimes against humanity can be committed for purely personal reasons, provided it is understood that the two aforementioned conditions – that the crimes must be committed in the context of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts, in the words of the Trial Chamber, “fitted into such a pattern” – are met.

256. In this regard, it is necessary to review the case-law cited by the Trial Chamber and the Prosecution, as well as other relevant case law, to establish whether this case-law is indicative of the emergence of a norm of customary international law on this matter.

257. The Prosecution is correct in stating that the 1948 case cited by the Trial Chamber<sup>318</sup> supports rather than negates the proposition that crimes against humanity may be committed for purely personal motives, provided that the acts in question were knowingly committed as “part and parcel of all the mass crimes committed during the persecution of the Jews”. As the Supreme Court for the British Zone stated, “in cases of crimes against humanity taking the form of political denunciations, only the perpetrator’s consciousness and intent to

<sup>318</sup> Decision of the Supreme Court for the British Zone (Criminal Chamber) (9 November 1948), S. StS 78/48, in Justiz und NS-Verbrechen vol. II, pp. 498-499. The Accused, Mrs. K. and P., had denounced P’s Jewish wife to the Gestapo for her anti-Nazi remarks. The defendants’ sole purpose was to rid themselves of Mrs. P., who would not agree to a divorce, and the Accused saw no other means of so doing than by delivering Mrs. P. to the Gestapo. Upon her denunciation, Mrs. P. was arrested and brought to Auschwitz concentration camp where she died after a few months due to malnutrition. The Court of First Instance convicted K. and P. of crimes against humanity. (See Decision of Schwurgericht Hamburg from 11 May 1948, (50). 17/48, in Justiz und NS-Verbrechen, vol. II, pp. 491-497). The Accused appealed to the Supreme Court of the British Zone which dismissed their appeal and confirmed their convictions, stating that both the physical and the mental elements of a crime against humanity were met. See Decision of the Supreme Court for the British Zone from 9 November 1948, S. StS 78/48, in Justiz und NS-Verbrechen, vol. II, pp. 498-499 at p. 499). According to the Supreme Court, the findings of the Court of First Instance had sufficiently proved that the accused fulfilled this mental requirement.

deliver his victim through denunciation to the forces of arbitrariness or terror are required”.<sup>319</sup>

258. The case involving the killing of mentally disturbed patients, decided by the same court and cited by the Prosecution, is also a persuasive authority concerning the irrelevance of personal motives with regard to the constituent elements of crimes against humanity.<sup>320</sup>

259. The Prosecution’s submission finds further support in other so-called denunciation cases rendered after the Second World War by the Supreme Court for the British Zone and by German national courts, in which private individuals who denounced others, albeit for personal reasons, were nevertheless convicted of crimes against humanity.

260. In Sch., the accused had denounced her landlord solely “out of revenge and for the purpose of rendering him harmless” after tensions in their tenancy had arisen. The denunciation led to investigation proceedings by the Gestapo which ended with the landlord’s conviction and execution. The Court of First Instance convicted Sch. and sentenced her to three years’ imprisonment for crimes against humanity.<sup>321</sup> The accused appealed against the decision, arguing that “crimes against humanity were limited to participation in mass crimes and ... did not include all those cases in which someone took action against a single person for personal reasons”. The Supreme Court dismissed the appeal, holding that neither the Nuremberg Judgement nor the statements of the Prosecutor

<sup>319</sup> Ibid., p. 499.

<sup>320</sup> OGHBZ, Supreme Court for the British Zone (Criminal Chamber) (5 March 1949), S. StS 19/49, in Entscheidungen des Obersten Gerichtshofes für die Britische Zone I, 1949, pp. 321-343. The Accused, Dr. P. and others, were medical doctors and a jurist working in a hospital for mentally disturbed patients. Pursuant to Hitler’s directive which ordered the transferral of mentally ill persons to other institutions (where the patients were secretly killed in gas chambers), the Defendants in a few cases participated in the transfer of patients. In most cases, however, they objected to these instructions and tried to save their patients’ lives by releasing them from hospital or by classifying them in categories which were not subject to Hitler’s directive. The Defendants, charged with aiding and abetting murder, were acquitted by the Court of First Instance because it could not be proven that they had acted with the requisite mens rea with regard to participation in the killing of the patients. The Court of First Instance did not take into consideration whether the Defendants’ behaviour could constitute a crime against humanity. This was criticised by the Supreme Court for the British Zone, which ordered the re-opening of the trial before the Court of First Instance to ascertain whether the Accused could be found guilty of a crime against humanity. The Supreme Court stated that a “perpetrator [of a crime against humanity] is indeed also anyone who contributes to the realisation of the elements of the offence, without at the same time wishing to promote National Socialist rule, [...] but who acts perhaps out of fear, indifference, hatred for the victim or to receive some gain. [This is] because even when one acts from these motives (“Beweggründe”), the action remains linked to this violent and oppressive system (“Gewaltherrschaft”)” (ibid., p. 341). The Defendants, ultimately, were not convicted of crimes against humanity for procedural reasons unrelated to the definition of the offence.

<sup>321</sup> Decision of Flensburg District Court dated 30 March 1948 in Justiz und NS-Verbrechen, vol. II, pp. 397-402. See this decision for the findings of the District Court to the effect that the denunciation was made for personal reasons.

before the International Military Tribunal indicated that Control Council Law No. 10 had to be interpreted in such a restrictive way. The Supreme Court stated:

[T]he International Military Tribunal and the Supreme Court considered that a crime against humanity as defined in CCL 10 Article II 1 (c) is committed whenever the victim suffers prejudice as a result of the National Socialist rule of violence and tyranny ("Gewalt- oder Willkürherrschaft") to such an extent that mankind itself was affected thereby. Such prejudice can also arise from an attack committed against an individual victim for personal reasons. However, this is only the case if the victim was not only harmed by the perpetrator – this would not be a matter which concerned mankind as such – but if the character, duration or extent of the prejudice were determined by the National Socialist rule of violence and tyranny or if a link between them existed. If the victim was harmed in his or her human dignity, the incident was no longer an event that did not concern mankind as such. If an individual's attack against an individual victim for personal reasons is connected to the National Socialist rule of violence and tyranny and if the attack harms the victim in the aforementioned way, it, too, becomes one link in the chain of the measures which under the National Socialist rule were intended to persecute large groups among the population. There is no apparent reason to exonerate the accused only because he acted against an individual victim for personal reasons.<sup>322</sup>

261. This view was upheld in a later decision of the Supreme Court in the case of H. H. denounced his father-in-law, V.F., for listening to a foreign broadcasting station, allegedly because V.F., who was of aristocratic origin, incessantly mocked H. for his low birth and tyrannised the family with his relentlessly scornful behaviour. The family members supposedly considered a denunciation to be the only solution to their family problems. Upon the denunciation, V.F. was sentenced by the Nazi authorities to three years in prison. V.F., who suffered from an intestinal illness, died in prison. Despite the fact that H.'s denunciation was motivated by personal reasons, the Court of First Instance sentenced H. for a crime against humanity, stating that "it can be left open as to whether [...] H. was motivated by political, personal or other reasons". Referring to the established jurisprudence of the Supreme Court for the British Zone,<sup>323</sup> the Court of First Instance held that "the

<sup>322</sup> Decision of the Supreme Court of the British Zone dated 26 October 1948, S. SIS 57/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen*, vol. I., pp. 122-126 at p. 124 (unofficial translation). The essence of this statement was reiterated in the Decision of the Supreme Court dated 8 January 1949 against G. (S. SIS 109/48, *ibid.*, pp. 246-249). G., a member of the SA (Stormtroopers), had participated in the mistreatment of a political opponent for apparently purely personal motives, namely personal rancour between his family and the family of the victim. Nevertheless, G. was found guilty of a crime against humanity. The Supreme Court dismissed G.'s appeal against his conviction, stating that the motive for an attack was immaterial and that an attack against a single victim for personal reasons can be considered a crime against humanity if there is a nexus between the attack and the National Socialist rule of violence and tyranny (*ibid.*, p. 247).

<sup>323</sup> The Court of First Instance referred to the Decision of the Supreme Court of the British Zone dated 17 August 1948, S. SIS 43/48, *ibid.*, pp. 60-62 and Decision dated 13 November 1948, S. SIS 68/48, *ibid.*, pp. 186-190. See also Decision of the Supreme Court of the British Zone dated 20 April 1949, S. SIS 120/49, *ibid.*, pp. 385-391, at p. 388.

motives ("Beweggründe") prompting a denunciation are not decisive (nicht entscheidend)".<sup>324</sup>

262. A further example is the V. case. In 1943, Nu. denounced Ste. for her repeated utterances against Hitler, the national-socialist system and the SS, made in Nu.'s house in 1942. Ste. was the natural mother of Nu.'s adoptive son. In fact, Nu. had denounced Ste. in the hope of regaining her son who had become increasingly estranged from his adoptive parents and had developed a closer relationship with his natural mother. Upon the denunciation, a special court sentenced Ste. to two years in prison. This court had envisaged her eventual transfer to a concentration camp, but she was released by the allied occupation forces before the transfer took place. In prison, Ste. suffered serious bodily harm and lost sight in one eye. After the war, a District Court sentenced Nu. to six months' imprisonment for her denunciation of Ste.. Although Nu.'s act of denunciation was motivated by personal reasons, the court considered that her denunciation constituted a crime against humanity.<sup>325</sup>

263. Turning to the decisions of the United States military tribunals under Control Council Law No. 10 cited by the Prosecution,<sup>326</sup> it must be noted that they appear to be less pertinent. These cases involve Nazi officials of various ranks whose acts were, therefore, by that token, already readily identifiable with the Nazi regime of terror. The question whether they acted "for personal reasons" would, therefore, not arise in a direct manner, since their acts were carried out in an official capacity, negating any possible "personal"

<sup>324</sup> Decision of the Braunschweig District Court dated 22 June 1950, in *Justiz und NS-Verbrechen*, vol. VI, pp. 631-644, at p. 639. Note, in particular, the findings of the District Court to the effect that the denunciation was motivated by personal concerns. Mention can also be made of the Decision of Schwurgericht Hannover, dated 30 November 1948, in the B. case, S. SIS 68/48 (in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen*, vol. I, pp. 186-190). B., an inspector of state church offices, informed his superior that one of his colleagues, P., had repeatedly expressed his doubts about the political situation in Germany and voiced his disapproval of the persecution of the Jews, the official propaganda, cultural policy and anti-clerical attitude of National Socialism. This information reached the Gestapo, who arrested P. A special court sentenced P. to one year and three months in prison. B., charged with crimes against humanity, was acquitted at first instance because the verdict of the Court of First Instance (Schwurgericht Hannover), having extensively examined the accused's motives ("Beweggründe"), could not determine whether the denunciation had been motivated by politics or religion. The Supreme Court of the British Zone dismissed the judgement of the District Court, stating that "it was erroneous and in contradiction to the consistent jurisprudence of the [Supreme] Court" to consider the motives of the accused as important. (*ibid.*, p. 189).

<sup>325</sup> Decision of the Supreme Court for the British Zone dated 22 June 1948, S. SIS 5/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen*, vol. I, pp. 19-25. The decision of the Supreme Court did not directly concern the accused Nu., but a co-accused of hers. Nu. had been sentenced by the District Court of Hamburg for committing a crime against humanity.  
<sup>326</sup> See *Cross-Appellant's Brief*, paras. 4.15, 4.16.

defence which has as its premise “non-official acts”. The question whether an accused acted for purely personal reasons can only arise where the accused can claim to have acted as a private individual in a private or non-official capacity. This is why the issue arises mainly in denunciation cases, where one neighbour or relative denounces another. This paradigm is, however, inapplicable to trials of Nazi ministers, judges or other officials of the State, particularly where they have not raised such a defence by admitting the acts in question whilst claiming that they acted for personal reasons. Any plea that an act was done for “purely personal” motives and that it therefore cannot constitute a crime against humanity is pre-eminently for the defence to raise and one would not expect the court to rule on the issue *proprio motu* and as *obiter dictum*.

264. The two sections of the Ministries case, referred to by the Prosecution,<sup>327</sup> are also not strictly relevant, as those sections re-state the law of complicity – “[...] he who participates or plays a consenting part therein is guilty of a crime against humanity” – rather than dealing with the importance or otherwise of whether the accused acted from personal motives. Equally, in the Justice case,<sup>328</sup> the defendants do not appear to have raised the defence that they acted for personal motives.

265. The Prosecution also refers to the Eichmann and Finta cases. The Eichmann case is inappropriate as the defendant in that case specifically denied that he ever acted from a personal motive, claiming that he did what he did “not of his own volition but as one of numerous links in the chain of command”.<sup>329</sup> Moreover the court found Eichmann, who was the Head of the Jewish Affairs and Evacuation Department and one of the persons who attended the infamous Wannsee Conference, to be “no mere ‘cog’, small or large, in a machine propelled by others; he was, himself, one of those who propelled the machine”.<sup>330</sup> Such a senior official would not be one to whom the “purely personal reasons” consideration could conceivably apply.

<sup>327</sup> U.S. v. Ernst von Weizsaecker et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol XIV, pp. 611, 470-471, cited in Cross-Appellant’s Brief, para. 4.15.

<sup>328</sup> U.S. v. Altstoetter et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol. III.

<sup>329</sup> Attorney-General of the Government of Israel v. Adolf Eichmann, 36 International Law Reports 1968, p. 323.

<sup>330</sup> *Ibid.*, p. 331.

266. The Finta case<sup>331</sup> is more on point, not least since the accused was a minor official, a captain in the Royal Hungarian Gendarmerie. He was thus better placed than senior officials to raise an issue as to his exclusively “personal” motives. That case is indeed authority for the proposition that the sole requirements for crimes against humanity in this regard are that:

[...] there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity. [...] The mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity.<sup>332</sup>

267. According to Finta, nothing more seems to be required beyond this and there is no mention of the relevance or otherwise of the accused’s personal motives.

268. One reason why the above cases do not refer to “motives” may be, as the Defence has suggested,<sup>333</sup> that “the issue in these cases was not whether the Defendants committed the acts for purely personal motives”. The Appeals Chamber believes, however, that a further reason why this was not in issue is precisely because motive is generally irrelevant in criminal law, as the Prosecution pointed out in the hearing of 20 April 1999:

For example, it doesn’t matter whether or not an accused steals money in order to buy Christmas presents for his poor children or to support a heroin habit. All we’re concerned with is that he stole and he intended to steal, and what we’re concerned with ... here is the same sort of thing. There’s no requirement for non-personal motive beyond knowledge of the context of a widespread or systematic act into which an accused’s act fits. The Prosecutor is submitting that, as a general proposition and one which is applicable here, motives are simply irrelevant in criminal law.<sup>334</sup>

269. The Appeals Chamber approves this submission, subject to the caveat that motive becomes relevant at the sentencing stage in mitigation or aggravation of the sentence (for example, the above mentioned thief might be dealt with more leniently if he stole to give presents to his children than if he were stealing to support a heroin habit). Indeed the inscrutability of motives in criminal law is revealed by the following *reductio ad absurdum*. Imagine a high-ranking SS official who claims that he participated in the genocide of the Jews and Gypsies for the “purely personal” reason that he had a deep-seated hatred of Jews and Gypsies and wished to exterminate them, and for no other reason. Despite this

<sup>331</sup> R. v. Finta, ?1994g 1 SCR 701.

<sup>332</sup> *Ibid.*, at p. 819, majority judgement delivered by Cory J..

<sup>333</sup> Defence’s Substituted Response to Cross-Appellant’s Brief, para. 4.16.  
<sup>334</sup> T. 152-153 (20 April 1999).

quintessentially genocidal frame of mind, the accused would have to be acquitted of crimes against humanity because he acted for “purely personal” reasons. Similarly, if the same man said that he participated in the genocide only for the “purely personal” reason that he feared losing his job, he would also be entitled to an acquittal. Thus, individuals at both ends of the spectrum would be acquitted. In the final analysis, any accused that played a role in mass murder purely out of self-interest would be acquitted. This shows the meaninglessness of any analysis requiring proof of “non-personal” motives. The Appeals Chamber does not believe, however, that the Trial Chamber meant to reach such a conclusion. Rather, the requirement that the accused’s acts be part of a context of large-scale crimes, and that the accused knew of this context, was misstated by the Trial Chamber as a negative requirement that the accused not be acting for personal reasons. The Trial Chamber did not, the Appeals Chamber believes, wish to import a “motive” requirement; it simply duplicated the context and mens rea requirement, and confused it with the need for a link with an armed conflict, and thereby seemed to have unjustifiably and inadvertently added a new requirement.

270. The conclusion is therefore warranted that the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, “purely personal motives” do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.

### C. Conclusion

271. The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related.

272. For the above reasons, however, the Appeals Chamber does not consider it necessary to further require, as a substantive element of mens rea, a nexus between the specific acts allegedly committed by the accused and the armed conflict, or to require proof

of the accused’s motives. Consequently, in the opinion of the Appeals Chamber, the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not form part of the prerequisites necessary for conduct to fall within the definition of a crime against humanity under Article 5 of the Tribunal’s Statute.

VII. THE FOURTH GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT ALL CRIMES AGAINST HUMANITY REQUIRE A DISCRIMINATORY INTENT

A. Submissions of the Parties

1. The Prosecution Case

273. The Prosecution submits that the Trial Chamber erred in finding that all crimes against humanity must be committed with a discriminatory intent. It is the submission of the Prosecution that the requirement of a discriminatory intent applies only to "persecution type" crimes and not to all crimes against humanity.<sup>335</sup>

274. The Prosecution notes that Article 5 of the Statute contains no express requirement of a discriminatory intent for all crimes against humanity. The requirement for such an intent is present in Article 3 of the Statute of the ICTR. The absence of a similar provision in Article 5 of this Tribunal's Statute implies a *contrario* that at the time of drafting the Statute of this Tribunal, there was no intention to include a similar requirement.<sup>336</sup>

275. A requirement of discriminatory intent for all crimes against humanity is also absent from customary international law. The Prosecution notes that the Nuremberg Charter and Control Council Law No. 10, upon which Article 5 is based, distinguish between "murder type" crimes such as murder, extermination, enslavement, etc., and "persecution type" crimes committed on political, racial, or religious grounds. Discriminatory intent need only be shown in relation to "persecution" crimes. The Prosecution submits that the Trial Chamber erred in relying upon a statement in paragraph

<sup>335</sup> Cross-Appellant's Brief, para. 5.5; T. 161 (20 April 1999).

<sup>336</sup> Cross-Appellant's Brief, para. 5.6; T. 162 (20 April 1999).

48 of the Report of the Secretary-General<sup>337</sup> and statements made in the Security Council by three of its fifteen Members to conclude that Article 5 of the Statute was to be interpreted as requiring that all crimes against humanity be committed with a discriminatory intent. In the Prosecution's submission, these sources do not purport to reflect customary international law and thus should not be given undue, authoritative weight in interpreting Article 5.<sup>338</sup> It is the view of the Prosecution that Article 5 does not contain any ambiguity. Thus, to accord weight to these sources to resolve an ambiguity which, in the Prosecution's submission, does not exist, would lead to considerable uncertainty with regard to the scope and content of Article 5 of the Statute.<sup>339</sup>

276. The Prosecution submits that the rules of statutory interpretation also militate against requiring a discriminatory intent for all crimes against humanity. If discriminatory intent were required for all crimes against humanity, the Prosecution submits that this would relegate the crime of "persecutions" under Article 5(h) to a residual provision and make "other inhumane acts" in Article 5(i) redundant. The Prosecution submits that the Statute should be interpreted in order to give proper effect to all of its provisions.<sup>340</sup>

277. Finally, the Prosecution submits that the requirement of discriminatory intent for all crimes against humanity is inconsistent with the humanitarian object and purpose of the Statute and international humanitarian law. The Prosecution argues that requiring a discriminatory intent for all crimes against humanity would create a significant normative lacuna by failing to protect civilian populations not encompassed by the listed grounds of discrimination.<sup>341</sup>

2. The Defence Case

278. The Defence submits that the Trial Chamber's decision that all crimes against humanity require a discriminatory intent should be upheld.

<sup>337</sup> The statement reads as follows: "Crimes against humanity refer to inhumane acts of a very serious nature [...] committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds."

<sup>338</sup> Cross-Appellant's Brief, paras. 5.7, 5.8; T. 162, 163 (20 April 1999).

<sup>339</sup> Cross-Appellant's Brief, paras. 5.20, 5.22.

<sup>340</sup> Cross-Appellant's Brief, para. 5.24; T. 165 (20 April 1999).

<sup>341</sup> Cross-Appellant's Brief, para. 5.26; T. 165 (20 April 1999).

279. The inclusion of discriminatory intent in the ICTR Statute does not indicate that discriminatory intent need not be shown in order for Article 5 of the Statute of this Tribunal to apply. Rather, the Defence submits that it shows the intention of the Security Council to embrace discriminatory intent as a requirement for crimes against humanity.<sup>342</sup>

280. The Defence submits that the silence in Article 5 as to whether discriminatory intent is required for crimes against humanity creates an uncertainty. To resolve this uncertainty, the Appeals Chamber should look to sources such as the preparatory work of the Statute as it interprets Article 5 of the Statute. Thus, the Defence submits that the Trial Chamber was correct in looking to the Report of the Secretary-General and to statements of members of the Security Council in determining that discriminatory intent must be shown in respect of all crimes under Article 5 of the Statute.<sup>343</sup>

#### B. Discussion

281. The Prosecution submits that the Trial Chamber erred in finding that all crimes against humanity enumerated under Article 5 require a discriminatory intent. It alleges, further, that because of this finding, the Trial Chamber “restricted the scope of persecutions under subparagraph (h) only to those acts not charged elsewhere in the Indictment rather than imposing additional liability for all acts committed on discriminatory grounds. In doing so, it would appear that the sentence against the accused was significantly reduced.”<sup>344</sup> However, the Prosecution does not appeal the sentence imposed by the Trial Chamber in respect of the crimes against humanity counts, or seek to overturn the Trial Chamber’s verdict or findings of fact in this regard. Thus, this ground of appeal does not, *prima facie*, appear to fall within the scope of Article 25(1).<sup>345</sup> Nevertheless, and as with the previous ground of appeal, the Appeals Chamber finds that this issue is a matter of general significance for the Tribunal’s jurisprudence. It is therefore appropriate for the Appeals Chamber to set forth its views on this matter.

<sup>342</sup> T. 231-232 (21 April 1999).

<sup>343</sup> T. 236 – 239 (21 April 1999).

<sup>344</sup> Skeleton Argument of the Prosecution, para. 32.

<sup>345</sup> See Cross-Appellant’s Brief, para. 7.1(4), where the Prosecution requests the Appeals Chamber to “reverse the decision of the Trial Chamber, at page 250 paragraph 652, that discriminatory intent is an ingredient of all crimes against humanity under Article 5 of the Statute.”

#### 1. The Interpretation of the Text of Article 5 of the Statute

282. Notwithstanding the fact that the ICTY Statute is legally a very different instrument from an international treaty, in the interpretation of the Statute it is nonetheless permissible to be guided by the principle applied by the International Court of Justice with regard to treaty interpretation in its Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations: “The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur”.<sup>346</sup>

283. The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely “persecutions” provided for in Article 5 (h).

284. In addition to such textual interpretation, a logical construction of Article 5 also leads to the conclusion that, generally speaking, this requirement is not laid down for all crimes against humanity. Indeed, if it were otherwise, why should Article 5(h) specify that “persecutions” fall under the Tribunal’s jurisdiction if carried out “on political, racial and religious grounds”? This specification would be illogical and superfluous. It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements.

285. As rightly submitted by the Prosecution, the interpretation of Article 5 in the light of its object and purpose bears out the above propositions. The aim of those drafting the Statute was to make all crimes against humanity punishable, including those which, while fulfilling all the conditions required by the notion of such crimes, may not have been perpetrated on political, racial or religious grounds as specified in paragraph (h) of Article 5. In light of the humanitarian goals of the framers of the Statute, one fails to see why they should have seriously restricted the class of offences coming within the purview of “crimes against humanity”, thus leaving outside this class all the possible instances of serious and widespread or systematic crimes against civilians on account only of their

lacking a discriminatory intent. For example, a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity. A fortiori, the object and purpose of Article 5 would be thwarted were it to be suggested that the discriminatory grounds required are limited to the five grounds put forth by the Secretary-General in his Report and taken up (with the addition, in one case, of the further ground of gender) in the statements made in the Security Council by three of its members.<sup>347</sup> Such an interpretation of Article 5 would create significant lacunae by failing to protect victim groups not covered by the listed discriminatory grounds. The experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5 (h), such as physical or mental disability, age or infirmity, or sexual preference. Similarly, the extermination of “class enemies” in the Soviet Union during the 1930s (admittedly, as in the case of Nazi conduct before the Second World War, an occurrence that took place in times of peace, not in times of armed conflict) and the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report.

286. It would be pointless to object that in any case those instances would fall under the category of war crimes or serious “violations of the laws or customs of war” provided for in Article 3 of the Statute. This would fail to explain why the framers of the Statute provided not only for war crimes but also for crimes against humanity. Indeed, those who drafted the Statute deliberately included both classes of crimes, thereby illustrating their intention that those war crimes which, in addition to targeting civilians as victims, present special features such as the fact of being part of a widespread or systematic practice, must be classified as crimes against humanity and deserve to be punished accordingly.

<sup>346</sup> ICJ Reports (1950), p. 8.

<sup>347</sup> See paragraphs 294-300 below.

## 2. Article 5 and Customary International Law

287. The same conclusion is reached if Article 5 is construed in light of the principle whereby, in case of doubt and whenever the contrary is not apparent from the text of a statutory or treaty provision, such a provision must be interpreted in light of, and in conformity with, customary international law. In the case of the Statute, it must be presumed that the Security Council, where it did not explicitly or implicitly depart from general rules of international law, intended to remain within the confines of such rules.

288. A careful perusal of the relevant practice shows that a discriminatory intent is not required by customary international law for all crimes against humanity.

289. First of all, the basic international instrument on the matter, namely, the London Agreement of 8 August 1945, clearly allows for crimes against humanity which may be unaccompanied by such intent. Article 6 (c) of that Agreement envisages two categories of crimes. One of them is that of “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population”, hence a category for which no discriminatory intent is required, while the other category (“persecutions on political, racial, or religious grounds”) is patently based on a discriminatory intent. An identical provision can be found in the Statute of the Tokyo International Tribunal (Article 5 (c)).<sup>348</sup> Similar language can also be found in Control Council Law No. 10 (Article II (1) (c)).<sup>349</sup>

290. The letter of these provisions is clear and indisputable. Consequently, had customary international law developed to restrict the scope of those treaty provisions which are at the very origin of the customary process, uncontroverted evidence would be needed. In other words, both judicial practice and possibly evidence of consistent State practice, including national legislation, would be necessary to show that customary law has deviated from treaty law by adopting a narrower notion of crimes against humanity. Such judicial and other practice is lacking. Indeed, the relevant case-law points in the contrary direction.

<sup>348</sup> Article 5 (c) of the Statute of the International Military Tribunal for the Far East provides:

“Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

<sup>349</sup> Article II (1) (c) of Control Council Law No. 10 provides:

“Crimes against Humanity: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any

Generally speaking, customary international law has gradually expanded the notion of crimes against humanity laid down in the London Agreement. With specific reference to the question at issue, it should be noted that, except for a very few isolated cases such as Finta,<sup>350</sup> national jurisprudence<sup>351</sup> includes many cases where courts found that in the

civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”

<sup>350</sup> The Supreme Court of Canada held that:

“[W]ith respect to crimes against humanity the additional element is that the inhumane acts were based on discrimination against or the persecution of an identifiable group of people.” (R. v. Finta, [1994] 1 SCR 701, at p. 813, majority judgement delivered by Cory J.).

<sup>351</sup> In this regard, mention can be made of some further cases: Ahlbrecht, decided by the Dutch Special Court of Cassation on 11 April 1949 (Nederlandse Jurisprudentie, 1949, no. 425, pp. 747-751); J. and R., decision of the German Supreme Court for the British Zone, judgement dated 16 November 1948, S. SIS 65/48 in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone*, vol. I, pp. 167-171; Enigster, decided by the District Court of Tel Aviv. As the District Court of Tel Aviv rightly stressed in the Enigster case, some crimes against humanity do not require a persecutory intent. In its Decision of 4 January 1952, the court stated the following:

“As to crimes against humanity, we have no hesitation in rejecting the argument of the Defence that any of the acts detailed in the definition of crime against humanity have to be performed with an intention to persecute the victim on national, religious or political grounds. It is clear that this condition only applies when the constituent element of the crime is persecution itself. The legislator found it necessary to separate persecution from the other types of action by a semi-colon and to precede the word ‘persecution’ with the words ‘and also’, thus clearly establishing that persecution stands by itself, and that it alone is subject to that condition.” (18 International Law Reports 1951, p. 541).

It should be noted, however, that the Court was clearly wrong as far as the question of the famous semi-colon was concerned; it is well known that in actual fact the Protocol of 6 October 1945 replaced the semi-colon with a colon. (For the text of the Protocol see *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. I, pp. XVI-XIX).

Reference can also be made to some cases decided by the German Supreme Court for the British Zone. The Appeals Chamber will briefly mention three of them: R., P. et al. and H. In a Decision of 27 July 1948 (S. SIS 19/48), the court pronounced on the case of R. In 1944, a member of the NSDAP (the German National Socialist Worker’s Party) and the NSKK (National Socialist Motor Vehicle Corps) had denounced another member of the NSDAP and of the SA (Stormtroopers) for insulting the leadership of NSDAP; as a result of this denunciation the victim had been brought to trial three times and eventually sentenced to death. (The sentence had not been carried out because the Russians had occupied Germany in the interim). The Court held that the denunciation could constitute a crime against humanity if it could be proved that the agent had intended to hand over the victim to the “uncontrollable power structure of the [Nazi] party and State”, knowing that as a consequence of his denunciation the victim was likely to be caught in an arbitrary and violent system (Entscheidungen des Obersten Gerichtshofes für die Britische Zone, vol. I, pp. 45-49 at p. 47).

In a Decision of 7 December 1948 (S. SIS 111/48), in the P. et al. case, the same court gave a very liberal interpretation to the notion of crimes against humanity as laid down in Control Council Law No. 10, extending it among other things to inhumane acts committed against members of the military. During the night after Germany’s partial capitulation (5 May 1945) four German marines had tried to escape from Denmark back to Germany; the next day they were caught by Danes and delivered to German troops, who court-martialled and sentenced three of them to death for desertion; on the very day of the general capitulation of Germany, i.e. 10 May 1945, the three were executed. The German Supreme Court found that the five members of the court-martial were guilty of complicity in a crime against humanity. According to the Supreme Court, the glaring discrepancy between the offence and the punishment constituted a clear manifestation of the Nazis’ brutal and intimidatory system of justice, which denied the very essence of humanity in blind reference to the allegedly superior exigencies of the Nazi State: there was “an intolerable degradation of the victim[s] to mere means for the pursuit of a goal, hence the depersonalisation and reification of human beings.” (Entscheidungen des Obersten Gerichtshofes für die Britische Zone, *ibid.*, vol. I, pp. 217-229 at p. 220). Consequently, by

circumstances of the case crimes against humanity did not necessarily consist of persecutory or discriminatory actions.

291. It is interesting to note that the necessity for discriminatory intent was considered but eventually rejected by the International Law Commission in its Draft Code of Offences Against the Peace and Security of Mankind.<sup>352</sup> Similarly, while the inclusion of a discriminatory intent was mooted in the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom),<sup>353</sup> Article 7 of the Rome Statute embodied the drafters’ rejection of discriminatory intent.<sup>354</sup>

292. This warrants the conclusion that customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity.

sentencing the marines to death the members of the court-martial had inflicted an injury upon humanity as a whole.

The same broad interpretation of Control Council Law No. 10 may be found, finally, in a Decision of 18 October 1949 (S. SIS 309/49) in the H. case (Entscheidungen des Obersten Gerichtshofes für die Britische Zone, vol. II, pp. 231-246). There, the court dealt with a case where a German judge had presided over two trials by a naval court-martial (Bordkriegsgericht) against two officers of the German Navy, a submarine commander, charged in 1944 with criticising Hitler, and the other a lieutenant-commander of the German naval forces, charged in 1944 with procuring two foreign identity cards for himself and his wife. The Judge had voted for sentencing both officers to death (the first had been executed, while the sentence against the second had been commuted by Hitler to 10 years’ imprisonment). The Supreme Court held that the Judge could be found guilty of crimes against humanity even if he had not acted for political reasons, to the extent that his action was deliberately taken in connection with the Nazi system of violence and terror (Entscheidungen des Obersten Gerichtshofes für die Britische Zone, *ibid.*, vol. II, pp. 233, 238).

<sup>352</sup> See for instance ILC 1996 Draft Code of Offences Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its 48<sup>th</sup> session May 6-July 26, 1996, UNGAOR 51<sup>st</sup> sess., supp. no. 10 (A/51/10), pp. 93-94.

<sup>353</sup> While some delegates argued that a conviction for crimes against humanity required proof that the defendant was motivated by a discriminatory animus, others argued that “the inclusion of such a criterion would complicate the task of the Prosecution by significantly increasing its burden of proof in requiring evidence of this subjective element.” These delegates further argued that crimes against humanity could be committed against other groups, including intellectuals, social, cultural or political groups, and that such an element was not required under customary international law as evidenced by the Yugoslav Tribunal’s Statute. (See Summary of the Proceedings of the Preparatory Committee During the Period March 25-April 12, 1996, U.N. Doc. A/AC.249/1 (May 7, 1996), pp. 16-17).

<sup>354</sup> Article 7(1) of the Rome Statute provides: “For the purposes of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder [...]” Article 7(1) of the Statute of the International Criminal Court thus articulates a definition of crimes against humanity based solely upon the interplay between the mens rea of the defendant and the existence of a widespread or systematic attack directed against a civilian population.

### 3. The Report of the Secretary-General

293. The interpretation suggested so far is not in keeping with the Report of the Secretary-General and the statements made by three members of the Security Council before the Tribunal's Statute was adopted by the Council. The Appeals Chamber is nevertheless of the view that these two interpretative sources do not suffice to establish that all crimes against humanity need be committed with a discriminatory intent.

294. We shall consider first the Report of the Secretary-General, which stated that the crimes under discussion are those "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".<sup>355</sup>

295. It should be noted that the Secretary-General's Report has not the same legal standing as the Statute. In particular, it does not have the same binding authority. The Report as a whole was "approved" by the Security Council (see the first operative paragraph of Security Council resolution 827(1993)), while the Statute was "adopted" (see operative paragraph 2). By "approving" the Report, the Security Council clearly intended to endorse its purpose as an explanatory document to the proposed Statute. Of course, if there appears to be a manifest contradiction between the Statute and the Report, it is beyond doubt that the Statute must prevail. In other cases, the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute.

296. Moreover, the Report of the Secretary-General does not purport to be a statement as to the position under customary international law. As stated above, it is open to the Security Council - subject to respect for peremptory norms of international law (jus cogens) - to adopt definitions of crimes in the Statute which deviate from customary international law.<sup>356</sup> Nevertheless, as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the terms of the Statute, or from other authoritative sources. The Report of the Secretary-General does not provide sufficient indication that the Security Council did so intend Article 5 to deviate from customary international law by requiring a discriminatory intent for all crimes against humanity. Indeed, in the case under consideration it would

<sup>355</sup> Report of the Secretary-General, para. 48.

seem that, although the discrepancy between the Report and the Statute is conspicuous, the wording of Article 5 is so clear and unambiguous as to render it unnecessary to resort to secondary sources of interpretation such as the Secretary-General's Report. Hence, the literal interpretation of Article 5 of the Statute, outlined above, must necessarily prevail.

297. Furthermore, it may be argued that, in his Report, the Secretary-General was merely describing the notion of crimes against humanity in a general way, as opposed to stipulating a technical, legal definition intended to be binding on the Tribunal. In other words, the statement that crimes against humanity are crimes "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" amounts to the observation that crimes against humanity as a matter of fact usually are committed on such discriminatory grounds. It is not, however, a legal requirement that such discriminatory grounds be present. That is, at least, another possible interpretation. It is true that in most cases, crimes against humanity are waged against civilian populations which have been specifically targeted for national, political, ethnic, racial or religious reasons.

### 4. The Statements Made by Some States in the Security Council

298. Let us now turn to the statements made in the Security Council, after the adoption of the Statute, by three States, namely, France, the United States and the Russian Federation.

299. Before considering what the legal meaning of these statements may be, one important point may first be emphasised. Although they were all directed at importing, as it were, into Article 5 the qualification concerning discriminatory intent set out in paragraph 48 of the Secretary-General's Report, these statements varied as to their purport. The statement by the French representative was intended to be part of "a few brief comments" on the Statute.<sup>357</sup> By contrast, the remarks of the United States representative

<sup>356</sup> For instance, the express requirement in Article 5 of a nexus with an armed conflict creates a narrower sphere of operation than that provided for crimes against humanity under customary international law.

<sup>357</sup> He stated the following: "[W]ith regard to Article 5, that Article applied to all the acts set out therein when committed in violation of the law during a period of armed conflict on the territory of the former Yugoslavia, within the context of a widespread or systematic attack against a civilian population for national, political, ethnic, racial or religious reasons" (U.N. Doc. S/PCV. 3217, p.11).

were expressly couched as an "interpretative statement"; furthermore, that representative added a significant comment: "[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute"<sup>358</sup> including the "clarification" concerning Article 5.<sup>359</sup> With regard to the representative of the Russian Federation, his statement concerning Article 5 was expressly conceived of as an interpretative declaration.<sup>360</sup> Nevertheless, this declaration was made in such terms as to justify the proposition that for the Russian Federation, Article 5 "encompasses" crimes committed with a "discriminatory intent" without, however, being limited to these acts alone.

300. The Appeals Chamber, first of all, rejects the notion that these three statements - at least as regards the issue of discriminatory intent - may be considered as part of the "context" of the Statute, to be taken into account for the purpose of interpretation of the Statute pursuant to the general rule of construction laid down in Article 31 of the Vienna Convention on the Law of the Treaties.<sup>361</sup> In particular, those statements cannot be regarded as an "agreement" relating to the Statute, made between all the parties in connection with the adoption of the Statute. True, the United States representative pointed out that it was her understanding that the other members of the Security Council shared her views regarding the "clarifications" she put forward. However, in light of the wording of the other two statements on the specific point at issue, and taking into account the lack of any comment by the other twelve members of the Security Council, it would seem difficult to conclude that there emerged an agreement in the Security Council designed to qualify the

<sup>358</sup> See U.N. Doc. S/PV. 3217, p. 15.

<sup>359</sup> On Article 5 the United States representative said that: "[I]t is understood that Article 5 applies to all acts listed in that Article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, gender, or religious grounds" (U.N. Doc. S/PV. 3217, p.16).

<sup>360</sup> He said the following: "While believing that the text of the Statute addresses the tasks that face the Tribunal, and for that reason supporting it, we deem it appropriate to note that, according to our understanding, Article 5 of the Statute encompasses criminal acts committed on the territory of the former Yugoslavia during an armed conflict - acts which were widespread or systematic, were aimed against the civilian population and were motivated by that population's national, political, ethnic, religious or other affiliation" (U.N. Doc. S/PV. 3217, p. 45).

<sup>361</sup> Article 31(1) and (2) provide:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

scope of Article 5 with respect to discriminatory intent. In particular, it must be stressed that the United States representative, in enumerating the discriminatory grounds required, in her view, for crimes against humanity, included one ground ("gender") that was not mentioned in the Secretary-General's Report and which was, more importantly, referred to neither by the French nor the Russian representatives in their declarations on Article 5. This, it may be contended, is further evidence that no agreement emerged within the Security Council as to the qualification concerning discriminatory intent.

301. Arguably, in fact, the main purpose of those statements was to stress that it is the existence of a widespread or systematic practice which constitutes an indispensable ingredient of crimes against humanity. This ingredient, absent in Article 5, had already been mentioned in paragraph 48 of the Secretary-General's Report.<sup>362</sup> In spelling out that this ingredient was indispensable, the States in question took up the relevant passage of the Secretary-General's Report and in the same breath also mentioned the discriminatory intent which may, in practice, frequently accompany such crimes.

302. The contention may also be warranted that the intent of the three States which made these declarations was to stress that in the former Yugoslavia most atrocities had been motivated by ethnic, racial, political or religious hatred. Those States therefore intended to draw the attention of the future Tribunal to the need to take this significant factor into account. One should not, however, confuse what happens most of the time (quod plerumque accidit) with the strict requirements of law.

303. Be that as it may, since at least with regard to the issue of discriminatory intent those statements may not be taken to be part of the "context" of the Statute, it may be argued that they comprise a part of the travaux préparatoires. Even if this were so, these statements would not be indispensable aids to interpretation, at least insofar as they relate to the particular issue of discriminatory intent under Article 5. Under customary international law, as codified in Article 32 of the Vienna Convention referred to above, the travaux constitute

b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

<sup>362</sup> The Trial Chamber in its Judgement of 7 May 1997 has also correctly emphasised that the phrases "widespread" and "systematic" are disjunctive as opposed to cumulative requirements (see Judgement, paras. 645-648). See also the Nikolic Rule 61 Decision, ("Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, The Prosecutor v. Dragan Nikolic), Case No.: IT-94-2-R61, Trial Chamber I, 20 October 1995) (Nikolic) (1995) II ICTY JR 739).

a supplementary means of interpretation and may only be resorted to when the text of a treaty or any other international norm-creating instrument is ambiguous or obscure. As the wording of Article 5 is clear and does not give rise to uncertainty, at least as regards the issue of discriminatory intent, there is no need to rely upon those statements. Excluding from the scope of crimes against humanity widespread or systematic atrocities on the sole ground that they were not motivated by any persecutory or discriminatory intent would be justified neither by the letter nor the spirit of Article 5.

304. The above propositions do not imply that the statements made in the Security Council by the three aforementioned States, or by other States, should not be given interpretative weight. They may shed light on the meaning of a provision that is ambiguous, or which lends itself to differing interpretations. Indeed, in its Tadić Decision on Jurisdiction the Appeals Chamber repeatedly made reference to those statements as well as to statements made by other States. It did so, for instance, when interpreting Article 3 of the Statute<sup>363</sup> and when pronouncing on the question whether the International Tribunal could apply international agreements binding upon the parties to the conflict.<sup>364</sup>

#### C. Conclusion

305. The Prosecution was correct in submitting that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.

<sup>363</sup> See Tadić Decision on Jurisdiction, paras 75, 88 (where reference was also made to the statements of the representatives of the United Kingdom and Hungary).

<sup>364</sup> See *ibid.*, para 143 (where reference was made to the statements of the representatives of the United States, the United Kingdom and France).

### VIII. THE FIFTH GROUND OF CROSS-APPEAL BY THE PROSECUTION: DENIAL OF THE PROSECUTION'S MOTION FOR DISCLOSURE OF DEFENCE WITNESS STATEMENTS

#### A. Submissions of the Parties

##### 1. The Prosecution Case

306. Ground five of the Cross-Appeal by the Prosecution is as follows:

The majority of the Trial Chamber, composed of Judge Ninian Stephen and Judge Lal Chand Vohrah, erred when it denied the Prosecution motion for production of witness statements[.]<sup>365</sup>

This ground of appeal arose out of the Decision on Prosecution Motion for Production of Defence Witness Statements of the Trial Chamber delivered on 27 November 1996. By a majority (Judge McDonald dissenting), the Trial Chamber rejected the Prosecution's motion for disclosure of a prior statement of a Defence witness after he had testified. This decision was reached on the basis that such statements are subject to a legal professional privilege, which protects the Defence from any obligation to disclose them. The Prosecution submits that the Trial Chamber erred in the application of the substantive law in the Witness Statements Decision.<sup>366</sup>

307. The Prosecution submits that a Trial Chamber has the power to order the production of prior statements of Defence witnesses pursuant to Rule 54, unless they are protected by some express or implied privilege in the Statute or Rules.<sup>367</sup> This power ensures that a Trial Chamber, entrusted with the duty of making factual findings on the evidence adduced, is presented with evidence which has been fully tested.<sup>368</sup> It is submitted that a Trial Chamber should have the benefit of weighing any inconsistencies between statements made by witnesses in arriving at its determinations.<sup>369</sup>

308. According to the Prosecution, if regard is had to Article 21(4)(g) of the Statute and to Sub-rules 70(A), 90(F) and 97 of the Rules, no express privilege exempts Defence

<sup>365</sup> Cross-Appellant's Brief, para. 6.3.

<sup>366</sup> *Ibid.*, para. 6.6; T. 190 (20 April 1999).

<sup>367</sup> *Ibid.*, paras. 6.6-6.24.

<sup>368</sup> T. 186 (20 April 1999).

witness statements from disclosure.<sup>370</sup> The privilege adopted by the International Tribunal in Rule 97 of the Rules does not cover third party statements given to Defence counsel, at least not once the Defence decides to present evidence by calling a particular witness.<sup>371</sup> Once the Defence calls a witness, that evidence should be subjected to the same scrutiny as that of the Prosecution.<sup>372</sup>

309. The Prosecution also submits that no implied privilege exempting Defence witness statements from disclosure can be inferred from the Rules (as Judge Stephen found, with Judge Vohrah concurring). In its view, there is no ambiguity in the Rules in this regard, and Judge Stephen's reference to the legal professional privilege found in national jurisdictions is incorrect.<sup>373</sup> The Prosecution submits that, even if an ambiguity exists, it is incorrect to resolve it by referring to the most common practice in adversarial jurisdictions, despite the obvious influence of adversarial systems on the Rules.<sup>374</sup> Sub-rule 89(B) of the Rules expressly requires the application of "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law". In line with this provision, the Trial Chamber should have favoured an interpretation allowing it to order disclosure of Defence witness statements "where it considers that this would enable it to reach a verdict based on all pertinent evidence".<sup>375</sup> The Prosecution relies in particular upon the restrictions set out by the U.S. Supreme Court in *United States v. Nobles*.<sup>376</sup>

310. The Prosecution also submits that the disclosure of prior statements of Defence witnesses is not otherwise inconsistent with the principles of a fair trial.<sup>377</sup> In particular, the principle of equality of arms does not require that the Defence be allowed to call witnesses under conditions more favourable than those afforded to the Prosecution.<sup>378</sup> If the Defence

<sup>369</sup> T. 186 (20 April 1999).

<sup>370</sup> Cross-Appellant's Brief, paras. 6.7-6.14.

<sup>371</sup> T. 187 (20 April 1999).

<sup>372</sup> T. 187 (20 April 1999).

<sup>373</sup> Cross-Appellant's Brief, paras. 6.15-6.18.

<sup>374</sup> *Ibid.*, para. 6.20.

<sup>375</sup> *Ibid.*, para. 6.21.

<sup>376</sup> 422 U.S. 225 (1975).

<sup>377</sup> Cross-Appellant's Brief, paras. 6.25-6.31.

<sup>378</sup> *Ibid.*, para. 6.31.

decides to call a witness at trial, that witness should in principle be subject to the same scrutiny as Prosecution witnesses.<sup>379</sup>

## 2. The Defence Case

311. The Defence submits that the Trial Chamber's Witness Statements Decision was correctly decided.

312. The Trial Chamber was correct in holding that the Statute and Rules do not specifically deal with the problem at issue.<sup>380</sup> The Defence also submits that, in light of the essentially adversarial system under which the Tribunal operates, the term "the general principles of law" in Sub-rule 89(B) should be interpreted as meaning "the general principles of law emerging from adversarial systems".<sup>381</sup>

313. The Defence submits that the general principles referred to may be summarised as follows. To begin with, the burden of proving the allegation is on the Prosecution. The Prosecution must inform the accused of the charges and the evidence against him. The accused has the right to remain silent and to require the Prosecution to prove its case. There is no duty similar to that imposed on the Prosecution for the Defence to disclose its evidence, and the privilege attaching to Defence witness statements is not waived when the witness in question gives evidence.<sup>382</sup>

314. It is also submitted that to allow such disclosure would increase the inequality of arms between the parties.<sup>383</sup> Furthermore, the Defence emphasises that because privilege can be claimed for communications between the client and third parties when litigation is ongoing in most adversarial jurisdictions, such disclosure would be incorrect.<sup>384</sup> The Defence also submits that such a disclosure requirement might deter witnesses from

<sup>379</sup> *Ibid.*

<sup>380</sup> Defence's Substituted Response to Cross-Appellant's Brief, para. 6.3; Skeleton Argument of the Prosecution, para. 5(b).

<sup>381</sup> Defence's Substituted Response to Cross-Appellant's Brief, para. 6.13; Skeleton Argument of the Prosecution, para. 5(d).

<sup>382</sup> Skeleton Argument of the Prosecution, paras. 5(f)-(g).

<sup>383</sup> T. 275 (21 April 1999).

<sup>384</sup> T. 275, 278 (21 April 1999).

testifying because of a loss of confidentiality, which in turn would impact on the right of a defendant to call witnesses.<sup>385</sup>

#### B. Discussion

##### 1. The Reason for Dealing with this Ground of the Cross-Appeal

315. While neither party asserts that the Witness Statements Decision had a bearing on the verdicts on any of the counts or that an appeal lies under Article 25(1),<sup>386</sup> they both agree that this is a matter of general importance which affects the conduct of trials before the Tribunal and therefore deserves the attention of the Appeals Chamber. The Prosecution further submits that the Witness Statements Decision, as it stands, remains persuasive authority that the Defence cannot be ordered to disclose prior witness statements.<sup>387</sup>

316. The Appeals Chamber has no power under Article 25 of the Statute to pass, one way or another, on the decision of the Trial Chamber as if the decision was itself under appeal. But the point of law which is involved is one of importance and worthy of an expression of opinion by the Appeals Chamber. The question posed as to whether or not a Trial Chamber has the power to order the disclosure of prior Defence witness statements after the witness has testified, must be placed in its proper context. Further, it is the view of the Appeals Chamber that this question impinges upon the ability of a Trial Chamber to meet its obligations in searching for the truth in all proceedings under the jurisdiction of the International Tribunal, with due regard to fairness. The judicial mandate of the International Tribunal is carried out by the Chambers, in this case a Trial Chamber, as this is a matter that arose during the trial process.

317. It is therefore necessary that the Appeals Chamber clarify the context in which the question posed is discussed. This is a matter that touches upon the duty of a Trial Chamber to ascertain facts, deal with credibility of witnesses and determine the innocence or guilt of

<sup>385</sup> Skeleton Argument of the Prosecution, para. 5(h).

<sup>386</sup> Article 25(1) provides: "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice."  
<sup>387</sup> T. 185 (20 April 1999).

the accused person. However, before answering the question posed, it is desirable to examine the implications of disclosure.

##### 2. The Power to Order the Disclosure of Prior Defence Witness Statements

318. The Appeals Chamber is of the view that the Defence witness statement referred to would be a recorded description of events touching upon the indictment, made and, normally, signed by a person with a view to the preparation of the Defence case.

319. There is no blanket right for the Prosecution to see the witness statement of a Defence witness. The Prosecution has the power only to apply for disclosure of a statement after the witness has testified, with the Chamber retaining the discretion to make a decision based on the particular circumstances in the case at hand.

320. The power of a Trial Chamber to order the disclosure of a prior Defence witness statement relates to an evidentiary question. Strictly speaking, the principle of equality of arms is not relevant to the problem. Also, since the Statute and the Rules do not expressly cover the problem at hand, the broad powers conferred by Sub-rule 89(B) may come into play.<sup>388</sup> The question to be addressed is whether those powers include the power of a Trial Chamber to order the disclosure of a prior Defence witness statement.

321. The mandate of the International Tribunal, as set out in Article 1 of the Statute, is to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia. To fulfil its mandate, a Trial Chamber has to ascertain the credibility of all the evidence brought before it. A Trial Chamber must also take account of the following provisions of the Statute: Article 20(1), concerning the need to ensure a fair and expeditious trial, Article 21 dealing with the rights of the accused, and Article 22, dealing with the protection of victims and witnesses. Further guidance may be taken from Article 14 of the International Covenant on Civil and Political Rights<sup>389</sup> and

<sup>388</sup> Sub-rule 89(B) provides:

"In cases not otherwise provided for in this Section, a Chamber shall apply Rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

<sup>389</sup> Article 14 provides in part:

Article 6 of the European Convention on Human Rights,<sup>390</sup> which are similar to Article 21 of the Statute.

322. With regard to the present case, once a Defence witness has testified, it is for a Trial Chamber to ascertain the credibility of his or her testimony. If he or she has made a prior statement, a Trial Chamber must be able to evaluate the testimony in the light of this statement, in its quest for the truth and for the purpose of ensuring a fair trial. Rather than deriving from the sweeping provisions of Sub-rule 89(B), this power is inherent in the jurisdiction of the International Tribunal, as it is within the jurisdiction of any criminal court, national or international. In other words, this is one of those powers mentioned by the Appeals Chamber in the Blaškić (Subpoena) decision which accrue to a judicial body even if not explicitly or implicitly provided for in the statute or rules of procedure of such a body, because they are essential for the carrying out of judicial functions and ensuring the fair administration of justice.<sup>391</sup>

323. It would be erroneous to consider that such disclosure amounts to having the Defence assist the Prosecution in trying the accused. Nor does such disclosure undermine the essentially adversarial nature of the proceedings before the International Tribunal,

<sup>390</sup> (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...].  
(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; [...]; (c) to be tried without undue delay; (d) to be tried in his presence, and to defend himself in person or through legal assistance [...]; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...]; (g) not to be compelled to testify against himself or to confess guilt. [...].  
<sup>391</sup> Article 6 provides in part:

"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...].  
(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; [...]; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...]."  
<sup>392</sup> See "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", The Prosecutor v. Tihomir Blaškić, Case No.: IT-95-14-AR108bis, Appeals Chamber, 29 October 1997, para. 25.

including the basic notion that the Prosecution has to prove its case against the accused. Although this provision was not in force at the time relevant to the present enquiry, it is worth noting that Sub-rule 73ter(B) provides that should a Pre-Defence Conference be held:

[...] the Trial Chamber may order that the defence, before the commencement of its case but after the close of the case for the prosecution, file the following:

- [...];  
(iii) a list of witnesses the defence intends to call with:  
(a) the name or pseudonym of each witness;  
(b) a summary of the facts on which each witness will testify;

[...]

This Sub-rule does not require that the Defence file its witness statements. But the substance is not far removed: the provision has been designed to assist a Trial Chamber in preparing for hearing the Defence case, and the Prosecution in preparing for cross-examination of the witnesses.

324. As stated above, once the Defence has called a witness to testify, it is for a Trial Chamber to ascertain his or her credibility. If there is a witness statement, in the sense referred to above, it would be subject to disclosure only if so requested by the Prosecution and if the Trial Chamber considers it right in the circumstances to order disclosure. The provisions of Rule 68 are limited to the Prosecution and do not extend to the Defence. Disclosure would follow only once the Prosecution's case has been closed. Even then, Sub-rules 89(C),<sup>392</sup> (D)<sup>393</sup> and (E)<sup>394</sup> would still apply to such a disclosed witness statement, with the consequence that a Trial Chamber might still exclude it. Furthermore, the provisions of Sub-rule 90(F) relating to self-incrimination would of course apply.

325. The Appeals Chamber is also of opinion that no reliance can be placed on a claim to privilege. Rule 97<sup>395</sup> relates to lawyer-client privilege; it does not cover prior Defence witness statements.

<sup>392</sup> Sub-rule 89(C) provides: "A Chamber may admit any relevant evidence which it deems to have probative value."  
<sup>393</sup> Sub-rule 89(D) provides: "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."

<sup>394</sup> Sub-rule 89(E) provides: "A Chamber may request verification of the authenticity of evidence obtained out of court."

<sup>395</sup> Rule 97 provides in part: "All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial [...]."

C. Conclusion

326. For the reasons set out above, it is the opinion of the Appeals Chamber that a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.

IX. DISPOSITION

327. For the foregoing reasons, THE APPEALS CHAMBER, UNANIMOUSLY

- (1) DENIES the first ground of the Appellant's Appeal against Judgement;
- (2) DENIES the third ground of the Appellant's Appeal against Judgement;
- (3) RESERVES JUDGEMENT on the Appellant's Appeal against Sentence until such time as the further sentencing proceedings referred to in sub-paragraph (6) below have been completed;
- (4) ALLOWS the first ground of the Prosecution's Cross-Appeal, REVERSES the Trial Chamber's verdict in this part, AND FINDS the Appellant guilty on Counts 8, 9, 12, 15, 21 and 32 of the Indictment;
- (5) ALLOWS the second ground of the Prosecution's Cross-Appeal, REVERSES the Trial Chamber's verdict in this part, AND FINDS the Appellant guilty on Counts 29, 30 and 31 of the Indictment;
- (6) DEFERS sentencing on the Counts mentioned in sub-paragraphs (4) and (5) above to a further stage of sentencing proceedings;
- (7) HOLDS that an act carried out for the purely personal motives of the perpetrator can constitute a crime against humanity within the meaning of Article 5 of the Tribunal's Statute relating to such crimes;
- (8) FINDS that the Trial Chamber erred in finding that all crimes against humanity require discriminatory intent and HOLDS that such intent is an indispensable legal ingredient of the offence only with regard to those crimes for which it is expressly required, that is, for the types of persecution crimes mentioned in Article 5(h) of the Tribunal's Statute;

(9) HOLDS that a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.

Done in both English and French, the English text being authoritative.

\_\_\_\_\_  
Mohamed Shahabuddeen  
Presiding

Antonio Cassese

Wang Tieya

\_\_\_\_\_  
Rafael Nieto-Navia

Florence Ndepele Mwachande Mumba

Dated this fifteenth day of July 1999  
At The Hague,  
The Netherlands.

Judge Nieto-Navia appends a Declaration to this Judgement.

Judge Shahabuddeen appends a Separate Opinion to this Judgement.

[Seal of the Tribunal]

### X. DECLARATION OF JUDGE NIETO-NAVIA

1. I am appending a declaration because it is, in my view, necessary to say a few words about Article 25 of the Statute which provides the Prosecution or a convicted person the right to appeal on an error on a question of law invalidating the decision or an error of fact occasioning a miscarriage of justice. It would appear that the Prosecution's appeals against the acquittals on Counts 8, 9, 12, 15, 21 and 32, constituting ground 1 of the cross-appeal, and on Counts 29, 30 and 31, constituting the second ground of cross-appeal, fall within the ambit of Article 25. The civil law principle of *non bis in idem*, according to Black's Law Dictionary, means that the accused "shall not be twice tried for the same crime". The corresponding common law principle of double jeopardy entitles the accused "not [to] be twice [to] be in jeopardy" for the same offence". On the face of it, it would appear that Prosecution appeals against acquittals, though permissible under Article 25, might be in contravention of the legal tenet of *non bis in idem*. My concern is two-fold: (1) is *non bis in idem* a general principle of law; and (2) if so, is Article 25 consistent with the principle?

2. It is notable that the International Tribunals own Statute recognises the maxim of *non bis in idem*. Article 10 protects a person tried by the Tribunal from subsequent prosecution by a national court. The corollary is also true: a person tried by a national court may not be tried subsequently by the International Tribunal unless the original charge was classified as a common crime, or the national court proceedings did not conform to the fundamental principles of criminal law (that is, the court proceedings were not independent and impartial, or were conducted to shield the accused from international criminal responsibility, or the charge was not prosecuted diligently).

3. Can a general principle of law be discerned from the practice of domestic courts? In the United States, the Supreme Court has interpreted the double jeopardy clause of the Fifth Amendment<sup>1</sup> to mean that the Prosecution cannot appeal against a verdict, whether on an error on a question of law or fact.<sup>2</sup> This finality accorded to criminal judgements is intended to protect the acquitted or convicted person against "prosecution oppression". Double jeopardy does not bar the convicted person from appealing because he/she chooses to put himself/herself at risk once more.

<sup>1</sup> The Fifth Amendment of the U.S. Constitution reads: "nor shall any person be subject for the same

4. Similarly, in the United Kingdom, the application of the double jeopardy principle precludes the Prosecution from appealing against acquittals, except where the appeal challenges an acquittal tainted by bribery, threats or other interference with a witness or juror,<sup>3</sup> or where the appeal is from acquittal in the magistrates' court by case stated to the Divisional Court of the Queen's Bench Division on the ground that it was rendered in error of law or in excess of jurisdiction.

5. Thus, it seems that the common law gives special weight to acquittals. In the United Kingdom, the Prosecution does not have the right to appeal although appeals are allowed in certain clearly circumscribed instances. In the United States, there is a complete bar on appeals against acquittals.<sup>4</sup>

6. I turn now to examine the position adopted by countries in the civil law tradition. Civil law generally allows appeals against decisions at first instance. However, decisions rendered by the second-tier courts can be appealed by way of cassation only on errors of law. In France, the Prosecution may lodge a *pourvoi en cassation* to challenge procedural irregularities, which *inter alia*, include an error in law made by the lower court.<sup>5</sup>

7. In Germany, Prosecution appeals against acquittals are not considered to violate *non bis in idem* because the judgement at trial is not seen to constitute the end of the criminal proceeding.<sup>6</sup> It seems that, in the German legal system, jeopardy attaches with the criminal charge and continues through all proceedings that arise from the original charge.<sup>7</sup> Hence, a Prosecution appeal from acquittal is seen as another step in the criminal proceedings.

8. This brief survey of domestic practice, though far from comprehensive, reveals that no general principle of law can be drawn from domestic practice. Unlike the Anglo-American common law system, the civil law system does not construe Prosecution appeals against acquittals to compromise the principle of *non bis in idem*.

9. From the foregoing, I must conclude that there is no general principle of law that would prohibit Prosecution appeals against acquittals. Therefore, it is unnecessary to analyse whether Article 25 is consistent with *non bis in idem*.

10. It seems to me that this conclusion is buttressed by the fact that the rationale which underpins the common law's vigorous approach is absent in the context of prosecutions before the International Tribunal. The impetus for the special weight given to acquittals is the desire to prevent the government, with its vast superior resources, from abusing its power to prosecute accused persons by re-prosecuting them until it manages to obtain convictions.<sup>8</sup> In the International Tribunal, while the Prosecution prosecutes on behalf of the international community, it is not supported by a governmental apparatus with abundant resources. Like the Defence, it too must rely on the co-operation of external entities. Moreover, Articles 20(1) and 21(4) guarantee to each party equality of arms.

11. I accept that Prosecution appeals against acquittals conform to the requirements of Article 25. However, I think that the Appeals Chamber should analyse, at the sentencing stage, whether a successful Prosecution appeal should put the person in a worse position than that at the end of trial ("*reformatio in pejus*").

12. With respect to the fourth ground of cross-appeal, on the question of whether there exists a crime against humanity where the accused acted out of purely personal motives, I join in the reasoning and conclusion offered by my learned colleague, Judge Shahabuddeen, in his separate opinion. I would add only the following to elaborate my own position. The reason that a crime against humanity under Article 5 cannot be committed for purely personal motives completely unrelated to the attack on a civilian population is that, being a crime under international law, there must be a proximate connection between the underlying act(s) and the surrounding armed conflict. An unlawful act perpetrated in the context of an armed conflict, but unrelated to the hostilities, is a common crime under national law. The fact that such a crime was committed in the context of an armed conflict does not render it subject to international humanitarian law.

13. On the question of whether the Prosecution has a right to the production of Defence witness statements, constituting the fifth ground of cross-appeal, I agree with

<sup>3</sup> See s. 54 of the Criminal Procedure and Investigations Act 1996.

<sup>4</sup> See *supra*, note 2.

<sup>5</sup> See *Dadomo*, Christian and Farran, Susan, *The French Legal System* (2<sup>nd</sup> ed., Sweet & Maxwell, London, 1996), 220.

<sup>6</sup> See ss. 312 and 333 of the German Criminal Code.

<sup>7</sup> Justice Holmes, dissenting in *Kepper v. United States*, advocated the adoption of the concept of "continuing jeopardy". He argued that "a man cannot be said to be more than once in jeopardy on the

the decision of the Appeals Chamber for the reasons set out in Judge Shahabuddeen's separate opinion.

Done in both English and French, the English text being authoritative.

Rafael Nieto-Navia

## XI. SEPARATE OPINION OF JUDGE SHAHABUDDIEN

1. Some time ago, yet not far from where the events in this case happened, a "breakdown of law and order" occurred. There "were savage and pitiless actions into which men were carried not so much for the sake of gain as because they were swept away into an internecine struggle by their ungovernable passions". The turmoil saw "the ordinary conventions of civilised life thrown into confusion". Sadly, it seems, people took "it upon themselves to begin the process of repealing those general laws of humanity which are there to give a hope of salvation to all who are in distress, instead of leaving those laws in existence, remembering that there may come a time when they, too, will be in danger and will need their protection".<sup>1</sup>
2. That last reflection of a great thinker of antiquity was later expressed in the saying by Westlake "that the mitigation of war must depend on the parties to it feeling that they belong to a larger whole than their respective tribes or states, a whole in which the enemy too is comprised, so that the duties arising out of that larger citizenship are owed even to him".<sup>2</sup> The development of a sense of that "larger citizenship" has been disappointingly slow. Since the ancient chronicler spoke of the "general laws of humanity", then lacking legal force but still recognisable, it has taken over two thousand years for those "laws" to assume the shape of binding norms applying world-wide. To what extent did they govern in this case? And, with what consequences?
3. I agree with the conclusions reached by the Appeals Chamber, and very largely with its arguments, subject to reservations on some aspects (including the relationship between the Rome Statute and the development of customary international law). I propose to explain my position on some of the points on which my reasoning may not be the same.

### A. Whether There Was an International Armed Conflict

4. As is observed in paragraph 83 of the judgement of the Appeals Chamber, the "requirement that the conflict be international for the grave breaches regime to operate

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<sup>1</sup> Thucydides, *The Peloponnesian War*, tr. Rex Warner (Middlesex, 1961), p. 211, speaking of the island of Corcyra.

pursuant to Article 2 of the Statute has not been contested by the parties". That point is not being considered.

5. As to the points which are being considered, I agree with the Appeals Chamber, and with Judge McDonald, that there was an international armed conflict in this case. I also appreciate the general direction taken by the judgement of the Appeals Chamber, but, so far as this case is concerned, I am unclear about the necessity to challenge Nicaragua (I.C.J Reports 1986, p. 14). I am not certain whether it is being said that that much debated case does not show that there was an international armed conflict in this case. I think it does, and that on this point it was both right and adequate.

#### 1. The Issue

6. The issue in this branch of the case is whether, after 19 May 1992, there was an "armed conflict" between the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY") and Bosnia and Herzegovina ("BH") within the meaning of Article 2, first paragraph, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"). The provision states that "... 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 ...". There was no state of declared war. If also there was no "armed conflict" as between the FRY and BH (as the majority of the Trial Chamber seemingly thought), the Fourth Geneva Convention did not apply, and the question whether victims were protected persons within the meaning of Article 4, first paragraph, of the Convention did not arise, a question which the majority nevertheless answered. Persons could only be protected by the Convention if the Convention in the first instance applied to the armed conflict by which they were affected.

2. Nicaragua Shows That There Was an Armed Conflict Between the FRY, Acting Through the VRS, and BH

7. Ex hypothesi, an armed conflict involves a use of force. Thus, the question whether there was an armed conflict between the FRY and BH depended on whether the FRY was using force against BH through the Bosnian Serbian Army of the Republika

8. Nicaragua is not easy reading. Many issues were involved, and interpretations differ. A general understanding is that the Court said that the United States had no responsibility for delictual acts committed by the contras because, in its view, the former lacked the requisite degree of control over the latter. However, the Court was careful to say that this "conclusion ... does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras". (I.C.J. Reports 1986, p. 63, para. 110). One part of this unresolved question of responsibility was whether, as claimed by Nicaragua, "the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua". (Ibid., p. 19, para. 15(c)). In so far as it was sought to support this part of the claim by reference to funds being supplied by the United States to the contras, the Court held that "the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, ... does not in itself amount to a use of force". (Ibid., p. 119, para. 228).

9. By contrast, the Court considered that, as distinguished from the mere supplying of funds, the United States had committed other acts in relation to the contras which amounted to a threat or use of force against Nicaragua. In paragraph 228 of its judgement, the Court put it this way:

As to the claim that United States activities in relation to the contras constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its assistance to the contras in Nicaragua, by organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State, and participating in acts of civil strife ... in another State, in terms of General Assembly resolution 2625(XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to involve a threat or use of force. In the view of the Court, while the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government.

The Court then mentioned "the mere supply of funds to the contras" as a form of assistance which did not amount to a use of force, although it amounted to intervention. Subject to that kind of exception, the Court considered that the arming and training of the contras in the circumstances of the case amounted to a use of force.

10. The Court adhered to this view in its formal disposition of the case. In paragraph 292(3) of its holding, it decided that the United States, by "training, arming, equipping,

affairs of Nicaragua. Then, in paragraph 292(4), it held that the United States, "by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State". The acts of intervention which involved a use of force included the arming and training of the contras, the Court having explicitly held that "the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua".

11. This is consistent with the Court's statement, in paragraph 238 of its judgement, that the United States, having no legal right to use force in the circumstances of the case, "has violated the principle prohibiting recourse to the threat or use of force ... by its assistance to the contras to the extent that this assistance 'involve[s] a threat or use of force' (paragraph 228 above)". Paragraph 228, to which the Court referred, is set out in relevant part above.

12. The contras were not using force exclusively on behalf of the United States; the case makes it clear that they were also using force on their own behalf against the Government of Nicaragua. This must be borne in mind in considering the following statement of the Court:

The conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. (*ibid.*, p.114, para.219).

I do not think anything in this passage is opposed to the conclusion that the United States was using force through the contras against the Government of Nicaragua, a finding which the Court in fact made as, I think, the Appeals Chamber in this case recognises (see para. 130 of the judgement). To judge whether that finding is applicable here, it is necessary to consider the facts of this case.

13. The Trial Chamber accepted that, having been itself in direct armed conflict with BH through the Yugoslav People's Army ("JNA"), the FRY established the VRS, trained it, equipped it, supplied it and maintained it. The establishment was done by the FRY, on 19 May 1992, by leaving in BH part of the JNA to function as the VRS, and doing that just days after the Security Council had called on the FRY to withdraw from BH. Senior military officers from the FRY were members of the staff of the VRS. The FRY

Yugoslav Army, or VJ, as the Yugoslav portion of the old JNA was now known. The VRS was engaged in carrying out the FRY's plan of ethnic cleansing and of carving out territory of BH to be ultimately added to that of the FRY so as to realise the FRY's ambition to create a "Greater Serbia".

14. Thus, the FRY did more than provide general funds to the VRS. On the basis of Nicaragua, I have no difficulty in concluding that the findings of the Trial Chamber suffice to show that the FRY was using force through the VRS against BH, even if it is supposed that the facts were not sufficient to fix the FRY with responsibility for any delictual acts committed by the VRS. The FRY and BH were therefore in armed conflict within the meaning of Article 2, first paragraph, of the Fourth Geneva Convention, with the consequence that the Convention applied to that armed conflict.

### 3. The Position Taken by the Majority of the Trial Chamber

15. Citing Nicaragua, the majority of the Trial Chamber (Judge Stephen and Judge Vohrah) held that the test as to whether there was an international armed conflict was whether the FRY had effective control over the VRS, which it considered meant command and control. (Judgement of the Trial Chamber, paras. 598 and 600). It found that the FRY did not have command and control over the VRS and so did not have effective control over the VRS; in its opinion, the relationship between them was one of coordination and cooperation as between allies (as to the legal implications of which I reserve my opinion). Consequently, in the view of the majority, the FRY was not a party to the armed conflict in BH after 19 May 1992. In effect, after that date, that conflict was not international.

16. With respect, it is too high a threshold to insist on proof of command and control for the purpose of determining whether a state was using force through a foreign military entity, as distinguished from whether the state was committing breaches of international humanitarian law through that entity. In Nicaragua, the Court held that the United States was using force through the contras by reason of the fact that, in the circumstances of that case, it was arming and training the contras. The Court did not say that these facts amounted to command and control; if they did, they should have given rise to state responsibility for breaches by the contras of international humanitarian law, which the

Court said was not the case.

4. The General Question of State Responsibility for the Delictual Acts of Another

17. On the question whether the United States was responsible for the delictual acts of the *contras*, the Appeals Chamber considered that Nicaragua was not correct and reviewed the general question of the responsibility of a state for the delictual acts of another. It appears to me, however, that that question does not arise in this case. The question, a distinguishable one, is whether the FRY was using force through the VRS against BH, not whether the FRY was responsible for any breaches of international humanitarian law committed by the VRS.

18. To appreciate the scope of the question actually presented, it is helpful to bear in mind that there is a difference between the mere use of force and any violation of international humanitarian law: it is possible to use force without violating international humanitarian law. Proof of use of force, without more, does not amount to proof of violation of international humanitarian law, although, if unlawful, it could of course give rise to state responsibility. Correspondingly, what needs to be proved in order to establish a violation of international humanitarian law goes beyond what needs to be proved in order to establish a use of force. This is important because, under Article 2, first paragraph, of the Fourth Geneva Convention, all that had to be proved, in this case, was that an "armed conflict" had arisen between BH and the FRY acting through the VRS, not that the FRY committed breaches of international humanitarian law through the VRS.

19. The foregoing may be borne in mind in considering the Court's holding in Nicaragua that, by arming and training the *contras* in the circumstances of that case, the United States had used force. The Court did not declare the nature of any underlying theory. I should not be surprised, however, if it applied a test of effective control, but on the flexible basis that control which is effective for one purpose need not be effective for another, and would interpret the decision that way. Thus, in holding that the United States had used force in arming and training the *contras*, the Court did not rely on specific instructions, something on which it otherwise laid stress where state responsibility was sought to be founded on the delictual acts of another. In this case, the test of effective control, flexibly applied (as I believe the Court intended it to be), shows that the FRY was using force through the VRS against BH, even if such control did not rise to the level required to fix the FRY with state responsibility for any breaches of

20. On the more general question whether Nicaragua was correct in its holding on the subject of the responsibility of a state for the delictual acts of a foreign military force, it may be that there is room for reviewing that case. The case may be interpreted to mean that a state could be using force through a foreign military entity without being responsible for any delictual acts committed by that entity otherwise than on the specific instructions of the state. In opposition to a theory based on the need for proof of specific instructions, it may be useful to consider whether there is merit in the argument that, by deciding to use force through an entity, a state places itself under an obligation of due diligence to ensure that such use does not degenerate into such breaches, as it can. However, I am not persuaded that it is necessary to set out on that inquiry for the purposes of this case, no issue being involved of state responsibility for another's breaches of international humanitarian law.

21. For these reasons, although I appreciate the general tendency of the judgement of the Appeals Chamber, I would respectfully reserve my position on the new test proposed.

5. The Position of the Prosecution on the Applicability of Nicaragua

22. The prosecution argues that Nicaragua is not relevant. It makes two points. First, it says that Nicaragua was concerned with the responsibility of a state for delictual acts of third parties, and not with the criminal responsibility of the individual. I am of the view, however, that, whatever the context, what constitutes a use of force (a necessary element of an "armed conflict") is so fundamental as to require constancy of principle. The distinction between the responsibility of a state and the criminal responsibility of the individual is interesting; but it is not of assistance on the question what constitutes a use of force. That is a concept of common currency in international law.

23. Second, the prosecution submits that Nicaragua did not enquire into whether the conflict was internal or international for the purposes of the Geneva Conventions of 1949. In its view, the Court found it unnecessary to do so, considering that, by virtue of common article 3 of the Geneva Conventions, the issues were determinable by reference to customary international law relating to the applicability of minimum humanitarian principles to the use of force, whether in the course of an international armed conflict or

inapplicable by reason of a United States exclusion of multilateral conventions as set out in its acceptance of the compulsory jurisdiction clause of the Statute of the Court. (I.C.J. Reports 1986, paras. 217-220 and 255; and see I.C.J. Reports 1984, p. 421, para. 67).

24. But this does not mean that the Court did not have to consider whether there was a use of force, for, altogether apart from the question whether there was a breach of the Geneva Conventions, Nicaragua, as has been seen, had claimed that "the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua..." (I.C.J. Reports 1986, p. 19, para. 15(c)). That is the point involved here. In Nicaragua, the Court did not have to determine whether the conflict was internal or international; but it did have to determine whether the United States was using force against Nicaragua through the contras, and, on my interpretation, it did decide that there was such a use of force. If there was such a use of force by one state against another, ex definitione the conflict was international, whether or not it was necessary for the Court to decide that it was.

6. The Demonstrable Link Test Proposed by the Prosecution

25. As mentioned in paragraph 69 of the judgement of the Appeals Chamber, the prosecution submitted that the answer to the question whether the FRY was in armed conflict with BH through the VRS hinged on whether the conflict involved a "demonstrable link" between the VRS and the FRY or VJ, meaning, I believe, something less stringent than either of two tests which were discussed, namely, the agency test and the effective control test. The prosecution accepted that there was no authority to support the idea but thought that general jurisprudence would. In aid of the submission, recourse could be had to the character of the reference in Article 2, first paragraph, of the Fourth Geneva Convention to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties..." As it has been often observed, the expression "armed conflict" is a factual one, not intended to become burdened with legal technicalities: one respected commentator refers to it as "a de facto concept".<sup>3</sup>

26. That is true. However, there is a difference between saying that the question whether there is an armed conflict between states is a factual one and saying that, for

states. Factual as the criterion may be, it remains necessary to determine whether there is an armed conflict between states. This question is not a generalised one as to whether an armed conflict has become "internationalised" in any broad sense of the term nor is it to be determined by reference to criteria of unmanageable plasticity. The question is a precise one as to whether there is an "armed conflict ... between two or more of the High Contracting Parties ..." to the Fourth Geneva Convention. Barring a "declared war" between them, it is only if there is such a conflict that the Convention applies. But whether or not there is such a conflict turns *ex hypothesi*, on whether one state is using force against the other. A demonstrable link test has to result in showing whether or not force was being used by a state. If the test premises that it is not necessary to prove that a state was using force, it is not persuasive.

27. More pertinently, if the proposed test is meant to show whether or not force was being used by a state through a foreign army, it has to have the effect of connecting the state with the use of force by the foreign army; and I do not see how it can do this unless it has a degree of specificity commensurate with the gravity of a finding that one state was using force against another and with the serious implications of such a finding for individual criminal responsibility for, if the Convention applies, the individual becomes liable to conviction for certain serious crimes to which he would not otherwise be exposed. If the test has the requisite degree of specificity I do not see the advantage which it possesses over the other tests concerned. Whatever may be said about the latter, they appear to have that quality. Thus, the proposed test is either unnecessary or inadequate.

7. The Test of Appellate Intervention

28. The Appeals Chamber is intervening in this part of the case because it holds that the Trial Chamber applied the wrong legal criterion. In another part of the case (and, in a sense, in this part also), the question of evaluation of facts is concerned. It may be convenient to say a word on the basis on which, I believe, the Appeals Chamber acts.

29. Assessment of facts is primarily a matter for the Trial Chamber. But appeals to the Appeals Chamber are by way of rehearing, though not involving a hearing de novo

<sup>3</sup> That is not necessarily to determine whether there is an armed conflict between

in the Appeals Chamber. Thus, the Appeals Chamber is also a judge of fact, although it must take account of its disadvantage in that, unlike the Trial Chamber, it cannot assess the witnesses first hand. Further, the Appeals Chamber is in as good a position as the Trial Chamber to decide on the proper inferences to be drawn from undisputed facts, or from facts which, being disputed, are established by the findings of the Trial Chamber.

30. However, where there is a difference in assessments of facts, the Appeals Chamber will not simply substitute its assessment for that of the Trial Chamber. As it was said by Brierly, "different minds, equally competent, may and often do arrive at different and equally reasonable results"<sup>4</sup>. Similarly, it has been remarked that "[t]wo reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable ... Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable"<sup>5</sup>. In these respects, I agree with the corresponding remark made by the Appeals Chamber in paragraph 64 of the judgement.

31. Consequently, the Appeals Chamber will intervene where it can see that no reasonable person would have taken the view taken by the Trial Chamber. But, of course, the Appeals Chamber can also intervene if the Trial Chamber did not take into account relevant facts, or if it took account of irrelevant ones, or if it applied the wrong legal criterion to the determination of the legal significance of the facts.

32. With respect, I think that, as regards another part of this case (concerning Jaski)), the decision of the Trial Chamber is not sustained by the criterion of reasonableness. More particularly, however, I consider that, as regards the question whether there was an international armed conflict, the wrong legal criterion was used.

**B. Whether There is a Crime against Humanity Where the Accused Acted out of Purely Personal Motives**

33. Motive is important to punishment. It is always relevant as evidence. In exceptional cases, not including this, it could be an element of the offence charged, as, in some countries, in the case of a prosecution for libel. But, more generally, it is not.

Therefore, if the Trial Chamber meant that the existence of personal motives excluded the possibility of a crime against humanity being committed if the elements of the crime were proven, I should have difficulty in supporting that. But I respectfully agree with the Appeals Chamber that the Trial Chamber did not mean to say so. What the Trial Chamber said, in paragraph 659 of its judgement, was this:

Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

34. There are difficulties in the passage, but, read as a whole and in the context in which it occurred, I do not think it meant that, if the accused "knows that his act fits in with the attack", that attack being one "on the civilian population", the mere circumstance that he acted out of personal motives sufficed to exclude the commission of the crime. "Denunciation" type cases, in which the accused sought to avail himself of the arrangements relating to the attack on the civilian population in order to advance his personal motives, are crimes against humanity. And rightly so, for those are cases in which, however personal were the motives, the act fitted in with the attack on the civilian population, within the contemplation of the phrase used by the Trial Chamber.

35. What, I apprehend, the Trial Chamber had in mind was a distinguishable situation in which, although the accused knew of the attack on the civilian population, he did not in fact intend to link his act to the attack but acted "for purely personal motives completely unrelated to the attack on the civilian population"<sup>6</sup>. Thus, in the period of an attack on a certain civilian population, a jealous husband, being a member of the aggressor group, might kill his wife being a member of the attacked civilian population, for exactly the same reasons, and no other, for which he would have killed her had she been a member of his own group. It does not appear to me that the mere fact that he knew of the attack on the civilian population could serve to classify his act as a crime against humanity in the absence of proof that he intended that his act should fit in with the arrangements for the attack. That proof is apparent in "denunciation" type cases. It is absent in the example suggested of the arrangements relating to the attack on the civilian population played no part in the commission of the act. Were the law as submitted by

<sup>4</sup> Sir Hersch Lauterpacht and C.H.M. Waldock (eds.), *The Basis of Obligation in International Law and*

the prosecution, whereas the killing of the wife who was a member of the aggressor group, would always be simple murder that of the wife who was a member of the attacked civilian population, would always be a crime against humanity.

36. The hypothesis of the murder of the wife who was a member of the attacked civilian population, is accommodated by the necessity for the prosecution to prove, as an element of a crime against humanity, that the murder was "directed against any civilian population" as is required by the chapeau of Article 5 of the Statute. Such a murder would not have been directed against the civilian population. Where the evidence is of that kind, the prosecution has failed to prove that element of a crime against humanity.

37. The Trial Chamber seems to have regarded the non-existence of personal reasons as being itself an element of the crime to be proved by the prosecution. With respect, that was a mistake. The prosecution does not have to prove negatively that there were no personal reasons; it has to prove affirmatively that the crime was directed against the civilian population. However, the *evidence* may show that the act was not directed against the civilian population for any of several reasons, and one of these may be that it was done for purely personal reasons completely unrelated to the attack on the civilian population, as discussed above. That possibility may be disclosed either by the evidence for the prosecution or by that for the defence. If that is the evidence, failure by the prosecution to overcome it means that the prosecution has failed to prove a required element of a crime against humanity, namely, that the act was directed against the civilian population.

38. That is a far cry from suggesting, as the Trial Chamber seems to have done, that it is an element of the crime, having to be proved by the prosecution, that the act of the accused was not dictated by purely personal motives. But I do not think that the Trial Chamber was wrong in taking the position that, where the act was dictated by purely personal motives which were completely unrelated to the attack on the civilian population, no crime against humanity was committed, even if the accused was aware of that attack.

C. Whether the Prosecution has a Right to Disclosure of Defence Witness Statements

39. I respectfully agree with the decision of the Appeals Chamber on this point but would add something on the reasoning out of the matter and the scope of the result.

40. The provisions of the Statute of the Tribunal relating to evidence are sparse. That suggests that there is room for fashioning the rest of the needed system under Article 15 of the Statute and Rules 54 and 89(B) of the Rules of Procedure and Evidence. Barring amendment of the Rules, how far can the Chambers now go?

41. Rule 90(E) provides for a privilege against self-incrimination, and Rule 97 provides for a lawyer-client privilege. It may be argued that, by implication, these express provisions exclude what is called a litigation privilege, which would have the effect of denying to the prosecution a right of access to defence witness statements. The exclusion of that privilege would leave a Chamber free to order disclosure of such statements in pursuit of its search for truth. But the sparsity of the provisions relating to evidence counsels caution in adopting that approach.

42. I do not think that protection from disclosure is provided by Rule 70(A), which states:

Notwithstanding the provisions of Rules 66 and 67, reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

It could be argued that the last phrase contemplated the pre-trial stage only; but I think that a better view is that the provision (as set out in the scheme of the Tribunal's Rules) was seeking, in part, to cancel out the effect of previous provisions which themselves assumed that, to the extent that such previous provisions did not control, "reports, memoranda or other internal documents" would not be subject to disclosure at any stage of the case. It would be odd if the protection afforded by Rule 70(A) was confined to the pre-trial stage, with the material being open to disclosure at any stage thereafter. No doubt, a similar provision is differently understood elsewhere. But it is good to recall that the transposition of a municipal text to the international plane does not necessarily take with it the technical environment in which the original text had its life. Otherwise,

one runs into those difficulties which are created "when a rule is removed from the framework in which it was formed, to another of different dimensions, to which it cannot adapt itself as easily as it did to its proper setting".<sup>8</sup> On balance, I agree with the prosecution that the protection referred to by Rule 70(A), as this provision occurs within the framework of the Tribunal's Rules, is to be regarded as extending throughout the case.

43. The question remains, however, as to what are the categories of material to which the protection provided by Rule 70(A) attaches. The opening words of the provision are not "Save as excepted in the provisions of Rules 66 and 67 ...". The "notwithstanding" formula used means that, "notwithstanding the provisions of Rules 66 and 67, "reports, memoranda or other internal documents ... are not subject to disclosure ...". If those categories include witness statements and thus deny the defence access to prosecution witness statements, a conflict exists with Rule 66(A)(ii), under which copies of prosecution witness statements must be made available to the defence. The particularity of Rule 66(A)(ii) suggests that witness statements are not included in the general reference to "reports, memoranda or other internal documents" in Rule 70(A). In the result, defence witness statements are not protected against disclosure by virtue of Rule 70(A).

44. But what of the arrangements for reciprocal inspection of materials? Under Rule 66(B), at the request of the defence the Prosecutor is required to

permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

If the defence avails itself of this right, the Prosecutor has a reciprocal right under Rule 67(C), reading:

If the defence makes a request pursuant to Sub-rule 66(B), the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

45. These provisions refer to real evidence, not to proofs of testimonial evidence which is expected to be given by a witness. A larger meaning may be suggested by the words "which are material to the preparation of the defence", but those words occur in

Rule 66(B) and do not recur in Rule 67(C). Accordingly, even if they bear that larger meaning, those words do not operate to entitle the prosecution to inspect defence witness statements.

46. The prosecution is obliged to furnish the defence with copies of prosecution witness statements and with any exculpatory evidence. Thus, so far as this kind of material is concerned, the defence does not need to invoke reciprocity to gain access to the material.

47. It may seem odd and unbalanced that the defence has a unilateral right to receive copies of prosecution witness statements under Rule 66(A)(ii). But that, I think, is the transmuted equivalent of the right of an accused person, under many legal systems, to be apprised beforehand, in one way or another, of the evidence for the prosecution. Also, it has to be remembered that, altogether apart from the question whether he is guilty or not guilty, a man has a right not to be charged without just cause.<sup>9</sup> Fairness requires this kind of unilateralism. A man who has been indicted, with the prospect of loss of liberty, has a right to know what is the evidence on the basis of which he is being put through the judicial process. The prosecution does not stand on that ground and has no similar basis for demanding access to the evidence of the defence.

48. In my opinion, the reciprocity provisions of Rule 67(C), read with Rule 66(B), do not enable the prosecution to have access to defence witness statements. More importantly, it appears to me that, *a contrario*, those provisions imply that the prosecution stands excluded from such access materials to which the prosecution may have access, and then only on a reciprocal basis, are specified, and they do not include defence witness statements.

49. A new Rule 73ter(B), not in force at the relevant time, empowers a Trial Chamber to order the defence to file, between the close of the case for the prosecution and the opening of the case for the defence, "a summary of the facts on which each (defence) witness will testify."<sup>10</sup> That goes some way in the direction of the submissions of the prosecution in this case, but not all the way: it implies that the prosecution has no right of access to defence witness statements.

<sup>9</sup> See the reference by Lord Parker CJ to the impermissibility of "an accusation of crime without cause" in

50. That is in keeping with the litigation privilege or the work product doctrine. The right is lost only where it is waived by the defence. It is waived where the defence itself puts a defence witness statement in issue by relying on it for one purpose or another. Such was the case of *Nobles*, 422 U.S. 244. There, defence counsel, in cross-examining two prosecution witnesses, sought to impeach their credit by reference to oral statements which they had allegedly made to a defence investigator as preserved in the latter's "report" to defence counsel - something in the nature of a witness statement. In the view of the United States Supreme Court, the trial judge had power, in those circumstances, to order the defence to make the "report" available to the prosecution after examination-in-chief of the investigator by the defence. That, with respect, was right; for the "report", having been relied on by the defence in cross-examining the two prosecution witnesses, was a factor which would obviously enter into the assessment of the truth. The "report" was thus put in issue by the defence itself.

51. On a similarly limited basis, a Trial Chamber has power to order the defence to make a defence witness statement available to the prosecution. I speak of a "limited basis" because I do not support the view that the prosecution has an unlimited right to see a defence witness statement after the witness has testified. The "cards on the table" approach favoured in some thinking on the subject has not reached that point under the Rules of Procedure and Evidence of the Tribunal. Nor, generally speaking, has that point been reached in the global common law system or in the global civil law system as they relate to criminal procedure. The right to protection is not spent at the point at which the witness has testified in chief.

52. I respectfully agree with the Appeals Chamber that a Chamber may order disclosure of a defence witness statement only where it is satisfied that in the particular circumstances disclosure would assist it in determining the truth. Disclosure by way of a fishing expedition is not correct. It is difficult to see how a defence witness statement is to be used by the prosecution otherwise than as a fishing expedition if it were the law that the prosecution has an automatic right to disclosure on completion of the examination-in-chief of each defence witness. At the point of disclosure, the prosecution will have no basis for suspecting that there is any variance between oral testimony and written statement; it will be only "fishing" for a variance.

53. However, it is not clear that this limited and conditional right of access to a

Trial Chamber in the relevant Decision of 27 November 1996. In the first paragraph of the separate opinion which he appended to that Decision Judge Vohrah said, "I fully agree with the views expressed by my brother Judge Stephen, for the reasons he has given". In the second paragraph of his own separate opinion, Judge Stephen said

The witness statement had not been in any way referred to in the witness' evidence and chief nor had anything emerged in cross-examination regarding it other than that, in answer to a question about what the witness had said when he made that statement, which was objected to by Defence counsel but was allowed, the witness said that he had 'talked about, how can I put it, the truth and only the truth, how long I have known Du(ko Tadi)'.<sup>10</sup>

Clearly, the defence had not sought in any way to place reliance on the particular defence witness statement. Thus, the conclusion reached by the majority that defence witness statements were not accessible to the prosecution was not intended to apply where a defence witness statement had been in some way referred to in the evidence-in-chief of the witness or otherwise relied upon by the defence. The situation with which the majority was dealing was one in which what was being asserted by the prosecution was an unqualified right to see a defence witness statement provided only that the witness had given evidence-in-chief - even if the statement was not referred to in that evidence. It is not so clear to me that the majority intended to deny that special circumstances could warrant disclosure.

54. There is one other matter. The parties were agreed that nothing in the reliefs prayed for by either side turned on a determination of the above-mentioned point. They were nevertheless also agreed that the importance of the point justified a pronouncement by the Appeals Chamber. The position was similar in respect of the issue whether discriminatory intent has to be proved in respect of all crimes against humanity under Article 5 of the Statute.

55. Were the parties right in the position which they took? I think they were. The principle is conveniently stated thus:

Appellate courts determine only matters actually before them on appeal, and no others, and will not give opinions on controversies or declare principles of law which cannot have any practical effect in settling the rights of the litigants. They consider only those questions that are necessary for the decision of the case and do not attempt further to lay down "a rule of guidance or precedent to the bench and bar of the state". Questions not directly involved in an appeal, or not necessary or relevant to, or material in, the final determination of the cause, will not be considered or decided by an appellate court, unless, it has been held, they are affected with a public interest

or are of moment to the profession, or unless some useful result will follow decision.<sup>11</sup>

56. That approach is consistent with the *Tadić* Decision on Jurisdiction, at paragraph 139. There, the defence had raised an argument before the Trial Chamber concerning an element of a crime against humanity under Article 5 of the Statute of the Tribunal. The defence did not pursue the argument on appeal. Nevertheless, the Appeals Chamber observed, "Although before the Appeals Chamber the Appellant has forgone the argument ..., in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5".

57. In my view, when the importance of the point in question is regarded, the parties were correct in agreeing that the Appeals Chamber could competently pass **oit**.

#### **D. Conclusion**

58. These remarks concern some elements of the reasoning of the Appeals Chamber. On certain points of law, I hold different views which I desire to preserve. But I agree with the disposition of the casus set out in today's judgement .

Done in both English and French, the English text being authoritative.

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Mohamed Shahabuddeen

Dated this fifteenth day of July 1999  
At The Hague,  
The Netherlands.

## ANNEX A – GLOSSARY OF TERMS

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977.	Defence's Skeleton Argument on the Cross-Appeal	Skeleton Argument – Prosecutor's Cross-Appeal, Case No.: IT-94-1-A, 20 April 1999.
Amended Notice of Appeal against Judgement	Amended Notice of Appeal, Case No.: IT-94-1-A, 8 January 1999.	Defence's Substituted Response to Cross-Appellant's Brief	The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 19, 1999", Case No.: IT-94-1-A, 19 January 1999.
Appellant	Du{ko Tadi}.	DR	European Commission of Human Rights, Decisions and Reports.
Appellant's Amended Brief on Judgement	Amended Brief of Argument on behalf of the Appellant, Case No.: IT-94-1-A, 8 January 1999.	ECHR	European Convention on Human Rights.
Appellant's Brief on Judgement	Appellant's Brief on Appeal Against Opinion and Judgement of 7 May 1997, Case No.: IT-94-1-A, 12 January 1998.	Eur. Commission H.R.	European Commission of Human Rights.
Appellant's Brief on Sentencing Judgement	Appellant's Brief on Appeal against Sentencing Judgement, Case No.: IT-94-1-A, 12 January 1998.	Eur. Court H.R.	European Court of Human Rights.
BH	Bosnia and Herzegovina.	FRY	Federal Republic of Yugoslavia (Serbia and Montenegro).
Claims Tribunal	Iran-United States Claims Tribunal.	Geneva Convention III (Third Geneva Convention)	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.
Cross-Appellant	Office of the Prosecutor.	Geneva Convention IV (Fourth Geneva Convention)	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.
Cross-Appellant's Brief	Brief of Argument of the Prosecution (Cross-Appellant), Case No.: IT-94-1-A, 12 January 1998.	HRC	Human Rights Committee.
Cross-Appellant's Brief in Reply	Prosecution (Cross-Appellant) Brief in Reply, Case No.: IT-94-1-A, 1 December 1998.	ICCPR	International Covenant on Civil and Political Rights.
Dayton-Paris Accord	General Framework Agreement for Peace in Bosnia and Herzegovina, initialled by the parties on 21 November 1995, U.N. Doc. A/50/790, S/1995/999, 30 November 1995.	ICRC	International Committee of the Red Cross.
Decision on Admissibility of Additional Evidence	Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence", <i>The Prosecutor v. Du{ko Tadi}</i> , Case No.: IT-94-1-A, Appeals Chamber, 15 October 1998	ICRC Commentary on Additional Protocols	Yves Sandoz <i>et al.</i> (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987.
		ICRC Commentary on Geneva Convention III	Jean Pictet (ed.), Commentary: III Geneva Convention Relative to Treatment of Prisoners of War, International Committee of the Red Cross, Geneva, 1960, First Reprint, 1994.

ICRC Commentary on Geneva Convention IV	Jean Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958, First Reprint, 1994.	Report of the Secretary-General	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993.
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.	Rome Statute	Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, 17 July 1998.
ICTY JR	International Criminal Tribunal for the Former Yugoslavia, Judicial Reports, Kluwer Law International, The Hague.	Rules	Rules of Procedure and Evidence of the International Tribunal.
ILC	International Law Commission.	Sentencing Judgement	Sentencing Judgment, <i>The Prosecutor v Duško Tadić</i> , Case No.: IT-94-I-T, Trial Chamber II, 14 July 1997.
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.	Separate and Dissenting Opinion of Judge McDonald	Opinion and Judgment – Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, <i>The Prosecutor v. Duško Tadić</i> , Case No.: IT-94-I-T, Trial Chamber II, 7 May 1997.
JNA	Yugoslav People's Army.	Skeleton Argument – Appellant's Appeal Against Conviction	Skeleton Argument – Appellant's Appeal against Conviction, Case No.: IT-94-I-A, 19 March 1999.
Judgement	Opinion and Judgment, <i>The Prosecutor v. Duško Tadić</i> , Case No IT-94-I-T, Trial Chamber II, 7 May 1997.	Skeleton Argument of the Prosecution	Skeleton Argument of the Prosecution, Case No.: IT-94-I-A, 19 March 1999.
Nicaragua	Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J.Reports (1986), p. 14.	Statute	Statute of the International Tribunal.
Notice of Cross-Appeal 1997.	Notice of Appeal, Case No.: IT-94-I-A, 6 June 1997.	T.	Transcript of hearing in <i>The Prosecutor v. Duško Tadić</i> , Case No.: IT-94-I-A. (All transcript page numbers referred to in the course of this Judgment are from the unofficial, uncorrected version of the English transcript. Minor differences may exist between the pagination therein and that of the final English transcript released to the public).
Prosecution's Response to Appellant's Brief on Judgement	Cross-Appellant's Response to Appellant's Brief on Appeal Against Opinion and Judgement of May 7, 1997 Filed on 12 January 1998, Case No.: IT-94-I-A, 17 November 1998.	Tadić Decision on Jurisdiction	Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, <i>The Prosecutor v. Duško Tadić</i> , IT-94-IAR72, Appeals Chamber, 2 October 1995 (Tadić) (1995) ICTY JR 353).
Prosecution Response to Appellant's Brief on Sentencing Judgement	Response to Appellant's Brief on Appeal Against	Third Geneva Convention	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

Tribunal	The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
TRNC	Turkish Republic of Northern Cyprus.
UNWCC	Law Reports of Trial of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, London 1947.
VJ	Army of the Federal Republic of Yugoslavia.
VRS	Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska.
Witness Statements Decision	Decision on Prosecution Motion for Production of Defence Witness Statements, <i>The Prosecutor v. Duško Tadić</i> , Case No. IT-94-I-T, Trial Chamber II, 27 November 1996.