



INTERNATIONAL LAW FELLOWSHIP PROGRAMME

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INTERNATIONAL PEACE AND SECURITY SIR MICHAEL WOOD

Codification Division of the United Nations Office of Legal Affairs

INTERNATIONAL PEACE AND SECURITY
SIR MICHAEL WOOD

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REQUIRED READINGS (*printed format*)

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International Peace and Security

Summary

It is proposed that the course be divided into four broad segments:

I. Introduction: basic United Nations Charter framework

- ‘International peace and security’ – the position before the Charter (League Covenant; Pact of Paris)
- United Nations Charter, Article 2(3) and Article 2(4)
- Role of Security Council, General Assembly, International Court of Justice, Secretary-General
- Chapter VI: Pacific settlement of disputes
- Peace-keeping
- Chapter VII: Action with respect to threats to the peace, breaches of the peace and acts of aggression
- Chapter VIII: Regional arrangements

II. The international law on the use of force

- Prohibition on the use of force
- Self-defence
(Iraq 1991)
- Authorisation by the Security Council
(Iraq 1991-2003)

III. Specific issues

- Rescue of nationals
(Entebbe)
- Humanitarian intervention
(Kosovo)
- Responsibility to protect

IV. Terrorism: need for new rules?

- Terrorism: action against non-State actors
(Afghanistan 2001)
- Are new rules needed?
(Summit Outcome Document 2005)

**Uniting for Peace (United Nations General Assembly
resolution 377 (V) of 3 November 1950)**

3. Requests the Economic and Social Council, in consultation with the specialized agencies, to develop plans for relief and rehabilitation on the termination of hostilities and to report to the General Assembly within three weeks^{3a} of the adoption of the present resolution by the General Assembly;

4. Also recommends the Economic and Social Council to expedite the study of long-term measures to promote the economic development and social progress of Korea, and meanwhile to draw the attention of the authorities which decide requests for technical assistance to the urgent and special necessity of affording such assistance to Korea;

5. Expresses its appreciation of the services rendered by the members of the United Nations Commission on Korea in the performance of their important and difficult task;

6. Requests the Secretary-General to provide the United Nations Commission for the Unification and Rehabilitation of Korea with adequate staff and facilities, including technical advisers as required; and authorizes the Secretary-General to pay the expenses and *per diem* of a representative and alternate from each of the States members of the Commission.

294th plenary meeting.
7 October 1950.

377 (V). Uniting for peace

A

The General Assembly,

Recognizing that the first two stated Purposes of the United Nations are:

"To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace", and

"To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace",

Reaffirming that it remains the primary duty of all Members of the United Nations, when involved in an international dispute, to seek settlement of such a dispute by peaceful means through the procedures laid down in Chapter VI of the Charter, and recalling the successful achievements of the United Nations in this regard on a number of previous occasions,

Finding that international tension exists on a dangerous scale,

Recalling its resolution 290 (IV) entitled "Essentials of peace", which states that disregard of the Principles of the Charter of the United Nations is primarily responsible for the continuance of international tension, and desiring to contribute further to the objectives of that resolution,

^{3a} See resolution 410 (V), page 31.

Reaffirming the importance of the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security, and the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto,

Reaffirming that the initiative in negotiating the agreements for armed forces provided for in Article 43 of the Charter belongs to the Security Council, and desiring to ensure that, pending the conclusion of such agreements, the United Nations has at its disposal means for maintaining international peace and security,

Conscious that failure of the Security Council to discharge its responsibilities on behalf of all the Member States, particularly those responsibilities referred to in the two preceding paragraphs, does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security,

Recognizing in particular that such failure does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security,

Recognizing that discharge by the General Assembly of its responsibilities in these respects calls for possibilities of observation which would ascertain the facts and expose aggressors; for the existence of armed forces which could be used collectively; and for the possibility of timely recommendation by the General Assembly to Members of the United Nations for collective action which, to be effective, should be prompt,

A

1. Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations;

2. Adopts for this purpose the amendments to its rules of procedure set forth in the annex to the present resolution;

B

3. Establishes a Peace Observation Commission which, for the calendar years 1951 and 1952, shall be composed of fourteen Members, namely: China, Colombia, Czechoslovakia, France, India, Iraq, Israel, New Zealand, Pakistan, Sweden, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uruguay, and which could observe and report on

the situation in any area where there exists international tension the continuance of which is likely to endanger the maintenance of international peace and security. Upon the invitation or with the consent of the State into whose territory the Commission would go, the General Assembly, or the Interim Committee when the Assembly is not in session, may utilize the Commission if the Security Council is not exercising the functions assigned to it by the Charter with respect to the matter in question. Decisions to utilize the Commission shall be made on the affirmative vote of two-thirds of the members present and voting. The Security Council may also utilize the Commission in accordance with its authority under the Charter:

4. *Decides* that the Commission shall have authority in its discretion to appoint sub-commissions and to utilize the services of observers to assist it in the performance of its functions;

5. *Recommends* to all governments and authorities that they co-operate with the Commission and assist it in the performance of its functions;

6. *Requests* the Secretary-General to provide the necessary staff and facilities, utilizing, where directed by the Commission, the United Nations Panel of Field Observers envisaged in General Assembly resolution 297 B (IV);

C

7. *Invites* each Member of the United Nations to survey its resources in order to determine the nature and scope of the assistance it may be in a position to render in support of any recommendations of the Security Council or of the General Assembly for the restoration of international peace and security;

8. *Recommends* to the States Members of the United Nations that each Member maintain within its national armed forces elements so trained, organized and equipped that they could promptly be made available, in accordance with its constitutional processes, for service as a United Nations unit or units, upon recommendation by the Security Council or the General Assembly, without prejudice to the use of such elements in exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter;

9. *Invites* the Members of the United Nations to inform the Collective Measures Committee provided for in paragraph 11 as soon as possible of the measures taken in implementation of the preceding paragraph;

10. *Requests* the Secretary-General to appoint, with the approval of the Committee provided for in paragraph 11, a panel of military experts who could be made available, on request, to Member States wishing to obtain technical advice regarding the organization, training, and equipment for prompt service as United Nations units of the elements referred to in paragraph 8;

D

11. *Establishes* a Collective Measures Committee consisting of fourteen Members, namely: Australia, Belgium, Brazil, Burma, Canada, Egypt, France, Mexico, Philippines, Turkey, the United Kingdom of

Great Britain and Northern Ireland, the United States of America, Venezuela and Yugoslavia, and directs the Committee, in consultation with the Secretary-General and with such Member States as the Committee finds appropriate, to study and make a report to the Security Council and the General Assembly, not later than 1 September 1951, on methods, including those in section C of the present resolution, which might be used to maintain and strengthen international peace and security in accordance with the Purposes and Principles of the Charter, taking account of collective self-defence and regional arrangements (Articles 51 and 52 of the Charter);

12. *Recommends* to all Member States that they co-operate with the Committee and assist it in the performance of its functions;

13. *Requests* the Secretary-General to furnish the staff and facilities necessary for the effective accomplishment of the purposes set forth in sections C and D of the present resolution;

E

14. *Is fully conscious* that, in adopting the proposals set forth above, enduring peace will not be secured solely by collective security arrangements against breaches of international peace and acts of aggression, but that a genuine and lasting peace depends also upon the observance of all the Principles and Purposes established in the Charter of the United Nations, upon the implementation of the resolutions of the Security Council, the General Assembly and other principal organs of the United Nations intended to achieve the maintenance of international peace and security, and especially upon respect for and observance of human rights and fundamental freedoms for all and on the establishment and maintenance of conditions of economic and social well-being in all countries; and accordingly

15. *Urges* Member States to respect fully, and to intensify, joint action, in co-operation with the United Nations, to develop and stimulate universal respect for and observance of human rights and fundamental freedoms, and to intensify individual and collective efforts to achieve conditions of economic stability and social progress, particularly through the development of under-developed countries and areas.

ANNEX

The rules of procedure of the General Assembly are amended in the following respects:

1. The present text of rule 8 shall become paragraph (a) of that rule, and a new paragraph (b) shall be added to read as follows:

"Emergency special sessions pursuant to resolution 377 A (V) shall be convened within twenty-four hours of the receipt by the Secretary-General of a request for such a session from the Security Council, on the vote of any seven members thereof, or of a request from a majority of the Members of the United Nations expressed by vote in the Interim Committee or otherwise, or of the concurrence of a majority of Members as provided in rule 9."

2. The present text of rule 9 shall become paragraph (a) of that rule and a new paragraph (b) shall be added to read as follows:

"This rule shall apply also to a request by any Member for an emergency special session pursuant to resolution 377 A (V). In such a case the Secretary-General shall communicate with other Members by the most expeditious means of communication available."

3. Rule 10 is amended by adding at the end thereof the following:

". . . In the case of an emergency special session convened pursuant to rule 8 (b), the Secretary-General shall notify the Members of the United Nations at least twelve hours in advance of the opening of the session."

4. Rule 16 is amended by adding at the end thereof the following:

". . . The provisional agenda of an emergency special session shall be communicated to the Members of the United Nations simultaneously with the communication summoning the session."

5. Rule 19 is amended by adding at the end thereof the following:

". . . During an emergency special session additional items concerning the matters dealt with in resolution 377 A (V) may be added to the agenda by a two-thirds majority of the Members present and voting."

6. There is added a new rule to precede rule 65 to read as follows:

"Notwithstanding the provisions of any other rule and unless the General Assembly decides otherwise, the Assembly, in case of an emergency special session, shall convene in plenary session only and proceed directly to consider the item proposed for consideration in the request for the holding of the session, without previous reference to the General Committee or to any other Committee; the President and Vice-Presidents for such emergency special sessions shall be, respectively, the Chairman of those delegations from which were elected the President and Vice-Presidents of the previous session."

*302nd plenary meeting,
3 November 1950.*

B

For the purpose of maintaining international peace and security, in accordance with the Charter of the United Nations, and, in particular, with Chapters V, VI and VII of the Charter,

The General Assembly

Recommends to the Security Council:

That it should take the necessary steps to ensure that the action provided for under the Charter is taken with respect to threats to the peace, breaches of the peace or acts of aggression and with respect to the peaceful settlement of disputes or situations likely to endanger the maintenance of international peace and security;

That it should devise measures for the earliest application of Articles 43, 45, 46 and 47 of the Charter of the United Nations regarding the placing of armed forces at the disposal of the Security Council by the States Members of the United Nations and the effective functioning of the Military Staff Committee;

The above dispositions should in no manner prevent the General Assembly from fulfilling its functions under resolution 377 A (V).

*302nd plenary meeting,
3 November 1950.*

C

The General Assembly,

Recognizing that the primary function of the United Nations Organization is to maintain and promote peace, security and justice among all nations,

Recognizing the responsibility of all Member States to promote the cause of international peace in accordance with their obligations as provided in the Charter,

Recognizing that the Charter charges the Security Council with the primary responsibility for maintaining international peace and security,

Reaffirming the importance of unanimity among the permanent members of the Security Council on all problems which are likely to threaten world peace,

Recalling General Assembly resolution 190 (III) entitled "Appeal to the Great Powers to renew their efforts to compose their differences and establish a lasting peace",

Recommends to the permanent members of the Security Council that:

(a) They meet and discuss, collectively or otherwise, and, if necessary, with other States concerned, all problems which are likely to threaten international peace and hamper the activities of the United Nations, with a view to their resolving fundamental differences and reaching agreement in accordance with the spirit and letter of the Charter;

(b) They advise the General Assembly and, when it is not in session, the Members of the United Nations, as soon as appropriate, of the results of their consultations.

*302nd plenary meeting,
3 November 1950.*

378 (V). Duties of States in the event of the outbreak of hostilities

A

The General Assembly,

Reaffirming the Principles embodied in the Charter, which require that the force of arms shall not be resorted to except in the common interest, and shall not be used against the territorial integrity or political independence of any State,

Desiring to create a further obstacle to the outbreak of war, even after hostilities have started, and to facilitate the cessation of the hostilities by the action of the parties themselves, thus contributing to the peaceful settlement of disputes,

1. Recommends:

(a) That if a State becomes engaged in armed conflict with another State or States, it take all steps

Definition of Aggression
(United Nations General Assembly resolution
3314 (XXIX) of 14 December 1974, annex)

to facilitating recourse to it for the judicial settlement of disputes, *inter alia* by simplifying the procedure, reducing the likelihood of undue delays and costs and allowing for greater influence of parties on the composition of *ad hoc* chambers,

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

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

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

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

2. *Draws the attention* of States to the advantage of inserting in treaties, in cases considered possible and appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties;

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

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

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

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

2280th plenary meeting
12 November 1974

3233 (XXIX). Participation in the Convention on Special Missions, its Optional Protocol concerning the Compulsory Settlement of Disputes and the Vienna Convention on the Law of Treaties

The General Assembly,

Recalling that, by its resolution 2530 (XXIV) of 8 December 1969, it adopted and opened for signature and ratification or for accession the Convention on Special Missions and its Optional Protocol concerning the Compulsory Settlement of Disputes and resolved to consider at a later session the question of issuing

invitations in order to ensure the widest possible participation therein,

Noting the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties, adopted by the United Nations Conference on the Law of Treaties,⁴ in which the General Assembly was invited to give consideration to the matter of issuing invitations in order to ensure the widest possible participation in that Convention,

Decides to invite all States to become parties to the Convention on Special Missions, its Optional Protocol concerning the Compulsory Settlement of Disputes and the Vienna Convention on the Law of Treaties.⁵

2280th plenary meeting
12 November 1974

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

The General Assembly,

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

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

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

2303rd plenary meeting
29 November 1974

3314 (XXIX). Definition of Aggression

The General Assembly,

Having considered the report of the Special Committee on the Question of Defining Aggression, established pursuant to its resolution 2330 (XXII)⁶ of 18 December 1967, covering the work of its seventh session held from 11 March to 12 April 1974, including the draft Definition of Aggression adopted by the Special Committee by consensus and recommended for adoption by the General Assembly,⁷

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

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

⁴ Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (United Nations publication, Sales No.: E.70.V.5), document A/CONF.39/26, p. 285.

⁵ Ibid., document A/CONF.39/27, p. 287.

⁶ Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr.1).

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

3. Calls upon all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations;⁷

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

2319th plenary meeting
14 December 1974

ANNEX

Definition of Aggression

The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,

Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

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

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

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

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

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

Reaffirming also the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

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

Believing that, although the question whether an act of aggression has been committed must be considered in the

light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic principles as guidance for such determination,

Adopts the following Definition of Aggression:⁸

Article 1

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

Explanatory note: In this Definition the term "State":

- (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;
- (b) Includes the concept of a "group of States" where appropriate.

Article 2

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

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

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

Article 4

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

Article 5

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

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

⁷ Resolution 2625 (XXV), annex.

2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Article 6

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

Article 7

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8

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

3315 (XXIX). Report of the International Law Commission⁹

The General Assembly,

Having considered the report of the International Law Commission on the work of its twenty-sixth session,¹⁰

Emphasizing the need for the progressive development of international law and its codification in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,¹¹ and to give increased importance to its role in relations among States,

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

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

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

Bearing in mind that the outstanding achievements of the International Law Commission during its twenty-six sessions in the field of the progressive development

of international law and its codification, in accordance with the aims of Article 13, subparagraph 1 (a) of the Charter, contribute to the fostering of friendly relations among nations,

I

1. *Takes note* of the report of the International Law Commission on the work of its twenty-sixth session;

2. *Expresses its appreciation* to the International Law Commission for the work it accomplished at that session;

3. *Approves* the programme of work planned by the International Law Commission for 1975;

4. *Recommends* that the International Law Commission should:

(a) Continue on a high priority basis at its twenty-seventh session its work on State responsibility, taking into account General Assembly resolutions 1765 (XVII) of 20 November 1962, 1902 (XVIII) of 18 November 1963, 2400 (XXIII) of 11 December 1968, 2926 (XXVII) of 28 November 1972 and 3071 (XXVIII) of 30 November 1973, with a view to the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts at the earliest possible time and to take up, as soon as appropriate, the separate topic of international liability for injurious consequences arising out of acts not prohibited by international law;

(b) Proceed with the preparation, on a priority basis, of draft articles on succession of States in respect of matters other than treaties;

(c) Proceed with the preparation of draft articles on the most-favoured-nation clause;

(d) Proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations;

(e) Continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the International Law Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the Commission's report;

5. *Approves*, in the light of the importance of its existing work programme, a twelve-week period for the annual sessions of the International Law Commission, subject to review by the General Assembly whenever necessary;

6. *Recognizes* the efficacy of the methods and conditions of work by which the International Law Commission has carried out its tasks and expresses confidence that the Commission will continue to adopt methods of work well suited to the realization of the tasks entrusted to it;

7. *Expresses its appreciation* to the Secretary-General for having completed the supplementary report on the legal problems relating to the non-navigational uses of international watercourses,¹² requested by the General Assembly in resolution 2669 (XXV);

8. *Expresses the wish* that, in conjunction with future sessions of the International Law Commission, further seminars might be organized, which should continue to

⁹ See also p. 149, item 87.

¹⁰ Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (A/9610/Rev.1).

¹¹ Resolution 2625 (XXV), annex.

¹² A/9732 (vols. I and II).

**2005 World Summit Outcome
(United Nations General Assembly resolution
60/1 of 16 September 2005)**



Distr.: General
24 October 2005

Sixtieth session
Agenda items 46 and 120

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/60/L.1)]

60/1. 2005 World Summit Outcome

The General Assembly
Adopts the following 2005 World Summit Outcome:

2005 World Summit Outcome

1. Values and principles

1. We, Heads of State and Government, have gathered at United Nations Headquarters in New York from 14 to 16 September 2005.
2. We reaffirm our faith in the United Nations and our commitment to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterate our determination to foster strict respect for them.
3. We reaffirm the United Nations Millennium Declaration,¹ which we adopted at the dawn of the twenty-first century. We recognize the valuable role of the major United Nations conferences and summits in the economic, social and related fields, including the Millennium Summit, in mobilizing the international community at the local, national, regional and global levels and in guiding the work of the United Nations.
4. We reaffirm that our common fundamental values, including freedom, equality, solidarity, tolerance, respect for all human rights, respect for nature and shared responsibility, are essential to international relations.
5. We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, to uphold resolution of disputes by

peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion, international cooperation in solving international problems of an economic, social, cultural or humanitarian character and the fulfilment in good faith of the obligations assumed in accordance with the Charter.

6. We reaffirm the vital importance of an effective multilateral system, in accordance with international law, in order to better address the multifaceted and interconnected challenges and threats confronting our world and to achieve progress in the areas of peace and security, development and human rights, underlining the central role of the United Nations, and commit ourselves to promoting and strengthening the effectiveness of the Organization through the implementation of its decisions and resolutions.

7. We believe that today, more than ever before, we live in a global and interdependent world. No State can stand wholly alone. We acknowledge that collective security depends on effective cooperation, in accordance with international law, against transnational threats.

8. We recognize that current developments and circumstances require that we urgently build consensus on major threats and challenges. We commit ourselves to translating that consensus into concrete action, including addressing the root causes of those threats and challenges with resolve and determination.

9. We acknowledge that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being. We recognize that development, peace and security and human rights are interlinked and mutually reinforcing.

10. We reaffirm that development is a central goal in itself and that sustainable development in its economic, social and environmental aspects constitutes a key element of the overarching framework of United Nations activities.

11. We acknowledge that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.

12. We reaffirm that gender equality and the promotion and protection of the full enjoyment of all human rights and fundamental freedoms for all are essential to advance development and peace and security. We are committed to creating a world fit for future generations, which takes into account the best interests of the child.

13. We reaffirm the universality, indivisibility, interdependence and interrelatedness of all human rights.

14. Acknowledging the diversity of the world, we recognize that all cultures and civilizations contribute to the enrichment of humankind. We acknowledge the importance of respect and understanding for religious and cultural diversity throughout the world. In order to promote international peace and security, we commit ourselves to advancing human welfare, freedom and prosperity everywhere, as well as to encouraging tolerance, respect, dialogue and cooperation among different cultures, civilizations and peoples.

¹ See resolution 55/2.

15. We pledge to enhance the relevance, effectiveness, efficiency, accountability and credibility of the United Nations system. This is our shared responsibility and interest.

16. We therefore resolve to create a more peaceful, prosperous and democratic world and to undertake concrete measures to continue finding ways to implement the outcome of the Millennium Summit and the other major United Nations conferences and summits so as to provide multilateral solutions to problems in the four following areas:

- Development

- Peace and collective security

- Human rights and the rule of law

- Strengthening of the United Nations

II. Development

17. We strongly reiterate our determination to ensure the timely and full realization of the development goals and objectives agreed at the major United Nations conferences and summits, including those agreed at the Millennium Summit that are described as the Millennium Development Goals, which have helped to galvanize efforts towards poverty eradication.

18. We emphasize the vital role played by the major United Nations conferences and summits in the economic, social and related fields in shaping a broad development vision and in identifying commonly agreed objectives, which have contributed to improving human life in different parts of the world.

19. We reaffirm our commitment to eradicate poverty and promote sustained economic growth, sustainable development and global prosperity for all. We are encouraged by reductions in poverty in some countries in the recent past and are determined to reinforce and extend this trend to benefit people worldwide. We remain concerned, however, about the slow and uneven progress towards poverty eradication and the realization of other development goals in some regions. We commit ourselves to promoting the development of the productive sectors in developing countries to enable them to participate more effectively in and benefit from the process of globalization. We underline the need for urgent action on all sides, including more ambitious national development strategies and efforts backed by increased international support.

Global partnership for development

20. We reaffirm our commitment to the global partnership for development set out in the Millennium Declaration,¹ the Monterrey Consensus² and the Johannesburg Plan of Implementation.³

21. We further reaffirm our commitment to sound policies, good governance at all levels and the rule of law, and to mobilize domestic resources, attract international

flows, promote international trade as an engine for development and increase international financial and technical cooperation for development, sustainable debt financing and external debt relief and to enhance the coherence and consistency of the international monetary, financial and trading systems.

22. We reaffirm that each country must take primary responsibility for its own development and that the role of national policies and development strategies cannot be overemphasized in the achievement of sustainable development. We also recognize that national efforts should be complemented by supportive global programmes, measures and policies aimed at expanding the development opportunities of developing countries, while taking into account national conditions and ensuring respect for national ownership, strategies and sovereignty. To this end, we resolve:

(a) To adopt, by 2006, and implement comprehensive national development strategies to achieve the internationally agreed development goals and objectives, including the Millennium Development Goals;

(b) To manage public finances effectively to achieve and maintain macroeconomic stability and long-term growth and to make effective and transparent use of public funds and ensure that development assistance is used to build national capacities;

(c) To support efforts by developing countries to adopt and implement national development policies and strategies through increased development assistance, the promotion of international trade as an engine for development, the transfer of technology on mutually agreed terms, increased investment flows and wider and deeper debt relief, and to support developing countries by providing a substantial increase in aid of sufficient quality and arriving in a timely manner to assist them in achieving the internationally agreed development goals, including the Millennium Development Goals;

(d) That the increasing interdependence of national economies in a globalizing world and the emergence of rule-based regimes for international economic relations have meant that the space for national economic policy, that is, the scope for domestic policies, especially in the areas of trade, investment and industrial development, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space. It is particularly important for developing countries, bearing in mind development goals and objectives, that all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments;

(e) To enhance the contribution of non-governmental organizations, civil society, the private sector and other stakeholders in national development efforts, as well as in the promotion of the global partnership for development;

(f) To ensure that the United Nations funds and programmes and the specialized agencies support the efforts of developing countries through the common country assessment and United Nations Development Assistance Framework process, enhancing their support for capacity-building;

(g) To protect our natural resource base in support of development.

¹ Monterrey Consensus of the International Conference on Financing for Development (*Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (United Nations publication, Sales No. E.02.II.A.7), chap. I, resolution 1, annex).

² Plan of Implementation of the World Summit on Sustainable Development (*Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002* (United Nations publication, Sales No. E.03.II.A.1 and corrigendum), chap 1, resolution 2, annex).

Financing for development

23. We reaffirm the Monterrey Consensus² and recognize that mobilizing financial resources for development and the effective use of those resources in developing countries and countries with economies in transition are central to a global partnership for development in support of the achievement of the internationally agreed development goals, including the Millennium Development Goals. In this regard:

(a) We are encouraged by recent commitments to substantial increases in official development assistance and the Organization for Economic Cooperation and Development estimate that official development assistance to all developing countries will now increase by around 50 billion United States dollars a year by 2010, while recognizing that a substantial increase in such assistance is required to achieve the internationally agreed goals, including the Millennium Development Goals, within their respective time frames;

(b) We welcome the increased resources that will become available as a result of the establishment of timetables by many developed countries to achieve the target of 0.7 per cent of gross national product for official development assistance by 2015 and to reach at least 0.5 per cent of gross national product for official development assistance by 2010 as well as, pursuant to the Brussels Programme of Action for the Least Developed Countries for the Decade 2001-2010,⁴ 0.15 per cent to 0.20 per cent for the least developed countries no later than 2010, and urge those developed countries that have not yet done so to make concrete efforts in this regard in accordance with their commitments;

(c) We further welcome recent efforts and initiatives to enhance the quality of aid and to increase its impact, including the Paris Declaration on Aid Effectiveness, and resolve to take concrete, effective and timely action in implementing all agreed commitments on aid effectiveness, with clear monitoring and deadlines, including through further aligning assistance with countries' strategies, building institutional capacities, reducing transaction costs and eliminating bureaucratic procedures, making progress on untying aid, enhancing the absorptive capacity and financial management of recipient countries and strengthening the focus on development results;

(d) We recognize the value of developing innovative sources of financing. Some countries will implement the International Finance Facility for Immunization. In that regard, we take note with interest of the international efforts, contributions and discussions, such as the Action against Hunger and Poverty, aimed at identifying innovative and additional sources of financing for development on a public, private, domestic or external basis to increase and supplement traditional sources of financing. Some countries will implement the International Finance Facility for Immunization. Some countries have launched the International Finance Facility for Immunization. Some countries will implement in the near future, utilizing their national authorities, a contribution on airline tickets to enable the financing of development projects, in particular in the health sector, directly or through financing of the International Finance Facility. Other countries are considering whether and to what extent they will participate in these initiatives;

(e) We acknowledge the vital role the private sector can play in generating new investments, employment and financing for development;

(f) We resolve to address the development needs of low-income developing countries by working in competent multilateral and international forums, to help them meet, inter alia, their financial, technical and technological requirements;

(g) We resolve to continue to support the development efforts of middle-income developing countries by working, in competent multilateral and international forums and also through bilateral arrangements, on measures to help them meet, inter alia, their financial, technical and technological requirements;

(h) We resolve to operationalize the World Solidarity Fund established by the General Assembly and invite those countries in a position to do so to make voluntary contributions to the Fund;

(i) We recognize the need for access to financial services, in particular for the poor, including through microfinance and microcredit.

Domestic resource mobilization

24. In our common pursuit of growth, poverty eradication and sustainable development, a critical challenge is to ensure the necessary internal conditions for mobilizing domestic savings, both public and private, sustaining adequate levels of productive investment, increasing human capacity, reducing capital flight, curbing the illicit transfer of funds and enhancing international cooperation for creating an enabling domestic environment. We undertake to support the efforts of developing countries to create a domestic enabling environment for mobilizing domestic resources. To this end, we therefore resolve:

(a) To pursue good governance and sound macroeconomic policies at all levels and support developing countries in their efforts to put in place the policies and investments to drive sustained economic growth, promote small and medium-sized enterprises, promote employment generation and stimulate the private sector;

(b) To reaffirm that good governance is essential for sustainable development; that sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication and employment creation; and that freedom, peace and security, domestic stability, respect for human rights, including the right to development, the rule of law, gender equality and market-oriented policies and an overall commitment to just and democratic societies are also essential and mutually reinforcing;

(c) To make the fight against corruption a priority at all levels and we welcome all actions taken in this regard at the national and international levels, including the adoption of policies that emphasize accountability, transparent public sector management and corporate responsibility and accountability, including efforts to return assets transferred through corruption, consistent with the United Nations Convention against Corruption.⁵ We urge all States that have not done so to consider signing, ratifying and implementing the Convention;

(d) To channel private capabilities and resources into stimulating the private sector in developing countries through actions in the public, public-private and

⁴ A/CONF.191/13, chap. II.

⁵ Resolution 58/4, annex.

private spheres to create an enabling environment for partnership and innovation that contributes to accelerated economic development and hunger and poverty eradication;

(e) To support efforts to reduce capital flight and measures to curb the illicit transfer of funds.

Investment

25. We resolve to encourage greater direct investment, including foreign investment, in developing countries and countries with economies in transition to support their development activities and to enhance the benefits they can derive from such investments. In this regard:

(a) We continue to support efforts by developing countries and countries with economies in transition to create a domestic environment conducive to attracting investments through, inter alia, achieving a transparent, stable and predictable investment climate with proper contract enforcement and respect for property rights and the rule of law and pursuing appropriate policy and regulatory frameworks that encourage business formation;

(b) We will put into place policies to ensure adequate investment in a sustainable manner in health, clean water and sanitation, housing and education and in the provision of public goods and social safety nets to protect vulnerable and disadvantaged sectors of society;

(c) We invite national Governments seeking to develop infrastructure projects and generate foreign direct investment to pursue strategies with the involvement of both the public and private sectors and, where appropriate, international donors;

(d) We call upon international financial and banking institutions to consider enhancing the transparency of risk rating mechanisms. Sovereign risk assessments made by the private sector should maximize the use of strict, objective and transparent parameters, which can be facilitated by high-quality data and analysis;

(e) We underscore the need to sustain sufficient and stable private financial flows to developing countries and countries with economies in transition. It is important to promote measures in source and destination countries to improve transparency and the information about financial flows to developing countries, particularly countries in Africa, the least developed countries, small island developing States and landlocked developing countries. Measures that mitigate the impact of excessive volatility of short-term capital flows are important and must be considered.

Debt

26. We emphasize the high importance of a timely, effective, comprehensive and durable solution to the debt problems of developing countries, since debt financing and relief can be an important source of capital for development. To this end:

(a) We welcome the recent proposals of the Group of Eight to cancel 100 per cent of the outstanding debt of eligible heavily indebted poor countries owed to the International Monetary Fund, the International Development Association and African Development Fund and to provide additional resources to ensure that the financing capacity of the international financial institutions is not reduced;

(b) We emphasize that debt sustainability is essential for underpinning growth and underline the importance of debt sustainability to the efforts to achieve national development goals, including the Millennium Development Goals, recognizing the key role that debt relief can play in liberating resources that can be directed towards activities consistent with poverty eradication, sustained economic growth and sustainable development;

(c) We further stress the need to consider additional measures and initiatives aimed at ensuring long-term debt sustainability through increased grant-based financing, cancellation of 100 per cent of the official multilateral and bilateral debt of heavily indebted poor countries and, where appropriate, and on a case-by-case basis, to consider significant debt relief or restructuring for low- and middle-income developing countries with an unsustainable debt burden that are not part of the Heavily Indebted Poor Countries Initiative, as well as the exploration of mechanisms to comprehensively address the debt problems of those countries. Such mechanisms may include debt for sustainable development swaps or multilateral debt swap arrangements, as appropriate. These initiatives could include further efforts by the International Monetary Fund and the World Bank to develop the debt sustainability framework for low-income countries. This should be achieved in a fashion that does not detract from official development assistance resources, while maintaining the financial integrity of the multilateral financial institutions.

Trade

27. A universal, rule-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can substantially stimulate development worldwide, benefiting countries at all stages of development. In that regard, we reaffirm our commitment to trade liberalization and to ensure that trade plays its full part in promoting economic growth, employment and development for all.

28. We are committed to efforts designed to ensure that developing countries, especially the least-developed countries, participate fully in the world trading system in order to meet their economic development needs, and reaffirm our commitment to enhanced and predictable market access for the exports of developing countries.

29. We will work towards the objective, in accordance with the Brussels Programme of Action,⁴ of duty-free and quota-free market access for all least developed countries' products to the markets of developed countries, as well as to the markets of developing countries in a position to do so, and support their efforts to overcome their supply-side constraints.

30. We are committed to supporting and promoting increased aid to build productive and trade capacities of developing countries and to taking further steps in that regard, while welcoming the substantial support already provided.

31. We will work to accelerate and facilitate the accession of developing countries and countries with economies in transition to the World Trade Organization consistent with its criteria, recognizing the importance of universal integration in the rules-based global trading system.

32. We will work expeditiously towards implementing the development dimensions of the Doha work programme.⁶

Commodities

33. We emphasize the need to address the impact of weak and volatile commodity prices and support the efforts of commodity-dependent countries to restructure, diversify and strengthen the competitiveness of their commodity sectors.

Quick-impact initiatives

34. Given the need to accelerate progress immediately in countries where current trends make the achievement of the internationally agreed development goals unlikely, we resolve to urgently identify and implement country-led initiatives with adequate international support, consistent with long-term national development strategies, that promise immediate and durable improvements in the lives of people and renewed hope for the achievement of the development goals. In this regard, we will take such actions as the distribution of malaria bed nets, including free distribution, where appropriate, and effective anti-malarial treatments, the expansion of local school meal programmes, using home-grown foods where possible, and the elimination of user fees for primary education and, where appropriate, health-care services.

Systemic issues and global economic decision-making

35. We reaffirm the commitment to broaden and strengthen the participation of developing countries and countries with economies in transition in international economic decision-making and norm-setting, and to that end stress the importance of continuing efforts to reform the international financial architecture, noting that enhancing the voice and participation of developing countries and countries with economies in transition in the Bretton Woods institutions remains a continuous concern.

36. We reaffirm our commitment to governance, equity and transparency in the financial, monetary and trading systems. We are also committed to open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial systems.

37. We also underscore our commitment to sound domestic financial sectors, which make a vital contribution to national development efforts, as an important component of an international financial architecture that is supportive of development.

38. We further reaffirm the need for the United Nations to play a fundamental role in the promotion of international cooperation for development and the coherence, coordination and implementation of development goals and actions agreed upon by the international community, and we resolve to strengthen coordination within the United Nations system in close cooperation with all other multilateral financial, trade and development institutions in order to support sustained economic growth, poverty eradication and sustainable development.

39. Good governance at the international level is fundamental for achieving sustainable development. In order to ensure a dynamic and enabling international

economic environment, it is important to promote global economic governance through addressing the international finance, trade, technology and investment patterns that have an impact on the development prospects of developing countries. To this effect, the international community should take all necessary and appropriate measures, including ensuring support for structural and macroeconomic reform, a comprehensive solution to the external debt problem and increasing the market access of developing countries.

South-South cooperation

40. We recognize the achievements and great potential of South-South cooperation and encourage the promotion of such cooperation, which complements North-South cooperation as an effective contribution to development and as a means to share best practices and provide enhanced technical cooperation. In this context, we note the recent decision of the leaders of the South, adopted at the Second South Summit and contained in the Doha Declaration⁷ and the Doha Plan of Action,⁸ to intensify their efforts at South-South cooperation, including through the establishment of the New Asian-African Strategic Partnership and other regional cooperation mechanisms, and encourage the international community, including the international financial institutions, to support the efforts of developing countries, *inter alia*, through triangular cooperation. We also take note with appreciation of the launching of the third round of negotiations on the Global System of Trade Preferences among Developing Countries as an important instrument to stimulate South-South cooperation.

41. We welcome the work of the United Nations High-Level Committee on South-South Cooperation and invite countries to consider supporting the Special Unit for South-South Cooperation within the United Nations Development Programme in order to respond effectively to the development needs of developing countries.

42. We recognize the considerable contribution of arrangements such as the Organization of Petroleum Exporting Countries Fund initiated by a group of developing countries, as well as the potential contribution of the South Fund for Development and Humanitarian Assistance, to development activities in developing countries.

Education

43. We emphasize the critical role of both formal and informal education in the achievement of poverty eradication and other development goals as envisaged in the Millennium Declaration,¹ in particular basic education and training for eradicating illiteracy, and strive for expanded secondary and higher education as well as vocational education and technical training, especially for girls and women, the creation of human resources and infrastructure capabilities and the empowerment of those living in poverty. In this context, we reaffirm the Dakar Framework for Action adopted at the World Education Forum in 2000⁹ and recognize the importance of the United Nations Educational, Scientific and Cultural Organization strategy for the eradication of poverty, especially extreme poverty, in supporting the Education for

⁶ See A/C.2/56/7, annex.

⁷ A/60/111, annex I.

⁸ Ibid., annex II.

⁹ See United Nations Educational, Scientific and Cultural Organization, *Final Report of the World Education Forum, Dakar, Senegal, 26-28 April 2000* (Paris, 2000).

All programmes as a tool to achieve the millennium development goal of universal primary education by 2015.

44. We reaffirm our commitment to support developing country efforts to ensure that all children have access to and complete free and compulsory primary education of good quality, to eliminate gender inequality and imbalance and to renew efforts to improve girls' education. We also commit ourselves to continuing to support the efforts of developing countries in the implementation of the Education for All initiative, including with enhanced resources of all types through the Education for All fast-track initiative in support of country-led national education plans.

45. We commit ourselves to promoting education for peace and human development.

Rural and agricultural development

46. We reaffirm that food security and rural and agricultural development must be adequately and urgently addressed in the context of national development and response strategies and, in this context will enhance the contributions of indigenous and local communities, as appropriate. We are convinced that the eradication of poverty, hunger and malnutrition, particularly as they affect children, is crucial for the achievement of the Millennium Development Goals. Rural and agricultural development should be an integral part of national and international development policies. We deem it necessary to increase productive investment in rural and agricultural development to achieve food security. We commit ourselves to increasing support for agricultural development and trade capacity-building in the agricultural sector in developing countries. Support for commodity development projects, especially market-based projects, and for their preparation under the Second Account of the Common Fund for Commodities should be encouraged.

Employment

47. We strongly support fair globalization and resolve to make the goals of full and productive employment and decent work for all, including for women and young people, a central objective of our relevant national and international policies as well as our national development strategies, including poverty reduction strategies, as part of our efforts to achieve the Millennium Development Goals. These measures should also encompass the elimination of the worst forms of child labour, as defined in International Labour Organization Convention No. 182, and forced labour. We also resolve to ensure full respect for the fundamental principles and rights at work.

Sustainable development: managing and protecting our common environment

48. We reaffirm our commitment to achieve the goal of sustainable development, including through the implementation of Agenda 21¹⁰ and the Johannesburg Plan of Implementation.³ To this end, we commit ourselves to undertaking concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles.¹¹ These efforts will also promote the integration of the

three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are overarching objectives of and essential requirements for sustainable development.

49. We will promote sustainable consumption and production patterns, with the developed countries taking the lead and all countries benefiting from the process, as called for in the Johannesburg Plan of Implementation. In that context, we support developing countries in their efforts to promote a recycling economy.

50. We face serious and multiple challenges in tackling climate change, promoting clean energy, meeting energy needs and achieving sustainable development, and we will act with resolve and urgency in this regard.

51. We recognize that climate change is a serious and long-term challenge that has the potential to affect every part of the globe. We emphasize the need to meet all the commitments and obligations we have undertaken in the United Nations Framework Convention on Climate Change¹² and other relevant international agreements, including, for many of us, the Kyoto Protocol.¹³ The Convention is the appropriate framework for addressing future action on climate change at the global level.

52. We reaffirm our commitment to the ultimate objective of the Convention: to stabilize greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system. We stress the importance of the eleventh session of the Conference of the Parties to the Convention, to be held in Montreal in November 2005.

53. We acknowledge that the global nature of climate change calls for the widest possible cooperation and participation in an effective and appropriate international response, in accordance with the principles of the Convention. We are committed to moving forward the global discussion on long-term cooperative action to address climate change, in accordance with these principles. We stress the importance of the

54. We acknowledge various partnerships that are under way to advance action on clean energy and climate change, including bilateral, regional and multilateral initiatives.

55. We are committed to taking further action through practical international cooperation, *inter alia*:

(a) To promote innovation, clean energy and energy efficiency and conservation; improve policy, regulatory and financing frameworks; and accelerate the deployment of cleaner technologies;

(b) To enhance private investment, transfer of technologies and capacity building to developing countries, as called for in the Johannesburg Plan of Implementation, taking into account their own energy needs and priorities;

(c) To assist developing countries to improve their resilience and integrate adaptation goals into their sustainable development strategies, given that adaptation to the effects of climate change due to both natural and human factors is a high

¹⁰ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E.93.1.8 and corrigenda), vol. I: Resolutions adopted by the Conference, resolution I, annex II.

¹¹ Ibid., annex I.

¹² United Nations, Treaty Series, vol. 1771, No. 3082.

¹³ FCCC/CP/1997/7/Add.1, decision I/CP.3, annex.

priority for all nations, particularly those most vulnerable, namely, those referred to in article 4.8 of the Convention;

(d) To continue to assist developing countries, in particular small island developing States, least developed countries and African countries, including those that are particularly vulnerable to climate change, in addressing their adaptation needs relating to the adverse effects of climate change.

56. In pursuance of our commitment to achieve sustainable development, we further resolve:

(a) To promote the United Nations Decade of Education for Sustainable Development and the International Decade for Action, “Water for Life”;

(b) To support and strengthen the implementation of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification. Particularly in Africa,¹⁴ to address causes of desertification and land degradation, as well as poverty resulting from land degradation, through, inter alia, the mobilization of adequate and predictable financial resources, the transfer of technology and capacity-building at all levels;

(c) That the States parties to the Convention on Biological Diversity¹⁵ and the Cartagena Protocol on Biosafety¹⁶ should support the implementation of the Convention and the Protocol, as well as other biodiversity-related agreements and the Johannesburg commitment for a significant reduction in the rate of loss of biodiversity by 2010. The States parties will continue to negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines,¹⁷ an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources. All States will fulfil commitments and significantly reduce the rate of loss of biodiversity by 2010 and continue ongoing efforts towards elaborating and negotiating an international regime on access to genetic resources and benefit-sharing;

(d) To recognize that the sustainable development of indigenous peoples and their communities is crucial in our fight against hunger and poverty;

(e) To reaffirm our commitment, subject to national legislation, to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity, promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from their utilization;

(f) To work expeditiously towards the establishment of a worldwide early warning system for all natural hazards with regional nodes, building on existing national and regional capacity such as the newly established Indian Ocean Tsunami Warning and Mitigation System;

(g) To fully implement the Hyogo Declaration¹⁸ and the Hyogo Framework for Action 2005–2015¹⁹ adopted at the World Conference on Disaster Reduction, in particular those commitments related to assistance for developing countries that are prone to natural disasters and disaster-stricken States in the transition phase towards sustainable physical, social and economic recovery, for risk-reduction activities in post-disaster recovery and for rehabilitation processes;

(h) To assist developing countries' efforts to prepare integrated water resources management and water efficiency plans as part of their national development strategies and to provide access to safe drinking water and basic sanitation in accordance with the Millennium Declaration¹ and the Johannesburg Plan of Implementation,³ including halving by 2015 the proportion of people who are unable to reach or afford safe drinking water and who do not have access to basic sanitation;

(i) To accelerate the development and dissemination of affordable and cleaner energy efficiency and energy conservation technologies, as well as the transfer of such technologies, in particular to developing countries, on favourable terms, including on concessional and preferential terms, as mutually agreed, bearing in mind that access to energy facilitates the eradication of poverty;

(j) To strengthen the conservation, sustainable management and development of all types of forests for the benefit of current and future generations, including through enhanced international cooperation, so that trees and forests may contribute fully to the achievement of the internationally agreed development goals, including those contained in the Millennium Declaration, taking full account of the linkages between the forest sector and other sectors. We look forward to the discussions at the sixth session of the United Nations Forum on Forests;

(k) To promote the sound management of chemicals and hazardous wastes throughout their life cycle, in accordance with Agenda 21 and the Johannesburg Plan of Implementation, aiming to achieve that by 2020 chemicals are used and produced in ways that lead to the minimization of significant adverse effects on human health and the environment using transparent and science-based risk assessment and risk management procedures, by adopting and implementing a voluntary strategic approach to international management of chemicals, and to support developing countries in strengthening their capacity for the sound management of chemicals and hazardous wastes by providing technical and financial assistance, as appropriate;

(l) To improve cooperation and coordination at all levels in order to address issues related to oceans and seas in an integrated manner and promote integrated management and sustainable development of the oceans and seas;

(m) To achieve significant improvement in the lives of at least 100 million slum-dwellers by 2020, recognizing the urgent need for the provision of increased resources for affordable housing and housing-related infrastructure, prioritizing slum prevention and slum upgrading, and to encourage support for the United Nations Habitat and Human Settlements Foundation and its Slum Upgrading Facility;

¹⁴ United Nations, *Treaty Series*, vol. 1954, No. 33480

¹⁵ Ibid., vol. 1760, No. 30619.

¹⁶ UNEP/CBD/ExCOP/1/3 and Corr.1, part two, annex.

¹⁷ UNEP/CBD/COP/6/20, annex I, decision VII/24A.

¹⁸ A/CONF.206/6 and Corr.1, chap. I, resolution 1.

¹⁹ Hyogo Framework for Action 2005–2015; Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6 and Corr.1, chap. I, resolution 2).

(n) To acknowledge the invaluable role of the Global Environment Facility in facilitating cooperation with developing countries; we look forward to a successful replenishment this year along with the successful conclusion of all outstanding commitments from the third replenishment;

(o) To note that cessation of the transport of radioactive materials through the regions of small island developing States is an ultimate desired goal of small island developing States and some other countries and recognize the right of freedom of navigation in accordance with international law. States should maintain dialogue and consultation, in particular under the aegis of the International Atomic Energy Agency and the International Maritime Organization, with the aim of improved mutual understanding, confidence-building and enhanced communication in relation to the safe maritime transport of radioactive materials. States involved in the transport of such materials are urged to continue to engage in dialogue with small island developing States and other States to address their concerns. These concerns include the further development and strengthening, within the appropriate forums, of international regulatory regimes to enhance safety, disclosure, liability, security and compensation in relation to such transports.

HIV/AIDS, malaria, tuberculosis and other health issues

57. We recognize that HIV/AIDS, malaria, tuberculosis and other infectious diseases pose severe risks for the entire world and serious challenges to the achievement of development goals. We acknowledge the substantial efforts and financial contributions made by the international community, while recognizing that these diseases and other emerging health challenges require a sustained international response. To this end, we commit ourselves to:

(a) Increasing investment, building on existing mechanisms and through partnership, to improve health systems in developing countries and those with economies in transition with the aim of providing sufficient health workers, infrastructure, management systems and supplies to achieve the health-related Millennium Development Goals by 2015;

(b) Implementing measures to increase the capacity of adults and adolescents to protect themselves from the risk of HIV infection;

(c) Fully implementing all commitments established by the Declaration of Commitment on HIV/AIDS²⁰ through stronger leadership, the scaling up of a comprehensive response to achieve broad multisectoral coverage for prevention, care, treatment and support, the mobilization of additional resources from national, bilateral, multilateral and private sources and the substantial funding of the Global Fund to Fight AIDS, Tuberculosis and Malaria as well as of the HIV/AIDS component of the work programmes of the United Nations system agencies and programmes engaged in the fight against HIV/AIDS;

(d) Developing and implementing a package for HIV prevention, treatment and care with the aim of coming as close as possible to the goal of universal access to treatment by 2010 for all those who need it, including through increased resources, and working towards the elimination of stigma and discrimination, enhanced access to affordable medicines and the reduction of vulnerability of

persons affected by HIV/AIDS and other health issues, in particular orphaned and vulnerable children and older persons;

(e) Ensuring the full implementation of our obligations under the International Health Regulations adopted by the fifty-eighth World Health Assembly in May 2005,²¹ including the need to support the Global Outbreak Alert and Response Network of the World Health Organization;

(f) Working actively to implement the "Three Ones" principles in all countries, including by ensuring that multiple institutions and international partners coordinate the work of all partners, with one national AIDS coordinating authority having a broad-based multisectoral mandate, and under one agreed country-level monitoring and evaluation system. We welcome and support the important recommendations of the Global Task Team on Improving AIDS Coordination among Multilateral Institutions and International Donors;

(g) Achieving universal access to reproductive health by 2015, as set out at the International Conference on Population and Development, integrating this goal in strategies to attain the internationally agreed development goals, including those contained in the Millennium Declaration, aimed at reducing maternal mortality, improving maternal health, reducing child mortality, promoting gender equality, combating HIV/AIDS and eradicating poverty;

(h) Promoting long-term funding, including public-private partnerships where appropriate, for academic and industrial research as well as for the development of new vaccines and microbicides, diagnostic kits, drugs and treatments to address major pandemics, tropical diseases and other diseases, such as avian flu and severe acute respiratory syndrome, and taking forward work on market incentives, where appropriate through such mechanisms as advance purchase commitments;

(i) Stressing the need to urgently address malaria and tuberculosis, in particular in the most affected countries, and welcoming the scaling up, in this regard, of bilateral and multilateral initiatives;

Gender equality and empowerment of women

58. We remain convinced that progress for women is progress for all. We reaffirm that the full and effective implementation of the goals and objectives of the Beijing Declaration and Platform for Action²² and the outcome of the twenty-third special session of the General Assembly is an essential contribution to achieving the internationally agreed development goals, including those contained in the Millennium Declaration, and we resolve to promote gender equality and eliminate pervasive gender discrimination by:

(a) Eliminating gender inequalities in primary and secondary education by the earliest possible date and at all educational levels by 2015;

(b) Guaranteeing the free and equal right of women to own and inherit property and ensuring secure tenure of property and housing by women;

²⁰ Resolution S-26/2, annex.

²¹ World Health Assembly resolution 58.3.
²² Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (United Nations publication, Sales No. E.96.IV.13), chap. I, resolution 1, annexes I and II.

- (c) Ensuring equal access to reproductive health;
- (d) Promoting women's equal access to labour markets, sustainable employment and adequate labour protection;
- (e) Ensuring equal access of women to productive assets and resources, including land, credit and technology;

(f) Eliminating all forms of discrimination and violence against women and the girl child, including by ending impunity and by ensuring the protection of civilians, in particular women and the girl child, during and after armed conflicts in accordance with the obligations of States under international humanitarian law and international human rights law;

(g) Promoting increased representation of women in Government decision-making bodies, including through ensuring their equal opportunity to participate fully in the political process.

59. We recognize the importance of gender mainstreaming as a tool for achieving gender equality. To that end, we undertake to actively promote the mainstreaming of a gender perspective in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and social spheres, and further undertake to strengthen the capabilities of the United Nations system in the area of gender.

Science and technology for development

60. We recognize that science and technology, including information and communication technology, are vital for the achievement of the development goals and that international support can help developing countries to benefit from technological advancements and enhance their productive capacity. We therefore commit ourselves to:

(a) Strengthening and enhancing existing mechanisms and supporting initiatives for research and development, including through voluntary partnerships between the public and private sectors, to address the special needs of developing countries in the areas of health, agriculture, conservation, sustainable use of natural resources and environmental management, energy, forestry and the impact of climate change;

(b) Promoting and facilitating, as appropriate, access to and the development, transfer and diffusion of technologies, including environmentally sound technologies and corresponding know-how, to developing countries;

(c) Assisting developing countries in their efforts to promote and develop national strategies for human resources and science and technology, which are primary drivers of national capacity-building for development;

(d) Promoting and supporting greater efforts to develop renewable sources of energy, such as solar, wind and geothermal;

(e) Implementing policies at the national and international levels to attract both public and private investment, domestic and foreign, that enhances knowledge, transfers technology on mutually agreed terms and raises productivity;

(f) Supporting the efforts of developing countries, individually and collectively, to harness new agricultural technologies in order to increase agricultural productivity through environmentally sustainable means;

- (g) Building a people-centred and inclusive information society so as to enhance digital opportunities for all people in order to help bridge the digital divide, putting the potential of information and communication technologies at the service of development and addressing new challenges of the information society by implementing the outcomes of the Geneva phase of the World Summit on the Information Society and ensuring the success of the second phase of the Summit, to be held in Tunis in November 2005; in this regard, we welcome the establishment of the Digital Solidarity Fund and encourage voluntary contributions to its financing.

Migration and development

61. We acknowledge the important nexus between international migration and development and the need to deal with the challenges and opportunities that migration presents to countries of origin, destination and transit. We recognize that international migration brings benefits as well as challenges to the global community. We look forward to the high-level dialogue of the General Assembly on international migration and development to be held in 2006, which will offer an opportunity to discuss the multidimensional aspects of international migration and development in order to identify appropriate ways and means to maximize their development benefits and minimize their negative impacts.

62. We reaffirm our resolve to take measures to ensure respect for and protection of the human rights of migrants, migrant workers and members of their families.

63. We reaffirm the need to adopt policies and undertake measures to reduce the cost of transferring migrant remittances to developing countries and welcome efforts by Governments and stakeholders in this regard.

Countries with special needs

64. We reaffirm our commitment to address the special needs of the least developed countries and urge all countries and all relevant organizations of the United Nations system, including the Bretton Woods institutions, to make concerted efforts and adopt speedy measures for meeting in a timely manner the goals and targets of the Brussels Programme of Action for the Least Developed Countries for the Decade 2001–2010.⁴

65. We recognize the special needs of and challenges faced by landlocked developing countries and therefore reaffirm our commitment to urgently address those needs and challenges through the full, timely and effective implementation of the Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries²³ and the São Paulo Consensus adopted at the eleventh session of the United Nations Conference on Trade and Development.²⁴ We encourage the work undertaken by United Nations regional commissions and organizations towards establishing a time-cost methodology for indicators to measure the progress in implementation of the Almaty Programme of Action. We also recognize the special difficulties and concerns of landlocked developing countries in their efforts to integrate their economies into the

²³ Report of the International Ministerial Conference of Landlocked and Transit Developing Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation, Almaty, Kazakhstan, 28 and 29 August 2003 (A/CONF.202/3), annex I.

²⁴ TD412, part II.

multilateral trading system. In this regard, priority should be given to the full and timely implementation of the Almaty Declaration²⁵ and the Almaty Programme of Action.²³

66. We recognize the special needs and vulnerabilities of small island developing States and reaffirm our commitment to take urgent and concrete action to address those needs and vulnerabilities through the full and effective implementation of the Mauritius Strategy adopted by the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States,²⁶ the Barbados Programme of Action²⁷ and the outcome of the twenty-second special session of the General Assembly.²⁸ We further undertake to promote greater international cooperation and partnership for the implementation of the Mauritius Strategy through, inter alia, the mobilization of domestic and international resources, the promotion of international trade as an engine for development and increased international financial and technical cooperation.

67. We emphasize the need for continued coordinated and effective international support for achieving the development goals in countries emerging from conflict and in those recovering from natural disasters.

Meeting the special needs of Africa

68. We welcome the substantial progress made by the African countries in fulfilling their commitments and emphasize the need to carry forward the implementation of the New Partnership for Africa's Development²⁹ to promote sustainable growth and development and deepen democracy, human rights, good governance and sound economic management and gender equality and encourage African countries, with the participation of civil society and the private sector, to continue their efforts in this regard by developing and strengthening institutions for governance and the development of the region, and also welcome the recent decisions taken by Africa's partners, including the Group of Eight and the European Union, in support of Africa's development efforts, including commitments that will lead to an increase in official development assistance to Africa of 25 billion dollars per year by 2010. We reaffirm our commitment to address the special needs of Africa, which is the only continent not on track to meet any of the goals of the Millennium Declaration by 2015, to enable it to enter the mainstream of the world economy, and resolve:

(a) To strengthen cooperation with the New Partnership for Africa's Development by providing coherent support for the programmes drawn up by African leaders within that framework, including by mobilizing internal and

external financial resources and facilitating approval of such programmes by the multilateral financial institutions;

(b) To support the African commitment to ensure that by 2015 all children have access to complete, free and compulsory primary education of good quality, as well as to basic health care;

(c) To support the building of an international infrastructure consortium involving the African Union, the World Bank and the African Development Bank, with the New Partnership for Africa's Development as the main framework, to facilitate public and private infrastructure investment in Africa;

(d) To promote a comprehensive and durable solution to the external debt problems of African countries, including through the cancellation of 100 per cent of multilateral debt consistent with the recent Group of Eight proposal for the heavily indebted poor countries, and, on a case-by-case basis, where appropriate, significant debt relief, including, inter alia, cancellation or restructuring for heavily indebted African countries not part of the Heavily Indebted Poor Countries Initiative that have unsustainable debt burdens;

(e) To make efforts to fully integrate African countries in the international trading system, including through targeted trade capacity-building programmes;

(f) To support the efforts of commodity-dependent African countries to restructure, diversify and strengthen the competitiveness of their commodity sectors and decide to work towards market-based arrangements with the participation of the private sector for commodity price-risk management;

(g) To supplement the efforts of African countries, individually and collectively, to increase agricultural productivity, in a sustainable way, as set out in the Comprehensive Africa Agriculture Development Programme of the New Partnership for Africa's Development as part of an African "Green Revolution";

(h) To encourage and support the initiatives of the African Union and subregional organizations to prevent, mediate and resolve conflicts with the assistance of the United Nations, and in this regard welcomes the proposals from the Group of Eight countries to provide support for African peacekeeping;

(i) To provide, with the aim of an AIDS-, malaria- and tuberculosis-free

generation in Africa, assistance for prevention and care and to come as close as possible to achieving the goal of universal access by 2010 to HIV/AIDS treatment in African countries, to encourage pharmaceutical companies to make drugs, including antiretroviral drugs, affordable and accessible in Africa and to ensure increased bilateral and multilateral assistance, where possible on a grant basis, to combat malaria, tuberculosis and other infectious diseases in Africa through the strengthening of health systems.

III. Peace and collective security

69. We recognize that we are facing a whole range of threats that require our urgent, collective and more determined response.

70. We also recognize that, in accordance with the Charter, addressing such threats requires cooperation among all the principal organs of the United Nations within their respective mandates.

71. We acknowledge that we are living in an interdependent and global world and that many of today's threats recognize no national boundaries, are interlinked and

²⁵ Report of the International Ministerial Conference of Landlocked and Transit Developing Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation, Almaty, Kazakhstan, 28 and 29 August 2003 (A/CONF.202/3), annex II.

²⁶ Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, Port Louis, Mauritius, 10-14 January 2005 (United Nations publication, Sales No. E.05.II.A.4 and corrigendum), chap. I, resolution 1, annex II.

²⁷ Report of the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados, 25 April-6 May 1994 (United Nations publication, Sales No. E.94.I.18 and corrigenda), chap. I, resolution 1, annex II.

²⁸ Resolution S-22/2, annex.

²⁹ A/57/304, annex.

must be tackled at the global, regional and national levels in accordance with the Charter and international law.

72. We therefore reaffirm our commitment to work towards a security consensus based on the recognition that many threats are interlinked, that development, peace, security and human rights are mutually reinforcing, that no State can best protect itself by acting entirely alone and that all States need an effective and efficient collective security system pursuant to the purposes and principles of the Charter.

Pacific settlement of disputes

73. We emphasize the obligation of States to settle their disputes by peaceful means in accordance with Chapter VI of the Charter, including, when appropriate, by the use of the International Court of Justice. All States should act in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.³⁰

74. We stress the importance of prevention of armed conflict in accordance with the purposes and principles of the Charter and solemnly renew our commitment to promote a culture of prevention of armed conflict as a means of effectively addressing the interconnected security and development challenges faced by peoples throughout the world, as well as to strengthen the capacity of the United Nations for the prevention of armed conflict.

75. We further stress the importance of a coherent and integrated approach to the prevention of armed conflicts and the settlement of disputes and the need for the Security Council, the General Assembly, the Economic and Social Council and the Secretary-General to coordinate their activities within their respective Charter mandates.

76. Recognizing the important role of the good offices of the Secretary-General, including in the mediation of disputes, we support the Secretary-General's efforts to strengthen his capacity in this area.

Use of force under the Charter of the United Nations

77. We reiterate the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter. We reaffirm that the purposes and principles guiding the United Nations are, inter alia, to maintain international peace and security, to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace, and to that end we are determined to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, in conformity with the principles of justice and international law, the adjustment or settlement of international disputes or situations that might lead to a breach of the peace.

78. We reiterate the importance of promoting and strengthening the multilateral process and of addressing international challenges and problems by strictly abiding

by the Charter and the principles of international law, and further stress our commitment to multilateralism.

79. We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.

80. We also reaffirm that the Security Council has primary responsibility in the maintenance of international peace and security. We also note the role of the General Assembly relating to the maintenance of international peace and security in accordance with the relevant provisions of the Charter.

Terrorism

81. We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security.

82. We welcome the Secretary-General's identification of elements of a counter-terrorism strategy. These elements should be developed by the General Assembly without delay with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism, which also takes into account the various conditions conducive to the spread of terrorism. In this context, we commend the various initiatives to promote dialogue, tolerance and understanding among civilizations.

83. We stress the need to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism during the sixtieth session of the General Assembly.

84. We acknowledge that the question of convening a high-level conference under the auspices of the United Nations to formulate an international response to terrorism in all its forms and manifestations could be considered.

85. We recognize that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.

86. We reiterate our call upon States to refrain from organizing, financing, encouraging, providing training for or otherwise supporting terrorist activities and to take appropriate measures to ensure that their territories are not used for such activities.

87. We acknowledge the important role played by the United Nations in combating terrorism and also stress the vital contribution of regional and bilateral cooperation, particularly at the practical level of law enforcement cooperation and technical exchange.

88. We urge the international community, including the United Nations, to assist States in building national and regional capacity to combat terrorism. We invite the Secretary-General to submit proposals to the General Assembly and the Security Council, within their respective mandates, to strengthen the capacity of the United

³⁰ Resolution 2625 (XXV), annex.

Nations system to assist States in combating terrorism and to enhance the coordination of United Nations activities in this regard.

89. We stress the importance of assisting victims of terrorism and of providing them and their families with support to cope with their loss and their grief.

90. We encourage the Security Council to consider ways to strengthen its monitoring and enforcement role in counter-terrorism, including by consolidating State reporting requirements, taking into account and respecting the different mandates of its counter-terrorism subsidiary bodies. We are committed to cooperating fully with the three competent subsidiary bodies in the fulfilment of their tasks, recognizing that many States continue to require assistance in implementing relevant Security Council resolutions.

91. We support efforts for the early entry into force of the International Convention for the Suppression of Acts of Nuclear Terrorism³¹ and strongly encourage States to consider becoming parties to it expeditiously and acceding without delay to the twelve other international conventions and protocols against terrorism and implementing them.

Peacekeeping

92. Recognizing that United Nations peacekeeping plays a vital role in helping parties to conflict end hostilities and commending the contribution of United Nations peacekeepers in that regard, noting improvements made in recent years in United Nations peacekeeping, including the deployment of integrated missions in complex situations, and stressing the need to mount operations with adequate capacity to counter hostilities and fulfil effectively their mandates, we urge further development of proposals for enhanced rapidly deployable capacities to reinforce peacekeeping operations in crises. We endorse the creation of an initial operating capability for a standing police capacity to provide coherent, effective and responsive start-up capability for the policing component of the United Nations peacekeeping missions and to assist existing missions through the provision of advice and expertise.

93. Recognizing the important contribution to peace and security by regional organizations as provided for under Chapter VIII of the Charter and the importance of forging predictable partnerships and arrangements between the United Nations and regional organizations, and noting, in particular, given the special needs of Africa, the importance of a strong African Union:

(a) We support the efforts of the European Union and other regional entities to develop capacities such as for rapid deployment, standby and bridging arrangements;

(b) We support the development and implementation of a ten-year plan for capacity-building with the African Union.

94. We support implementation of the 2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.³²

95. We urge States parties to the Anti-Personnel Mine Ban Convention³³ and Amended Protocol II to the Convention on Certain Conventional Weapons³⁴ to fully implement their respective obligations. We call upon States in a position to do so to provide greater technical assistance to mine-affected States.

96. We underscore the importance of the recommendations of the Adviser to the Secretary-General on Sexual Exploitation and Abuse by United Nations Peacekeeping Personnel,³⁵ and urge that those measures adopted in the relevant General Assembly resolutions based upon the recommendations be fully implemented without delay.

Peacebuilding

97. Emphasizing the need for a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, recognizing the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development, and recognizing the vital role of the United Nations in that regard, we decide to establish a Peacebuilding Commission as an intergovernmental advisory body.

98. The main purpose of the Peacebuilding Commission is to bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery. The Commission should focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and support the development. In addition, it should provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations, develop best practices, help to ensure predictable financing for early recovery activities and extend the period of attention by the international community to post-conflict recovery. The Commission should act in all matters on the basis of consensus of its members.

99. The Peacebuilding Commission should make the outcome of its discussions and recommendations publicly available as United Nations documents to all relevant bodies and actors, including the international financial institutions. The Peacebuilding Commission should submit an annual report to the General Assembly.

100. The Peacebuilding Commission should meet in various configurations. Country-specific meetings of the Commission, upon invitation of the Organizational

³² See Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15), chap. IV, para. 24.

³³ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction (United Nations, Treaty Series, vol. 2036, No. 35597).

³⁴ Amended Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW/CONF.II/16 (Part I), annex B).

³⁵ A/59/710, paras. 68-93.

³¹ Resolution 59/290, annex.

Committee referred to in paragraph 101 below, should include as members, in addition to members of the Organizational Committee, representatives from:

- (a) The country under consideration;
- (b) Countries in the region engaged in the post-conflict process and other countries that are involved in relief efforts and/or political dialogue, as well as relevant regional and subregional organizations;
- (c) The major financial, troop and civilian police contributors involved in the recovery effort;

(d) The senior United Nations representative in the field and other relevant United Nations representatives;

(e) Such regional and international financial institutions as may be relevant.

101. The Peacebuilding Commission should have a standing Organizational Committee, responsible for developing its procedures and organizational matters, comprising:

(a) Members of the Security Council, including permanent members;

(b) Members of the Economic and Social Council, elected from regional groups, giving due consideration to those countries that have experienced post-conflict recovery;

(c) Top providers of assessed contributions to the United Nations budgets and voluntary contributions to the United Nations funds, programmes and agencies, including the standing Peacebuilding Fund, that are not among those selected in (a) or (b) above;

(d) Top providers of military personnel and civilian police to United Nations missions that are not among those selected in (a), (b) or (c) above.

102. Representatives from the World Bank, the International Monetary Fund and other institutional donors should be invited to participate in all meetings of the Peacebuilding Commission in a manner suitable to their governing arrangements, in addition to a representative of the Secretary-General.

103. We request the Secretary-General to establish a multi-year standing Peacebuilding Fund for post-conflict peacebuilding, funded by voluntary contributions and taking due account of existing instruments. The objectives of the Peacebuilding Fund will include ensuring the immediate release of resources needed to launch peacebuilding activities and the availability of appropriate financing for recovery.

104. We also request the Secretary-General to establish, within the Secretariat and from within existing resources, a small peacebuilding support office staffed by qualified experts to assist and support the Peacebuilding Commission. The office should draw on the best expertise available.

105. The Peacebuilding Commission should begin its work no later than 31 December 2005.

Sanctions

106. We underscore that sanctions remain an important tool under the Charter in our efforts to maintain international peace and security without recourse to the use of force, and resolve to ensure that sanctions are carefully targeted in support of clear

objectives, to comply with sanctions established by the Security Council and to ensure that sanctions are implemented in ways that balance effectiveness to achieve the desired results against the possible adverse consequences, including socio-economic and humanitarian consequences, for populations and third States.

107. Sanctions should be implemented and monitored effectively with clear benchmarks and should be periodically reviewed, as appropriate, and remain for as limited a period as necessary to achieve their objectives and should be terminated once the objectives have been achieved.

108. We call upon the Security Council, with the support of the Secretary-General, to improve its monitoring of the implementation and effects of sanctions, to ensure that sanctions are implemented in an accountable manner, to review regularly the results of such monitoring and to develop a mechanism to address special economic problems arising from the application of sanctions in accordance with the Charter.

109. We also call upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.

110. We support efforts through the United Nations to strengthen State capacity to implement sanctions provisions.

Transnational crime

111. We express our grave concern at the negative effects on development, peace and security and human rights posed by transnational crime, including the smuggling of and trafficking in human beings, the world narcotic drug problem and the illicit trade in small arms and light weapons, and at the increasing vulnerability of States to such crime. We reaffirm the need to work collectively to combat transnational crime.

112. We recognize that trafficking in persons continues to pose a serious challenge to humanity and requires a concerted international response. To that end, we urge all States to devise, enforce and strengthen effective measures to combat and eliminate all forms of trafficking in persons to counter the demand for trafficked victims and to protect the victims.

113. We urge all States that have not yet done so to consider becoming parties to the relevant international conventions on organized crime and corruption and, following their entry into force, to implement them effectively, including by incorporating the provisions of those conventions into national legislation and by strengthening criminal justice systems.

114. We reaffirm our unwavering determination and commitment to overcome the world narcotic drug problem through international cooperation and national strategies to eliminate both the illicit supply of and demand for illicit drugs.

115. We resolve to strengthen the capacity of the United Nations Office on Drugs and Crime, within its existing mandates, to provide assistance to Member States in those tasks upon request.

Women in the prevention and resolution of conflicts

116. We stress the important role of women in the prevention and resolution of conflicts and in peacebuilding. We reaffirm our commitment to the full and effective implementation of Security Council resolution 1325 (2000) of 31 October 2000 on

women and peace and security. We also underline the importance of integrating a gender perspective and of women having the opportunity for equal participation and full involvement in all efforts to maintain and promote peace and security, as well as the need to increase their role in decision-making at all levels. We strongly condemn all violations of the human rights of women and girls in situations of armed conflict and the use of sexual exploitation, violence and abuse, and we commit ourselves to elaborating and implementing strategies to report on, prevent and punish gender-based violence.

Protecting children in situations of armed conflict

117. We reaffirm our commitment to promote and protect the rights and welfare of children in armed conflicts. We welcome the significant advances and innovations that have been achieved over the past several years. We welcome in particular the adoption of Security Council resolution 1612 (2005) of 26 July 2005. We call upon States to consider ratifying the Convention on the Rights of the Child³⁶ and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.³⁷ We also call upon States to take effective measures, as appropriate, to prevent the recruitment and use of children in armed conflict, contrary to international law, by armed forces and groups, and to prohibit and criminalize such practices.

118. We therefore call upon all States concerned to take concrete measures to ensure accountability and compliance by those responsible for grave abuses against children. We also reaffirm our commitment to ensure that children in armed conflicts receive timely and effective humanitarian assistance, including education, for their rehabilitation and reintegration into society.

IV. Human rights and the rule of law

119. We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates.

120. We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for and the observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter, the Universal Declaration of Human Rights³⁸ and other instruments relating to human rights and international law. The universal nature of these rights and freedoms is beyond question.

Human rights

121. We reaffirm that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their

political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms.

122. We emphasize the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or other status.

123. We resolve further to strengthen the United Nations human rights machinery with the aim of ensuring effective enjoyment by all of all human rights and civil, political, economic, social and cultural rights, including the right to development.

124. We resolve to strengthen the Offices of the United Nations High Commissioner for Human Rights, taking note of the High Commissioner's plan of action, to enable it to effectively carry out its mandate to respond to the broad range of human rights challenges facing the international community, particularly in the areas of technical assistance and capacity-building, through the doubling of its regular budget resources over the next five years with a view to progressively setting a balance between regular budget and voluntary contributions to its resources, keeping in mind other priority programmes for developing countries and the recruitment of highly competent staff on a broad geographical basis and with gender balance, under the regular budget, and we support its closer cooperation with all relevant United Nations bodies, including the General Assembly, the Economic and Social Council and the Security Council.

125. We resolve to improve the effectiveness of the human rights treaty bodies, including through more timely reporting, improved and streamlined reporting procedures and technical assistance to States to enhance their reporting capacities and further enhance the implementation of their recommendations.

126. We resolve to integrate the promotion and protection of human rights into national policies and to support the further mainstreaming of human rights throughout the United Nations system, as well as closer cooperation between the Office of the United Nations High Commissioner for Human Rights and all relevant United Nations bodies.

127. We reaffirm our commitment to continue making progress in the advancement of the human rights of the world's indigenous peoples at the local, national, regional and international levels, including through consultation and collaboration with them, and to present for adoption a final draft United Nations declaration on the rights of indigenous peoples as soon as possible.

128. We recognize the need to pay special attention to the human rights of women and children and undertake to advance them in every possible way, including by bringing gender and child-protection perspectives into the human rights agenda.

129. We recognize the need for persons with disabilities to be guaranteed full enjoyment of their rights without discrimination. We also affirm the need to finalize a comprehensive draft convention on the rights of persons with disabilities.

130. We noted that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to political and social stability and peace and enrich the cultural diversity and heritage of society.

131. We support the promotion of human rights education and learning at all levels, including through the implementation of the World Programme for Human Rights Education, as appropriate, and encourage all States to develop initiatives in this regard.

³⁶ United Nations, *Treaty Series*, vol. 1577, No. 27531.

³⁷ Resolution 54/263 annex I.

³⁸ Resolution 217 A (III).

Internally displaced persons

132. We recognize the Guiding Principles on Internal Displacement³⁹ as an important international framework for the protection of internally displaced persons and resolve to take effective measures to increase the protection of internally displaced persons.

Refugee protection and assistance

133. We commit ourselves to safeguarding the principle of refugee protection and to upholding our responsibility in resolving the plight of refugees, including through the support of efforts aimed at addressing the causes of refugee movement, bringing about the safe and sustainable return of those populations, finding durable solutions for refugees in protracted situations and preventing refugee movement from becoming a source of tension among States. We reaffirm the principle of solidarity and burden-sharing and resolve to support nations in assisting refugee populations and their host communities.

Rule of law

134. Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels, we:

- (a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States;

(b) Support the annual treaty event;

(c) Encourage States that have not yet done so to consider becoming parties to all treaties that relate to the protection of civilians;

(d) Call upon States to continue their efforts to eradicate policies and practices that discriminate against women and to adopt laws and promote practices that protect the rights of women and promote gender equality;

(e) Support the idea of establishing a rule of law assistance unit within the Secretariat, in accordance with existing relevant procedures, subject to a report by the Secretary-General to the General Assembly, so as to strengthen United Nations activities to promote the rule of law, including through technical assistance and capacity-building;

(f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court's work, including by supporting the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice on a voluntary basis.

Democracy

135. We reaffirm that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination. We stress that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing.

136. We renew our commitment to support democracy by strengthening countries' capacity to implement the principles and practices of democracy and resolve to strengthen the capacity of the United Nations to assist Member States upon their request. We welcome the establishment of a Democracy Fund at the United Nations. We note that the advisory board to be established should reflect diverse geographical representation. We invite the Secretary-General to help to ensure that practical arrangements for the Democracy Fund take proper account of existing United Nations activity in this field.

137. We invite interested Member States to give serious consideration to contributing to the Fund.

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.

³⁹ E/CN.4/1998/53/Add.2, annex.

Children's rights

141. We express dismay at the increasing number of children involved in and affected by armed conflict, as well as all other forms of violence, including domestic violence, sexual abuse and exploitation and trafficking. We support cooperation policies aimed at strengthening national capacities to improve the situation of those children and to assist in their rehabilitation and reintegration into society.

142. We commit ourselves to respecting and ensuring the rights of each child without discrimination of any kind, irrespective of the race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status of the child or his or her parent(s) or legal guardian(s). We call upon States to consider as a priority becoming a party to the Convention on the Rights of the Child.³⁶

Human security

143. We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end, we commit ourselves to discussing and defining the notion of human security in the General Assembly.

Culture of peace and initiatives on dialogue among cultures, civilizations and religions

144. We reaffirm the Declaration and Programme of Action on a Culture of Peace⁴⁰ as well as the Global Agenda for Dialogue among Civilizations and its Programme of Action⁴¹ adopted by the General Assembly and the value of different initiatives on dialogue among cultures and civilizations, including the dialogue on interfaith cooperation. We commit ourselves to taking action to promote a culture of peace and dialogue at the local, national, regional and international levels and request the Secretary-General to explore enhancing implementation mechanisms and to follow up on those initiatives. In this regard, we also welcome the Alliance of Civilizations initiative announced by the Secretary-General on 14 July 2005.

145. We underline that sports can foster peace and development and can contribute to an atmosphere of tolerance and understanding, and we encourage discussions in the General Assembly for proposals leading to a plan of action on sport and development.

V. Strengthening the United Nations

146. We reaffirm our commitment to strengthen the United Nations with a view to enhancing its authority and efficiency, as well as its capacity to address effectively, and in accordance with the purposes and principles of the Charter, the full range of challenges of our time. We are determined to reinvigorate the intergovernmental organs of the United Nations and to adapt them to the needs of the twenty-first century.

Economic and Social Council

147. We stress that, in order to efficiently perform their respective mandates as provided under the Charter, United Nations bodies should develop good cooperation and coordination in the common endeavour of building a more effective United Nations.

148. We emphasize the need to provide the United Nations with adequate and timely resources with a view to enabling it to carry out its mandates. A reformed United Nations must be responsive to the entire membership, faithful to its founding principles and adapted to carrying out its mandate.

General Assembly

149. We reaffirm the central position of the General Assembly as the chief deliberative, policymaking and representative organ of the United Nations, as well as the role of the Assembly in the process of standard-setting and the codification of international law.

150. We welcome the measures adopted by the General Assembly with a view to strengthening its role and authority and the role and leadership of the President of the Assembly and, to that end, we call for their full and speedy implementation.

151. We call for strengthening the relationship between the General Assembly and the other principal organs to ensure better coordination on topical issues that require coordinated action by the United Nations, in accordance with their respective mandates.

Security Council

152. We reaffirm that Member States have conferred on the Security Council primary responsibility for the maintenance of international peace and security, acting on their behalf, as provided for by the Charter.

153. We support early reform of the Security Council - an essential element of our overall effort to reform the United Nations - in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the legitimacy and implementation of its decisions. We commit ourselves to continuing our efforts to achieve a decision to this end and request the General Assembly to review progress on the reform set out above by the end of 2005.

154. We recommend that the Security Council continue to adapt its working methods so as to increase the involvement of States not members of the Council in its work, as appropriate, enhance its accountability to the membership and increase the transparency of its work.

155. We reaffirm the role that the Charter and the General Assembly have vested in the Economic and Social Council and recognize the need for a more effective Economic and Social Council as a principal body for coordination, policy review, policy dialogue and recommendations on issues of economic and social development, as well as for implementation of the international development goals agreed at the major United Nations conferences and summits, including the Millennium Development Goals. To achieve these objectives, the Council should:

- (a) Promote global dialogue and partnership on global policies and trends in the economic, social, environmental and humanitarian fields. For this purpose, the Council should serve as a quality platform for high-level engagement among

⁴⁰ Resolutions 53/243 A and B.
⁴¹ See resolution 56/6.

Member States and with the international financial institutions, the private sector and civil society on emerging global trends, policies and action and develop its ability to respond better and more rapidly to developments in the international economic, environmental and social fields;

(b) Hold a biennial high-level Development Cooperation Forum to review trends in international development cooperation, including strategies, policies and financing, promote greater coherence among the development activities of different development partners and strengthen the links between the normative and operational work of the United Nations;

(c) Ensure follow-up of the outcomes of the major United Nations conferences and summits, including the internationally agreed development goals, and hold annual ministerial-level substantive reviews to assess progress, drawing on its functional and regional commissions and other international institutions, in accordance with their respective mandates;

(d) Support and complement international efforts aimed at addressing humanitarian emergencies, including natural disasters, in order to promote an improved, coordinated response from the United Nations;

(e) Play a major role in the overall coordination of funds, programmes and agencies, ensuring coherence among them and avoiding duplication of mandates and activities.

156. We stress that in order to fully perform the above functions, the organization of work, the agenda and the current methods of work of the Economic and Social Council should be adapted.

Human Rights Council

157. Pursuant to our commitment to further strengthen the United Nations human rights machinery, we resolve to create a Human Rights Council.

158. The Council will be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.

159. The Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote effective coordination and the mainstreaming of human rights within the United Nations system.

160. We request the President of the General Assembly to conduct open, transparent and inclusive negotiations to be completed as soon as possible during the sixtieth session, with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council.

Secretariat and management reform

161. We recognize that in order to effectively comply with the principles and objectives of the Charter, we need an efficient, effective and accountable Secretariat. Its staff shall act in accordance with Article 100 of the Charter, in a culture of organizational accountability, transparency and integrity. Consequently we:

(a) Recognize the ongoing reform measures carried out by the Secretary-General to strengthen accountability and oversight, improve management

performance and transparency and reinforce ethical conduct, and invite him to report to the General Assembly on the progress made in their implementation;

(b) Emphasize the importance of establishing effective and efficient mechanisms for responsibility and accountability of the Secretariat;

(c) Urge the Secretary-General to ensure that the highest standards of efficiency, competence, and integrity shall be the paramount consideration in the employment of the staff, with due regard to the principle of equitable geographical distribution, in accordance with Article 101 of the Charter;

(d) Welcome the Secretary-General's efforts to ensure ethical conduct, more extensive financial disclosure for United Nations officials and enhanced protection for those who reveal wrongdoing within the Organization. We urge the Secretary-General to scrupulously apply the existing standards of conduct and develop a system-wide code of ethics for all United Nations personnel. In this regard, we request the Secretary-General to submit details on an ethics office with independent status, which he intends to create, to the General Assembly at its sixtieth session;

(e) Pledge to provide the United Nations with adequate resources, on a timely basis, to enable the Organization to implement its mandates and achieve its objectives, having regard to the priorities agreed by the General Assembly and the need to respect budget discipline. We stress that all Member States should meet their obligations with regard to the expenses of the Organization;

(f) Strongly urge the Secretary-General to make the best and most efficient use of resources in accordance with clear rules and procedures agreed by the General Assembly, in the interest of all Member States, by adopting the best management practices, including effective use of information and communication technologies, with a view to increasing efficiency and enhancing organizational capacity, concentrating on those tasks that reflect the agreed priorities of the Organization.

162. We reaffirm the role of the Secretary-General as the chief administrative officer of the Organization, in accordance with Article 97 of the Charter. We request the Secretary-General to make proposals to the General Assembly for its consideration on the conditions and measures necessary for him to carry out his managerial responsibilities effectively.

163. We commend the Secretary-General's previous and ongoing efforts to enhance the effective management of the United Nations and his commitment to update the Organization. Bearing in mind our responsibility as Member States, we emphasize the need to decide on additional reforms in order to make more efficient use of the financial and human resources available to the Organization and thus better comply with its principles, objectives and mandates. We call on the Secretary-General to submit proposals for implementing management reforms to the General Assembly for consideration and decision in the first quarter of 2006, which will include the following elements:

(a) We will ensure that the United Nations budgetary, financial and human resource policies, regulations and rules respond to the current needs of the Organization and enable the efficient and effective conduct of its work, and request the Secretary-General to provide an assessment and recommendations to the General Assembly for decision during the first quarter of 2006. The assessment and recommendations of the Secretary-General should take account of the measures already under way for the reform of human resources management and the budget process;

(b) We resolve to strengthen and update the programme of work of the United Nations so that it responds to the contemporary requirements of Member States. To this end, the General Assembly and other relevant organs will review all mandates older than five years originating from resolutions of the General Assembly and other organs, which would be complementary to the existing periodic reviews of activities. The General Assembly and the other organs should complete and take the necessary decisions arising from this review during 2006. We request the Secretary-General to facilitate this review with analysis and recommendations, including on the opportunities for programmatic shifts that could be considered for early General Assembly consideration;

(c) A detailed proposal on the framework for a one-time staff buyout to improve personnel structure and quality, including an indication of costs involved and mechanisms to ensure that it achieves its intended purpose.

164. We recognize the urgent need to substantially improve the United Nations oversight and management processes. We emphasize the importance of ensuring the operational independence of the Office of Internal Oversight Services. Therefore:

(a) The expertise, capacity and resources of the Office of Internal Oversight Services in respect of audit and investigations will be significantly strengthened as a matter of urgency;

(b) We request the Secretary-General to submit an independent external evaluation of the auditing and oversight system of the United Nations, including the specialized agencies, including the roles and responsibilities of management, with due regard to the nature of the auditing and oversight bodies in question. This evaluation will take place within the context of the comprehensive review of the governance arrangements. We ask the General Assembly to adopt measures during its sixtieth session at the earliest possible stage, based on the consideration of recommendations of the evaluation and those made by the Secretary-General;

(c) We recognize that additional measures are needed to enhance the independence of the oversight structures. We therefore request the Secretary-General to submit detailed proposals to the General Assembly at its sixtieth session for its early consideration on the creation of an independent oversight advisory committee, including its mandate, composition, selection process and qualification of experts;

(d) We authorize the Office of Internal Oversight Services to examine the feasibility of expanding its services to provide internal oversight to United Nations agencies that request such services in such a way as to ensure that the provision of internal oversight services to the Secretariat will not be compromised. 165. We insist on the highest standards of behaviour from all United Nations personnel and support the considerable efforts under way with respect to the implementation of the Secretary-General's policy of zero tolerance regarding sexual exploitation and abuse by United Nations personnel, both at Headquarters and in the field. We encourage the Secretary-General to submit proposals to the General Assembly leading to a comprehensive approach to victims' assistance by 31 December 2005.

166. We encourage the Secretary-General and all decision-making bodies to take further steps in mainstreaming a gender perspective in the policies and decisions of the Organization.

167. We strongly condemn all attacks against the safety and security of personnel engaged in United Nations activities. We call upon States to consider becoming parties to the Convention on the Safety of United Nations and Associated Personnel⁴², and stress the need to conclude negotiations on a protocol expanding the scope of legal protection during the sixtieth session of the General Assembly.

System-wide coherence

168. We recognize that the United Nations brings together a unique wealth of expertise and resources on global issues. We commend the extensive experience and expertise of the various development-related organizations, agencies, funds and programmes of the United Nations system in their diverse and complementary fields of activity and their important contributions to the achievement of the Millennium Development Goals and the other development objectives established by various United Nations conferences.

169. We support stronger system-wide coherence by implementing the following measures:

Policy

- Strengthening linkages between the normative work of the United Nations system and its operational activities
- Coordinating our representation on the governing boards of the various development and humanitarian agencies so as to ensure that they pursue a coherent policy in assigning mandates and allocating resources throughout the system
- Ensuring that the main horizontal policy themes, such as sustainable development, human rights and gender, are taken into account in decision-making throughout the United Nations

Operational activities

- Implementing current reforms aimed at a more effective, efficient, coherent, coordinated and better-performing United Nations country presence with a strengthened role for the senior resident official, whether special representative, resident coordinator or humanitarian coordinator, including appropriate authority, resources and accountability, and a common management, programming and monitoring framework
- Inviting the Secretary-General to launch work to further strengthen the management and coordination of United Nations operational activities so that they can make an even more effective contribution to the achievement of the internationally agreed development goals, including the Millennium Development Goals, including proposals for consideration by Member States for more tightly managed entities in the fields of development, humanitarian assistance and the environment

⁴² United Nations, *Treaty Series*, vol. 2051, No. 35457.

Humanitarian assistance

- Upholding and respecting the humanitarian principles of humanity, neutrality, impartiality and independence and ensuring that humanitarian actors have safe and unhindered access to populations in need in conformity with the relevant provisions of international law and national laws
- Supporting the efforts of countries, in particular developing countries, to strengthen their capacities at all levels in order to prepare for and respond rapidly to natural disasters and mitigate their impact
- Strengthening the effectiveness of the United Nations humanitarian response, inter alia, by improving the timeliness and predictability of humanitarian funding, in part by improving the Central Emergency Revolving Fund
- Further developing and improving, as required, mechanisms for the use of emergency standby capacities, under the auspices of the United Nations, for a timely response to humanitarian emergencies

Environmental activities

- Recognizing the need for more efficient environmental activities in the United Nations system, with enhanced coordination, improved policy advice and guidance, strengthened scientific knowledge, assessment and cooperation, better treaty compliance, while respecting the legal autonomy of the treaties, and better integration of environmental activities in the broader sustainable development framework at the operational level, including through capacity-building, we agree to explore the possibility of a more coherent institutional framework to address this need, including a more integrated structure, building on existing institutions and internationally agreed instruments, as well as the treaty bodies and the specialized agencies

Participation of local authorities, the private sector and civil society, including non-governmental organizations

- 172. We welcome the positive contributions of the private sector and civil society, including non-governmental organizations, in the promotion and implementation of development and human rights programmes and stress the importance of their continued engagement with Governments, the United Nations and other international organizations in these key areas.

173. We welcome the dialogue between those organizations and Member States, as reflected in the first informal interactive hearings of the General Assembly with representatives of non-governmental organizations, civil society and the private sector.

- 174. We underline the important role of local authorities in contributing to the achievement of the internationally agreed development goals, including the Millennium Development Goals.

175. We encourage responsible business practices, such as those promoted by the Global Compact.

Charter of the United Nations

- 176. Considering that the Trusteeship Council no longer meets and has no remaining functions, we should delete Chapter XIII of the Charter and references to the Council in Chapter XII.

177. Taking into account General Assembly resolution 50/52 of 11 December 1995 and recalling the related discussions conducted in the General Assembly, bearing in mind the profound cause for the founding of the United Nations and looking to our common future, we resolve to delete references to "enemy States" in Articles 53, 77 and 107 of the Charter.

- 178. We request the Security Council to consider the composition, mandate and working methods of the Military Staff Committee.

*8th plenary meeting
16 September 2005*

- 170. We support a stronger relationship between the United Nations and regional and subregional organizations, pursuant to Chapter VIII of the Charter, and therefore resolve:

- (a) To expand consultation and cooperation between the United Nations and regional and subregional organizations through formalized agreements between the respective secretariats and, as appropriate, involvement of regional organizations in the work of the Security Council;
- (b) To ensure that regional organizations that have a capacity for the prevention of armed conflict or peacekeeping consider the option of placing such capacity in the framework of the United Nations Standby Arrangements System;
- (c) To strengthen cooperation in the economic, social and cultural fields.

Cooperation between the United Nations and parliaments

- 171. We call for strengthened cooperation between the United Nations and national and regional parliaments, in particular through the Inter-Parliamentary Union, with a view to furthering all aspects of the Millennium Declaration in all fields of the work of the United Nations and ensuring the effective implementation of United Nations reform.

**United Kingdom Attorney General's Iraq
advice of 7 March 2003**



PRIME MINISTER

IRAQ: RESOLUTION 1441

1. You have asked me for advice on the legality of military action against Iraq without a further resolution of the Security Council. This is, of course, a matter we have discussed before. Since then I have had the benefit of discussions with the Foreign Secretary and Sir Jeremy Greenstock, who have given me valuable background information on the negotiating history of resolution 1441. In addition, I have also had the opportunity to hear the views of the US Administration from their perspective as co-sponsors of the resolution. This note considers the issues in detail in order that you are in a position to understand the legal reasoning. My conclusions are summarised at paragraphs 26 to 31 below.

Possible legal bases for the use of force

2. As I have previously advised, there are generally three possible bases for the use of force:

- (a) self-defence (which may include collective self-defence);
- (b) exceptionally, to avert overwhelming humanitarian catastrophe; and
- (c) authorisation by the Security Council acting under Chapter VII of the UN Charter.

3. Force may be used in self-defence if there is an actual or imminent threat of an armed attack; the use of force must be necessary, ie the only means of averting an attack; and the force used must be a proportionate response. It is now widely accepted that an imminent armed attack will justify the use of force if the other conditions are met. The concept of what is imminent may depend on the circumstances. Different considerations may apply, for example, where the risk is of attack from terrorists sponsored or harboured by a particular State, or where there is a threat of an attack by nuclear weapons. However, in my opinion there must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognised in international law.

4. The use of force to avert overwhelming humanitarian catastrophe has been emerging as a further, and exceptional, basis for the use of force. It was relied on by the UK in the Kosovo crisis and is the underlying justification for the No-Fly Zones. The doctrine remains controversial, however. I know of no reason why it would be an appropriate basis for action in present circumstances.

5. Force may be used where this **authorised by the UN Security Council** acting under Chapter VII of the UN Charter. The key question is whether resolution 1441 has the effect of providing such authorisation.

Resolution 1441

6. As you are aware, the argument that resolution 1441 itself provides the authorisation to use force depends on the revival of the express authorisation to use force given in 1990 by Security Council resolution 678. This in turn gives rise to two questions:

- (a) is the so-called "revival argument" a sound legal basis in principle?
- (b) is resolution 1441 sufficient to revive the authorisation in resolution 678?

I deal with these questions in turn. It is a trite, but nonetheless relevant observation given what some commentators have been saying, that if the answer to these two questions is "yes", the use of force will have been authorised by the United Nations and not in defiance of it.

The revival argument

7. Following its invasion and annexation of Kuwait, the Security Council authorised the use of force against Iraq in resolution 678 (1990). This resolution authorised coalition forces to use all necessary means to force Iraq to withdraw from Kuwait and to restore international peace and security in the area. The resolution gave a legal basis for Operation Desert Storm, which was brought to an end by the cease-fire set out by the Council in resolution 687 (1991). The conditions for the cease-fire in that resolution (and subsequent resolutions) imposed obligations on Iraq with regard to the elimination of WMD and monitoring of its obligations. Resolution 687 suspended, but did not terminate, the authority to use force in resolution 678. Nor has any subsequent resolution terminated the authorisation to use force in resolution 678. It has been the UK's view that a violation of Iraq's obligations under resolution 687 which is sufficiently serious to undermine the basis of the cease-

fire can revive the authorisation to use force in resolution 678.

8. In reliance on this argument, force has been used on certain occasions. I am advised by the Foreign Office Legal Advisers that this was the basis for the

violation of the conditions of the cease-fire and that the Security Council considers it sufficiently serious to destroy the basis of the cease-fire. Revival will not, however, take place, notwithstanding a finding of violation, if the Security Council has made it clear either that action short of the use of force should be taken to ensure compliance with the terms of the cease-fire, or that it intends to decide subsequently what action is required to ensure compliance. Notwithstanding the determination of material breach in OP1 of resolution 1441, it is clear that the Council did not intend that the authorisation in resolution 678 should revive immediately following the adoption of resolution 1441, since OP2 of the resolution affords Iraq a "final opportunity" to comply with its disarmament obligations under previous resolutions by cooperating with the enhanced inspection regime described in OPs 3 and 5-9. But OP2 also states that the Council has determined that compliance with resolution 1441 is Iraq's last chance before the cease-fire resolution will be enforced. OP2 has the effect therefore of suspending the legal consequences of the OP1 determination of material breach which would otherwise have triggered the revival of the authorisation in resolution 678. The narrow but key question is: on the true interpretation of resolution 1441, what has the Security Council decided will be the consequences of Iraq's failure to comply with the enhanced regime.

use of force between 13 and 18 January 1993 following UN Presidential Statements on 8 and 11 January 1993 condemning particular failures by Iraq to observe the terms of the cease-fire resolution. The revival argument was also the basis for the use of force in December 1998 by the US and UK (Operation Desert Fox). This followed a series of Security Council resolutions, notably, resolution 1205 (1998).

9. Law Officers have advised in the past that, provided the conditions are made out, the revival argument does provide a sufficient justification in international law for the use of force against Iraq. That view is supported by an opinion given in August 1992 by the then UN Legal Counsel, Carl-August Fleischauer. However, the UK has consistently taken the view (as did the Fleischauer opinion) that, as the cease-fire conditions were set by the Security Council in resolution 687, it is for the Council to assess whether any such breach of those obligations has occurred. The US have a rather different view: they maintain that the fact of whether Iraq is in breach is a matter of objective fact which may therefore be assessed by individual Member States. I am not aware of any other state which supports this view. This is an issue of critical importance when considering the effect of resolution 1441.

10. The revival argument is controversial. It is not widely accepted among academic commentators. However, I agree with my predecessors' advice on this issue. Further, I believe that the arguments in support of the revival argument are stronger following adoption of resolution 1441. That is because of the terms of the resolution and the course of the negotiations which led to its adoption. Thus, preambular paragraphs 4, 5 and 10 recall the authorisation to use force in resolution 678 and that resolution 687 imposed obligations on Iraq as a necessary condition of the cease-fire. Operative paragraph (OP) 1 provides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including the resolution 687. OP13 recalls that Iraq has been warned repeatedly that "serious consequences" will result from continued violations of its obligations. The previous practice of the Council and statements made by Council members during the negotiation of resolution 1441 demonstrate that the phrase "material breach" signifies a finding by the Council of a sufficiently serious breach of the cease-fire conditions to revive the authorisation in resolution 678 and that "serious consequences" is accepted as indicating the use of force.

11. I disagree, therefore, with those commentators and lawyers, who assert that nothing less than an explicit authorisation to use force in a Security Council resolution will be sufficient.

13. The provisions relevant to determining whether or not Iraq has taken the final opportunity given by the Security Council are contained in OPs 4, 11 and 12 of the resolution.

- OP4 provides that false statements or omissions in the declaration to be submitted by Iraq under OP3 and failure by Iraq at any time to comply with and cooperate fully in the implementation of resolution 1441 will constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment under paragraphs 11 and 12 of the resolution.

- OP11 directs the Executive Chairman of UNMOVIC and the Director-General of the IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including the obligations regarding inspections under resolution 1441.

- OP12 provides that the Council will convene immediately on receipt of a report in accordance with paragraphs 4 or 11 "in order to consider the situation and the need for compliance with all of the relevant Council resolutions in order to secure international peace and security".

It is clear from the text of the resolution, and is apparent from the negotiating history, that if Iraq fails to comply, there will be a further Security Council discussion. The text is, however, ambiguous and unclear on what happens next.

Sufficiency of resolution 1441

12. In order for the authorisation to use force in resolution 678 to be revived, there needs to be a determination by the Security Council that there is a

The second argument

14. There are two competing arguments:
- that provided there is a Council discussion, if it does not reach a conclusion, there remains an authorisation to use force;
 - that nothing short of a further Council decision will be a legitimate basis for the use of force.

The first argument

15. The first argument is based on the following steps:

- OP1, by stating that Iraq "has been and remains in material breach" of its obligations under relevant resolutions, including resolution 687 amounts to a determination by the Council that Iraq's violations of resolution 687 are sufficiently serious to destroy the basis of the cease-fire and therefore, in principle, to revive the authorisation to use force in resolution 678;
- the Council decided, however, to give Iraq "a final opportunity" (OP 2) but because of the clear warning that it faced "serious consequences as a result of its continued violations" (OP 13) was warning that a failure to take that "final opportunity" would lead to such consequences;
- further, by OP 4, the Council decided in advance that false statements or omissions in its declaration and "failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution" would constitute "a further material breach"; the argument is that the Council's determination in advance that particular conduct would constitute a material breach (thus reviving the authorisation to use force) is as good as its determination after the event;
- in either event, the Council must meet (OP 12) "to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security", but the resolution singularly does not say that the Council must decide what action to take. The Council knew full well, it is argued, the difference between "consider" and "decide" and so the omission is highly significant. Indeed, the omission is especially important as the French and Russians made proposals to include an express requirement for a further decision, but these were rejected precisely to avoid being tied to the need to obtain a second resolution. On this view, therefore, while the Council has the opportunity to take a further decision, the determinations of material breach in OPs 1 and 4 remain valid even if the Council does not act.

16. The second argument focuses, by contrast, on two provisions in particular of the resolution: first, the final words in OP 4 ("and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below") and, second, the requirement in OP 12 for the Council to "consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security". Taken together, it is argued, these provisions indicate that the Council decided in resolution 1441 that in the event of continued Iraqi non-compliance, the issue should return to the Council for a further decision on what action should be taken at that stage.

Discussion

17. So far as OP4 of the resolution is concerned, one view is that the words at the end of this paragraph indicate the need for an assessment by the Security Council of how serious any Iraqi breaches really are and whether they are sufficiently serious to destroy the basis of the cease-fire. This argument is supported by public statements to the effect that only serious cases of non-compliance will constitute a further material breach. Thus, the Foreign Secretary stated in Parliament on 25 November that "material breach means something significant; some behaviour or pattern of behaviour that is serious. Among such breaches could be action by the Government of Iraq seriously to obstruct or impede the inspectors, to intimidate witnesses, or a pattern of behaviour where any single action appears relatively minor but the action as a whole add up to something deliberate and more significant: something that shows Iraq's intention not to comply". If that is right, then the question is who makes the assessment of what constitutes a sufficiently serious breach. On the UK view of the revival argument (though not the US view) that can only be the Council, because only the Council can decide if a violation is sufficiently serious to revive the authorisation to use force.

18. It is right to say, however, that such an argument has less force if OP 4 operates automatically. Thus, the wording of OP4 indicates that any failure by Iraq to comply with and cooperate fully in the implementation of the resolution will constitute a further material breach (leaving aside the question of whether false statements or omissions in the OP3 declaration is an additional requirement). If OP4 means what it says: the words "cooperate fully" were included specifically to ensure that any instances of non-cooperation would amount to a further material breach. This is the US analysis of OP4 and is undoubtedly more consistent with the view that no further decision of the Council is necessary to authorise force, because it can be argued that the Council has determined in advance that any failure will be a material breach.

19. It has been suggested that it is possible to establish that Iraq has failed to take its final opportunity through the procedures in OPs 11 and 12 without

means should be used. But the Council might fail to act. The resolution does not state what is to happen in those circumstances. The clear US view is that, whatever the reason for the Council's failure to act, the determination of material breach in OPs 1 and 4 would remain valid, thus authorising the use of force without a further decision. My view is that different considerations apply in different circumstances. The OP12 discussion might make clear that the Council's view is that military action is appropriate but that no further decision is required because of the terms of resolution 1441. In such a case, there would be good grounds for relying on the existing resolution as the legal basis for any subsequent military action. The more difficult scenario is if the views of Council members are divided and a further resolution is not adopted either because it fails to attract 9 votes or because it is vetoed.

22. The principal argument in favour of the view that no further decision is required to authorise force in these circumstances is that the language of OP12 (ie "consider") was chosen deliberately to indicate the need for a further discussion, but not a decision. As I have indicated, it is contended that this interpretation is supported by the negotiating history. The French and Russians both made proposals to amend OP12 to include an express requirement for a further decision, but these proposals were not accepted. The US Administration insist that they made clear throughout that they would not accept a text which subjected the use of force to a further Council decision. The French (and others) therefore knew what they were voting for. The US are confident that in accepting OPs 4 and 12, they were conceding a Council discussion and no more. The US, of course, approached the negotiation of resolution 1441 from a different starting point because, as I explained in paragraph 9 above, they have always taken the view that "material breach" is a matter of objective fact and does not require a Security Council determination. (By contrast, the UK position taken on the advice of successive Law Officers, has been that it is for the Security Council to determine the existence of a material breach of the cease-fire.) Therefore, while the US objective was to ensure that the resolution did not constrain the right of action which they believed they already had, our objective was to secure a sufficient authorisation from the Council in the absence of which we would have had no right to act. I have considered whether this difference in the underlying legal view means that the effect of the resolution might be different for the US than for the UK, but I have concluded that it does not affect the position. If OP12 of the resolution, properly interpreted, were to mean that a further Council decision was required before force was authorised, this would constrain the US just as much as the UK. It was therefore an essential negotiating point for the US that the resolution should not concede the need for a second resolution. They are convinced that they succeeded.

23. I was impressed by the strength and sincerity of the views of the US Administration which I heard in Washington on this point. However, the difficulty is that we are reliant on their assertions for the view that the French

regard to OP4, in which case it is unnecessary to consider the effect of the words "for assessment". I do not consider that this argument really assists. First, the resolution must be read as a whole. Second, I accept that it is possible that a Council discussion under OP11 may be triggered by a report from Blix and El-Baradei under OP11 and that this may have the effect of establishing that Iraq has failed to take the final opportunity granted by OP2. But I do not consider that it can be argued seriously that OP4 does not apply in these circumstances. It is clear from a comparison of the wording of paragraphs 4 and 11 that any Iraqi conduct which would be sufficient to trigger a report from the inspectors under OP11 would also amount to a failure to comply with and cooperate fully in the implementation of the resolution and would thus also be covered by OP4. In addition, the reference to paragraph 11 in OP4 cannot be ignored. It is not entirely clear what this means, but the most convincing explanation seems to be that it is a recognition that an OP11 inspectors' report would also constitute a report of further material breach within the meaning of OP4 and would thus be assessed by the Council under OP12. Moreover, the US see OP4 as an essential part of the mechanism for establishing that Iraq has failed to take its final opportunity.

20. It has also been suggested that the final words of OP4 were chosen carefully to avoid the implication that it was for the Security Council to assess whether Iraqi conduct constituted a further material breach. The French proposed to amend OP4 so that Iraqi conduct would only amount to a further material breach "when assessed" as such by the Council, but this amendment was not accepted. I am not wholly convinced by this argument; if, for the reasons discussed in paragraph 17 above, OP4 requires an assessment of Iraq's conduct by the Council, the alternative language makes little difference. However, I do accept that the negotiating history indicates that the words at the end of OP4 "and shall be reported to the Council for assessment in accordance with paragraphs 11 and 12" were added at a late stage, but in substitution for other language which would clearly have had the effect of making any finding of further material breach subject to a further Council decision.

21. Whether a report comes to the Council under OP4 or OP11, the critical issue is what action the Council is required to take at that point. In other words, what does OP12 require. It is clear that the language of OP12 was a compromise by the US from their starting position that the Council should authorise in advance the use of all necessary means to enforce the cease-fire resolution in the event of continued violations by Iraq. It is equally clear, however, that the language does not expressly provide that a further Council decision is necessary to authorise the use of force. The paragraph indicates that in the event of a report of a further material breach (whether under OP4 or OP11) there will be a meeting of the Council to consider the situation and the need for compliance in order to secure international peace and security. The Council thus has the opportunity to take a further decision expressly authorising the use of force or, conceivably, to decide that other enforcement

(and others) knew and accepted that they were voting for a further discussion and no more. We have very little hard evidence of this beyond a couple of telegrams recording admissions by French negotiators that they knew the US would not accept a resolution which required a further Council decision. The possibility remains that the French and others accepted OP 12 because in their view it gave them a sufficient basis on which to argue that a second resolution was required (even if that was not made expressly clear). A further difficulty is that, if the matter ever came before a court, it is very uncertain to what extent the court would accept evidence of the negotiating history to support a particular interpretation of the resolution, given that most of the negotiations were conducted in private and there are no agreed or official records.

24. The counter view of OP 12 is that this paragraph must imply a decision by the Council. Three particular arguments support that approach:

- (i) when taken with the word "assessment" in OP 4, the language of OP 12 indicates that the Council will be assessing the seriousness of any Iraqi breach; this is especially powerful if in truth some assessment is necessary;
 - (ii) there is a special significance in the words "in order to secure international peace and security". They reflect not only the special responsibility of the Security Council under Article 39 of the UN Charter ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or acts of aggression and shall make recommendations, or decide what measures shall be takento maintain or restore international peace and security"), but also pick up the language of both resolution 678 (which authorised the use of force "to restore international peace and security in the area") and resolution 687 (which referred to the objective of "restoring international peace and security in the area as set out in its recent resolutions"). The clear inference, it will be argued, is that this shows the Council was to exercise a deliberative role on that issue, ie to determine what it is necessary to secure international peace and security;
 - (iii) any other construction reduces the role of the Council discussion under OP 12 to a procedural formality. Others have jibbed at this categorisation, but I remain of the opinion that this would be the effect in legal terms, of the view that no further resolution is required. The Council would be required to meet, and all members of the Council would be under an obligation to participate in the discussion in good faith, but even if an overwhelming majority of the Council were opposed to the use of force, military action could proceed regardless.
25. Where the meaning of a resolution is unclear from the text, the statements made by members of the Council at the time of its adoption may be taken into account in order to ascertain the Council's intentions. The statements made during the debate on 8 November 2002 are not, however, conclusive. The US and UK stated that further breaches would be reported to the Council "for discussion". Jeremy Greenstock then added that we would then expect the Council to "meet its responsibilities", although (implicitly) we would be prepared to act without Council backing to ensure that the task of disarmament is completed. Only the US explicitly stated that it believed that the resolution did not constrain the use of force by States "to enforce relevant United Nations resolutions and protect world peace and security" regardless of whether there was a further Council decision. Conversely, two other Council members, Mexico and Ireland, made clear that in their view a further decision of the Council was required before the use of force would be authorised. Syria also stated that "the resolution should not be interpreted, through certain paragraphs, as authorising any State to use force". Most other Council members were less clear in their comments. The joint statement of France, Russia and China is somewhat opaque, but seems to imply that a further decision is required. Many delegations welcomed the fact that there was "no automaticity" in the resolution with regard to the use of force. But it is not clear what they meant by this. It could indicate that they did not consider that the resolution authorised the use of force in any circumstances by means of the revival argument. On the other hand there is some evidence from the negotiating history that their main concern was that the resolution should not authorise force immediately following its adoption on the basis of "material breach" in OP1 plus "serious consequences" in OP13. The UK and US indicated that "no automaticity" meant that there would be a Council discussion before force was used.

Summary

26. To sum up, the language of resolution 1441 leaves the position unclear and the statements made on adoption of the resolution suggest that there were differences of view within the Council as to the legal effect of the resolution. Arguments can be made on both sides. A key question is whether there is in truth a need for an assessment of whether Iraq's conduct constitutes a failure to take the final opportunity or has constituted a failure fully to cooperate within the meaning of OP 4 such that the basis of the cease-fire is destroyed. If an assessment is needed of that sort, it would be for the Council to make it. A narrow textual reading of the resolution suggests that sort of assessment is not needed, because the Council has pre-determined the issue. Public statements, on the other hand, say otherwise.

27. In these circumstances, I remain of the opinion that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force. I have already advised that I do not believe that such a resolution need be explicit in its terms. The key point is that it should

establish that the Council has concluded that Iraq has failed to take the final opportunity offered by resolution 1441, as in the draft which has already been tabled.

28. Nevertheless, having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution.

29. However, the argument that resolution 1441 alone has revived the authorisation to use force in resolution 678 will only be sustainable if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity. In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-cooperation. Given the structure of the resolution as a whole, the views of UNMOVIC and the IAEA will be highly significant in this respect. In the light of the latest reporting by UNMOVIC, you will need to consider extremely carefully whether the evidence of non-cooperation and non-compliance by Iraq is sufficiently compelling to justify the conclusion that Iraq has failed to take its final opportunity.

30. In reaching my conclusions, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable. But a "reasonable case" does not mean that if the matter ever came before a court I would be confident that the court would agree with this view. I judge that, having regard to the arguments on both sides, and considering the resolution as a whole in the light of the statements made on adoption and subsequently, a court might well conclude that Ops 4 and 12 do require a further Council decision in order to revive the authorisation in resolution 678. But equally I consider that the counter view can be reasonably maintained. However, it must be recognised that on previous occasions when military action was taken on the basis of a reasonably arguable case, the degree of public and Parliamentary scrutiny of the legal issue was nothing like as great as it is today.

31. The analysis set out above applies whether a second resolution fails to be adopted because of a lack of votes or because it is vetoed. As I have said before, I do not believe that there is any basis in law for arguing that there is an implied condition of reasonableness which can be read into the power of veto conferred on the permanent members of the Security Council by the UN Charter. So there are no grounds for arguing that an "unreasonable veto" would entitle us to proceed on the basis of a

presumed Security Council authorisation. In any event, if the majority of world opinion remains opposed to military action, it is likely to be difficult on the facts to categorise a French veto as "unreasonable". The legal analysis may, however, be affected by the course of events over the next week or so, eg the discussions on the draft second resolution. If we fail to achieve the adoption of a second resolution, we would need to consider urgently at that stage the strength of our legal case in the light of circumstances at that time.

Possible consequences of acting without a second resolution

32. In assessing the risks of acting on the basis of a reasonably arguable case, you will wish to take account of the ways in which the matter might be brought before a court. There are a number of possibilities. First, the General Assembly could request an advisory opinion on the legality of the military action from the International Court of Justice (ICJ). A request for such an opinion could be made at the request of a simple majority of the States within the GA, so the UK and US could not block such action. Second, given that the United Kingdom has accepted the compulsory jurisdiction of the ICJ, it is possible that another State which has also accepted the Courts jurisdiction might seek to bring a case against us. This, however, seems a less likely option since Iraq itself could not bring a case and it is not easy to see on what basis any other State could establish that it had a dispute with the UK. But we cannot absolutely rule out that some State strongly opposed to military action might try to bring such a case. If it did, an application for interim measures to stop the campaign could be brought quite quickly (as it was in the case of Kosovo).

33. The International Criminal Court at present has no jurisdiction over the crime of aggression and could therefore not entertain a case concerning the lawfulness of any military action. The ICC will however have jurisdiction to examine whether any military campaign has been conducted in accordance with international humanitarian law. Given the controversy surrounding the legal basis for action, it is likely that the Court will scrutinise any allegations of war crimes by UK forces very closely. The Government has already been put on notice by CND that they intend to report to the ICC Prosecutor any incidents which their lawyers assess to have contravened the Geneva Conventions. The ICC would only be able to exercise jurisdiction over UK personnel if it considered that the UK prosecuting authorities were unable or unwilling to investigate and, if appropriate, prosecute the suspects themselves.

34. It is also possible that CND may try to bring further action to stop military action in the domestic courts, but I am confident that the courts would decline jurisdiction as they did in the case brought by CND last November. Two further, though probably more remote possibilities, are an attempted prosecution for murder on the grounds that the military action is unlawful and

an attempted prosecution for the crime of aggression. Aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognised by the common law which can be prosecuted in the UK courts.

35. In short, there are a number of ways in which the opponents of military action might seek to bring a legal case, internationally or domestically, against the UK, members of the Government or UK military personnel. Some of these seem fairly remote possibilities, but given the strength of opposition to military action against Iraq, it would not be surprising if some attempts were made to get a case of some sort off the ground. We cannot be certain that they would not succeed. The GA route may be the most likely, but you are in a better position than me to judge whether there are likely to be enough States in the GA who would be willing to vote for such a course of action in present circumstances.

Proportionality

36. Finally, I must stress that the lawfulness of military action depends not only on the existence of a legal basis, but also on the question of proportionality. Any force used pursuant to the authorisation in resolution 678 (whether or not there is a second resolution):

- must have as its objective the enforcement the terms of the cease-fire contained in resolution 687 (1990) and subsequent relevant resolutions;
- be limited to what is necessary to achieve that objective; and
- must be a proportionate response to that objective, ie securing compliance with Iraq's disarmament obligations.

That is not to say that action may not be taken to remove Saddam Hussein from power if it can be demonstrated that such action is a necessary and proportionate measure to secure the disarmament of Iraq. But regime change cannot be the objective of military action. This should be borne in mind in considering the list of military targets and in making public statements about any campaign.

ATTORNEY GENERAL

7 March 2003

**Sir Michael Wood, (First) written statement
to the United Kingdom Iraq Inquiry,
15 January 2010**

IRAQ INQUIRY

Statement by Sir Michael Wood

This statement describes my role and responsibilities between 2001 and February 2006. It also sets out, briefly, my views on the following matters:

- *the legal position on the use of force against Iraq before UNSCR 1441*
- *the legal position on the use of force against Iraq after UNSCR 1441*

- *the duties and responsibilities of Occupying Powers and UNSCR 1483*
- *how the process for obtaining legal advice and decision making worked.*

My role and responsibilities between 2001 and February 2006

1. I was the Legal Adviser to the Foreign and Commonwealth Office (FCO) between December 1999 and the end of February 2006. I had been an FCO lawyer since 1970. Between 1991 and 1994 I was posted to the United Kingdom Mission to the United Nations in New York (UKMIS New York).
2. During the period that I was the head of the FCO Legal Advisers, there were about 27 lawyers based in the FCO in London, and another nine or so working outside the FCO. Two were posted to UKMIS New York, and others were posted in Brussels, Geneva, Bridgetown and The Hague. As had been the case for many years, a senior FCO lawyer was seconded to the Attorney General's Office (then known as the Legal Secretariat to the Law Officers – LLSO). From May 2003, an FCO lawyer was posted in Baghdad, initially working with ORHA/CPA and the UK Representative in Baghdad, then in the British Embassy.
3. The lawyers were (and are) members of HM Diplomatic Service. As the head of the FCO Legal Advisers, I had overall responsibility for the legal advice given within the FCO, with direct access to Ministers and when necessary the Attorney General. I was responsible for the management of the team of lawyers based in the FCO, and for overseeing their work. In practice, I shared these duties with other senior lawyers. I dealt directly with some legal issues, for example when acting as Agent for the UK in international litigation. During 2002-2003, in addition to Iraq, I was dealing with the negotiations with Libya over Lockerbie; two arbitral cases between Ireland and the UK over the Sellafield MOX Plant; and the International Criminal Court (including the election campaign for the British judge). I was abroad for at least six weeks of
4. FCO Legal Advisers work on the whole range of legal matters relevant to the FCO. These include public international law, on which FCO lawyers often assist other government departments. The work also includes European Union law; international human rights law; the constitutional and other law of the British overseas territories; and UK law relevant to the work of the FCO (such as employment law, data protection, freedom of information, official secrets). During this time, the FCO was increasingly involved in litigation, before the English courts as well as before international courts and tribunals.
5. Legal advice is given within the FCO and to other government departments both orally and in writing. But even written advice rarely takes the form of a formal legal opinion, such as a barrister in private practice might give. Legal advice is usually fully integrated into the development of policy. Any policy submission raising legal issues will be based on, and where necessary include, legal advice. Advice often takes the form of commenting on drafts prepared by policy colleagues; such advice may be given in the form of textual changes or oral comment. Much advice is given in the course of meetings with Ministers and officials, or by email or phone. A huge volume of papers is copied to the Legal Advisers, which enables them to volunteer advice where necessary, without waiting to be asked.
6. Iraq was naturally a high priority for FCO Legal Advisers; at a rough estimate I would say that it took up about 10% of my time during 2002-2003, and much of the time of a number of other lawyers, both senior and more junior. We worked together as a team.
7. Given the importance and difficulty of the issues, a considerable number of FCO lawyers worked on various aspects of Iraq. While the emphasis changed over time, the issues included UN sanctions; enforcement of the No-fly Zones; the use of force (*jus in bello*); the application of the laws of war, including targeting and rules of engagement (*jus ad bellum*); and post-invasion matters, such as the responsibilities and duties of belligerent Occupants; constitutional developments within Iraq; and trials in Iraq, including the trial of Saddam Hussein. On many of these issues, FCO lawyers worked closely with lawyers in the Ministry of Defence, and with the Attorney General and his officials.
8. The Attorney General is the Government's chief legal adviser, including on public international law. The usual procedure by which the Government obtains legal advice from the Attorney General was described in the Butler Report¹.

¹ HC 898, at paragraphs 368 to 373. An account of the development of the Attorney General's advice on the legality of the use of force against Iraq in 2003 is given in the Disclosure Statement prepared by the LSO which forms Annex 6 to the Information

The close relationship between FCO lawyers and the Attorney General and his officials is an important part of the machinery for ensuring that HMG comply with their legal obligations, including those under public international law. The Attorney General's support for the FCO lawyers, and their assistance to him or her, are key parts of this relationship. For reasons that I have set out elsewhere,² I agree with the Joint Committee on the Constitutional Renewal Bill, which concluded - in 2008 - as follows:

“We have carefully considered the evidence we have received and the recommendation of the House of Commons Justice Committee. We recognise that there are different and strongly held views on this issue. On balance, however, we are not persuaded of the case for separating the Attorney General’s legal and political functions. We therefore support the current arrangement which combines these functions, and support the retention of the Attorney’s present status as a Government Minister.”³

Legal position on the use of force against Iraq before UNSCR 1441

9. The starting point is the fundamental rule of international law that all States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.⁴ Under the Charter of the United Nations, there are two exceptions to the prohibition on the use of force. The use of force is prohibited unless: (i) it is in exercise of the inherent right of individual or collective self-defence, recognised in Article 51; or (ii) it is authorized by the Security Council acting under Chapter VII. In addition, HMG has taken the position that, exceptionally, a limited degree of force may be used to avert an overwhelming humanitarian catastrophe.

10. Self-defence requires an actual or imminent attack. There must be more than a ‘threat’. Talk in some quarters of a right of pre-emption, in so far as it suggests a right going beyond self-defence, has no basis in international law. On the information available in the summer of 2002, there was no basis for the UK to exercise the right of self-defence against Iraq. Nor was it suggested that the conditions for an exceptional right to use force to avert an overwhelming humanitarian catastrophe were met.

Commissioner’s Enforcement Notice of 22 May 2006, available on the Information Commissioner’s website.

² Memorandum to the Joint Committee on the Draft Constitutional Renewal Bill, HL Paper 166-II, HC Paper 551-II, Evidence, pp.433-435.

³ Joint Committee on the Draft Constitutional Renewal Bill, HL Paper 166-I, HC Paper 551-I, Report, para. 84.

⁴ Article 2(4) of the Charter of the United Nations. I shall not refer further to the Charter prohibition on the threat of force, the application of which raises difficult issues.

Legal position on the use of force against Iraq after UNSCR 1441

Summary

15. I considered that the use of force against Iraq in March 2003 was contrary to international law. In my opinion, that use of force had not been authorized by the Security Council, and had no other legal basis in international law.

16. I therefore did not agree with the position, stated in the Parliamentary Answer of 17 March 2003 and the paper of the same date entitled “Iraq: Legal Basis for the Use of Force”, that SCRs 678, 687 and 1441, read together, amounted to such authorization. Nor did I agree with the view expressed in the advice of 7 March 2003 “that a reasonable case can be made out that resolution 1441 is capable of reviving the authorisation in 678 without a further resolution” (paragraph 28).

Detail

17. The Security Council, acting under Chapter VII of the Charter of the United Nations, may authorize the use of force. The question was whether it had done so. The legality of the use of force in March 2003 turned on the interpretation of a series of SCRs. Either that use of force had been authorized by the Council, or it had not.

18. While international law has developed rules for the interpretation of treaties (codified in the Vienna Convention on the Law of Treaties of 1969), there are no similarly authoritative rules for the interpretation of SCRs. Some guidance may be found in the Vienna Convention rules, but account needs to be taken of the differences between SCRs and treaties. Given the way SCRs emerge, and that for the most part they are intended to be political documents, one should not expect them to be drafted with the same attention to legal detail and consistency as is usual in the case of a treaty or Act of Parliament.

19. The Vienna Convention distinguishes between a general rule of interpretation and supplementary means of interpretation (including recourse to the negotiating history). This distinction is perhaps less significant in the case of SCRs than in the case of treaties, given the importance of the historical background for the interpretation of SCRs. In any event, any serious attempt to interpret an SCR needs to have regard to the available preparatory work (*travaux préparatoires*); to the circumstances of the resolution’s adoption; to the Council’s practice; and to subsequent developments.

20. The series of resolutions at issue in relation to the use of force against Iraq in 2003 were complex. Their interpretation was not straightforward. I agreed with

most of what was said in the Attorney General’s advice of 7 March 2003. I agreed with his statement of the possible legal bases for the use of force (paragraphs 2 to 5); that the Security Council’s authorization of the use of force given in SCR 678 could be ‘revived’ by the finding by the Security Council of a material breach of SCR 687 (paragraphs 7 to 11); that there were precedents for this dating from 1993 and 1998 (paragraph 8); and that (contrary to the US Government’s view) such ‘revival’ could not be based on the views of individual members of the Council (paragraph 9).

21. I also agreed with much of the analysis of the material and the arguments about the effect of SCR 1441 (paragraphs 11 to 25). Where I had a different view was on whether a ‘reasonable case’ could be made for saying that, by adopting SCR 1441, the Security Council had already made a finding of material breach which had the effect of reviving the authorization in SCR 678 for some future use of force, without the need for a further decision by the Council. In other words, I did not consider that the Council, by adopting SCR 1441, had left to individual States the decision whether at some point in the future a material breach had occurred sufficient to revive the authorization to use force. I reached this conclusion after considering the wording of SCR 1441, its negotiating history, the circumstances of its adoption, subsequent developments in the Council, and the Council’s practice⁵.

22. The key provisions of SCR 1441, for present purposes, were paragraphs 4, 11, 12 and 13. In paragraph 4 the Council decided that false statements or omissions in Iraq’s declarations and “failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq’s obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below”. In paragraph 11, the Council directed UNMOVIC’s Executive Chairman and the IAEA Director-General “to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution”. In paragraph 12, the Council decided “to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security”. And in paragraph 13 the Council recalled, “in that context” (i.e., in the context of paragraph 12), that it had repeatedly warned Iraq “that it will face serious consequences as a result of its continued violations of its obligations”.

23. My reading was that the Council had decided in paragraph 12 to convene upon a certain event (the submission of a report) for the purpose of considering certain

⁵ A good deal of relevant material is described in Professor Sean Murphy’s article “Assessing the Legality of Invading Iraq”, 92 *The Georgetown Law Journal* 173-257 (2004).

matters (the situation and the need for full compliance with all relevant SCR's). Paragraph 4 spoke of a material breach being referred to the Council 'for assessment'. In my view, the ordinary meaning to be given to the terms of these provisions in their context was that the Council would consider the situation, and assess the nature of any breach. Paragraph 12 made no express mention of subsequent Council action. But neither did it clearly indicate that no such action was needed before the Council's authorization of the use of force revived. In my view, the natural reading of the provisions in question, in context, was that the purpose of Council consideration and assessment was for the Council to decide what measures were needed in the light of the circumstances at the time. Among such circumstances, as it turned out, was the ongoing work of UNMOVIC and the view strongly held by many that the inspectors should be given more time. A strong hint of what might come was given in paragraph 13. This 'reading' of the text was not, in my view, contradicted by anything in the preparatory work of the resolution. If anything it was reinforced by the preparatory work. And many statements made in connection with the adoption of SCR 1441 pointed towards this view set out in the present paragraph.⁶

24. One factor underlying the differing views on the effect of SCR 1441 may have been different perceptions of its negotiating history⁷. I did not think that much weight could be given to the recollections of informal discussions or to differences between successive versions of elements of the draft resolution that were exchanged among Council members. The negotiating record of an international instrument is rarely clear; it rarely points in one direction. Negotiators often convince themselves - they genuinely believe - that the outcome of a negotiation meets their objectives. But that does not mean that they are right, or that a court would agree.

occupants (Occupying Powers). Thereafter they also had additional authorities granted by the Security Council.

26. As Occupying Powers, the UK and USA were bound by the rules of international law on belligerent occupation, which are set out in the 1907 Hague Regulations (articles 42 to 56) and the Fourth Geneva Convention of 1949 (articles 27 to 34 and 47 to 78) (GCIV).⁸

27. The rules are complex, but the following indicates in general terms the limitations on the authority of an Occupying Power:

- Article 43 of the Hague Regulations provides that the Occupying Power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [l'ordre et la vie publiques], while respecting, unless absolutely prevented, the laws in force in the country". While some changes to the legislative and administrative structure may be permissible if they are necessary for public order and safety, more wide-reaching reforms of governmental and administrative structures are not lawful. That includes the imposition of major economic reforms.
 - GCIV prohibits, subject to limited exceptions, any alteration in the status of public officials.
 - GCIV requires that the penal laws of the occupied territory must remain in force except where they constitute a threat to security or an obstacle to the application of GCIV. In addition, again with limited exceptions, the courts in the occupied territory must be allowed to continue to operate.
28. There is a close relationship between SCR 1483 and the law of occupation. In their joint letter of 8 May 2003 to the President of the Security Council, the USA and UK said that they "will strictly abide by their obligations under international law". The Security Council noted this letter in SCR 1483, and recognised "the specific authorities, responsibilities, and obligations under applicable international law" of the USA and the UK "as occupying powers under unified command (the "Authority")".
29. SCR 1483 conferred a clear mandate on the Coalition working with the Special Representative of the Secretary-General (SRSG) to facilitate a process leading to the establishment by the people of Iraq, first, of an Iraqi interim administration and, subsequently, of an internationally recognised representative government. It clarified the scope of activity of the Occupying Powers and authorized them to undertake actions for the reform and reconstruction of Iraq

⁶ See S/PV.4644.

⁷ The Attorney General spoke with some of those directly involved in the negotiations, in the FCO, at the UK Mission to the United Nations, and with American officials in Washington (paragraphs 1 and 28 of the advice of 7 March 2003). See, for example, paragraph 28: "having regard to the information on the negotiating history which I have been given and to the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution."

⁸ See, inter alia, the Manual of the Law of Armed Conflict, published by the UK Ministry of Defence in 2004. A draft of the Manual was available within Whitehall in 2003.

going beyond what was permitted under the Hague Regulations and GCIV. It endorsed the view that the activities mentioned in the letter of 8 May 2003 might lawfully be carried out under the law of occupation. Subsequent SCRs added to these authorities. In some cases, these actions were to be carried out in coordination with the SRSG or in consultation with the interim Iraqi administration (IIA).

How the process for obtaining legal advice and decision making worked

35. The lesson I would draw is that on matters such as this it is important that Ministers seek legal advice, where necessary from the Attorney General, in a timely manner. Where the use of force is under consideration, this probably means throughout the process of policy formation.

36. Another issue is the strength of the legal case that should be required before the Government goes to war. Is a ‘reasonable’ legal case sufficient? A ‘respectable’ case? An ‘arguable’ case? Or should there be a higher degree of legal certainty? This is ultimately a policy question, and one that perhaps cannot be answered in the abstract.

37. The events leading to the use of force against Iraq in 2003 also raise the question of the role of government lawyers advising on public international law, in circumstances as acute as this, where the likelihood of the matter coming before an international or national court is remote. In my view, the seriousness of the matter and the absence of a court places a special responsibility on the lawyer to do his or her best to ensure that the law is upheld.

30. Four issues may be worth considering: the relevance of the rules of international law on the use of force in circumstances such as those of March 2003; the need for timely legal advice; the strength of the legal case that should be required before something as serious as the use of force against Iraq in 2003 is undertaken; and the role of government lawyers advising on public international law.

31. It is clear that in the United Kingdom great importance attaches to compliance with the rules of international law on the use of force. Ministers frequently assure Parliament that any use of force will be in accordance with international law, and this is taken very seriously.

32. If it is to be useful and effective, legal advice needs to be timely. Within government, this usually means that lawyers should be integrated into the policy-making process, and that their views should be known throughout the process. This was the case, for example, in the period before the adoption of SCR 1441, during the conflict itself (targeting), and as regards the post-conflict phase. For example, in respect of the post-conflict phase FCO Legal Advisers regularly attended the daily FCO meetings, and kept in close touch with MOD lawyers, and with LSSLO. The Attorney General’s advice was sought and given on many occasions, and factored into policy as it developed.

33. The negotiation of SCR 1441 was conducted in an exceptional way, over some seven or eight weeks. Some of it took place through direct contact among Foreign Ministers; much of the debate and drafting seems to have taken place within the US Administration itself. If Ministers had needed a definitive legal view on whether the draft resolution met their political objective, the Attorney General’s advice should have been sought during the negotiation and on the final draft before the resolution was adopted by the Security Council.

34. Following the adoption of SCR 1441, legal advice was given within the FCO, whenever necessary, on whether by adopting SCR 1441 the Security Council had revived the authorization to use force. In my view it had not, but it was fully understood that it was ultimately for the Attorney General, as the government’s chief legal adviser, to advise on this matter.

**Note on the United Kingdom's legal position
on Syria, 29 August 2013**



- Prime Minister's Office, 10 Downing Street (<https://www.gov.uk/government/organisations/prime-ministers-office-10-downing-street>)

See more information about this Guidance (<https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position>)

Guidance

Chemical weapon use by Syrian regime: UK government legal position

Published 29 August 2013

Contents

1.

This note sets out the UK government's position regarding the legality of military action in Syria following the chemical weapons attack in Eastern Damascus on 21 August 2013.

2.

The use of chemical weapons by the Syrian regime is a serious crime of international concern, as a breach of the customary international law prohibition on use of chemical weapons, and amounts to a war crime and a crime against humanity. However, the legal basis for military action would be humanitarian intervention; the aim is to relieve humanitarian suffering by deterring or disrupting the further use of chemical weapons.

3.

The UK is seeking a resolution of the United Nations Security Council under Chapter VII of the Charter of the United Nations which would condemn the use of chemical weapons by the Syrian authorities; demand that the Syrian authorities strictly observe their obligations under international law and previous Security Council resolutions, including ceasing all use of chemical weapons; and

authorise member states, among other things, to take all necessary measures to protect civilians in Syria from the use of chemical weapons and prevent any future use of Syria's stockpile of chemical weapons; and refer the situation in Syria to the International Criminal Court.

4.

If action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).

1. All three conditions would clearly be met in this case:

- (i) The Syrian regime has been killing its people for two years, with reported deaths now over 100,000 and refugees at nearly 2 million. The large-scale use of chemical weapons by the regime in a heavily populated area on 21 August 2013 is a war crime and perhaps the most egregious single incident of the conflict. Given the Syrian regime's pattern of use of chemical weapons over several months, it is likely that the regime will seek to use such weapons again. It is also likely to continue frustrating the efforts of the United Nations to establish exactly what has happened. Renewed attacks using chemical weapons by the Syrian regime would cause further suffering and loss of civilian lives, and would lead to displacement of the civilian population on a large scale and in hostile conditions.
- (ii) Previous attempts by the UK and its international partners to secure a resolution of this conflict, end its associated humanitarian suffering and prevent the use of chemical weapons through meaningful action by the Security Council have been blocked over the last two years. If action in the Security Council is blocked again, no practicable alternative would remain to the use of force to deter and degrade the capacity for the further use of chemical weapons by the Syrian regime.
- (iii) In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention to strike specific targets with the aim of deterring and disrupting further such attacks would be necessary and proportionate and therefore legally justifiable. Such an

intervention would be directed exclusively to averting a humanitarian catastrophe, and the minimum judged necessary for that purpose.

International Court of Justice

**Military and Paramilitary Activities in
and against Nicaragua**

(Nicaragua v. United States of America)

Merits, Judgment

I.C.J. Reports 1986

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

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*Claim for reparation.
Peaceful settlement of disputes.*

INTERNATIONAL COURT OF JUSTICE

YEAR 1986

27 June
General List
No. 70

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA v. UNITED STATES OF AMERICA)

MERITS

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Applicable law – Customary international law – Opinio juris and State practice – Significance of concordant views of Parties – Relationship between customary international law and treaty law – United Nations Charter – Significance of Resolutions of United Nations General Assembly and Organization of American States General Assembly.

JUDGMENT

*Present : President NAGENDRA SINGH ; Vice-President DE LACHARRIERE ;
Judges LACHS, RUDA, ELIAS, ODA, AGO, SETTE-CAMARA, SCHWEBEL,
Sir Robert JENNINGS, MBAYE, BEDIAOU, NI, EVENSEN ; Judge ad hoc
COLLIARD ; Registrar TORRES BERNÁDEZ.*

In the case concerning military and paramilitary activities in and against Nicaragua,
between
the Republic of Nicaragua,
represented by
H.E. Mr. Carlos Argüello Gómez, Ambassador,
as Agent and Counsel,

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

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

Mr. Alain Pellet, Professor at the University of Paris-Nord and the Institut d’Études Politiques de Paris,

Mr. Paul S. Reichler, Reichler and Appelbaum, Washington, D.C. ; Member of the Bar of the United States Supreme Court ; Member of the Bar of the District of Columbia,

as Counsel and Advocates,

Mr. Augusto Zamora 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. David Wippman, Reichler and Appelbaum, Washington, D.C.,

as Counsel,

and
the United States of America.

THE COURT,

composed as above,

delivers the following Judgment :

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

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of the United States of America. In accordance with paragraph 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 an Order dated 10 May 1984, the Court rejected a request made by the United States for removal of the case from the list, indicated, pending its final decision in the proceedings, certain provisional measures, and decided that, until the Court delivers its final judgment in the case, it would keep the matters covered by the Order continuously under review.

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

5. In its Memorial on jurisdiction and admissibility, the Republic of Nicaragua contended that, in addition to the basis of jurisdiction relied on in the Application, a Treaty of Friendship, Commerce and Navigation signed by the Parties

in 1956 provides an independent basis for jurisdiction under Article 36, paragraph 1, of the Statute of the Court.

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

7. On 15 August 1984, two days before the 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. Having been supplied with the written observations of the Parties on the Declaration pursuant to Article 83 of the Rules of Court, the Court, by an Order dated 4 October 1984, decided not to hold a hearing on the Declaration of Intervention, and decided that that Declaration was inadmissible inasmuch as it related to the phase of the proceedings then current.

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

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

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

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

11. By an Order dated 22 January 1985 the President of the Court, after referring to the letter from the United States Agent, fixed 30 April 1985 as time-limit for a Memorial of Nicaragua and 31 May 1985 as time-limit for a Counter-Memorial of the United States of America on the merits of the dispute. The Memorial of Nicaragua was filed within the time-limit so fixed ; no pleading was filed by the United States of America, nor did it make any request for extension of the time-limit. In its Memorial, communicated to the United States pursuant to Article 43 of the Statute of the Court, Nicaragua invoked Article 53 of the Statute and called upon the Court to decide the case despite the failure of the Respondent to appear and defend.

12. On 10 September 1985, immediately prior to the opening of the oral proceedings, the Agent of Nicaragua submitted to the Court a number of documents referred to as "Supplemental Annexes" to the Memorial of Nicaragua. In application of Article 56 of the Rules of Court, these documents were treated as "new documents" and copies were transmitted to the United States of America, which did not lodge any objection to their production.

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

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

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

in the Application :

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

(a) That the United States, in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express charter and treaty obligations to Nicaragua, and in particular, its charter and treaty obligations under :

- Article 2 (4) of the United Nations Charter ;
- Articles 18 and 20 of the Charter of the Organization of American States ;
- Article 8 of the Convention on Rights and Duties of States ;

- Article I, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife.

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

– armed attacks against Nicaragua by air, land and sea ;

– incursions into Nicaraguan territorial waters ;

– aerial trespass into Nicaraguan airspace ;

– efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.

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

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

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

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

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

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

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

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

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

in the Memorial on the merits :

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

First : the Court is requested to adjudge and declare that the United

States has violated the obligations of international law indicated in this Memorial, and that in particular respects the United States is in continuing violation of those obligations.

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

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

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

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

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

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

* * * * *

almost its sole component. Certain opponents of the new Government, primarily supporters of the former Somoza Government and in particular ex-members of the National Guard, formed themselves into irregular military forces, and commenced a policy of armed opposition, though initially on a limited scale.

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

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

21. Nicaragua claims furthermore that certain military or paramilitary operations against it were carried out, not by the *contras*, who at the time claimed responsibility, but by persons in the pay of the United States

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

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

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

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

25. Various elements of the present dispute have been brought before the United Nations Security Council by Nicaragua, in April 1984 (as the Court had occasion to note in its Order of 10 May 1984, and in its Judgment on jurisdiction and admissibility of 26 November 1984, *I.C.J. Reports 1984*, p. 432, para. 91), and on a number of other occasions. The subject-matter of the dispute also forms part of wider issues affecting Central America at present being dealt with on a regional basis in the

context of what is known as the "Contadora Process" (*I.C.J. Reports 1984*, pp. 183-185, paras. 34-36 ; pp. 438-441, paras. 102-108).

* * *

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

27. When a State named as party to proceedings before the Court decides not to appear in the proceedings, or not to defend its case, the Court usually expresses regret, because such an obviously has a negative impact on the sound administration of justice (cf. *Fisheries Jurisdiction, I.C.J. Reports 1973*, p. 7, para. 12 ; p. 54, para. 13 ; *I.C.J. Reports 1974*, p. 9, para. 17 ; p. 181, para. 18 ; *Nuclear Tests, I.C.J. Reports 1974*, p. 257, para. 15 ; p. 461, para. 15 ; *Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 7, para. 15 ; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 18, para. 33). In the present case, the Court regrets even more deeply the decision of the respondent State not to participate in the present phase of the proceedings, because this decision was made after the United States had participated fully in the proceedings on the request for provisional measures, and the proceedings on jurisdiction and admissibility. Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits. It is not possible to argue that the Court had jurisdiction only to declare that it lacked jurisdiction. In the normal course of events, for a party to appear before a court entails acceptance of the possibility of the court's finding against that party. Furthermore the Court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to "reserve its rights"

in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision. Under Article 36, paragraph 6, of its Statute, the Court has jurisdiction to determine any dispute as to its own jurisdiction, and its judgment on that matter, as on the merits, is final and binding on the parties under Articles 59 and 60 of the Statute (cf. *Corfu Channel, Judgment of 15 December 1949, I.C.J. Reports 1949*, p. 248).

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

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

"The Court . . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be

relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court." (*I.C.J. Reports 1974*, p. 9, para. 17 ; p. 181, para. 18.)

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

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

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

31. While these are the guiding principles, the experience of previous cases in which one party has decided not to appear shows that something more is involved. Though formally absent from the proceedings, the party in question frequently submits to the Court letters and documents, in ways and by means not contemplated by the Rules. The Court has thus to strike a balance. On the one hand, it is valuable for the Court to know the views of both parties in whatever form those views may have been expressed. Further, as the Court noted in 1974, where one party is not appearing "it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts" (*Nuclear Tests, I.C.J. Reports 1974*, p. 263, para. 31 ; p. 468, para. 32). On the other hand, the Court has to emphasize

that the equality of the parties to the dispute must remain the basic principle for the Court. The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage ; therefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage. The provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions. The treatment to be given by the Court to communications or material emanating from the absent party must be determined by the weight to be given to these different considerations, and is not susceptible of rigid definition in the form of a precise general rule. The vigilance which the Court can exercise when aided by the presence of both parties to the proceedings has a counterpart in the special care it has to devote to the proper administration of justice in a case in which only one party is present.

* * *

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

33. In the first place, it has been suggested that the present dispute should be declared non-justiciable, because it does not fall into the category of "legal disputes" within the meaning of Article 36, paragraph 2, of the Statute. It is true that the jurisdiction under that provision is limited to "legal disputes" concerning any of the matters enumerated in the text. The question whether a given dispute between two States is or is not a "legal dispute" for the purposes of this provision may itself be a matter in dispute between those two States ; and if so, that dispute is to be

settled by the decision of the Court in accordance with paragraph 6 of Article 36. In the present case, however, this particular point does not appear to be in dispute between the Parties. The United States, during the proceedings devoted to questions of jurisdiction and admissibility, advanced a number of grounds why the Court should find that it had no jurisdiction, or that the claim was not admissible. It relied *inter alia* on proviso (c) to its own declaration of acceptance of jurisdiction under Article 36, paragraph 2, without ever advancing the more radical argument that the whole declaration was inapplicable because the dispute brought before the Court by Nicaragua was not a "legal dispute" within the meaning of that paragraph. As a matter of admissibility, the United States objected to the application of Article 36, paragraph 2, not because the dispute was not a "legal dispute", but because of the express allocation of such matters as the subject of Nicaragua's claims to the political organs under the United Nations Charter, an argument rejected by the Court in its Judgment of 26 November 1984 (*I.C.J. Reports 1984*, pp. 431-436). Similarly, while the United States contended that the nature of the judicial function precludes its application to the substance of Nicaragua's allegations in this case – an argument which the Court was again unable to uphold (*ibid.*, pp. 436-438) –, it was careful to emphasize that this did not mean that it was arguing that international law was not relevant or controlling in a dispute of this kind. In short, the Court can see no indication whatsoever that, even in the view of the United States, the present dispute falls outside the category of "legal disputes" to which Article 36, paragraph 2, of the Statute applies. It must therefore proceed to examine the specific claims of Nicaragua in the light of the international law applicable.

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

35. As will be further explained below, in the circumstances of the dispute now before the Court, what is in issue is the purported exercise by the United States of a right of collective self-defence in response to an armed attack on another State. The possible lawfulness of a response to the imminent threat of an armed attack which has not yet taken place has not

been raised. The Court has therefore to determine first whether such attack has occurred, and if so whether the measures allegedly taken in self-defence were a legally appropriate reaction as a matter of collective self-defence. To resolve the first of these questions, the Court does not have to determine whether the United States, or the State which may have been under attack, was faced with a necessity of reacting. Nor does its examination, if it determines that an armed attack did occur, of issues relating to the collective character of the self-defence and the kind of reaction, necessarily involve it in any evaluation of military considerations. Accordingly the Court can at this stage confine itself to a finding that, in the circumstances of the present case, the issues raised of collective self-defence are issues which it has competence, and is equipped, to determine.

* * *

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

"When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim ; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent

lapse of the Declaration [or, as in the present case also, the Treaty containing a compromissory clause], by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." (*I.C.J. Reports 1953*, p. 123.)

*

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

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

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

"the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law" (*Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2*, p. 16).

39. Under the Rules of Court dating back to 1936 (which on this point reflected still earlier practice), the Court had the power to join an objection to the merits "whenever the interests of the good administration of justice require it" (*Panvezys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 75*,

p. 56), and in particular where the Court, if it were to decide on the objection, "would run the risk of adjudicating on questions which appear to the merits of the case or of prejudging their solution" (*ibid.*). If this power was exercised, there was always a risk, namely that the Court would ultimately decide the case on the preliminary objection, after requiring the parties fully to plead the merits, – and this did in fact occur (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970, p. 3*). The result was regarded in some quarters as an unnecessary prolongation of an expensive and time-consuming procedure.

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

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

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

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

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

stage of the proceedings. The new rule enumerates the objections contemplated as follows :

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

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

* * *

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

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

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

43. It regarded this as not necessary because, in its Application, Nicaragua had not confined its claims to breaches of multilateral treaties but had also invoked a number of principles of "general and customary international law", as well as the bilateral Treaty of Friendship, Commerce and Navigation of 1956. These principles remained binding as such, although they were also enshrined in treaty law provisions. Consequently, since the case had not been referred to the Court solely on the basis of multilateral treaties, it was not necessary for the Court, in order to consider the merits of Nicaragua's claim, to decide the scope of the reservation in question : "the claim . . . would not in any event be barred by the multilateral treaty reservation" (*I.C.J. Reports 1984, p. 425, para. 73*). Moreover, it was not found possible for the reservation to be definitively dealt with at the jurisdictional stage of the proceedings. To make a judgment on the scope of the reservation would have meant giving a definitive interpretation of the term "affected" in that reservation. In its 1984 Judgment, the Court held

that the term "affected" applied not to multilateral treaties, but to the parties to such treaties. The Court added that if those parties wished to protect their interests "in so far as these are not already protected by Article 59 of the Statute", they "would have the choice of either instituting proceedings or intervening" during the merits phase. But at all events, according to the Court, "the determination of the States 'affected' could not be left to the parties but must be made by the Court" (*I.C.J. Reports 1984*, p. 425, para. 75). This process could however not be carried out at the stage of the proceedings in which the Court then found itself : "it is only when the general lines of the judgment to be given become clear", the Court said, "that the States 'affected' could be identified" (*ibid.*). The Court thus concluded that this was "a question concerning matters of substance relating to the merits of the case" (*ibid.*, para. 76). Since "the question of what States may be 'affected' by the decision on the merits is not in itself a jurisdictional problem", the Court found that it

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

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

45. The reservation in question is not necessarily a bar to the United States accepting the Court's jurisdiction whenever a third State which may

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

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

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

46. It has also been suggested that the United States may have waived the multilateral treaty reservation by its conduct of its case at the jurisdictional stage, or more generally by asserting collective self-defence in accordance with the United Nations Charter as justification for its activities vis-à-vis Nicaragua. There is no doubt that the United States, during its participation in the proceedings, insisted that the law applicable to the dispute was to be found in multilateral treaties, particularly the United Nations Charter and the Charter of the Organization of American States ; indeed, it went so far as to contend that such treaties supersede and subsume customary law on the subject. It is however one thing for a State to advance a contention that the law applicable to a given dispute derives from a specified source ; it is quite another for that State to consent to the Court's having jurisdiction to entertain that dispute, and thus to apply that law to the dispute. The whole purpose of the United States argument as to the applicability of the United Nations and Organization of American

States Charters was to convince the Court that the present dispute is one "arising under" those treaties, and hence one which is excluded from jurisdiction by the multilateral treaty reservation in the United States declaration of acceptance of jurisdiction. It is impossible to interpret the attitude of the United States as consenting to the Court's applying multilateral treaty law to resolve the dispute, when what the United States was arguing was that, for the very reason that the dispute "arises under" multilateral treaties, no consent to its determination by the Court has ever been given. The Court was fully aware, when it gave its 1984 Judgment, that the United States regarded the law of the two Charters as applicable to the dispute ; it did not then regard that approach as a waiver, nor can it do so now. The Court is therefore bound to ascertain whether its jurisdiction is limited by virtue of the reservation in question.

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

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

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

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

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

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

50. Both Article 51 of the United Nations Charter and Article 21 of the Organization of American States Charter refer to self-defence as an exception to the principle of the prohibition of the use of force. Unlike the United Nations Charter, the Organization of American States Charter does not use the expression "collective self-defence", but refers to the case of "self-defence in accordance with existing treaties or in fulfillment thereof", one such treaty being the United Nations Charter. Furthermore it is evident that if actions of the United States complied with all requirements of the United Nations Charter so as to constitute the exer-

cise of the right of collective self-defence, it could not be argued that they could nevertheless constitute a violation of Article 21 of the Organization of American States Charter. It therefore follows that the situation of El Salvador with regard to the assertion by the United States of the right of collective self-defence is the same under the Organization of American States Charter as it is under the United Nations Charter.

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

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

53. Nor is it only in the case of a decision of the Court rejecting the United States claim to be acting in self-defence that El Salvador would be

"affected" by the decision. The multilateral treaty reservation does not require, as a condition for the exclusion of a dispute from the jurisdiction of the Court, that a State party to the relevant treaty be "adversely" or "prejudicially" affected by the decision, even though this is clearly the case primarily in view. In other situations in which the position of a State not before the Court is under consideration (cf. *Monetary Gold Removed from Rome in 1943*, *I.C.J. Reports 1954*, p. 32 ; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Application to Intervene, Judgment*, *I.C.J. Reports 1984*, p. 20, para. 31) it is clearly impossible to argue that that State may be differently treated if the Court's decision will not necessarily be adverse to the interests of the absent State, but could be favourable to those interests. The multilateral treaty reservation bars any decision that would "affect" a third State party to the relevant treaty. Here also, it is not necessary to determine whether the decision will "affect" that State unfavourably or otherwise ; the condition of the reservation is met if the State will necessarily be "affected", in one way or the other.

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

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

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

The potential link, recognized by this text, between intervention and the use of armed force, is actual in the present case, where the same activities attributed to the United States are complained of under both counts, and

the response of the United States is the same to each complaint – that it has acted in self-defence. The Court has to consider what would be the impact, for the States identified by the United States as likely to be “affected”, of a decision whereby the Court would decline to rule on the alleged violation of Article 21 of the Organization of American States Charter, concerning the use of force, but passed judgment on the alleged violation of Article 18. The Court will not here enter into the question whether self-defence may justify an intervention involving armed force, so that it has to be treated as not constituting a breach either of the principle of non-use of force or of that of non-intervention. At the same time, it is impossible to say that in the particular circumstances of this case, it is impossible to say that a ruling on the alleged breach by the United States of Article 18 of the Organization of American States Charter would not “affect” El Salvador.

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

* * *

57. One of the Court’s chief difficulties in the present case has been the determination of the facts relevant to the dispute. First of all, there is marked disagreement between the Parties not only on the interpretation of the facts, but even on the existence or nature of at least some of them. Secondly, the respondent State has not appeared during the present merits phase of the proceedings, thus depriving the Court of the benefit of its complete and fully argued statement regarding the facts. The Court’s task was therefore necessarily more difficult, and it has had to pay particular heed, as said above, to the proper application of Article 53 of its Statute. Thirdly, there is the secrecy in which some of the conduct attributed to one or other of the Parties has been carried on. This makes it more difficult for the Court not only to decide on the imputability of the facts, but also to

establish what are the facts. Sometimes there is no question, in the sense that it does not appear to be disputed, that an act was done, but there are conflicting reports, or a lack of evidence, as to who did it. The problem is then not the legal process of imputing the act to a particular State for the purpose of establishing responsibility, but the prior process of tracing material proof of the identity of the perpetrator. The occurrence of the act itself may however have been shrouded in secrecy. In the latter case, the Court has had to endeavour first to establish what actually happened, before entering on the next stage of considering whether the act (if proven) was imputable to the State to which it has been attributed.

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

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

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

* *

59. The Court is bound by the relevant provisions of its Statute and its Rules relating to the system of evidence, provisions devised to guarantee the sound administration of justice, while respecting the equality of the parties. The presentation of evidence is governed by specific rules relating to, for instance, the observance of time-limits, the communication of

evidence to the other party, the submission of observations on it by that party, and the various forms of challenge by each party of the other's evidence. The absence of one of the parties restricts this procedure to some extent. The Court is careful, even where both parties appear, to give each of them the same opportunities and chances to produce their evidence, 'when the situation is complicated by the non-appearance of one of them,' then *a fortiori* the Court regards it as essential to guarantee as perfect equality as possible between the parties. Article 53 of the Statute therefore obliges the Court to employ whatever means and resources may enable it to satisfy itself whether the submissions of the applicant State are well-founded in fact and law, and simultaneously to safeguard the essential principles of the sound administration of justice.

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

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

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

63. However, although it is perfectly proper that press information should not be treated in itself as evidence for judicial purposes, public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge. In the case of *United States Diplomatic*

and Consular Staff in Tehran, the Court referred to facts which "are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries" (*I.C.J. Reports 1980*, p. 9, para. 12). On the basis of information, including press and broadcast material, which was "wholly consistent and concordant as to the main facts and circumstances of the case", the Court was able to declare that it was satisfied that the allegations of fact were well-founded (*ibid.*, p. 10, para. 13). The Court has however to show particular caution in this area. Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source. It is with this important reservation that the newspaper reports supplied to the Court should be examined in order to assess the facts of the case, and in particular to ascertain whether such facts were matters of public knowledge.

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

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

66. At the hearings in this case, the applicant State called five witnesses to give oral evidence, and the evidence of a further witness was offered in

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

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

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

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

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

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

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

71. However, before outlining the limits of the probative effect of declarations by the authorities of the States concerned, the Court would recall that such declarations may involve legal effects, some of which it has defined in previous decisions (*Nuclear Tests, United States Diplomatic and Consular Staff in Tehran* cases). Among the legal effects which such declarations may have is that they may be regarded as evidence of the truth of facts, as evidence that such facts are attributable to the States the authorities of which are the authors of these declarations and, to a lesser degree, as evidence for the legal qualification of these facts. The Court is here concerned with the significance of the official declarations as evidence of specific facts and of their imputability to the States in question.

72. The declarations to which the Court considers it may refer are not limited to those made in the pleadings and the oral argument addressed to it in the successive stages of the case, nor are they limited to statements made by the Parties. Clearly the Court is entitled to refer, not only to the Nicaraguan pleadings and oral argument, but to the pleadings and oral argument submitted to it by the United States before it withdrew from participation in the proceedings, and to the Declaration of Intervention of El Salvador in the proceedings. It is equally clear that the Court may take account of public declarations to which either Party has specifically drawn attention, and the text, or a report, of which has been filed as documentary evidence. But the Court considers that, in its quest for the truth, it may also take note of statements of representatives of the Parties (or of other States) in international organizations, as well as the resolutions adopted or discussed by such organizations, in so far as factually relevant, whether or not such material has been drawn to its attention by a Party.

73. In addition, the Court is aware of the existence and the contents of a publication of the United States State Department entitled "Revolution Beyond Our Borders", *Sandinista Intervention in Central America* intended to justify the policy of the United States towards Nicaragua. This publication was issued in September 1985, and on 6 November 1985 was circulated as an official document of the United Nations General Assembly and the Security Council, at the request of the United States (A/40/858; S/17612); Nicaragua had circulated in reply a letter to the Secretary-General, annexing *inter alia* an extract from its Memorial on the Merits and an extract from the verbatim records of the hearings in the case (A/40/907; S/17639). The United States publication was not submitted to the Court in any formal manner contemplated by the Statute and Rules of Court, though on 13 September 1985 the United States Information Office in The Hague sent copies to an official of the Registry to be made available to anyone at the Court interested in the subject. The representatives of Nicaragua before the Court during the hearings were aware of the existence of this publication, since it was referred to in a question put to the Agent of Nicaragua by a Member of the Court. They did not attempt to refute before the Court what was said in that publication, pointing out that materials of this kind "do not constitute evidence in this case", and going on to suggest that it "cannot properly be considered by the Court". The Court however considers that, in view of the special circumstances of this case, it may, within limits, make use of information in such a publication.

* *

74. In connection with the question of proof of facts, the Court notes that Nicaragua has relied on an alleged implied admission by the United States. It has drawn attention to the invocation of collective self-defence by the United States, and contended that "the use of the justification of

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

* * * *

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

relate to *contra* activity is that of overflights of Nicaraguan territory and territorial waters by United States military aircraft. These complaints will now be examined.

* *

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

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

warning or notification to other States of the existence and location of the mines.

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

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

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

79. According to Nicaragua, vessels of Dutch, Panamanian, Soviet, Liberian and Japanese registry, and one (*Homin*) of unidentified registry, were damaged by mines, though the damage to the *Homin* has also been attributed by Nicaragua rather to gunfire from minelaying vessels. Other sources mention damage to a British or a Cuban vessel. No direct evidence is available to the Court of any diplomatic protests by a State whose vessel had been damaged ; according to press reports, the Soviet Government accused the United States of being responsible for the mining, and the British Government indicated to the United States that it deeply deplored the mining, as a matter of principle. Nicaragua has also submitted evidence to show that the mining of the ports caused a rise in marine insurance rates for cargo to and from Nicaragua, and that some shipping companies stopped sending vessels to Nicaraguan ports.

80. On this basis, the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports ; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea, or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents ; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines ; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.

* * *

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

- (i) 8 September 1983 : an attack was made on Sandino international airport in Managua by a Cessna aircraft, which was shot down ;
- (ii) 13 September 1983 : an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up ;
- (iii) 2 October 1983 : an attack was made on oil storage facilities at Benjamin Zeledón on the Atlantic coast, causing the loss of a large quantity of fuel ;
- (iv) 10 October 1983 : an attack was made by air and sea on the port of Corinto, involving the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population ;
- (v) 14 October 1983 : the underwater oil pipeline at Puerto Sandino was again blown up ;
- (vi) 4/5 January 1984 : an attack was made by speedboats and helicopters using rockets against the Potosí Naval Base ;
- (vii) 24/25 February 1984 : an incident at El Bluff listed under this date appears to be the mine explosion already mentioned in paragraph 76 ;
- (viii) 7 March 1984 : an attack was made on oil and storage facility at San Juan del Sur by speedboats and helicopters ;
- (ix) 28/30 March 1984 : clashes occurred at Puerto Sandino between speedboats, in the course of minelaying operations, and Nicaraguan patrol boats ; intervention by a helicopter in support of the speedboats ;
- (x) 9 April 1984 : a helicopter allegedly launched from a mother ship in international waters provided fire support for an ARDE attack on San Juan del Norte.

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

83. On 19 October 1983, thus nine days after the attack on Corinto, a question was put to President Reagan at a press conference. Nicaragua has supplied the Court with the official transcript which, so far as relevant, reads as follows :

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

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

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

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

84. The evidence available to the Court to show that the attacks listed above occurred, and that they were the work of United States personnel or "UCLAs", other than press reports, is as follows. In his declaration,

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

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

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

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

of the "UCLAs", while United States nationals participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established.

* *

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

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

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

"These overflights, conducted by unarmed, high-flying planes, for the express and sole purpose of verifying reports of Nicaraguan intervention, are no threat to regional peace and stability ; quite the contrary." (S/PV.2335, p. 48, emphasis added.)

The use of the present tense may be taken to imply that the overflights were continuing at the time of the debate. Press reports of 12 November 1984 confirm the occurrence of sonic booms at that period, and report the statement of Nicaraguan Defence Ministry officials that the plane responsible was a United States SR-71.

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

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

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

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

* *

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

* *

93. The Court must now examine in more detail the genesis, development and activities of the *contra* force, and the role of the United States in relation to it, in order to determine the legal significance of the conduct of the United States in this respect. According to Nicaragua, the United States "conceived, created and organized a mercenary army, the *contra* force". However, there is evidence to show that some armed opposition to the Government of Nicaragua existed in 1979-1980, even before any interference or support by the United States. Nicaragua dates the beginning of the activity of the United States to "shortly after" 9 March 1981, when, it was said, the President of the United States made a formal presidential finding authorizing the CIA to undertake "covert activities" directed against Nicaragua. According to the testimony of Commander

Carrión, who stated that the "organized military and paramilitary activities" began in December 1981, there were Nicaraguan "anti-government forces" prior to that date, consisting of

"just a few small bands very poorly armed, scattered along the northern border of Nicaragua and . . . composed mainly of ex-members of the Somoza's National Guard. They did not have any military effectiveness and what they mainly did was rustling cattle and killing some civilians near the borderlines."

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

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

"assistance" was cut off in September 1984, the size of the force was reported to be over 10,000 men.

95. The financing by the United States of the aid to the *contras* was initially undisclosed, but subsequently became the subject of specific legislative provisions and ultimately the stake in a conflict between the legislative and executive organs of the United States. Initial activities in 1981 seem to have been financed out of the funds available to the CIA for "covert" action : according to subsequent press reports quoted by Nicaragua, \$19.5 million was allocated to these activities. Subsequently, again according to press sources, a further \$19 million was approved in late 1981 for the purpose of the CIA plan for military and paramilitary operations authorized by National Security Decision Directive 117. The budgetary arrangements for funding subsequent operations up to the end of 1983 have not been made clear, though a press report refers to the United States Congress as having approved "about \$20 million" for the fiscal year to 30 September 1983, and from a Report of the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter called the "Intelligence Committee") it appears that the covert programme was funded by the Intelligence Authorization Act relating to that fiscal year, and by the Defense Appropriations Act, which had been amended by the House of Representatives so as to prohibit "assistance for the purpose of overthrowing the Government of Nicaragua". In May 1983, this Committee approved a proposal to amend the Act in question so as to prohibit United States support for military or paramilitary operations in Nicaragua. The proposal was designed to have substituted for these operations the provision of open security assistance to any friendly Central American country so as to prevent the transfer of military equipment from or through Cuba or Nicaragua. This proposal was adopted by the House of Representatives, but the Senate did not concur ; the executive in the meantime presented a request for \$45 million for the operations in Nicaragua for the fiscal year to 30 September 1984. Again conflicting decisions emerged from the Senate and House of Representatives, but ultimately a compromise was reached. In November 1983, legislation was adopted, coming into force on 8 December 1983, containing the following provision :

"During fiscal year 1984, not more than \$24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or

which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual." (Intelligence Authorization Act 1984, Section 108.)

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

"for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual", the Act provided \$14 million for that purpose if the President submitted a report to Congress after 28 February 1985 justifying such an appropriation, and both Chambers of Congress voted affirmatively to approve it. Such a report was submitted on 10 April 1985 ; it defined United States objectives toward Nicaragua in the following terms :

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

The changes sought were stated to be :

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

- reduction of Nicaragua's expanded military/security apparatus to restore military balance in the region ;
- severance of Nicaragua's military and security ties to the Soviet Bloc and Cuba and the return to those countries of their military and security advisers now in Nicaragua ; and
- implementation of Sandinista commitment to the Organization of American States to political pluralism, human rights, free elections, non-alignment, and a mixed economy.”

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

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

“\$27,000,000 for humanitarian assistance to the Nicaraguan democratic resistance. Such assistance shall be provided in such department or agency of the United States as the President shall designate, except the Central Intelligence Agency or the Department of Defense . . . As used in this subsection, the term ‘humanitarian assistance’ means the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death.”

The Joint Explanatory Statement of the Conference Committee noted that while the legislation adopted

"does prescribe these two agencies [CIA and DOD] from administering the funds and from providing any military training or advice to the democratic resistance... none of the prohibitions on the provision of military or paramilitary assistance to the democratic resistance prevents the sharing of intelligence information with the democratic resistance".

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

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

Finance for supporting the military and paramilitary activities of the *contras* was thus available from the budget of the United States Government from some time in 1981 until 30 September 1984; and finance limited to "humanitarian assistance" has been available since that date from the same source and remains authorized until 30 September 1986. It further appears, particularly since the restriction just mentioned was imposed, that financial and other assistance has been supplied from private sources in the United States, with the knowledge of the Government. So far as this was earmarked for "humanitarian assistance", it was actively encouraged by the United States President. According to press reports, the State Department made it known in September 1984 that the administration had decided "not to discourage" private American citizens and foreign governments from supporting the *contras*. The Court notes that this statement was prompted by an incident which indicated that some private assistance of a military nature was being provided.

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

"Cover operations under the CIA proposal, according to the NSC records, are intended to :

'Build popular support in Central America and Nicaragua for an opposition front that would be nationalistic, anti-Cuban and anti-Somoza.'

Support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere.

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

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

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

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

The CIA also supplied the FDN with intelligence, particularly as to Nicaraguan troop movements, derived from radio and telephonic interception, code-breaking, and surveillance by aircraft and satellites. Mr. Chamorro also refers to aircraft being supplied by the CIA ; from press reports it appears that those were comparatively small aircraft suitable for reconnaissance and a certain amount of supply-dropping, not for offensive

operations. Helicopters with Nicaraguan crews are reported to have taken part in certain operations of the "UCLAS" (see paragraph 86 above), but there is nothing to show whether these belonged to the *contras* or were lent by United States agencies.

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

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

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

for Nicaragua, on the impact on *contra* tactics of the availability of intelligence assistance and, still more important, supply aircraft.

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

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

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

108. Despite the large quantity of documentary evidence and testimony which it has examined, the Court has not been able to satisfy itself that the respondent State "created" the *contra* force in Nicaragua. It seems certain

that members of the former Somoza National Guard, together with civilian opponents to the Sandinista régime, withdrew from Nicaragua soon after that régime was installed in Managua, and sought to continue their struggle against it, even if in a disorganized way and with limited and ineffectual resources, before the Respondent took advantage of the existence of these opponents and incorporated this fact into its policies vis-à-vis the régime of the Applicant. Nor does the evidence warrant a finding that the United States gave "direct and critical combat support", at least if that form of words is taken to mean that this support was tantamount to direct intervention by the United States combat forces, or that all *contra* operations reflected strategy and tactics wholly devised by the United States. On the other hand, the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN.

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

110. So far as the potential control constituted by the possibility of cessation of United States military aid is concerned, it may be noted that after 1 October 1984 such aid was no longer authorized, though the sharing of intelligence, and the provision of "humanitarian assistance" as defined in the above-cited legislation (paragraph 97) may continue. Yet, according to Nicaragua's own case, and according to press reports, *contra* activity has continued. In sum, the evidence available to the Court indicates that the various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the *contra* force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the *contras* depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is *a fortiori* unable to determine that the *contra* force may be equated for

legal purposes with the forces of the United States. This conclusion, however, does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the *contras*.

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

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

* * *

113. The question of the degree of control of the *contras* by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the *contras* whereby the United States has, it is alleged, violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua. The activities in question are said to represent a tactic which includes "the spreading of terror and danger to non-combatants as an end in itself with no attempt to

observe humanitarian standards and no reference to the concept of military necessity". In support of this, Nicaragua has catalogued numerous incidents, attributed to "CIA-trained mercenaries" or "mercenary forces", of kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity. The declaration of Commander Carrón annexed to the Memorial lists the first such incident in December 1981, and continues up to the end of 1984. Two of the witnesses called by Nicaragua (Father Loison and Mr. Glennon) gave oral evidence as to events of this kind. By way of examples of evidence to provide "direct proof of the tactics adopted by the *contras* under United States guidance and control", the Memorial of Nicaragua offers a statement, reported in the press, by the ex-FDN leader Mr. Edgar Chamorro, repeated in the latter's affidavit, of assassinations in Nicaraguan villages : the alleged existence of a classified Defence Intelligence Agency report of July 1982, reported in the *New York Times* on 21 October 1984, disclosing that the *contras* were carrying out assassinations ; and the preparation by the CIA in 1983 of a manual of psychological warfare. At the hearings, reliance was also placed on the affidavit of Mr. Chamorro.

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

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the 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. Such acts could well be committed by members of the *contras* without the control of the United

States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

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

117. Nicaragua has in fact produced in evidence before the Court two publications which it claims were prepared by the CIA and supplied to the *contras* in 1983. The first of these, in Spanish, is entitled "*Operaciones sicológicas en guerra de guerrillas*" ("Psychological Operations in Guerrilla Warfare"), by "Tayacán" ; the certified copy supplied to the Court carries no publisher's name or date. In its Preface, the publication is described as "a manual for the training of guerrillas in psychological operations, and its application to the concrete case of the Christian and democratic crusade being waged in Nicaragua by the Freedom Com-mandos".

The second is entitled the *Freedom Fighter's Manual*, with the subtitle "Practical guide to liberating Nicaragua from oppression and misery by paralyzing the military-industrial complex of the traitorous marxist state without having to use special tools and with minimal risk for the combatant". The text is printed in English and Spanish, and illustrated with simple drawings : it consists of guidance for elementary sabotage techniques. The only indications available to the Court of its authorship are reports in the *New York Times*, quoting a United States Congressman and

Mr. Edgar Chamorro as attributing the book to the CIA. Since the evidence linking the *Freedom Fighter's Manual* to the CIA is no more than newspaper reports the Court will not treat its publication as an act imputable to the United States Government for the purposes of the present case.

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

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

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

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

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

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

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

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

The original purpose of the manual was to provide training to moderate FDN behavior in the field. Yet, the Committee believes that at the manual was written, edited, distributed and used without adequate supervision. No one but its author paid much attention

to the manual. Most CIA officials learned about it from news accounts.

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

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

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

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

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

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

* *

123. Nicaragua has complained to the Court of certain measures of an economic nature taken against it by the Government of the United States, beginning with the cessation of economic aid in April 1981, which it regards as an indirect form of intervention in its internal affairs. According to information published by the United States Government, it provided more than \$100 million in economic aid to Nicaragua between July 1979 and January 1981; however, concern in the United States Congress about certain activities attributed to the Nicaraguan Government led to a requirement that, before disbursing assistance to Nicaragua, the President certify that Nicaragua was not "aiding, abetting or supporting acts of violence or terrorism in other countries" (Special Central American Assistance Act, 1979, Sec. 536 (g)). Such a certification was given in September 1980 (45 Federal Register 62779), to the effect that

"on the basis of an evaluation of the available evidence, that the Government of Nicaragua 'has not co-operated with or harbors any international terrorist organization or is aiding, abetting or supporting acts of violence or terrorism in other countries'".

An official White House press release of the same date stated that

"The certification is based upon a careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field . . . Our intelligence agencies as well as our Embassies in Nicaragua and neighboring countries were fully consulted, and the diverse information and opinions from all sources were carefully weighed."

On 1 April 1981, however a determination was made to the effect that the United States could no longer certify that Nicaragua was not engaged in support for "terrorism" abroad, and economic assistance, which had been suspended in January 1981, was thereby terminated. According to the Nicaraguan Minister of Finance, this also affected loans previously contracted, and its economic impact was more than \$36 million per annum. Nicaragua also claims that, at the multilateral level, the United States has

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

acted in the Bank for International Reconstruction and Development and the Inter-American Development Bank to oppose or block loans to Nicaragua.

124. On 23 September 1983, the President of the United States made a proclamation modifying the system of quotas for United States imports of sugar, the effect of which was to reduce the quota attributed to Nicaragua by 90 per cent. The Nicaraguan Finance Minister assessed the economic impact of the measure at between \$15 and \$18 million, due to the preferential system of prices that sugar has in the market of the United States.

125. On 1 May 1985, the President of the United States made an Executive Order, which contained a finding that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States" and declared a "national emergency". According to the President's message to Congress, this emergency situation had been created by "the Nicaraguan Government's aggressive activities in Central America". The Executive Order declared a total trade embargo on Nicaragua, prohibiting all imports from and exports to that country, barring Nicaraguan vessels from United States ports and excluding Nicaraguan aircraft from air transportation to and from the United States.

* * *

126. The Court has before it, in the Counter-Memorial on jurisdiction and admissibility filed by the United States, the assertion that the United States, pursuant to the inherent right of individual and collective self-defence, and in accordance with the Inter-American Treaty of Reciprocal Assistance, has responded to requests from El Salvador, Honduras and Costa Rica, for assistance in their self-defence against aggression by Nicaragua. The Court has therefore to ascertain, so far as possible, the facts on which this claim is or may be based, in order to determine whether collective self-defence constitutes a justification of the activities of the United States here complained of. Furthermore, it has been suggested that, as a result of certain assurances given by the Nicaraguan "Junta of the Government of National Reconstruction" in 1979, the Government of Nicaragua is bound by international obligations as regards matters which would otherwise be matters of purely domestic policy, that it is in breach of those obligations, and that such breach might justify the action of the United States. The Court will therefore examine the facts underlying this suggestion also.

127. Nicaragua claims that the references made by the United States to

the justification of collective self-defence are merely "pretexts" for the activities of the United States. It has alleged that the true motive for the conduct of the United States is unrelated to the support which it accuses

Nicaragua of giving to the armed opposition in El Salvador, and that the real objectives of United States policy are to impose its will upon Nicaragua and force it to comply with United States demands. In the Court's view, however, if Nicaragua has been giving support to the armed opposition in El Salvador, and if this constitutes an armed attack on El Salvador and the other appropriate conditions are met, collective self-defence could be legally invoked by the United States, even though there may be the possibility of an additional motive, one perhaps even more decisive for the United States, drawn from the political orientation of the present Nicaraguan Government. The existence of an additional motive, other than that officially proclaimed by the United States, could not deprive the latter of its right to resort to collective self-defence. The conclusion to be drawn is that special caution is called for in considering the allegations of the United States concerning conduct by Nicaragua which may provide a sufficient basis for self-defence.

128. In its Counter-Memorial on jurisdiction and admissibility, the United States claims that Nicaragua has "promoted and supported guerrilla violence in neighboring countries", particularly in El Salvador; and has openly conducted cross-border military attacks on its neighbours, Honduras and Costa Rica. In support of this, it annexed to the Counter-Memorial an affidavit by Secretary of State George P. Shultz. In his affidavit, Mr. Shultz declares, *inter alia*, that:

"The United States has abundant evidence that the Government of Nicaragua has actively supported armed groups engaged in military and paramilitary activities in and against El Salvador, providing such groups with sites in Nicaragua for communications facilities, command and control headquarters, training and logistics support. The Government of Nicaragua is directly engaged with these armed groups in planning ongoing military and paramilitary activities conducted in and against El Salvador. The Government of Nicaragua also participates directly in the procurement, and transshipment through Nicaraguan territory, of large quantities of ammunition, supplies and weapons for the armed groups conducting military and paramilitary activities in and against El Salvador.

In addition to this support for armed groups operating in and against El Salvador, the Government of Nicaragua has engaged in similar support, albeit on a smaller scale, for armed groups engaged, or which have sought to engage, in military or paramilitary activities in and against the Republic of Costa Rica, the Republic of Honduras, and the Republic of Guatemala. The regular military forces of Nicaragua have engaged in several direct attacks on Honduran and Costa Rican territory, causing casualties among the armed forces and civilian populations of those States."

In connection with this declaration, the Court would recall the observa-

tions it has already made (paragraphs 69 and 70) as to the evidential value of declarations by ministers of the government of a State engaged in litigation concerning an armed conflict.

129. In addition, the United States has quoted Presidents Magaña and Duarte of El Salvador, press reports, and United States Government publications. With reference to the claim as to cross-border military attacks, the United States has quoted a statement of the Permanent Representative of Honduras to the Security Council, and diplomatic protests by the Governments of Honduras and Costa Rica to the Government of Nicaragua. In the subsequent United States Government publication "*Revolution Beyond Our Borders*", referred to in paragraph 73 above, these claims are brought up to date with further descriptive detail. Quoting "Honduran government records", this publication asserts that there were 35 border incursions by the Sandinista People's Army in 1981 and 68 in 1982.

130. In its pleading at the jurisdictional stage, the United States asserted the justification of collective self-defence in relation to alleged attacks on El Salvador, Honduras and Costa Rica. It is clear from the material laid before the Court by Nicaragua that, outside the context of the present judicial proceedings, the United States administration has laid the greatest stress on the question of arms supply and other forms of support to opponents of the Government in El Salvador. In 1983, on the proposal of the Intelligence Committee, the covert programme of assistance to the *contras* "was to be directed only at the interdiction of arms to El Salvador". Nicaragua's other neighbours have not been lost sight of, but the emphasis has continued to be on El Salvador : the United States Continuing Appropriations Act 1985, Section 8066 (b) (1) (A), provides for aid for the military or paramilitary activities in Nicaragua to be resumed if the President reports *inter alia* that

"the Government of Nicaragua is providing material or monetary support to anti-government forces engaged in military or paramilitary operations in El Salvador or other Central American countries".

131. In the proceedings on the merits, Nicaragua has addressed itself primarily to refuting the claim that it has been supplying arms and other assistance to the opponents of the Government of El Salvador ; it has not specifically referred to the allegations of attacks on Honduras or Costa Rica. In this it is responding to what is, as noted above, the principal justification announced by the United States for its conduct. In ascertaining whether the conditions for the exercise by the United States of the right of collective self-defence are satisfied, the Court will accordingly first consider the activities of Nicaragua in relation to El Salvador, as established by the evidence and material available to the Court. It will then consider whether Nicaragua's conduct in relation to Honduras or Costa

Rica may justify the exercise of that right ; in that respect it will examine only the allegations of direct cross-border attacks, since the affidavit of Mr. Shultz claims only that there was support by the provision of arms and supplies for military and paramilitary activities "on a smaller scale" in those countries than in El Salvador.

132. In its Declaration of Intervention dated 15 August 1984, the Government of El Salvador stated that : "The reality is that we are the victims of aggression and armed attack from Nicaragua and have been since at least 1980." (Para. IV.) The statements of fact in that Declaration are backed by a declaration by the Acting Minister for Foreign Affairs of El Salvador, similar in form to the declarations by Nicaraguan Ministers annexed to its pleadings. The Declaration of Intervention asserts that "terrorists" seeking the overthrow of the Government of El Salvador were "directed, armed, supplied and trained by Nicaragua" (para. II) ; that Nicaragua provided "houses, hideouts and communication facilities" (para. VI), and training centres managed by Cuban and Nicaraguan military personnel (para. VII). On the question of arms supply, the Declaration states that

"Although the quantities of arms and supplies, and the routes used, vary, there has been a continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country." (Para. VIII.)

133. In its observations, dated 10 September 1984, on the Declaration of Intervention of El Salvador, Nicaragua stated as follows :
 "The Declaration includes a series of paragraphs alleging activities by Nicaragua that El Salvador terms an 'armed attack'. The Court should know that this is the first time El Salvador has asserted it is under armed attack from Nicaragua. None of these allegations, which are properly addressed to the merits phase of the case, is supported by proof or evidence of any kind. Nicaragua denies each and every one of them, and stands behind the affidavit of its Foreign Minister, Father Miguel d'Escoto Brockmann, in which the Foreign Minister affirms that the Government of Nicaragua has not supplied arms or other materials of war to groups fighting against the Government of El Salvador or provided financial support, training or training facilities to such groups or their members."

134. Reference has also to be made to the testimony of one of the witnesses called by Nicaragua. Mr. David MacMichael (paragraph 99 above) said in evidence that he was in the full time employment of the CIA from March 1981 to April 1983, working for the most part on Inter-

American affairs. During his examination by counsel for Nicaragua, he stated as follows :

[Question :] In your opinion, if the Government of Nicaragua was sending arms to rebels in El Salvador, could it do so without detection by United States intelligence-gathering capabilities ?

[Answer :] In any significant manner over this long period of time I do not believe they could have done so.

Q.: And there was in fact no such detection during the period that you served in the Central Intelligence Agency ?

A.: No.

Q.: In your opinion, if arms in significant quantities were being sent from Nicaraguan territory to the rebels in El Salvador – with or without the Government's knowledge or consent – could these shipments have been accomplished without detection by United States intelligence capabilities ?

A.: If you say in significant quantities over any reasonable period of time, no I do not believe so.

Q.: And there was in fact no such detection during your period of service with the Agency ?

A.: No.

Q.: Mr. MacMichael, up to this point we have been talking about the period when you were employed by the CIA – 6 March 1981 to 3 April 1983. Now let me ask you without limit of time : did you see any evidence of arms going to the Salvadorian rebels from Nicaragua at any time ?

A.: Yes, I did.

Q.: When was that ?

A.: Late 1980 to very early 1981."

Mr. MacMichael indicated the sources of the evidence he was referring to, and his examination continued :

"[Question :] Does the evidence establish that the Government of Nicaragua was involved during this period ?

[Answer :] No, it does not establish it, but I could not rule it out."

135. After counsel for Nicaragua had completed his examination of the witness, Mr. MacMichael was questioned from the bench, and in this context he stated (*inter alia*) as follows :

"[Question :] Thus if the Government of Nicaragua had shipped arms to El Salvador before March 1981, for example in 1980 and early 1981, in order to arm the big January offensive of the insurgents in El

Salvador, you would not be in a position to know that ; is that correct ?

[Answer :] I think I have testified, your honour, that I reviewed the immediate past intelligence material at that time, that dealt with that period, and I have stated today that there was credible evidence and that on the basis of my reading of it I could not rule out a finding that the Nicaraguan Government had been involved during that period.

Q.: Would you rule it 'in' ?

A.: I prefer to stay with my answer that I could not rule it out, but to answer you as directly as I can my inclination would be more towards ruling 'in' than ruling 'out'.

Q.: I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadorian insurgency. Is that the conclusion I can draw from your remarks ?

A.: I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion."

In short, the Court notes that the evidence of a witness called by Nicaragua in order to negate the allegation of the United States that the Government of Nicaragua had been engaged in the supply of arms to the armed opposition in El Salvador only partly contradicted that allegation.

136. Some confirmation of the situation in 1981 is afforded by an internal Nicaraguan Government report, made available by the Government of Nicaragua in response to a request by the Court, of a meeting held in Managua on 12 August 1981 between Commander Ortega, Co-ordinator of the Junta of the Government of Nicaragua and Mr. Enders, Assistant Secretary of State for Inter-American Affairs of the United States. According to this report, the question of the flow of "arms, munitions and other forms of military aid" to El Salvador, was raised by Mr. Enders as one of the "major problems" (*problemas principales*). At one point he is reported to have said :

"On your part, you could take the necessary steps to ensure that the flow of arms to El Salvador is again halted as in March of this year. We do not seek to involve ourselves in deciding how and with whom this object should be achieved, but we may well monitor the results."

Later in the course of the discussion, the following exchange is recorded :

“/Ortega : As for the flow of arms to El Salvador, what must be stated is that as far as we have been informed by you, efforts have been made to stop it ; however, I want to make clear that there is a great desire here to collaborate with the Salvadorian people, also among members of our armed forces, although our Junta and the National Directorate have a decision that activities of this kind should not be permitted. We would ask you to give us reports about that flow to help us control it.

[Enders : / You have succeeded in doing so in the past and I believe you can do so now. We are not in a position to supply you with intelligence reports. We would compromise our sources, and our nations have not yet reached the necessary level to exchange intelligence reports.”

137. As regards the question, raised in this discussion, of the picture given by United States intelligence sources, further evidence is afforded by the 1983 Report of the Intelligence Committee (paragraphs 95, 109 above). In that Report, dated 13 May 1983, it was stated that

“The Committee has regularly reviewed voluminous intelligence material on Nicaraguan and Cuban support for leftist insurgencies since the 1979 Sandinista victory in Nicaragua.”

The Committee continued :

“At the time of the filing of this report, the Committee believes that the intelligence available to it continues to support the following judgments with certainty :

A major portion of the arms and other material sent by Cuba and other communist countries to the Salvadorian insurgents transits Nicaragua with the permission and assistance of the Sandinistas.

The Salvadorian insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material and propaganda activities.

The Sandinista leadership sanctions and directly facilitates all of the above functions.

Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.

In addition, Nicaragua and Cuba have provided – and appear to continue providing – training to the Salvadorian insurgents.”

The Court is not aware of the contents of any analogous report of a body with access to United States intelligence material covering a more recent

period. It notes however that the Resolution adopted by the United States Congress on 29 July 1985 record the expectation of Congress from the Government of Nicaragua of :

“the end to Sandinista support for insurgencies in other countries in the region, including the cessation of military supplies to the rebel forces fighting the democratically elected government in El Salvador”.

138. In its Declaration of Intervention, El Salvador alleges that “Nicaraguan officials have publicly admitted their direct involvement in waging war on us” (para. IX). It asserts that the Foreign Minister of Nicaragua admitted such support at a meeting of the Foreign Ministers of the Contadora Group in July 1983. Setting this against the declaration by the Nicaraguan Foreign Minister annexed to the Nicaraguan Memorial, denying any involvement of the Nicaraguan Government in the provision of arms or other supplies to the opposition in El Salvador, and in view of the fact that the Court has not been informed of the exact words of the alleged admission, or with any corroborative testimony from others present at the meeting, the Court cannot regard as conclusive the assertion in the Declaration of Intervention. Similarly, the public statement attributed by the Declaration of Intervention (para. XII) to Commander Ortega, referring to “the fact of continuing support to the Salvadorian guerrillas” cannot, even assuming it to be accurately quoted, be relied on as proof that that support (which, in the form of political support, is openly admitted by the Nicaraguan Government) takes any specific material form, such as the supply of arms.

139. The Court has taken note of four draft treaties prepared by Nicaragua in 1983, and submitted as an official proposal within the framework of the Contadora process, the text of which was supplied to the Court with the Nicaraguan Application. These treaties, intended to be “subscribed to by all nations that desire to contribute to the peaceful solution of the present armed conflict in the Republic of El Salvador” (p. 58), contained the following provisions :

“Article One

The High Contracting Parties promise to adopt in their respective territories whatever measures may be necessary to impede all supply and trafficking of arms, munitions and military equipment that may be made directly to the contending forces or indirectly through third States.

Article Two

The High Contracting Parties promise to not offer and, should such be the case, to suspend military assistance and training and the supply of the Contadora process, the text of which was supplied to the Court with the Nicaraguan Application. These treaties, intended to be “subscribed to by all nations that desire to contribute to the peaceful solution of the present armed conflict in the Republic of El Salvador.” (P. 60.)

In the Introduction to its proposal the Nicaraguan Government stated that it was ready to enter into an agreement of this kind immediately, even if only with the United States, "in order that the Government of that country cease justifying its interventionist policy in El Salvador on the basis of supposed actions by Nicaragua" (p. 58).

140. When filing its Counter-Memorial on the questions of jurisdiction and admissibility, the United States deposited a number of documents in the Registry of the Court, two of which are relevant to the questions here under examination. The first is a publication of the United States Department of State dated 23 February 1981, entitled *Communist Interference in El Salvador*, reproducing a number of documents (in Spanish with English translation) stated to have been among documents in "two particularly important document caches . . . recovered from the Communist Party of El Salvador (PCS) in November 1980 and the People's Revolutionary Army (ERP) in January 1981". A summary of the documents is also to be found in an attachment to the 1983 Report of the Intelligence Committee, filed by Nicaragua. The second is a "Background Paper" published by the United States Department of State and Department of Defense in July 1984, entitled *Nicaragua's Military Build-Up and Support for Central American Subversion*.

141. The full significance of the documents reproduced in the first of these publications, which are "written using cryptic language and abbreviations", is not readily apparent, without further assistance from United States experts, who might have been called as witnesses had the United States appeared in the proceedings. For example, there are frequent references to "Lagos" which, according to the United States, is a code-name for Nicaragua ; but without such assistance the Court cannot judge whether this interpretation is correct. There is also however some specific reference in an undated document to aid to the armed opposition "which all would pass through Nicaragua" – no code-name being here employed – which the Court must take into account for what it is worth.

142. The second document, the Background Paper, is stated to be based on "Sandinista documents, press reports, and interviews with captured guerrillas and defectors" as well as information from "intelligence sources" ; specific intelligence reports are not cited "because of the potential consequences of revealing sources and methods". The only material evidence included is a number of aerial photographs (already referred to in paragraph 88 above), and a map said to have been captured in a guerrilla camp in El Salvador, showing arms transport routes ; this map does not appear of itself to indicate that arms enter El Salvador from Nicaraguan territory.

143. The Court's attention has also been drawn to various press reports of statements by diplomats, by leaders of the armed opposition in El Salvador, or defectors from it, supporting the view that Nicaragua was

involved in the arms supply. As the Court has already explained, it regards press reports not as evidence capable of proving facts, but considers that they can nevertheless contribute, in some circumstances, to corroborating the existence of a particular fact (paragraph 62 above). The press reports here referred to will therefore be taken into account only to that extent.

144. In an interview published in English in the *New York Times Magazine* on 28 April 1985, and in Spanish in *ABC*, Madrid, on 12 May 1985 given by Daniel Ortega Saavedra, President of the Junta of Nicaragua, he is reported to have said :

"We've said that we're willing to send home the Cubans, the Russians, the rest of the advisers. We're willing to stop the movement of military aid, or any other kind of aid, through Nicaragua to El Salvador; and we're willing to accept international verification. In return, we're asking for one thing : that they don't attack us, that the United States stop arming and financing . . . the gangs that kill our people, burn our crops and force us to divert enormous human and economic resources into war when we desperately need them for development." ("Hemos dicho que estamos dispuestos a sacar a los cubanos, soviéticos y demás asesores ; a suspender todo tránsito por nuestro territorio de ayuda militar u ora a los salvadoreños, bajo verificación internacional. Hemos dicho que lo único que pedimos es que no nos agredan y que Estados Unidos no arme y financie . . . las bandas que entran a matarnos, a quemar las cosechas, y que nos obligan a distraer enormes recursos humanos y económicos que nos hacen una falta angustiosa para el desarrollo.")

The Court has to consider whether this press report can be treated as evidence of an admission by the Nicaraguan Head of State that the Nicaraguan Government is in a position to stop the movement of military or other aid through Nicaraguan territory to El Salvador ; and whether it can be deduced from this (in conjunction with other material) that the Nicaraguan Government is responsible for the supply or transit of such aid.

145. Clearly the remarks attributed to President Ortega raise questions as to his meaning, namely as to what exactly the Nicaraguan Government was offering to stop. According to Nicaragua's own evidence, President Ortega had offered during the meeting of 12 August 1981 to stop the arms flow if the United States would supply the necessary information to enable the Nicaraguan Government to track it down ; it may in fact be the interview of 12 August 1981 that President Ortega was referring to when he spoke of what had been said to the United States Government. At all events, against the background of the firm denial by the Nicaraguan Government of complicity in an arms flow to El Salvador, the Court cannot regard remarks of this kind as an admission that that Government

was in fact doing what it had already officially denied and continued subsequently to deny publicly.

146. Reference was made during the hearings to the testimony of defectors from Nicaragua or from the armed opposition in El Salvador ; the Court has no such direct testimony before it. The only material available in this respect is press reports, some of which were annexed to the United States Counter-Memorial on the questions of jurisdiction and admissibility. With appropriate reservations, the Court has to consider what the weight is of such material, which includes allegations of arms supply and of the training of Salvadoreans at a base near Managua. While the Court is not prepared totally to discount this material, it cannot find that it is of any great weight in itself. Still less can statements attributed in the press to unidentified diplomats stationed in Managua be regarded as evidence that the Nicaraguan Government was continuing to supply aid to the opposition in El Salvador.

147. The evidence or material offered by Nicaragua in connection with the allegation of arms supply has to be assessed bearing in mind the fact that, in responding to that allegation, Nicaragua has to prove a negative. Annexed to the Memorial was a declaration dated 21 April 1984 of Miguel d'Escoto Brockmann, the Foreign Minister of Nicaragua. In this respect the Court has, as in the case of the affidavit of the United States Secretary of State, to recall the observations it has already made (paragraphs 69 and 70) as to the evidential value of such declarations. In the declaration, the Foreign Minister states that the allegations made by the United States, that the Nicaraguan Government "is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the Government of El Salvador, are false". He continues :

"In truth, my government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador . . . Since my government came to power on July 19, 1979, its policy and practice has been to prevent our national territory from being used as a conduit for arms or other military supplies intended for other governments or rebel groups. In fact, on numerous occasions the security forces of my government have intercepted clandestine arms shipments, apparently destined for El Salvador, and confiscated them."

The Foreign Minister explains the geographical difficulty of patrolling Nicaragua's frontiers :

"Nicaragua's frontier with Honduras, to the north, is 530 kilometers long. Most of it is characterized by rugged mountains, or remote and dense jungles. Most of this border area is inaccessible by motorized land transport and simply impossible to patrol. To the south, Nicaragua's border with Costa Rica extends for 220 kilometers. This area is also characterized by dense and remote jungles and is also virtually inaccessible by land transport. As a small underdeveloped country with extremely limited resources, and with no modern or sophisticated detection equipment, it is not easy for us to seal off our borders to all unwanted and illegal traffic."

He then points out the complication of the presence of the *contras* along the northern and southern borders, and describes efforts by Nicaragua to obtain verifiable international agreements for halting all arms traffic in the region.

148. Before turning to the evidence offered by Nicaragua at the hearings, the Court would note that the action of the United States Government itself, on the basis of its own intelligence reports, does not suggest that arms supply to El Salvador from the territory of Nicaragua was continuous from July 1979, when the new régime took power in Managua, and the early months of 1981. The presidential Determination of 12 September 1980, for the purposes of the Special Central American Assistance Act 1979, quoted in paragraph 123 above, officially certified that the Government of Nicaragua was not aiding, abetting or supporting acts of violence or terrorism in other countries, and the press release of the same date emphasized the "careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field" for the purposes of the Determination. The 1983 Report of the Intelligence Committee, on the other hand, referring to its regular review of intelligence since "the 1979 Sandinista victory in Nicaragua", found that the intelligence available to it in May 1983 supported "with certainty" the judgment that arms and material supplied to "the Salvadorian insurgents transits Nicaragua with the permission and assistance of the Sandinistas" (see paragraph 137 above).

149. During the oral proceedings Nicaragua offered the testimony of Mr MacMichael, already reviewed above (paragraphs 134 and 135) from a different aspect. The witness, who was well placed to judge the situation from United States intelligence, stated that there was no detection by United States intelligence capabilities of arms traffic from Nicaraguan territory to El Salvador during the period of his service (March 1981 to April 1983). He was questioned also as to his opinion, in the light of official

statements and press reports, on the situation after he left the CIA and ceased to have access to intelligence material, but the Court considers it can attach little weight to statements of opinion of this kind (cf. paragraph 68 above).

150. In weighing up the evidence summarized above, the Court has to determine also the significance of the context of, or background to, certain statements or indications. That background includes, first, the ideological similarity between two movements, the Sandinista movement in Nicaragua and the armed opposition to the present government in El Salvador ; secondly the consequent political interest of Nicaragua in the weakening or overthrow of the government in power in El Salvador ; and finally, the sympathy displayed in Nicaragua, including among members of the army, towards the armed opposition in El Salvador. At the meeting of 12 August 1981 (paragraph 136 above), for example, Commander Ortega told the United States representative, Mr. Enders, that "we are interested in seeing the guerrillas in El Salvador and Guatemala triumph . . . and that there is a great desire here to collaborate with the Salvadorian people . . .". Against this background, various indications which, taken alone, cannot constitute either evidence or even a strong presumption of aid being given by Nicaragua to the armed opposition in El Salvador, do at least require to be examined meticulously on the basis that it is probable that they are significant.

151. It is in this light, for example, that one indirect piece of evidence acquires particular importance. From the record of the meeting of 12 August 1981 in Managua, mentioned in the preceding paragraph, it emerges that the Nicaraguan authorities may have immediately taken steps, at the request of the United States, to bring to a halt or prevent various forms of support to the armed opposition in El Salvador. The United States representative is there reported to have referred to steps taken by the Government of Nicaragua in March 1981 to halt the flow of arms to El Salvador, and his statement to that effect was not contradicted. According to a *New York Times* report (17 September 1985) Commander Ortega stated that around this time measures were taken to prevent an airstrip in Nicaragua from continuing to be used for these types of activities. This, in the Court's opinion, is an admission of certain facts, such as the existence of an airstrip designed to handle small aircraft, probably for the transport of weapons, the likely destination being El Salvador, even if the Court has not received concrete proof of such transport. The promptness with which the Nicaraguan authorities closed off this channel is a strong indication that it was in fact being used, or had been used for such a purpose.

152. The Court finds, in short, that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up to the early months of 1981. While the Court does not possess full proof that there was aid, or as to its exact nature, its scale and its continuance until the early months of

1981, it cannot overlook a number of concordant indications, many of which were provided moreover by Nicaragua itself, from which it can reasonably infer the provision of a certain amount of aid from Nicaraguan territory. The Court has already explained (paragraphs 64, 69 and 70) the precise degree to which it intended to take account, as regards factual evidence, of statements by members of the governments of the States concerned, including those of Nicaragua. It will not return to this point.

153. After the early months of 1981, evidence of military aid from or through Nicaragua remains very weak. This is so despite the deployment by the United States in the region of extensive technical resources for tracking, monitoring and intercepting air, sea and land traffic, described in evidence by Mr. MacMichael and its use of a range of intelligence and information sources in a political context where, moreover, the Government had declared and recognized surveillance of Nicaragua as a "high priority". The Court cannot of course conclude from this that no trans-border traffic in arms existed, although it does not seem particularly unreasonable to believe that traffic of this kind, had it been persistent and on a significant scale, must inevitably have been discovered, in view of the magnitude of the resources used for that purpose. The Court merely takes note that the allegations of arms-trafficking are not solidly established ; it has not, in any event, been able to satisfy itself that any continuing flow on a significant scale took place after the early months of 1981.

154. In this connection, it was claimed in the Declaration of Intervention by El Salvador that there was a "continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country" (para. VII), and El Salvador also affirmed the existence of "land infiltration routes between Nicaragua and El Salvador". Had evidence of this become available, it is not apparent why El Salvador, given full knowledge of an arms-flow and the routes used, could not have put an end to the traffic, either by itself or with the assistance of the United States, which has deployed such powerful resources. There is no doubt that the United States and El Salvador are making considerable effort to prevent any infiltration of weapons and any form of support to the armed opposition in El Salvador from the direction of Nicaragua. So far as the Court has been informed, however, they have not succeeded in tracing and intercepting this infiltration and these various forms of support. Consequently, it can only interpret the lack of evidence of the transborder arms-flow in one of the following two ways : either this flow exists, but is neither as frequent nor as considerable as alleged by the respondent State ; or it is being carried on without the knowledge, and against the will, of a government which would rather put a stop to it. If this latter conclusion is at all valid with regard to El Salvador and the United States it must therefore be at least equally valid with regard to Nicaragua.

155. Secondly, even supposing it well established that military aid is

reaching the armed opposition in El Salvador from the territory of Nicaragua, it still remains to be proved that this aid is imputable to the authorities of the latter country. Indeed, the applicant State has in no way sought to conceal the possibility of weapons en route to the armed opposition in El Salvador crossing its territory but it denies that this is the result of any deliberate official policy on its part. As the Court observed in 1949 :

"it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof." (*Corfu Channel, I.C.J. Reports 1949*, p. 18.)

Here it is relevant to bear in mind that there is reportedly a strong will for collaboration and mutual support between important elements of the populations of both El Salvador and Nicaragua, not least among certain members of the armed forces in Nicaragua. The Court sees no reason to dismiss these considerations, especially since El Salvador itself recognizes the existence in Nicaraguan coastal areas of "traditional smugglers" (Declaration, para. VIII, H), because Nicaragua is accused not so much of delivering weapons itself as of allowing them to transit through its territory ; and finally because evidence has been provided, in the report of the meeting of 12 August 1981 referred to in paragraph 136 above, of a degree of co-operation between the United States and Nicaragua for the purpose of putting a stop to these arms deliveries. The continuation of this co-operation does not seem to have depended solely on the Government of Nicaragua, for the Government of the United States, which in 1981 again raised with it the question of this traffic, this time refused to provide the Nicaraguan authorities, as it had on previous occasions, with the specific information and details that would have enabled them to call a halt to it. Since the Government of the United States has justified its refusal by claiming that any disclosure would jeopardize its sources of information, the Court has no means of assessing the reality or cogency of the undivulged evidence which the United States claimed to possess.

156. In passing, the Court would remark that, if this evidence really existed, the United States could be expected to have taken advantage of it in order to forestall or disrupt the traffic observed ; it could presumably for example arrange for the deployment of a strong patrol force in El Salvador and Honduras, along the frontiers of these States with Nicaragua. It is difficult to accept that it should have continued to carry out military and paramilitary activities against Nicaragua if their only purpose was, as alleged, to serve as a riposte in the exercise of the right of collective self-defence. If, on the other hand, this evidence does not exist, that, as the Court has pointed out, implies that the arms traffic is so insignificant and

casual that it escapes detection even by the sophisticated techniques employed for the purpose, and that, *a fortiori*, it could also have been carried on unbeknown to the Government of Nicaragua, as that Government claims. These two conclusions mutually support each other.

157. This second hypothesis would provide the Court with a further reason for taking Nicaragua's affirmation into consideration, in that, if the flow of arms is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States. In particular, when Nicaragua is blamed for allowing consignments of arms to cross its territory, this is tantamount, where El Salvador is concerned, to an admission of its inability to stem the flow. This is revealing as to the predicament of any government, including that of Nicaragua, faced with this arms traffic : its determination to put a stop to it would be likely to fail. More especially, to the extent that some of this aid is said to be successfully routed through Honduras, this accusation against Nicaragua would also signify that Honduras, which is not suspected of seeking to assist the armed opposition in El Salvador, is providing involuntary proof that it is by no means certain that Nicaragua can combat this clandestine traffic any better than Honduras. As the means at the disposal of the governments in the region are roughly comparable, the geographical obstacles, and the intrinsic character of any clandestine arms traffic, simply show that this traffic may be carried on successfully without any complicity from governmental authorities, and even when they seek to put a stop to it. Finally, if it is true that the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadorian armed opposition supplied, this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal for subduing this traffic if it takes place on its territory and the authorities endeavour to put a stop to it.

158. Confining itself to the regional States concerned, the Court accordingly considers that it is scarcely possible for Nicaragua's responsibility for an arms traffic taking place on its territory to be automatically assumed while the opposite assumption is adopted with regard to its neighbours in respect of similar traffic. Having regard to the circumstances characterizing this part of Central America, the Court considers it more realistic, and consistent with the probabilities, to recognize that an activity of that nature, if on a limited scale, may very well be pursued unbeknown to the territorial government.

159. It may be objected that the Nicaraguan authorities are alleged to have declared on various occasions that military assistance to the armed opposition in El Salvador was part of their official policy. The Court has already indicated that it is unable to give weight to alleged statements to that effect of which there is insufficient evidence. In the report of the diplomatic talks held on 12 August 1981 at Managua, Commander Ortega

did not in any sense promise to cease sending arms, but, on the contrary, said on the one hand that Nicaragua had taken immediate steps to put a stop to it once precise information had been given and, on the other hand, expressed inability to take such steps where Nicaragua was not provided with information enabling that traffic to be located. The Court would further observe that the four draft treaties submitted by Nicaragua within the Contadora process in 1983 (quoted in paragraph 139 above) do not constitute an admission by Nicaragua of the supply of assistance to the armed opposition in El Salvador, but simply make provision for the future in the context of the inter-American system, in which a State is prohibited from assisting the armed opposition within another State.

160. On the basis of the foregoing, the Court is satisfied that, between July 1979, the date of the fall of the Somoza régime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period.

* * *

161. The Court therefore turns to the claim that Nicaragua has been responsible for cross-border military attacks on Honduras and Costa Rica. The United States annexed to its Counter-Memorial on jurisdiction, *inter alia*, a document entitled "Résumé of Sandinista Aggression in Honduran Territory in 1982" issued by the Press and Information Officer of the Honduran Ministry of Foreign Relations on 23 August 1982. That document listed 35 incidents said to involve violations of Honduran territory, territorial waters or airspace, attacks on and harassment of the Honduran population or Honduran patrols between 30 January 1982 and 21 August 1982. Also attached to the Counter-Memorial were copies of diplomatic Notes from Honduras to Nicaragua protesting at other incidents stated to have occurred in June/July 1983 and July 1984. The Court has no information as to whether Nicaragua replied to these communications, and if so in what terms.

162. With regard to Costa Rica, the United States has supplied the text of diplomatic Notes of protest from Costa Rica to Nicaragua concerning incidents in September 1983, February 1984 and April 1984, and a Note from Costa Rica to the Foreign Ministers of Colombia, Mexico, Panama and Venezuela, referring to an incident of 29 April 1984, and requesting the sending of a mission of observers. Again, the Court has no information as

to the contemporary reaction of Nicaragua to these allegations ; from press reports it appears that the matter was later amicably settled.

163. As the Court has already observed (paragraphs 130 to 131 above), both the Parties have addressed themselves primarily to the question of aid by the Government of Nicaragua to the armed opposition in El Salvador, and the question of aggression directed against Honduras and Costa Rica has fallen somewhat into the background. Nevertheless the allegation that such aggression affords a basis for the exercise by the United States of the right of collective self-defence remains on the record ; and the Court has to note that Nicaragua has not taken the opportunity during the proceedings of expressly refuting the assertion that it has made cross-border military attacks on the territory of those two States. At the opening of the hearings in 1984, on the questions of jurisdiction and admissibility, the Agent of Nicaragua referred to the "supposed armed attacks of Nicaragua against its neighbours", and proceeded to "reiterate our denial of these accusations which in any case we will amply address in the merits phase of these proceedings". However, the declaration of the Nicaraguan Foreign Minister annexed to the Memorial on the merits filed on 30 April 1985, while repudiating the accusation of support for the armed opposition in El Salvador, did not refer at all to the allegation of border incidents involving Honduras and Costa Rica.

164. The Court, while not as fully informed on the question as it would wish to be, therefore considers as established the fact that certain trans-border military incursions into the territory of Honduras and Costa Rica are imputable to the Government of Nicaragua. The Court is also aware of the fact that the FDN operates along the Nicaraguan border with Honduras, and the ARDE operates along the border with Costa Rica.

* * *

165. In view of the assertion by the United States that it has acted in exercise of the right of collective self-defence for the protection of El Salvador, Honduras and Costa Rica, the Court has also to consider the evidence available on the question whether those States, or any of them, made a request for such protection. In its Counter-Memorial on jurisdiction and admissibility, the United States informed the Court that "El Salvador, Honduras, and Costa Rica have each sought outside assistance, principally from the United States, in their self-defense against Nicaragua's aggression. Pursuant to the inherent right of individual and collective self-defense, and in accordance with the terms of the Inter-American Treaty of Reciprocal Assistance, the United States has responded to these requests."

No indication has however been given of the dates on which such requests for assistance were made. The affidavit of Mr. Shultz, Secretary of State,

dated 14 August 1984 and annexed to the United States Counter-Memorial on jurisdiction and admissibility, while asserting that the United States is acting in accord with the provisions of the United Nations Charter, and pursuant to the inherent right of self defence, makes no express mention of any request for assistance by the three States named. El Salvador, in its Declaration of Intervention in the present proceedings of 15 August 1984, stated that, faced with Nicaraguan aggression,

"we have been called upon to defend ourselves, but our own economic and military capability is not sufficient to face any international apparatus that has unlimited resources at its disposal, and we have, therefore, requested support and assistance from abroad. It is our natural, inherent right under Article 51 of the Charter of the United Nations to have recourse to individual and collective acts of self-defence. It was with this in mind that President Duarte, during a recent visit to the United States and in discussions with United States congressmen, reiterated the importance of this assistance for our defence from the United States and the democratic nations of the world." (Para. XII.)

Again, no dates are given, but the Declaration continues "This was also done by the Revolutionary Junta of Government and the Government of President Magaña", i.e., between October 1979 and December 1980, and between April 1982 and June 1984.

166. The Court however notes that according to the report, supplied by the Agent of Nicaragua, of the meeting on 12 August 1981 between President Ortega of Nicaragua and Mr. Enders, the latter is reported to have referred to action which the United States might take "if the arms race in Central America is built up to such a point that some of your [sc. Nicaragua's] neighbours in Central America seek protection from us under the Inter-American Treaty [of Reciprocal Assistance]."

This remark might be thought to carry the implication that no such request had yet been made. Admittedly, the report of the meeting is a unilateral one, and its accuracy cannot be assumed as against the United States. In conjunction with the lack of direct evidence of a formal request for assistance from any of the three States concerned to the United States, the Court considers that this report is not entirely without significance.

* * *

167. Certain events which occurred at the time of the fall of the régime of President Somoza have next to be mentioned, since reliance has been placed on them to support a contention that the present Government of Nicaragua is in violation of certain alleged assurances given by its imme-

diate predecessor, the Government of National Reconstruction, in 1979. From the documents made available to the Court, at its request, by Nicaragua, it appears that what occurred was as follows. On 23 June 1979, the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States adopted by majority, over the negative vote of, *inter alios*, the representative of the Somoza government of Nicaragua, a resolution on the subject of Nicaragua. By that resolution after declaring that "the solution of the serious problem is exclusively within the jurisdiction of the people of Nicaragua", the Meeting of Consultation declared

"That in the view of the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs this solution should be arrived at on the basis of the following :

1. Immediate and definitive replacement of the Somoza régime.
2. Installation in Nicaraguan territory of a democratic government, the composition of which should include the principal representative groups which oppose the Somoza régime and which reflects the free will of the people of Nicaragua.
3. Guarantee of the respect for human rights of all Nicaraguans without exception.
4. The holding of free elections as soon as possible, that will lead to the establishment of a truly democratic government that guarantees peace, freedom, and justice."

On 12 July 1979, the five members of the Nicaraguan "Junta of the Government of National Reconstruction", sent from Costa Rica a telegram to the Secretary-General of the Organization of American States, communicating the "Plan of the Government of National Reconstruction to Secure Peace". The telegram explained that the plan had been developed on the basis of the Resolution of the Seventeenth Meeting of Consultation ; in connection with that plan, the Junta members stated that they wished to "ratify" (*ratificare*) some of the "goals that have inspired their government". These included, first

"our firm intention to establish full observance of human rights in our country in accordance with the United Nations Universal Declaration of the Rights of Man /sic/, and the Charter on Human Rights of the Organization of American States" ;

the Inter-American Commission on Human Rights was invited "to visit our country as soon as we are installed in our national territory". A further goal was

"the plan to call the first free elections our country has known in this century, so that Nicaraguans can elect their representatives to the city councils and to a constituent assembly, and later elect the country's highest authorities".

The Plan to Secure Peace provided for the Government of National Reconstruction, as soon as established, to decree a Fundamental Statute and an Organic Law, and implement the Program of the Government of National Reconstruction. Drafts of these texts were appended to the Plan ; they were enacted into law on 20 July 1979 and 21 August 1979.

168. In this connection, the Court notes that, since thus announcing its objectives in 1979, the Nicaraguan Government has in fact ratified a number of international instruments on human rights. At the invitation of the Government of Nicaragua, the Inter-American Commission on Human Rights visited Nicaragua and compiled two reports (OEA/Ser.L/V/11.53 and 62). A state of emergency was declared by the Nicaraguan Government (and notified to the United Nations Secretary-General) in July 1979, and was re-declared or extended on a number of subsequent occasions. On 4 November 1984, presidential and legislative elections were held, in the presence of foreign observers ; seven political parties took part in the election, while three parties abstained from taking part on the ground that the conditions were unsatisfactory.

169. The view of the United States as to the legal effect of these events is reflected in, for example, a Report submitted to Congress by President Reagan on 10 April 1985 in connection with finance for the *contras*. It was there stated that one of the changes which the United States was seeking from the Nicaraguan Government was :

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

A fuller statement of those views is contained in a formal finding by Congress on 29 July 1985, to the following effect :

“(A) the Government of National Reconstruction of Nicaragua formally accepted the June 23, 1979, resolution as a basis for resolving the Nicaraguan conflict in its ‘Plan to Achieve Peace’ which was submitted to the Organization of American States on July 12, 1979 ;

(B) the June 23, 1979, resolution and its acceptance by the Government of National Reconstruction of Nicaragua was the formal basis for the removal of the Somoza régime and the installation of the Government of National Reconstruction ;

(C) the Government of National Reconstruction, now known as the Government of Nicaragua and controlled by the Frente Sandinista (the FSLN), has flagrantly violated the provisions of the June 23, 1979, resolution, the rights of the Nicaraguan people, and the security of the nations in the region, in that it –

- (i) no longer includes the democratic members of the Government of National Reconstruction in the political process ;
- (ii) is not a government freely elected under conditions of freedom of the press, assembly, and organization, and is not recognized as freely elected by its neighbors, Costa Rica, Honduras, and El Salvador ;
- (iii) has taken significant steps towards establishing a totalitarian Communist dictatorship, including the formation of FSLN neighborhood watch committees and the enactment of laws that violate human rights and grant undue executive power ;
- (iv) has committed atrocities against its citizens as documented in reports by the Inter-American Commission on Human Rights of the Organization of American States ;
- (v) has aligned itself with the Soviet Union and Soviet allies, including the German Democratic Republic, Bulgaria, Libya, and the Palestine Liberation Organization ;
- (vi) has committed and refuses to cease aggression in the form of armed subversion against its neighbors in violation of the Charter of the United Nations, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention ; and

- (vii) has built up an army beyond the needs of immediate self-defense, at the expense of the needs of the Nicaraguan people and about which the nations of the region have expressed deepest concern.”

170. The resolution goes on to note the belief expressed by Costa Rica, El Salvador and Honduras that

“their peace and freedom is not safe so long as the Government of Nicaragua excludes from power most of Nicaragua’s political leadership and is controlled by a small sectarian party, without regard to the will of the majority of Nicaraguans”

and adds that

“the United States, given its role in the installation of the current Government of Nicaragua, has a special responsibility regarding the implementation of the commitments made by that Government in 1979, especially to those who fought against Somoza to bring democracy to Nicaragua with United States support”.

Among the findings as to the “Resolution of the Conflict” is the statement that the Congress

"supports the Nicaraguan democratic resistance in its efforts to peacefully resolve the Nicaraguan conflict and to achieve the fulfillment of the Government of Nicaragua's solemn commitments to the Nicaraguan people, the United States, and the Organization of American States".

From the transcripts of speeches and press conferences supplied to the Court by Nicaragua, it is clear that the resolution of Congress expresses a view shared by the President of the United States, who is constitutionally responsible for the foreign policy of the United States.

171. The question whether the alleged violations by the Nicaraguan Government of the 1979 Resolution of the Organization of American States Meeting of Consultation, listed in paragraph 169, are relied on by the United States Government as legal justifications of its conduct towards Nicaragua, or merely as political arguments, will be examined later in the present Judgment. It may however be observed that the resolution clearly links United States support for the *contras* to the breaches of what the United States regards as the "solemn commitments" of the Government of Nicaragua.

* * * * *

172. The Court has now to turn its attention to the question of the law applicable to the present dispute. In formulating its view on the significance of the United States multilateral treaty reservation, the Court has reached the conclusion that it must refrain from applying the multilateral treaties invoked by Nicaragua in support of its claims, without prejudice either to other treaties or to the other sources of law enumerated in Article 38 of the Statute. The first stage in its determination of the law actually to be applied to this dispute is to ascertain the consequences of the exclusion of the applicability of the multilateral treaties for the definition of the content of the customary international law which remains applicable.

173. According to the United States, these consequences are extremely wide-ranging. The United States has argued that :

"Just as Nicaragua's claims allegedly based on 'customary and general international law' cannot be determined without recourse to the United Nations Charter as the principal source of that law, they also cannot be determined without reference to the 'particular international law' established by multilateral conventions in force among the parties."

The United States contends that the only general and customary international law on which Nicaragua can base its claims is that of the Charter : in particular, the Court could not, it is said, consider the lawfulness of an alleged use of armed force without referring to the "principal source of the

relevant international law", namely, Article 2, paragraph 4, of the United Nations Charter. In brief, in a more general sense "the provisions of the United Nations Charter relevant here subsume and supersede related principles of customary and general international law". The United States concludes that "since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all of Nicaragua's claims". Thus the effect of the reservation in question is not, it is said, merely to prevent the Court from deciding upon Nicaragua's claims by applying the multilateral treaties in question ; it further prevents it from applying in its decision any rule of customary international law the content of which is also the subject of a provision in those multilateral treaties.

174. In its Judgment of 26 November 1984, the Court has already commented briefly on this line of argument. Contrary to the views advanced by the United States, it affirmed that it

"cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated." (*I.C.J. Reports 1984*, p. 424, para. 73.)

Now that the Court has reached the stage of a decision on the merits, it must develop and refine upon these initial remarks. The Court would observe that, according to the United States argument, it should refrain from applying the rules of customary international law because they have been "subsumed" and "superseded" by those of international treaty law, and especially those of the United Nations Charter. Thus the United States apparently takes the view that the existence of principles in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content.

175. The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in

the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.

176. As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law ; this reference to customary law is contained in the actual text of Article 51, which mentions the “inherent right” (in the French text the “droit naturel”) of individual or collective self-defence, which “nothing in the present Charter shall impair” and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the “armed attack” which, if found to exist, authorizes the exercise of the “inherent right” of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which “subsumes and supervenes” customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.

177. But as observed above (paragraph 175), even if the customary norm and the treaty norm were to have exactly the same content, this

would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the *North Sea Continental Shelf* cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to “crystallize”, or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle : on the contrary, it considered it to be clear that certain other articles of the treaty in question “were ... regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law” (*I.C.J. Reports 1969*, p. 39, para. 63). More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter “supervenes” the former, so that the customary international law has no further existence of its own.

178. There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability. In a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State’s conduct in respect of the application of other rules, on other subjects, also included in the same treaty. For example, if a State exercises its right to terminate or suspend the operation of a treaty on the ground of the violation by the other party of a “provision essential to the accomplishment of the object or purpose of the treaty” (in the words of Art. 60, para. 3 (b), of the Vienna Convention on the Law of Treaties), it is exempted, vis-à-vis the other State, from a rule of treaty-law because of the breach by that other State of a different rule of treaty-law. But if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule. Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are

customary rules or treaty rules. The present dispute illustrates this point.

179. It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content. Consequently, in ascertaining the content of the customary international law applicable to the present dispute, the Court must satisfy itself that the Parties are bound by the customary rules in question ; but the Court is in no way bound to uphold these rules only in so far as they differ from the treaty rules which it is prevented by the United States reservation from applying in the present dispute.

180. The United States however presented a further argument, during the proceedings devoted to the question of jurisdiction and admissibility, in support of its contention that the multilateral treaty reservation debars the Court from considering the Nicaraguan claims based on customary international law. The United States observed that the multilateral treaties in question contain legal standards specifically agreed between the Parties to govern their mutual rights and obligations, and that the conduct of the Parties will continue to be governed by these treaties, irrespective of what the Court may decide on the customary law issue, because of the principle of *pacta sunt servanda*. Accordingly, in the contention of the United States, the Court cannot properly adjudicate the mutual rights and obligations of the two States when reference to their treaty rights and obligations is barred ; the Court would be adjudicating those rights and obligations by standards other than those to which the Parties have agreed to conduct themselves in their actual international relations.

181. The question raised by this argument is whether the provisions of the multilateral treaties in question, particularly the United Nations Charter, diverge from the relevant rules of customary international law to such an extent that a judgment of the Court as to the rights and obligations of the parties under customary law, disregarding the content of the multilateral treaties binding on the parties, would be a wholly academic exercise, and not "susceptible of any compliance or execution whatever" (*Northern Cameroons, I.C.J. Reports 1963, p. 37*). The Court does not consider that this is the case. As already noted, on the question of the use of force, the United States itself argues for a complete identity of the relevant rules of customary international law with the provisions of the Charter. The Court has not accepted this extreme contention, having found that on a number of points the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content (paragraph 174, above). However, so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter,

to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution.

182. The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes "arising under" the United Nations and Organization of American States Charters.

* * *

183. In view of this conclusion, the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States ; as the Court recently observed,

"It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985, pp. 29-30*, para. 27.)

In this respect the Court must not lose sight of the Charter of the United Nations and that of the Organization of American States, notwithstanding the operation of the multilateral treaty reservation. Although the Court has no jurisdiction to determine whether the conduct of the United States constitutes a breach of those conventions, it can and must take them into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed.

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*,

international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.

185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element" – the expression used by the Court in its 1969 Judgment in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 44) – that the Court has to appraise the relevant practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

* *

187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and

admissibility the United States asserts that "Article 2 (4) of the Charter is customary and general international law". It quotes with approval an observation by the International Law Commission to the effect that "the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force" (*ILC Yearbook*, 1966, Vol. II, p. 247).

The United States points out that Nicaragua has endorsed this view, since one of its counsel asserted that "indeed it is generally considered by publicists that Article 2, paragraph 4, of the United Nations Charter is in this respect an embodiment of existing general principles of international law". And the United States concludes :

"In sum, the provisions of Article 2 (4) with respect to the lawfulness of the use of force are 'modern customary law' (International Law Commission, *loc. cit.*) and the 'embodiment of general principles of international law' (counsel for Nicaragua, Hearing of 25 April 1984, morning, *loc. cit.*). There is no other customary and general international law on which Nicaragua can rest its claims."

"It is, in short, inconceivable that this Court could consider the lawfulness of an alleged use of armed force without referring to the principal source of the relevant international law – Article 2 (4) of the United Nations Charter."

As for Nicaragua, the only noteworthy shade of difference in its view lies in Nicaragua's belief that
"in certain cases the rule of customary law will not necessarily be identical in content and mode of application to the conventional rule".

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced

from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

189. As regards the United States in particular, the weight of an expression of *opinio juris* can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression (18 February 1928) and ratification of the Montevideo Convention on Rights and Duties of States (26 December 1933). Article 11 of which imposes the obligation not to recognize territorial acquisitions or special advantages which have been obtained by force. Also significant is United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), whereby the participating States undertake to "refrain in their mutual relations, as well as in their international relations in general," (emphasis added) from the threat or use of force. Acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States prohibiting the use of force in international relations.

190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*" (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-II, p. 247). Nicaragua in its

Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*". The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of *jus cogens*".

191. As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force. In particular, according to this resolution :

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

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

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

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

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

192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is found :

“Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.”

In the context of the inter-American system, this approach can be traced back at least to 1928 (Convention on the Rights and Duties of States in the Event of Civil Strife, Art. I (1)) ; it was confirmed by resolution 78 adopted by the General Assembly of the Organization of American States on 21 April 1972. The operative part of this resolution reads as follows :

“*The General Assembly Resolves :*

1. To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of nonintervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.
 2. To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.
 3. Similarly, to reaffirm the obligation of these states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles.”
193. The general rule prohibiting force allows for certain exceptions. In view of the arguments advanced by the United States to justify the acts of which it is accused by Nicaragua, the Court must express a view on the content of the right of self-defence, and more particularly the right of collective self-defence. First, with regard to the existence of this right, it notes that in the language of Article 51 of the United Nations Charter, the inherent right (or “droit naturel”) which any State possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law. Moreover, just as the wording of certain General Assembly declarations adopted by States demonstrates their recognition of the principle of the prohibition of force as definitely a matter of customary international law, some of the wording in those declarations operates similarly in respect of the right of self-defence (both collective and individual). Thus, in the declaration quoted above on the

Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the reference to the prohibition of force is followed by a paragraph stating that :

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

This resolution demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

194. With regard to the characteristics governing the right of self-defence, since the Parties consider the existence of this right to be established as a matter of customary international law, they have concentrated on the conditions governing its use. In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue. The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred.

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (*inter alia*) an actual armed attack conducted by regular forces, “or its substantial involvement therein”. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the

Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

196. The question remains whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State also depends on a request addressed by that State to the third State. A provision of the Charter of the Organization of American States is here in point : and while the Court has no jurisdiction to consider that instrument as applicable to the dispute, it may examine it to ascertain what light it throws on the content of customary international law. The Court notes that the Organization of American States Charter includes, in Article 3 (*f*), the principle that : "an act of aggression against one American State is an act of aggression against all the other American States" and a provision in Article 27 that :

"Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States."

197. Furthermore, by Article 3, paragraph 1, of the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947, the High-Contracting Parties

"agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations";

and under paragraph 2 of that Article,

"On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate

measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity."

(The 1947 Rio Treaty was modified by the 1975 Protocol of San José, Costa Rica, but that Protocol is not yet in force.)
198. The Court observes that the Treaty of Rio de Janeiro provides that measures of collective self-defence taken by each State are decided "on the request of the State or States directly attacked". It is significant that this requirement of a request on the part of the attacked State appears in the treaty particularly devoted to these matters of mutual assistance ; it is not found in the more general text (the Charter of the Organization of American States), but Article 28 of that Charter provides for the application of the measures and procedures laid down in "the special treaties on the subject".

199. At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.

200. At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of this right of self-defence must be "immediately reported" to the Security Council. As the Court has observed above (paragraphs 178 and 188), a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.

201. To justify certain activities involving the use of force, the United States has relied solely on the exercise of its right of collective self-defence. However the Court, having regard particularly to the non-participation of the United States in the merits phase, considers that it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities. It does not, however, see any need to reopen the question of the conditions governing the exercise of the right of individual self-defence, which have already been examined in connection with collective self-defence. On the other hand, the Court must enquire whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack. It will examine this point in connection with an analysis of the principle of non-intervention in customary international law.

* * *

202. The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference ; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed : "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" (*I.C.J. Reports 1949*, p. 35), and international law requires political integrity also to be respected. Expressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find. Of course, statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal and external affairs of other States, since this principle is not, as such, spelt out in the Charter. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States. In the *Corfu Channel* case, when a State claimed a right of intervention in order to secure evidence in the territory of another State for submission to an international tribunal (*I.C.J. Reports 1949*, p. 34), the Court observed that :

"the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here ; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." (*I.C.J. Reports 1949*, p. 35.)

203. The principle has since been reflected in numerous declarations adopted by international organizations and conferences in which the United States and Nicaragua have participated, e.g., General Assembly resolution 2131 (XX), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It is true that the United States, while it voted in favour of General Assembly resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law" (*Official Records of the General Assembly, Twentieth Session*, First Committee, A/C.1/SR.1423, p. 436). However, the essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be "basic principles" of international law, and on the adoption of which no analogous statement was made by the United States representative.

204. As regards inter-American relations, attention may be drawn to, for example, the United States reservation to the Montevideo Convention on Rights and Duties of States (26 December 1933), declaring the opposition of the United States Government to "interference with the freedom, the sovereignty or other internal affairs, or processes of the Governments of other nations" ; or the ratification by the United States of the Additional Protocol relative to Non-Intervention (23 December 1936). Among more recent texts, mention may be made of resolutions AG/RES/78 and AG/RES/128 of the General Assembly of the Organization of American States. In a different context, the United States expressly accepted the principles set forth in the declaration, to which reference has already been made, appearing in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), including an elaborate statement of the principle of non-intervention ; while these principles were presented as applying to the mutual relations among the participating States, it can be inferred that the text testifies to the existence, and the acceptance by the United States, of a customary principle which has universal application.

205. Notwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions : first,

what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law? As regards the first problem – that of the content of the principle of non-intervention – the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191), General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force". These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. In view of the nature of Nicaragua's complaints against the United States, and those expressed by the United States in regard to Nicaragua's conduct towards El Salvador, it is primarily acts of intervention of this kind with which the Court is concerned in the present case.

206. However, before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it. There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State. The Court is not here concerned with the process of decolonization; this question is not in issue in the present case. It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

207. In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied

by the *opinio iuris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is

"evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio iuris sive necessitatis*." (*I.C.J. Reports 1969*, p. 44, para. 77.)

The Court has no jurisdiction to rule upon the conformity with international law of any conduct of States not parties to the present dispute, or of conduct of the Parties unconnected with the dispute ; nor has it authority to ascribe to States legal views which they do not themselves advance. The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.

208. In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances. As mentioned above, the United States has, on the legal plane, justified its intervention expressly and solely by reference to the "classic" rules involved, namely, collective self-defence against an armed attack. Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition in various States, especially in El Salvador. But Nicaragua too has not argued that this was a legal basis for an intervention, let alone an intervention involving the use of force.

209. The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they

directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.

* *

210. When dealing with the rule of the prohibition of the use of force, the Court considered the exception to it constituted by the exercise of the right of collective self-defence in the event of armed attack. Similarly, it must now consider the following question : if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs ? A right to act in this way in the case of intervention would be analogous to the right of collective self-defence in the case of an armed attack, but both the act which gives rise to the reaction, and that reaction itself, would in principle be less grave. Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant from the theoretical viewpoint. However, since the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence, it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure. It might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of armed attack.

211. The Court has recalled above (paragraphs 193 to 195) that for one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today – whether customary international law or that of the United Nations system – States do not have a right of “collective” armed response to acts which do not constitute an “armed attack”. Furthermore, the Court has to recall that the United States itself is relying on the “inherent right of self-defence” (paragraph 126 above), but apparently does not claim that any such right exists

as would, in respect of intervention, operate in the same way as the right of collective self-defence in respect of an armed attack. In the discharge of its duty under Article 53 of the Statute, the Court has nevertheless had to consider whether such a right might exist ; but in doing so it may take note of the absence of any such claim by the United States as an indication of *opinio iuris*.

* *

212. The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention. The basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law.

213. The duty of every State to respect the territorial sovereignty of others is to be considered for the appraisal to be made of the facts relating to the mining which occurred along Nicaragua's coasts. The legal rules in the light of which these acts of mining should be judged depend upon where they took place. The laying of mines within the ports of another State is governed by the law relating to internal waters, which are subject to the sovereignty of the coastal State. The position is similar as regards mines placed in the territorial sea. It is therefore the sovereignty of the coastal State which is affected in such cases. It is also by virtue of its sovereignty that the coastal State may regulate access to its ports.

214. On the other hand, it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters ; Article 18, paragraph 1 (b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for

maritime navigation. It may therefore be said that, if this right of access to the port is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce. At all events, it is certain that interference with navigation in these areas prejudices both the sovereignty of the coastal State over its internal waters, and the right of free access enjoyed by foreign ships.

* *

215. The Court has noted above (paragraph 77 *in fine*) that the United States did not issue any warning or notification of the presence of the mines which had been laid in or near the ports of Nicaragua. Yet even in time of war, the Convention relative to the laying of automatic submarine contact mines of 18 October 1907 (the Hague Convention No. VIII) provides that "every possible precaution must be taken for the security of peaceful shipping" and belligerents are bound "to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel" (Art. 3).

Neutral Powers which lay mines off their own coasts must issue a similar notification, in advance (Art. 4). It has already been made clear above that in peacetime for one State to lay mines in the internal or territorial waters of another is an unlawful act ; but in addition, if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907. Those principles were expressed by the Court in the *Corfu Channel* case as follows :

"certain general and well recognized principles, namely : elementary considerations of humanity, even more exacting in peace than in war" (*I.C.J. Reports 1949*, p. 22).

* *

216. This last consideration leads the Court on to examination of the international humanitarian law applicable to the dispute. Clearly, use of force may in some circumstances raise questions of such law. Nicaragua has in the present proceedings not expressly invoked the provisions of the international humanitarian law as such, even though, as noted above (paragraph 113), it has complained of acts committed on its territory which

would appear to be breaches of the provisions of such law. In the submissions in its Application it has expressly charged

"That the United States, in breach of its obligation under general and customary international law, has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua."
(Application, 26 (f).)

The Court has already indicated (paragraph 115) that the evidence available is insufficient for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua ; accordingly, this submission has to be rejected. The question however remains of the law applicable to the acts of the United States in relation to the activities of the *contras*, in particular the production and dissemination of the manual on psychological operations described in paragraphs 117 to 122 above ; as already explained (paragraph 116), this is a different question from that of the violations of humanitarian law of which the *contras* may or may not have been guilty.

217. The Court observes that Nicaragua, which has invoked a number of multilateral treaties, has refrained from making reference to the four Geneva Conventions of 12 August 1949, to which both Nicaragua and the United States are parties. Thus at the time when the Court was seized of the dispute, that dispute could be considered not to "arise", to use the wording of the United States multilateral treaty reservation, under any of these Geneva Conventions. The Court did not therefore have to consider whether that reservation might be a bar to the Court treating the relevant provisions of these Conventions as applicable. However, if the Court were on its own initiative to find it appropriate to apply these Conventions, as such, for the settlement of the dispute, it could be argued that the Court would be treating it as a dispute "arising" under them ; on that basis, it would have to consider whether any State party to those Conventions would be "affected" by the decision, for the purposes of the United States multilateral treaty reservation.

218. The Court however sees no need to take a position on that matter, since in its view the conduct of the United States may be judged according to the fundamental general principles of humanitarian law ; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles. It is significant in this respect that, according to the terms of the Conventions, the denunciation of one of them

"shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the

“public conscience” (Convention I, Art. 63; Convention II, Art. 62; Convention III, Art. 142; Convention IV, Art. 158).

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts ; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called “elementary considerations of humanity” (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22 ; paragraph 215 above). The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question.

219. The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character ; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character.

220. The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions, which reads as follows :

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions :

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any

adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons :

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture ;

(b) taking of hostages ;
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment ;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for . . .

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention . . . ”

* * *

221. In its Judgment of 26 November 1984, the Court concluded that, in so far as the claims presented in Nicaragua's Application revealed the existence of a dispute as to the interpretation or application of the Articles of the 1956 Treaty of Friendship, Commerce and Navigation between the Parties mentioned in Paragraph 82 of that Judgment (that is, Arts. XIX, XIV, XVII, XX, I), it had jurisdiction to deal with them under Article XIV, paragraph 2, of that Treaty. Having thus established its jurisdiction to entertain the dispute between the Parties in respect of the interpretation and application of the Treaty in question, the Court must determine the meaning of the various provisions which are relevant for its judgment. In this connection, the Court has in particular to ascertain the scope of Article XXI, paragraphs 1 (c) and 1 (d), of the Treaty. According to that clause

“the present Treaty shall not preclude the application of measures :

(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment ;

(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests".

In the Spanish text of the Treaty (equally authentic with the English text) the last phrase is rendered as "sus intereses esenciales y seguridad".

222. This article cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an article of the Treaty, it is covered by the provision in Article XXIV that any dispute about the "interpretation or application" of the Treaty lies within the Court's jurisdiction. Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXIV. That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such.

223. The Court will therefore determine the substantial nature of the two categories of measures contemplated by this Article and which are not barred by the Treaty. No comment is required at this stage on subparagraph 1(c) of Article XXI. As to subparagraph 1(d), clearly "measures... necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security" must signify measures which the State in question must take in performance of an international commitment of which any evasion constitutes a breach. A commitment of this kind is accepted by Members of the United Nations in respect of Security Council decisions taken on the basis of Chapter VII of the United Nations Charter (Art. 25), or, for members of the Organization of American States, in respect of decisions taken by the Organ of Consultation of the Inter-American system, under Articles 3 and 20 of the Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 1947). The Court does not

believe that this provision of the 1956 Treaty can apply to the eventuality of the exercise of the right of individual or collective self-defence.

224. On the other hand, action taken in self-defence, individual or collective, might be considered as part of the wider category of measures qualified in Article XXI as "necessary to protect" the "essential security interests" of a party. In its Counter-Memorial on jurisdiction and admissibility, the United States contended that : "Any possible doubts as to the applicability of the FCN Treaty to Nicaragua's claims is dispelled by Article XXI of the Treaty . . ." After quoting paragraph 1 (d) (set out in paragraph 221 above), the Counter-Memorial continues :

"Article XXI has been described by the Senate Foreign Relations Committee as containing 'the usual exceptions relating . . . to traffic in arms, ammunition and implements of war and to measures for collective or individual self-defense'."

It is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests. But the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past. The Court has therefore to assess whether the risk run by these "essential security interests" is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but "necessary".

225. Since Article XXI of the 1956 Treaty contains a power for each of the parties to derogate from the other provisions of the Treaty, the possibility of invoking the clauses of that Article must be considered once it is apparent that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty. The appraisal of the conduct of the United States in the light of these relevant provisions of the Treaty pertains to the application of the law rather than to its interpretation, and the Court will therefore undertake this in the context of its general evaluation of the facts established in relation to the applicable law.

* * * * *

226. The Court, having outlined both the facts of the case as proved by the evidence before it, and the general rules of international law which appear to it to be in issue as a result of these facts, and the applicable treaty-law, has now to appraise the facts in relation to the legal rules applicable. In so far as acts of the Respondent may appear to constitute violations of the relevant rules of law, the Court will then have to determine

whether there are present any circumstances excluding unlawfulness, or whether such acts may be justified upon any other ground.

* * *

227. The Court will first appraise the facts in the light of the principle of the non-use of force, examined in paragraphs 187 to 200 above. What is unlawful, in accordance with that principle, is recourse to either the threat or the use of force against the territorial integrity or political independence of any State. For the most part, the complaints by Nicaragua are of the actual use of force against it by the United States. Of the acts which the Court has found imputable to the Government of the United States, the following are relevant in this respect :

- the laying of mines in Nicaraguan internal or territorial waters in early 1984 (paragraph 80 above) ;
- certain attacks on Nicaraguan ports, oil installations and a naval base (paragraphs 81 and 86 above).

These activities constitute infringements of the principle of the prohibition of the use of force, defined earlier, unless they are justified by circumstances which exclude their unlawfulness, a question now to be examined. The Court has also found (paragraph 92) the existence of military manoeuvres held by the United States near the Nicaraguan borders ; and Nicaragua has made some suggestion that this constituted a "threat of force", which is equally forbidden by the principle of non-use of force. The Court is however not satisfied that the manoeuvres complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force.

228. Nicaragua has also claimed that the United States has violated Article 2, paragraph 4, of the Charter, and has used force against Nicaragua in breach of its obligation under customary international law in as much as it has engaged in

"recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua" (Application, para. 26 (a) and (c)).

So far as the claim concerns breach of the Charter, it is excluded from the Court's jurisdiction by the multilateral treaty reservation. As to the claim that United States activities in relation to the *contras* constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a *prima facie* violation of that principle by its

assistance to the *contras* in Nicaragua, by "organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State", and "participating in acts of civil strife ... in another State", in the terms of General Assembly resolution 2625 (XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to "involve a threat or use of force". In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.

* * *

229. The Court must thus consider whether, as the Respondent claims, the acts in question of the United States are justified by the exercise of its right of collective self-defence against an armed attack. The Court must therefore establish whether the circumstances required for the exercise of this right of self-defence are present and, if so, whether the steps taken by the United States actually correspond to the requirements of international law. For the Court to conclude that the United States was lawfully exercising its right of collective self-defence, it must first find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica.

230. As regards El Salvador, the Court has found (paragraph 160 above) that it is satisfied that between July 1979 and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in that country. The Court was not however satisfied that assistance has reached the Salvadorean armed opposition, on a scale of any significance, since the early months of 1981, or that the Government of Nicaragua was responsible for any flow of arms at either period. Even assuming that the supply of arms to the opposition in El Salvador could be treated as imputable to the Government of Nicaragua to justify invocation of the right of collective self-defence in customary international law, it would have to be equated with an armed attack by Nicaragua on El Salvador. As stated above, the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government, that would not constitute such armed attack.

231. Turning to Honduras and Costa Rica, the Court has also stated (paragraph 164 above) that it should find established that certain trans-

border incursions into the territory of those two States, in 1982, 1983 and 1984, were imputable to the Government of Nicaragua. Very little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an "armed attack" by Nicaragua on either or both States. The Court notes that during the Security Council debate in March/April 1984, the representative of Costa Rica made no accusation of an armed attack, emphasizing merely his country's neutrality and support for the Contadora process (S/PV.2529, pp. 13-23); the representative of Honduras however stated that

"my country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population" (*ibid.*, p. 37).

There are however other considerations which justify the Court in finding that neither these incursions, nor the alleged supply of arms to the opposition in El Salvador, may be relied on as justifying the exercise of the right of collective self-defence.

232. The exercise of the right of collective self-defence presupposes that an armed attack has occurred ; and it is evident that it is the victim State, being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect. Thus in the present instance, the Court is entitled to take account, in judging the asserted justification of the exercise of collective self-defence by the United States, of the actual conduct of El Salvador, Honduras and Costa Rica at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack by Nicaragua, and of the making of a request by the victim State to the United States for help in the exercise of collective self-defence.

233. The Court has seen no evidence that the conduct of those States was consistent with such a situation, either at the time when the United States first embarked on the activities which were allegedly justified by self-defence, or indeed for a long period subsequently. So far as El Salvador is concerned, it appears to the Court that while El Salvador did in fact officially declare itself the victim of an armed attack, and did ask for the United States to exercise its right of collective self-defence, this occurred only on a date much later than the commencement of the United States activities which were allegedly justified by this request. The Court notes that on 3 April 1984, the representative of El Salvador before the United Nations Security Council, while complaining of the "open foreign intervention practised by Nicaragua in our internal affairs" (S/PV.2528, p. 58), refrained from stating that El Salvador had been subjected to armed

attack, and made no mention of the right of collective self-defence which it had supposedly asked the United States to exercise. Nor was this mentioned when El Salvador addressed a letter to the Court in April 1984, in connection with Nicaragua's complaint against the United States. It was only in its Declaration of Intervention filed on 15 August 1984, that El Salvador referred to requests addressed at various dates to the United States for the latter to exercise its right of collective self-defence (para. XII), asserting on this occasion that it had been the victim of aggression from Nicaragua "since at least 1980". In that Declaration, El Salvador affirmed that initially it had "not wanted to present any accusation or allegation [against Nicaragua] to any of the jurisdictions to which we have a right to apply", since it sought "a solution of understanding and mutual respect" (para. III).

234. As to Honduras and Costa Rica, they also were prompted by the institution of proceedings in this case to address communications to the Court; in neither of these is there mention of armed attack or collective self-defence. As has already been noted (paragraph 231 above), Honduras in the Security Council in 1984 asserted that Nicaragua had engaged in aggression against it, but did not mention that a request had consequently been made to the United States for assistance by way of collective self-defence. On the contrary, the representative of Honduras emphasized that the matter before the Security Council "is a Central American problem, without exception, and it must be solved regionally" (S/PV.2529, p. 38), i.e., through the Contadora process. The representative of Costa Rica also made no reference to collective self-defence. Nor, it may be noted, did the representative of the United States assert during that debate that it had acted in response to requests for assistance in that context.

235. There is also an aspect of the conduct of the United States which the Court is entitled to take into account as indicative of the view of that State on the question of the existence of an armed attack. At no time, up to the present, has the United States Government addressed to the Security Council, in connection with the matters the subject of the present case, the report which is required by Article 51 of the United Nations Charter in respect of measures which a State believes itself bound to take when it exercises the right of individual or collective self-defence. The Court, whose decision has to be made on the basis of customary international law, has already observed that in the context of that law, the reporting obligation enshrined in Article 51 of the Charter of the United Nations does not exist. It does not therefore treat the absence of a report on the part of the United States as the breach of an undertaking forming part of the customary international law applicable to the present dispute. But the Court is justified in observing that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter. This fact is all the more noteworthy because, in the Security

Council, the United States has itself taken the view that failure to observe the requirement to make a report contradicted a State's claim to be acting on the basis of collective self-defence (S/PV.2187).

236. Similarly, while no strict legal conclusion may be drawn from the date of El Salvador's announcement that it was the victim of an armed attack, and the date of its official request addressed to the United States concerning the exercise of collective self-defence, those dates have a significance as evidence of El Salvador's view of the situation. The declaration and the request of El Salvador, made publicly for the first time in August 1984, do not support the contention that in 1981 there was an armed attack capable of serving as a legal foundation for United States activities which began in the second half of that year. The States concerned did not behave as though there were an armed attack at the time when the activities attributed by the United States to Nicaragua, without actually constituting such an attack, were nevertheless the most accentuated ; they did so behave only at a time when these facts fell furthest short of what would be required for the Court to take the view that an armed attack existed on the part of Nicaragua against El Salvador.

237. Since the Court has found that the condition *sine qua non* required for the exercise of the right of collective self-defence by the United States is not fulfilled in this case, the appraisal of the United States activities in relation to the criteria of necessity and proportionality takes on a different significance. As a result of this conclusion of the Court, even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however they were not, this may constitute an additional ground of wrongfulness. On the question of necessity, the Court observes that the United States measures taken in December 1981 (or, at the earliest, March of that year – paragraph 93 above) cannot be said to correspond to a "necessity" justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce their effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981), and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadorean Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity. Whether or not the assistance to the *contras* might meet the criterion of proportionality, the Court cannot regard the United States activities summarized in paragraphs 80, 81 and 86, i.e., those relating to the mining of the Nicaraguan ports and the attacks on ports, oil installations, etc., as satisfying that criterion. Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorean armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid. Finally on this point, the Court must also

observe that the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.

238. Accordingly, the Court concludes that the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica, advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld ; and accordingly that the United States has violated the principle prohibiting recourse to the threat or use of force by the acts listed in paragraph 227 above, and by its assistance to the *contras* to the extent that this assistance "involves[s] a threat or use of force" (paragraph 228 above).

* * *

239. The Court comes now to the application in this case of the principle of non-intervention in the internal affairs of States. It is argued by Nicaragua that the "military and paramilitary activities aimed at the government and people of Nicaragua" have two purposes :

- "(a) The actual overthrow of the existing lawful government of Nicaragua and its replacement by a government acceptable to the United States ; and
- "(b) The substantial damaging of the economy, and the weakening of the political system, in order to coerce the government of Nicaragua into the acceptance of United States policies and political demands."

Nicaragua also contends that the various acts of an economic nature, summarized in paragraphs 123 to 125 above, constitute a form of "indirect" intervention in Nicaragua's internal affairs.

240. Nicaragua has laid much emphasis on the intentions it attributes to the Government of the United States in giving aid and support to the *contras*. It contends that the purpose of the policy of the United States and its actions against Nicaragua in pursuance of this policy was, from the beginning, to overthrow the Government of Nicaragua. In order to demonstrate this, it has drawn attention to numerous statements by high officials of the United States Government, in particular by President Reagan, expressing solidarity and support for the *contras*, described on occasion as "freedom fighters", and indicating that support for the *contras* would continue until the Nicaraguan Government took certain action, desired by the United States Government, amounting in effect to a surrender to the demands of the latter Government. The official Report of the

President of the United States to Congress of 10 April 1985, quoted in paragraph 96 above, states that : "We have not sought to overthrow the Nicaraguan Government nor to force on Nicaragua a specific system of government." But it indicates also quite openly that "United States policy toward Nicaragua" — which includes the support for the military and paramilitary activities of the *contras* which it was the purpose of the Report to continue — "has consistently sought to achieve changes in Nicaraguan government policy and behavior".

241. The Court however does not consider it necessary to seek to establish whether the intention of the United States to secure a change of governmental policies in Nicaragua went so far as to be equated with an endeavour to overthrow the Nicaraguan Government. It appears to the Court to be clearly established first, that the United States intended, by its support of the *contras*, to coerce the Government of Nicaragua in respect of matters in which each State is permitted, by the principle of State sovereignty, to decide freely (see paragraph 205 above); and secondly that the intention of the *contras* themselves was to overthrow the present Government of Nicaragua. The 1983 Report of the Intelligence Committee refers to the *contras* "openly acknowledged goal of overthrowing the Sandinistas". Even if it be accepted, for the sake of argument, that the objective of the United States in assisting the *contras* was solely to interdict the supply of arms to the armed opposition in El Salvador, it strains belief to suppose that a body formed in armed opposition to the Government of Nicaragua, and calling itself the "Nicaraguan Democratic Force", intended only to check Nicaraguan interference in El Salvador and did not intend to achieve violent change of government in Nicaragua. The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far-reaching. It is for this reason that the Court has only examined the intentions of the United States Government so far as they bear on the question of self-defence.

242. The Court therefore finds that the support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention. The Court has however taken note that, with effect from the beginning of the United States governmental financial year 1985, namely 1 October 1984, the United States Congress has restricted the use of the funds appropriated for assistance to the *contras* to "humanitarian assistance" (paragraph 97 above). There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first

and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that

"The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours — in its international and national capacity — to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples"

and that

"It makes no discrimination as to nationality, race, religion, beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress."

243. The United States legislation which limited aid to the *contras* to humanitarian assistance however also defined what was meant by such assistance, namely :

"the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death" (paragraph 97 above).

It is also to be noted that, while the United States Congress has directed that the CIA and Department of Defense are not to administer any of the funds voted, it was understood that intelligence information might be "shared" with the *contras*. Since the Court has no information as to the interpretation in fact given to the Congress decision, or as to whether intelligence information is in fact still being supplied to the *contras*, it will limit itself to a declaration as to how the law applies in this respect. An essential feature of truly humanitarian aid is that it is given "without discrimination" of any kind. In the view of the Court, if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering", and "to protect life and health and to ensure respect for the human being"; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.

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244. As already noted, Nicaragua has also asserted that the United States is responsible for an "indirect" form of intervention in its internal

affairs inasmuch as it has taken, to Nicaragua's disadvantage, certain action of an economic nature. The Court's attention has been drawn in particular to the cessation of economic aid in April 1981 ; the 90 per cent reduction in the sugar quota for United States imports from Nicaragua in April 1981 ; and the trade embargo adopted on 1 May 1985. While admitting in principle that some of these actions were not unlawful in themselves, counsel for Nicaragua argued that these measures of economic constraint add up to a systematic violation of the principle of non-intervention.

245. The Court does not here have to concern itself with possible breaches of such international economic instruments as the General Agreement on Tariffs and Trade, referred to in passing by counsel for Nicaragua : any such breaches would appear to fall outside the Court's jurisdiction, particularly in view of the effect of the multilateral treaty reservation, nor has Nicaragua seized the Court of any complaint of such breaches. The question of the compatibility of the actions complained of with the 1956 Treaty of Friendship, Commerce and Navigation will be examined below, in the context of the Court's examination of the provisions of that Treaty. At this point, the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.

* * *

246. Having concluded that the activities of the United States in relation to the activities of the *contras* in Nicaragua constitute *prima facie* acts of intervention, the Court must next consider whether they may nevertheless be justified on some legal ground. As the Court has stated, the principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State – supposing such a request to have actually been made by an opposition to the régime in Nicaragua in this instance. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.

247. The Court has already indicated (paragraph 238) its conclusion that the conduct of the United States towards Nicaragua cannot be justified by the right of collective self-defence in response to an alleged armed attack on one or other of Nicaragua's neighbours. So far as regards the allegations of supply of arms by Nicaragua to the armed opposition in El Salvador, the Court has indicated that while the concept of an armed

attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack. Nevertheless, such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack. The Court must therefore enquire now whether the activities of the United States towards Nicaragua might be justified as a response to an intervention by that State in the internal affairs of another State in Central America.

248. The United States admits that it is giving its support to the *contras* in Nicaragua, but justifies this by claiming that that State is adopting similar conduct by itself assisting the armed opposition in El Salvador, and to a lesser extent in Honduras and Costa Rica, and has committed trans-border attacks on those two States. The United States raises this justification as one of self-defence ; having rejected it on those terms, the Court has nevertheless to consider whether it may be valid as action by way of counter-measures in response to intervention. The Court has however to find that the applicable law does not warrant such a justification.

249. On the legal level the Court cannot regard response to an intervention by Nicaragua as such a justification. While an armed attack would give rise to an entitlement to collective self-defence, an use of force of a lesser degree of gravity cannot, as the Court has already observed (paragraph 211 above), produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.

* * *

250. In the Application, Nicaragua further claims :

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

- armed attacks against Nicaragua by air, land and sea ;
- incursions into Nicaraguan territorial waters ;
- aerial trespass into Nicaraguan airspace ;
- efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua." (Para. 26 (b).)

The Nicaraguan Memorial, however, enumerates under the heading of violations of sovereignty only attacks on Nicaraguan territory, incursions into its territorial sea, and overflights. The claim as to United States "efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua" was presented in the Memorial under the heading of the threat or use of force, which has already been dealt with above (paragraph 227). Accordingly, that aspect of Nicaragua's claim will not be pursued further.

251. The effects of the principle of respect for territorial sovereignty of force and of non-intervention. Thus the assistance to the *contras*, as well as the direct attacks on Nicaraguan ports, oil installations, etc., referred to in paragraphs 81 to 86 above, not only amount to an unlawful use of force, but also constitute infringements of the territorial sovereignty of Nicaragua, and incursions into its territorial and internal waters. Similarly, the mining operations in the Nicaraguan ports not only constitute breaches of the principle of the non-use of force, but also affect Nicaragua's sovereignty over certain maritime expanses. The Court has in fact found that these operations were carried on in Nicaragua's territorial or internal waters or both (paragraph 80), and accordingly they constitute a violation of Nicaragua's sovereignty. The principle of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State. The Court has found above that such overflights were in fact made (paragraph 91 above).

252. These violations cannot be justified either by collective self-defence, for which, as the Court has recognized, the necessary circumstances are lacking, nor by any right of the United States to take countermeasures involving the use of force in the event of intervention by Nicaragua in El Salvador, since no such right exists under the applicable international law. They cannot be justified by the activities in El Salvador attributed to the Government of Nicaragua. The latter activities, assuming that they did in fact occur, do not bring into effect any right belonging to the United States which would justify the actions in question. Accordingly, such actions constitute violations of Nicaragua's sovereignty under customary international law.

The laying of mines, this constitutes an infringement of the freedom of communications and of maritime commerce. This is clearly the case here. It is not for the Court to pass upon the rights of States which are not parties to the case before it ; but it is clear that interference with a right of access to the ports of Nicaragua is likely to have an adverse effect on Nicaragua's economy and its trading relations with any State whose vessels enjoy the right of access to its ports. Accordingly, the Court finds, in the context of the present proceedings between Nicaragua and the United States, that the laying of mines in or near Nicaraguan ports constituted an infringement, to Nicaragua's detriment, of the freedom of communications and of maritime commerce.

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254. The Court now turns to the question of the application of humanitarian law to the activities of the United States complained of in this case. Mention has already been made (paragraph 215 above) of the violations of customary international law by reason of the failure to give notice of the mining of the Nicaraguan ports, for which the Court has found the United States directly responsible. Except as regards the mines, Nicaragua has not however attributed any breach of humanitarian law to either United States personnel or the "UCLAs", as distinct from the *contras*. The Applicant has claimed that acts perpetrated by the *contras* constitute breaches of the "fundamental norms protecting human rights" ; it has not raised the question of the law applicable in the event of conflict such as that between the *contras* and the established Government. In effect, Nicaragua is accusing the *contras* of violations both of the law of human rights and humanitarian law, and is attributing responsibility for these acts to the United States. The Court has however found (paragraphs 115, 216) that this submission of Nicaragua cannot be upheld ; but it has also found the United States responsible for the publication and dissemination of the manual on "Psychological Operations in Guerrilla Warfare" referred to in paragraphs 118 to 122 above.

255. The Court has also found (paragraphs 219 and 220 above) that general principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not. By virtue of such general principles, the United States is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of 12 August 1949. The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement. The Court takes note of the advice given in the manual on psychological operations to "neutralize" certain "carefully selected and planned targets", including judges, police officers, State Security officials, etc., after the local population have been gathered

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253. At this point it will be convenient to refer to another aspect of the legal implications of the mining of Nicaragua's ports. As the Court has indicated in paragraph 214 above, where the vessels of one State enjoy a right of access to ports of another State, if that right of access is hindered by

in order to "take part in the act and formulate accusations against the oppressor". In the view of the Court, this must be regarded as contrary to the prohibition in Article 3 of the Geneva Conventions, with respect to non-combatants, of

"the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples",

and probably also of the prohibition of "violence to life and person, in particular murder to all kinds. . .".

256. It is also appropriate to recall the circumstances in which the manual of psychological operations was issued. When considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found (paragraph 121) that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual was to "moderate" such behaviour. The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.

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257. The Court has noted above (paragraphs 169 and 170) the attitude of the United States, as expressed in the finding of the Congress of 29 July 1985, linking United States support to the *contras* with alleged breaches by the Government of Nicaragua of its "solemn commitments to the Nicaraguan people, the United States, and the Organization of American States". Those breaches were stated to involve questions such as the composition of the government, its political ideology and alignment, totalitarianism, human rights, militarization and aggression. So far as the question of "aggression in the form of armed subversion against its neighbours" is concerned, the Court has already dealt with the claimed justification of collective self-defence in response to armed attack, and will not return to that matter. It has also disposed of the suggestion of a right to collective counter-measures in face of an armed intervention. What is now in question is whether there is anything in the conduct of Nicaragua which might legally warrant counter-measures by the United States.

258. The questions as to which the Nicaraguan Government is said to

have entered into a commitment are questions of domestic policy. The Court would not therefore normally consider it appropriate to engage in a verification of the truth of assertions of this kind, even assuming that it was in a position to do so. A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems. Consequently, there would normally be no need to make any enquiries, in a matter outside the Court's jurisdiction, to ascertain in what sense and along what lines Nicaragua has actually exercised its right.

259. However, the assertion of a commitment raises the question of the possibility of a State binding itself by agreement in relation to a question of domestic policy, such as that relating to the holding of free elections on its territory. The Court cannot discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field. This is a conceivable situation for a State which is bound by institutional links to a confederation of States, or indeed to an international organization. Both Nicaragua and the United States are members of the Organization of American States. The Charter of that Organization however goes no further in the direction of an agreed limitation on sovereignty of this kind than the provision in Article 3 (d) that

"The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy";

on the other hand, it provides for the right of every State "to organize itself as it sees fit" (Art. 12), and to "develop its cultural, political and economic life freely and naturally" (Art. 16).

260. The Court has set out above the facts as to the events of 1979, including the resolution of the XVIIth Meeting of Consultation of Ministers for Foreign Affairs of the Organization of American States, and the communications of 12 July 1979 from the Junta of the Government of National Reconstruction of Nicaragua to the Secretary-General of the Organization, accompanied by a "Plan to secure peace". The letter contained *inter alia* a list of the objectives of the Nicaraguan Junta and stated in particular its intention of installing the new regime by a peaceful, orderly transition and of respecting human rights under the supervision of the Inter-American Commission on Human Rights, which the Junta invited to visit Nicaragua "as soon as we are installed". In this way, before its installation in Managua, the new régime soothed apprehensions as desired and expressed its intention of governing the country democratically.

261. However, the Court is unable to find anything in these documents, whether the resolution or the communication accompanied by the "plan to secure peace", from which it can be inferred that any legal undertaking was intended to exist. Moreover, the Junta made it plain in one of these documents that its invitation to the Organization of American States to supervise Nicaragua's political life should not be allowed to obscure the fact that it was the Nicaraguans themselves who were to decide upon and conduct the country's domestic policy. The resolution of 23 June 1979 also declares that the solution of their problems is a matter "exclusively" for the Nicaraguan people, while stating that that solution was to be based (in Spanish, *debería inspirar*) on certain foundations which were put forward merely as recommendations to the future government. This part of the resolution is a mere statement which does not comprise any formal offer which if accepted would constitute a promise in law, and hence a legal obligation. Nor can the Court take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature. The Nicaraguan Junta of National Reconstruction planned the holding of free elections as part of its political programme of government, following the recommendation of the XVIIth Meeting of Consultation of Foreign Ministers of the Organization of American States. This was an essentially political pledge, made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries. But the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections. The Organization of American States Charter has already been mentioned, with its respect for the political independence of the member States ; in the field of domestic policy, it goes no further than to list the social standards to the application of which the Members "agree to dedicate every effort", including :

"The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community; acceleration of the process of social mobility, and the consolidation of the democratic system." (Art. 43 (*fj.*))

It is evident that provisions of this kind are far from being a commitment as to the use of particular political mechanisms.

262. Moreover, even supposing that such a political pledge had had the force of a legal commitment, it could not have justified the United States insisting on the fulfilment of a commitment made not directly towards the United States, but towards the Organization, the latter being alone empowered to monitor its implementation. The Court can see no legal basis for the "special responsibility regarding the implementation of the

commitments made" by the Nicaraguan Government which the United States considers itself to have assumed in view of "its role in the installation of the current Government of Nicaragua" (see paragraph 170 above). Moreover, even supposing that the United States were entitled to act in lieu of the Organization, it could hardly make use for the purpose of methods which the Organization could not use itself : in particular, it could not be authorized to use force in that event. Of its nature, a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State.

263. The finding of the United States Congress also expressed the view that the Nicaraguan Government had taken "significant steps towards establishing a totalitarian Communist dictatorship". However the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law ; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.

264. The Court has also emphasized the importance to be attached, in other respects, to a text such as the Helsinki Final Act, or, on another level, to General Assembly resolution 2625 (XXV) which, as its name indicates, is a declaration on "Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". Texts like these, in relation to which the Court has pointed to the customary content of certain provisions such as the principles of the non-use of force and non-intervention, envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies ; the United States not only voiced no objection to their adoption, but took an active part in bringing it about.

265. Similar considerations apply to the criticisms expressed by the United States of the external policies and alliances of Nicaragua. Whatever the impact of individual alliances on regional or international political-military balances, the Court is only competent to consider such questions from the standpoint of international law. From that aspect, it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State.

266. The Court also notes that these justifications, advanced solely in a political context which it is naturally not for the Court to appraise, were not advanced as legal arguments. The respondent State has always confined itself to the classic argument of self-defence, and has not attempted to introduce a legal argument derived from a supposed rule of "ideological intervention", which would have been a striking innovation. The Court would recall that one of the accusations of the United States against Nicaragua is violation of "the 1965 General Assembly Declaration on Intervention" (paragraph 169 above), by its support for the armed opposition to the Government in El Salvador. It is not aware of the United States having officially abandoned reliance on this principle, substituting for it a new principle "of ideological intervention", the definition of which would be discretionary. As stated above (paragraph 29), the Court is not solely dependent for its decision on the argument of the Parties before it with respect to the applicable law : it is required to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute even if these rules have not been invoked by a party. The Court is however not entitled to ascribe to States legal views which they do not themselves formulate.

267. The Court also notes that Nicaragua is accused by the 1985 finding of the United States Congress of violating human rights. This particular point requires to be studied independently of the question of the existence of a "legal commitment" by Nicaragua towards the Organization of American States to respect these rights ; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights. However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves. The political pledge by Nicaragua was made in the context of the Organization of American States, the organs of which were consequently entitled to monitor its observance. The Court has noted above (paragraph 168) that the Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human Rights (the Pact of San José, Costa Rica). The mechanisms provided for therein have functioned. The Inter-American Commission on Human Rights in fact took action and compiled two reports (OEA/Ser.L/V/11.53 and 62) following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organization was in a position, if it so wished, to take a decision on the basis of these reports.

268. In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of

ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.

269. The Court now turns to another factor which bears both upon domestic policy and foreign policy. This is the militarization of Nicaragua, which the United States deems excessive and such as to prove its aggressive intent, and in which it finds another argument to justify its activities with regard to Nicaragua. It is irrelevant and inappropriate, in the Court's opinion, to pass upon this allegation of the United States, since in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.

* * *

270. Having thus concluded its examination of the claims of Nicaragua based on customary international law, the Court must now consider its claims based on the Treaty of Friendship, Commerce and Navigation between the Parties, signed at Managua on 21 January 1956 : Article XXIV, paragraph 2, of that Treaty provides for the jurisdiction of the Court for any dispute between the Parties as to its interpretation or application. The first claim which Nicaragua makes in relation to the Treaty is however one not based directly on a specific provision thereof. Nicaragua has argued that the United States, by its conduct in relation to Nicaragua, has deprived the Treaty of its object and purpose, and emptied it of real content. For this purpose, Nicaragua has relied on the existence of a legal obligation of States to refrain from acts which would impede the due performance of any treaties entered into by them. However, if there is a duty of a State not to impede the due performance of a treaty to which it is a party, that is not a duty imposed by the treaty itself. Nicaragua itself apparently contends that this is a duty arising under customary international law independently of the treaty, that it is implicit in the rule *pacta sunt servanda*. This claim therefore does not in fact fall under the heading of possible breach by the United States of the provisions of the 1956 Treaty, though it may involve the interpretation or application thereof.

271. In view of the Court's finding in its 1984 Judgment that the Court has jurisdiction both under the 1956 FCN Treaty and on the basis of the United States acceptance of jurisdiction under the Optional Clause of Article 36, paragraph 2, this poses no problem of jurisdiction in the present

case. It should however be emphasized that the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose. It is only because in the present case the Court has found that it has jurisdiction, apart from Article XXIV, over any legal dispute between the Parties concerning any of the matters enumerated in Article 36, paragraph 2, of the Statute, that it can proceed to examine Nicaragua's claim under this head. However, as indicated in paragraph 221 above, the Court has first to determine whether the actions of the United States complained of as breaches of the 1956 FCN Treaty have to be regarded as "measures . . . necessary to protect its essential security interests /sus intereses esenciales y seguridad/", since Article XXI of the Treaty provides that "the present Treaty shall not preclude the application of" such measures. The question thus arises whether Article XXI similarly affords a defence to a claim under customary international law based on allegation of conduct depriving the Treaty of its object and purpose if such conduct can be shown to be "measures . . . necessary to protect" essential security interests.

272. In the view of the Court, an act cannot be said to be one calculated to deprive a treaty of its object and purpose, or to impede its due performance, if the possibility of that act has been foreseen in the treaty itself, and it has been expressly agreed that the treaty "shall not preclude" the act, so that it will not constitute a breach of the express terms of the treaty. Accordingly, the Court cannot entertain either the claim of Nicaragua alleging conduct depriving the treaty of its object and purpose, or its claims of breach of specific articles of the treaty, unless it is first satisfied that the conduct complained of is not "measures . . . necessary to protect" the essential security interests of the United States. The Court will first proceed to examine whether the claims of Nicaragua in relation to the Treaty appear to be well founded, and then determine whether they are nevertheless justifiable by reference to Article XXI.

273. The argument that the United States has deprived the Treaty of its object and purpose has a scope which is not very clearly defined, but it appears that in Nicaragua's contention the Court could on this ground make a blanket condemnation of the United States for all the activities of which Nicaragua complains on more specific grounds. For Nicaragua, the Treaty is "without doubt a treaty of friendship which imposes on the Parties the obligation to conduct amicable relations with each other", and "whatever the exact dimensions of the legal norm of 'friendship' there can be no doubt of a United States violation in this case". In other words, the Court is asked to rule that a State which enters into a treaty of friendship binds itself, for so long as the Treaty is in force, to abstain from any act

toward the other party which could be classified as an unfriendly act, even if such act is not in itself the breach of an international obligation. Such a duty might of course be expressly stipulated in a treaty, or might even emerge as a necessary implication from the text; but as a matter of customary international law, it is not clear that the existence of such a far-reaching rule is evidenced in the practice of States. There must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty. That object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense.

274. The Court has in this respect to note that the Treaty itself provides in Article XXIV, paragraph 1, as follows :

"Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty."

Nicaragua claims that the conduct of the United States is such as drastically to "affect the operation" of the Treaty; but so far as the Court is informed, no representations on the specific question have been made. The Court has therefore first to be satisfied that a claim based on the 1956 FCN Treaty is admissible even though no attempt has been made to use the machinery of Article XIV, paragraph 1, to resolve the dispute. In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim. However, in the present case, the operation of Article XXIV, paragraph 1, if it had been invoked, would have been wholly artificial. While Nicaragua does allege that certain activities of the United States were in breach of the 1956 FCN Treaty, it has also claimed, and the Court has found, that they were violations of customary international law. In the Court's view, it would therefore be excessively formalistic to require Nicaragua first to exhaust the procedure of Article XXIV, paragraph 1, before bringing the matter to the Court. In its 1984 Judgment the Court has already dealt with the argument that Article XXIV, paragraph 2, of the Treaty required that the dispute be "one not satisfactorily adjusted by diplomacy", and that this was not the case in view of the absence of negotiations between the Parties. The Court held that :

"it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a *compromissory clause* in that treaty" (*J.C.J. Reports 1984*, p. 428).

The point now at issue is different, since the claim of conduct impeding the operation of the Treaty is not advanced on the basis of the compromisory clause in the Treaty. The Court nevertheless considers that neither paragraph of Article XXIV constitutes a bar to examination of Nicaragua's claims.

275. In respect of the claim that the United States activities have been such as to deprive the 1956 FCN Treaty of its object and purpose, the Court has to make a distinction. It is unable to regard all the acts complained of in that light ; but it does consider that there are certain activities of the United States which are such as to undermine the whole spirit of a bilateral agreement directed to sponsoring friendship between the two States parties to it. These are : the direct attacks on ports, oil installations, etc., referred to in paragraphs 81 to 86 above ; and the mining of Nicaraguan ports, mentioned in paragraph 80 above. Any action less calculated to serve the purpose of "strengthening the bonds of peace and friendship traditionally existing between" the Parties, stated in the Preamble of the Treaty, could hardly be imagined.

276. While the acts of economic pressure summarized in paragraphs 123 to 125 above are less flagrantly in contradiction with the purpose of the Treaty, the Court reaches a similar conclusion in respect of some of them. A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation ; but where there exists such a commitment, of the kind implied in a treaty of friendship and commerce, such an abrupt act of termination of commercial intercourse as the general trade embargo of 11 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty. The 90 per cent cut in the sugar import quota of 23 September 1983 does not on the other hand seem to the Court to go so far as to constitute an act calculated to defeat the object and purpose of the Treaty. The cessation of economic aid, the giving of which is more of a unilateral and voluntary nature, could be regarded as such a violation only in exceptional circumstances. The Court has also to note that, by the very terms of the legislation authorizing such aid (the Special Central American Assistance Act, 1979), of which the Government of Nicaragua must have been aware, the continuance of aid was made subject to the appreciation of Nicaragua's conduct by the President of the United States. As to the opposition to the grant of loans from international institutions, the Court cannot regard this as sufficiently linked with the 1956 FCN Treaty to constitute an act directed to defeating its object and purpose.

* * *

277. Nicaragua claims that the United States is in breach of Article I of the 1956 FCN Treaty, which provides that each Party is to accord "equitable treatment" to the nationals of the other. Nicaragua suggests that whatever meaning given to the expression "equitable treatment",

"it necessarily precludes the Government of the United States from . . . killing, wounding or kidnapping citizens of Nicaragua, and, more generally from threatening Nicaraguan citizens in the integrity of their persons or the safety of their property".

It is Nicaragua's claim that the treatment of Nicaraguan citizens complained of was inflicted by the United States or by forces controlled by the United States. The Court is however not satisfied that the evidence available demonstrates that the *contras* were "controlled" by the United States when committing such acts. As the Court has indicated (paragraph 110 above), the exact extent of the control resulting from the financial dependence of the *contras* on the United States authorities cannot be established ; and it has not been able to conclude that the *contras* are subject to the United States to such an extent that any acts they have committed are imputable to that State (paragraph 115 above). Even if the provision for "equitable treatment" in the Treaty is read as involving an obligation not to kill, wound or kidnap Nicaraguan citizens in Nicaragua — as to which the Court expresses no opinion — those acts of the *contras* performed in the course of their military or paramilitary activities in Nicaragua are not conduct attributable to the United States.

278. Secondly, Nicaragua claims that the United States has violated the provisions of the Treaty relating to freedom of communication and commerce. For the reasons indicated in paragraph 253 above, the Court must uphold the contention that the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty ; there remains the question whether such action can be justified under Article XXI (see paragraphs 280 to 282 below). In the commercial context of the Treaty, Nicaragua's claim is justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce. Nicaragua however also contended that all the activities of the United States in and against Nicaragua are "violate of the 1956 Treaty" :

"Since the word 'commerce' in the 1956 Treaty must be understood in its broadest sense, all of the activities by which the United States has deliberately inflicted on Nicaragua physical damage and economic losses of all types, violate the principle of freedom of commerce which the Treaty establishes in very general terms."

It is clear that considerable economic loss and damage has been inflicted

on Nicaragua by the actions of the *contras* : apart from the economic impact of acts directly attributable to the United States, such as the loss of fishing boats blown up by mines, the Nicaraguan Minister of Finance estimated loss of production in 1981-1984 due to inability to collect crops, etc., at some US\$ 300 million. However, as already noted (paragraph 277 above) the Court has not found the relationship between the *contras* and the United States Government to have been proved to be such that the United States is responsible for all acts of the *contras*.

279. The trade embargo declared by the United States Government on 1 May 1985 has already been referred to in the context of Nicaragua's contentions as to acts tending to defeat the object and purpose of the 1956 FCN Treaty. The question also arises of its compatibility with the letter and the spirit of Article XIX of the Treaty. That Article provides that "Between the territories of the two Parties there shall be freedom of commerce and navigation" (para. 1) and continues

"3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation . . ."

By the Executive Order dated 1 May 1985 the President of the United States declared "I hereby prohibit vessels of Nicaraguan registry from entering into United States ports, and transactions relating thereto". The Court notes that on the same day the United States gave notice to Nicaragua to terminate the Treaty under Article XXV, paragraph 3, thereof ; but that Article requires "one year's written notice" for the termination to take effect. The freedom of Nicaraguan vessels, under Article XIX, paragraph 3, "to come with their cargoes to all ports, places and waters" of the United States could not therefore be interfered with during that period of notice, let alone terminated abruptly by the declaration of an embargo. The Court accordingly finds that the embargo constituted a measure in contradiction with Article XIX of the 1956 FCN Treaty.

280. The Court has thus found that the United States is in breach of a duty not to deprive the 1956 FCN Treaty of its object and purpose, and has committed acts which are in contradiction with the terms of the Treaty, subject to the question whether the exceptions in Article XXI, paragraphs 1 (c) and 1 (d), concerning respectively "traffic in arms" and "measures . . . necessary to fulfill" obligations "for the maintenance or restoration of international peace and security" or necessary to protect the "essential security interests" of a party may be invoked to justify the acts complained of. In its Counter-Memorial on jurisdiction and admissibility,

the United States relied on paragraph 1 (c) as showing the inapplicability of the 1956 FCN Treaty to Nicaragua's claims. This paragraph appears however to be relevant only in respect of the complaint of supply of arms to the *contras*, and since the Court does not find that arms supply to be a breach of the Treaty, or an act calculated to deprive it of its object and purpose, paragraph 1 (c) does not need to be considered further. There remains the question of the relationship of Article XXI, paragraph 1 (d), to the direct attacks on ports, oil installations, etc. ; the mining of Nicaraguan ports ; and the general trade embargo of 1 May 1985 (paragraphs 275 to 276 above).

281. In approaching this question, the Court has first to bear in mind the chronological sequence of events. If the activities of the United States are to be covered by Article XXI of the Treaty, they must have been, at the time they were taken, measures necessary to protect its essential security interests. Thus the finding of the President of the United States on 1 May 1985 that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States", even if it be taken as sufficient evidence that that was so, does not justify action by the United States previous to that date.

282. Secondly, the Court emphasizes the importance of the word "necessary" in Article XXI : the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be "necessary" for that purpose. Taking into account the whole situation of the United States in relation to Central America, so far as the Court is informed of it (and even assuming that the justification of self-defence, which the Court has rejected on the legal level, had some validity on the political level), the Court considers that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, cannot possibly be justified as "necessary" to protect the essential security interests of the United States. As to the trade embargo, the Court has to note the express justification for it given in the Presidential finding quoted in paragraph 125 above, and that the measure was one of an economic nature, thus one which fell within the sphere of relations contemplated by the Treaty. But by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized (paragraph 222 above), purely a question for the subjective judgment of the party ; the text does not refer to what the party "considers necessary" for that purpose. Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to "essential security interests" in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was "necessary" to protect those interests. Accordingly, Article XXI affords

no defence for the United States in respect of any of the actions here under consideration.

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283. The third submission of Nicaragua in its Memorial on the merits, set out in paragraph 15 above, requests the Court to adjudge and declare that compensation is due to Nicaragua and
“to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua”.

The fourth submission requests the Court to award to Nicaragua the sum of 370,200,000 United States dollars, “which sum constitutes the minimum valuation of the direct damages” claimed by Nicaragua. In order to decide on these submissions, the Court must satisfy itself that it possesses jurisdiction to do so. In general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation. More specifically, the Court notes that in its “declaration of acceptance of jurisdiction under the Optional Clause of 26 August 1946, the United States expressly accepted the Court’s jurisdiction in respect of disputes concerning “the nature or extent of the reparation to be made for the breach of an international obligation”. The corresponding declaration by which Nicaragua accepted the Court’s jurisdiction contains no restriction of the powers of the Court under Article 36, paragraph 2, of its Statute: Nicaragua has thus accepted the “same obligation”. Under the 1956 FCN Treaty, the Court has jurisdiction to determine “any dispute between the Parties as to the interpretation or application of the present Treaty” (Art. XXIV, para. 2); and as the Permanent Court of International Justice stated in the case concerning the *Factory at Chorzów*,

“Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.” (*Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21.)

284. The Court considers appropriate the request of Nicaragua for the nature and amount of the reparation due to it to be determined in a subsequent phase of the proceedings. While a certain amount of evidence has been provided, for example, in the testimony of the Nicaraguan Minister of Finance, of pecuniary loss sustained, this was based upon contentions as to the responsibility of the United States which were more far-reaching than the conclusions at which the Court has been able to arrive. The opportunity should be afforded Nicaragua to demonstrate and prove

exactly what injury was suffered as a result of each action of the United States which the Court has found contrary to international law. Nor should it be overlooked that, while the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes. On the contrary, the principle of the equality of the Parties requires that it be given that opportunity. It goes without saying, however, that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become *res judicata*.

285. There remains the request of Nicaragua (paragraph 15 above) for an award, at the present stage of the proceedings, of \$370,200,000 as the “minimum (and in that sense provisional) valuation of direct damages”. There is no provision in the Statute of the Court either specifically empowering the Court to make an interim award of this kind, or indeed debarring it from doing so. In view of the final and binding character of the Court’s judgments, under Articles 59 and 60 of the Statute, it would however only be appropriate to make an award of this kind, assuming that the Court possesses the power to do so, in exceptional circumstances, and where the entitlement of the State making the claim was already established with certainty and precision. Furthermore, in a case in which the respondent State is not appearing, so that its views on the matter are not known to the Court, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. It bears repeating that

“the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement . . .” (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13).

Accordingly, the Court does not consider that it can accede at this stage to the request made in the Fourth Submission of Nicaragua.

* * *

286. By its Order of 10 May 1984, the Court indicated, pursuant to Article 41 of the Statute of the Court, the provisional measures which in its view “ought to be taken to preserve the respective rights of either party”, pending the final decision in the present case. In connection with the first such measure, namely that

“The United States of America should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines”,

the Court notes that no complaint has been made that any further action of this kind has been taken.

287. On 25 June 1984, the Government of Nicaragua addressed a communication to the Court referring to the Order indicating provisional measures, informing the Court of what Nicaragua regarded as "the failure of the United States to comply with that Order", and requesting the indication of further measures. The action by the United States complained of consisted in the fact that the United States was continuing "to sponsor and carry out military and paramilitary activities in and against Nicaragua". By a letter of 16 July 1984, the President of the Court informed the Agent of Nicaragua that the Court considered that that request should await the outcome of the proceedings on jurisdiction which were then pending before the Court. The Government of Nicaragua has not reverted to the question.

288. The Court considers that it should re-emphasize, in the light of its present findings, what was indicated in the Order of 10 May 1984 :

"The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States."

289. Furthermore, the Court would draw attention to the further measures indicated in its Order, namely that the Parties "should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court" and

"should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case".

When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law.

290. In the present Judgment, the Court has found that the Respondent has, by its activities in relation to the Applicant, violated a number of principles of customary international law. The Court has however also to recall a further principle of international law, one which is complementary to the principles of a prohibitive nature examined above, and respect for which is essential in the world of today : the principle that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means. Enshrined in Article 33 of the United Nations Charter, which also indicates a number of peaceful means which are available, this principle has also the status of customary law. In the present case, the Court has already taken note, in its Order indicating provisional measures and in its Judgment on jurisdiction and admissibility (*I.C.J. Reports 1984*, pp. 183-184, paras. 34 ff., pp. 438-441, paras. 102 ff.) of the diplomatic negotiation known as the Contadora Process, which appears to the Court to correspond closely to the spirit of the principle which the Court has here recalled.

291. In its Order indicating provisional measures, the Court took note of the Contadora Process, and of the fact that it had been endorsed by the United Nations Security Council and General Assembly (*I.C.J. Reports 1984*, pp. 183-184, para. 34). During that phase of the proceedings as during the phase devoted to jurisdiction and admissibility, both Nicaragua and the United States have expressed full support for the Contadora Process, and praised the results achieved so far. Therefore, the Court could not but take cognizance of this effort, which merits full respect and consideration as a unique contribution to the solution of the difficult situation in the region. The Court is aware that considerable progress has been achieved on the main objective of the process, namely agreement on texts relating to arms control and reduction, exclusion of foreign military bases or military interference and withdrawal of foreign advisers, prevention of arms traffic, stopping the support of groups aiming at the destabilization of any of the Governments concerned, guarantee of human rights and enforcement of democratic processes, as well as on co-operation for the creation of a mechanism for the verification of the agreements concerned. The work of the Contadora Group may facilitate the delicate and difficult negotiations, in accord with the letter and spirit of the United Nations Charter, that are now required. The Court recalls to both Parties to the present case the need to co-operate with the Contadora efforts in seeking a definitive and lasting Peace in Central America, in accordance with the principle of customary international law that prescribes the peaceful settlement of international disputes.

* * * *

292. For these reasons,

THE COURT

(1) By eleven votes to four,

Decides that in adjudicating the dispute brought before it by the Application filed by the Republic of Nicaragua on 9 April 1984, the Court is required to apply the "multilateral treaty reservation" contained in proviso (c) to the declaration of acceptance of jurisdiction made under Article 36, paragraph 2, of the Statute of the Court by the Government of the United States of America deposited on 26 August 1946;

IN FAVOUR : *President Nagendra Singh ; Vice-President de Lacharriére ; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; Judge ad hoc Colliard ;*

AGAINST : *Judges Oda, Schwobel and Sir Robert Jennings.*

(2) By twelve votes to three,

Rejects the justification of collective self-defence maintained by the United States of America in connection with the military and paramilitary activities in and against Nicaragua the subject of this case ;

IN FAVOUR : *President Nagendra Singh ; Vice-President de Lacharriére ; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; Judge ad hoc Colliard ;*

AGAINST : *Judges Oda, Schwobel and Sir Robert Jennings.*

(3) By twelve votes to three,

*Decides that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State ;*

IN FAVOUR : *President Nagendra Singh ; Vice-President de Lacharriére ; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; Judge ad hoc Colliard ;*

AGAINST : *Judges Oda, Schwobel and Sir Robert Jennings.*

(4) By twelve votes to three,

Decides that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983 ; an attack on Corinto on 10 October 1983 ; an attack on Potosí Naval Base on 4/5 January 1984 ; an attack on San Juan del Sur on 7 March 1984 ; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984 ; and an attack on San Juan del Norte on 9 April 1984 ; and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against

the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State ;

IN FAVOUR : *President Nagendra Singh ; Vice-President de Lacharriére ; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; Judge ad hoc Colliard ;*

AGAINST : *Judges Oda, Schwobel and Sir Robert Jennings.*

(5) By twelve votes to three,

Decides that the United States of America, by directing or authorizing overflights of Nicaraguan territory, and by the acts imputable to the United States referred to in subparagraph (4) hereof, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to violate the sovereignty of another State ;

IN FAVOUR : *President Nagendra Singh ; Vice-President de Lacharriére ; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; Judge ad hoc Colliard ;*

AGAINST : *Judges Oda, Schwobel and Sir Robert Jennings.*

(6) By twelve votes to three,

Decides that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce ;

IN FAVOUR : *President Nagendra Singh ; Vice-President de Lacharriére ; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; Judge ad hoc Colliard ;*

AGAINST : *Judges Oda, Schwobel and Sir Robert Jennings.*

(7) By fourteen votes to one,

Decides that, by the acts referred to in subparagraph (6) hereof, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956 ;

IN FAVOUR : *President Nagendra Singh ; Vice-President de Lacharriére ; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; Judge ad hoc Colliard ;*

AGAINST : *Judge Schwobel.*

(8) By fourteen votes to one,

Decides that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph

(6) hereof, has acted in breach of its obligations under customary international law in this respect ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge ad hoc* Colliard ;

AGAINST : *Judge* Oda.

(9) By fourteen votes to one,

Finds that the United States of America, by producing in 1983 a manual entitled *Operaciones sicológicas en guerra de guerrillas*, and disseminating it to *contra* forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law ; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge ad hoc* Colliard ;

AGAINST : *Judge* Oda.

(10) By twelve votes to three,

Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has committed acts calculated to deprive of its object and purpose the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge ad hoc* Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(11) By twelve votes to three,

Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge ad hoc* Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(12) By twelve votes to three,

Decides that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge ad hoc* Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(13) By twelve votes to three,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge ad hoc* Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(14) By fourteen votes to one,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge ad hoc* Colliard ;

AGAINST : *Judge* Schwebel.

(15) By fourteen votes to one,

Decides that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge ad hoc* Colliard ;

AGAINST : *Judge* Schwebel.

(16) Unanimously,

Recalls to both Parties their obligation to seek a solution to their disputes by peaceful means in accordance with international law.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of June, one thousand nine hundred and eighty-six, in three copies, one of which will be placed in the archives of the Court and the others will be transmitted to the Government of the Republic of Nicaragua and to the Government of the United States of America, respectively.

(Signed) NAGENDRA SINGH,
President.

(Signed) Santiago TORRES BERNÁRDEZ,
Registrar.

President NAGENDRA SINGH, Judges LACHS, RUDA, ELIAS, AGO, SETTE-CAMARA and NI append separate opinions to the Judgment of the Court.

Judges ODA, SCHWEBEL and Sir Robert JENNINGS append dissenting opinions to the Judgment of the Court.

(Initialled) N.S.

(Initialled) S.T.B.

International Court of Justice

Legality of Use of Force
(Yugoslavia v. United States of America)
Provisional measures, Order of 2 June 1999

I.C.J Reports 1999

Makes the following Order:

1. Whereas in that Application Yugoslavia defines the subject of the dispute as follows:

"The subject-matter of the dispute are acts of the United States of America by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group";

2. Whereas in the said Application Yugoslavia refers, as a basis for the jurisdiction of the Court, to Article IX 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"), and to Article 38, paragraph 5, of the Rules of Court;

3. Whereas in its Application Yugoslavia states that the claims submitted by it to the Court are based upon the following facts:

"The Government of the United States of America, together with the Governments of other Member States of NATO, took part in the acts of use of force against the Federal Republic of Yugoslavia by taking part in bombing targets in the Federal Republic of Yugoslavia. In bombing the Federal Republic of Yugoslavia military and civilian targets were attacked. Great number of people were killed, including a great many civilians. Residential houses came under attack. Numerous dwellings were destroyed. Enormous damage was caused to schools, hospitals, radio and television stations, cultural and health institutions and to places of worship. A large number of bridges, roads and railway lines were destroyed. Attacks on oil refineries and chemical plants have had serious environmental effects on cities, towns and villages in the Federal Republic of Yugoslavia. The use of weapons containing depleted uranium is having far-reaching consequences for human life. The above-mentioned acts are deliberately creating conditions calculated at the physical destruction of an ethnic group, in whole or in part. The Government of the United States of America is taking part in the training, arming, financing, equipping and supplying the so-called 'Kosovo Liberation Army';

INTERNATIONAL COURT OF JUSTICE

YEAR 1999

2 June 1999

**CASE CONCERNING
LEGALITY OF USE OF FORCE**

(YUGOSLAVIA v. UNITED STATES OF AMERICA)

**REQUEST FOR THE INDICATION OF PROVISIONAL
MEASURES**

ORDER

Present: Vice-President WEERAMANTRY, Acting President; President SCHWEBEL; Judges ODA, BEDJAOUI, GUILLAUME, RANJEA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOLMANS, Judge ad hoc KRECA; Registrar VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73 and 74 of the Rules of Court,
Having regard to the Application by the Federal Republic of Yugoslavia (hereinafter "Yugoslavia") filed in the Registry of the Court on 29 April 1999, instituting proceedings against the United States of America (hereinafter "the United States") "for violation of the obligation not to use force".

and whereas it further states that the said claims are based on the following legal grounds:

"The above acts of the Government of the United States of America represent a gross violation of the obligation not to use force against another State. By financing, arming, training, and equipping the so-called 'Kosovo Liberation Army', support is given to terrorist groups and the secessionist movement in the territory of the Federal Republic of Yugoslavia in breach of the obligation not to intervene in the internal affairs of another State. In addition, the provisions of the Geneva Convention of 1949 and of the Additional Protocol No. 1 of 1977 on the protection of civilians and civilian objects in time of war have been violated. The obligation to protect the environment has also been breached. The destruction of bridges on the Danube is in contravention of the provisions of Article I of the 1948 Convention on free navigation on the Danube. The provisions of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights of 1966 have also been breached. Furthermore, the obligation contained in the Convention on the Prevention and Punishment of the Crime of Genocide not to impose deliberately on a national group conditions of life calculated to bring about the physical destruction of the group has been breached. Furthermore, the activities in which the United States of America is taking part are contrary to Article 53, paragraph 1, of the Charter of the United Nations";

4. Whereas the claims of Yugoslavia are formulated as follows in the Application:

"The Government of the Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

- by taking part in the bombing of the territory of the Federal Republic of Yugoslavia, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use force against another State;
- by taking part in the training, arming, financing, equipping and supplying terrorist groups, i.e. the so-called 'Kosovo Liberation Army', the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to intervene in the affairs of another State;
- by taking part in attacks on civilian targets, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation to spare the civilian population, civilians and civilian objects;

- by taking part in destroying or damaging monasteries, monuments of culture, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to commit any act of hostility directed against historical monuments, works of art or places of worship which constitute cultural or spiritual heritage of people;
- by taking part in the use of cluster bombs, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons, i.e. weapons calculated to cause unnecessary suffering;
- by taking part in the bombing of oil refineries and chemical plants, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to cause considerable environmental damage;
- by taking part in the use of weapons containing depleted uranium, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons and not to cause far-reaching health and environmental damage;
- by taking part in killing civilians, destroying enterprises, communications, health and cultural institutions, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation to respect the right to life, the right to work, the right to information, the right to health care as well as other basic human rights;
- by taking part in destroying bridges on international rivers, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation to respect freedom of navigation on international rivers;
- by taking part in activities listed above, and in particular by causing enormous environmental damage and by using depleted uranium, the United States of America has acted against the Federal Republic of Yugoslavia in breach of its obligation not to deliberately inflict on a national group conditions of life calculated to bring about its physical destruction, in whole or in part;
- the United States of America is responsible for the violation of the above international obligations;
- the United States of America is obliged to stop immediately the violation of the above obligations vis-à-vis the Federal Republic of Yugoslavia;
- the United States of America is obliged to provide compensation for the damage done to the Federal Republic of Yugoslavia and to its citizens and juridical persons";

and whereas, at the end of its Application, Yugoslavia reserves the right to amend and supplement it;

5. Whereas on 29 April 1999, immediately after filing its Application, Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court; and whereas that request was accompanied by a volume of photographic annexes produced as "evidence";

6. Whereas, in support of its request for the indication of provisional measures, Yugoslavia contends *inter alia* that, since the onset of the bombing of its territory, and as a result thereof, about 1,000 civilians, including 19 children, have been killed and more than 4,500 have sustained serious injuries; that the lives of three million children are endangered; that hundreds of thousands of citizens have been exposed to poisonous gases; that about one million citizens are short of water supply; that about 500,000 workers have become jobless; that two million citizens have no means of livelihood and are unable to ensure minimum means of sustenance; and that the road and railway network has suffered extensive destruction; whereas, in its request for the indication of provisional measures, Yugoslavia also lists the targets alleged to have come under attack in the air strikes and describes in detail the damage alleged to have been inflicted upon them (bridges, railway lines and stations, roads and means of transport, airports, industry and trade, refineries and warehouses storing liquid raw materials and chemicals, agriculture, hospitals and health care centres, schools, public buildings and housing facilities, infrastructure, telecommunications, cultural-historical monuments and religious shrines); and whereas Yugoslavia concludes from this that:

"The acts described above caused death, physical and mental harm to the population of the Federal Republic of Yugoslavia; huge devastation; heavy pollution of the environment, so that the Yugoslav population is deliberately imposed conditions of life calculated to bring about physical destruction of the group, in whole or in part";

7. Whereas, at the end of its request for the indication of provisional measures, Yugoslavia states that

"If the proposed measure were not to be adopted, there will be new losses of human life, further physical and mental harm inflicted on the population of the FR of Yugoslavia, further destruction of civilian targets, heavy environmental pollution and further physical destruction of the people of Yugoslavia";

and whereas, while reserving the right to amend and supplement its request, Yugoslavia requests the Court to indicate the following measure:

"The United States of America shall cease immediately its acts of

use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia";

8. Whereas the request for the indication of provisional measures was accompanied by a letter from the Agent of Yugoslavia, addressed to the President and Members of the Court, which read as follows:

"I have the honour to bring to the attention of the Court the latest bombing of the central area of the town of Surdulica on 27 April 1999 at noon resulting in losses of lives of civilians, most of whom were children and women, and to remind of killings of peoples in Kursumlija, Aleksinac and Cuprija, as well as bombing of a refugee convoy and the Radio and Television of Serbia, just to mention some of the well-known atrocities. Therefore, I would like to caution the Court that there is a highest probability of further civilian and military casualties.

Considering the power conferred upon the Court by Article 75, paragraph 1, of the Rules of Court and having in mind the greatest urgency caused by the circumstances described in the Requests for provisional measure of protection I kindly ask the Court to decide on the submitted Requests *proprio motu* or to fix a date for a hearing at earliest possible time";

9. Whereas on 29 April 1999, the day on which the Application and the request for the indication of provisional measures were filed in the Registry, the Registrar sent to the United States Government signed copies of the Application and of the request, in accordance with Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas he also sent to that Government copies of the documents accompanying the Application and the request for the indication of provisional measures;

10. Whereas on 29 April 1999 the Registrar informed the Parties that the Court had decided, pursuant to Article 74, paragraph 3, of the Rules of Court, to hold hearings on 10 and 11 May 1999, where they would be able to present their observations on the request for the indication of provisional measures;

11. Whereas, pending the notification under Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, by transmittal of the printed bilingual text of the Application to the Members of the United Nations and other States entitled to appear before the Court, the Registrar on 29 April 1999 informed those States of the filing of the Application and of its subject-matter, and of the filing of the request for the indication of provisional measures;

12. Whereas, since the Court includes upon the bench no judge of Yugoslav nationality, the Yugoslav Government has availed itself of the provisions of Article 31 of the Statute of the Court to choose Mr. Milenko Kreća to sit as judge *ad hoc* in the case; and whereas no

objection to that choice was raised within the time-limit fixed for the purpose pursuant to Article 35, paragraph 3, of the Rules of Court;

13. Whereas, at the public hearings held between 10 and 12 May 1999, oral observations on the request for the indication of provisional measures were presented by the following:

On behalf of Yugoslavia:

Mr. Rodoljub Etinski, *Agent*,

Mr. Ian Brownlie,

Mr. Paul J. I. M. de Waart,

Mr. Eric Suy,

Mr. Miodrag Mitić;

Mr. Olivier Corten;

On behalf of the United States:

Mr. David Andrews, *Agent*;

Mr. John Crook,

Mr. Michael Matheson;

14. Whereas, in this phase of the proceedings, the Parties presented the following submissions:

On behalf of Yugoslavia:

"[T]he Court [is asked] to indicate the following provisional measure:

[T]he United States of America . . . shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia";

On behalf of the United States of America:

"That the Court reject the request of the Federal Republic of Yugoslavia for the indication of provisional measures";

* * *

15. Whereas the Court is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia;

16. Whereas the Court is profoundly concerned with the use of force in Yugoslavia; whereas under the present circumstances such use raises very serious issues of international law;

17. Whereas the Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and the Statute of the Court;

18. Whereas the Court deems it necessary to emphasize that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law;

* * *

19. Whereas the Court, under its Statute, does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States to whom access to the Court has been granted; whereas the Court has repeatedly stated "that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction" (*East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 101*, para. 26); and whereas the Court can therefore exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned;

20. Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be established;

21. Whereas in its Application Yugoslavia claims, in the first place, to found the jurisdiction of the Court upon Article IX of the Genocide Convention, which provides:

"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";

whereas it is not disputed that both Yugoslavia and the United States are parties to the Genocide Convention; but whereas, when the United States ratified the Convention on 25 November 1988, it made the following reservation:

"That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this Article, the specific consent of the United States is required in each case";

22. Whereas the United States contends that "[its] reservation [to Article IX] is clear and unambiguous"; that "[t]he United States has not given the specific consent [that reservation] requires [and] . . . will not do so"; and that Article IX of the Convention cannot in consequence found the jurisdiction of the Court in this case, even *prima facie*; whereas the United States also observed that reservations to the Genocide Convention are generally permitted; that its reservation to Article IX is not contrary to the Convention's object and purpose; and that, "[s]ince . . . Yugoslavia did not object to the . . . reservation, [it] is bound by it"; and whereas the United States further contends that there is no "legally sufficient . . . connection between the charges against the United States contained in the Application and [the] supposed jurisdictional basis under the Genocide Convention"; and whereas the United States further asserts that Yugoslavia has failed to make any credible allegation of violation of the Genocide Convention, by failing to demonstrate the existence of the specific intent required by the Convention to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such", which intent could not be inferred from the conduct of conventional military operations against another State.

23. Whereas Yugoslavia disputed the United States interpretation of the Genocide Convention, but submitted no argument concerning the United States reservation to Article IX of the Convention;

24. Whereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to the United States reservation to Article IX; and whereas the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties;

25. Whereas in consequence Article IX of the Genocide Convention cannot found the jurisdiction of the Court to entertain a dispute between Yugoslavia and the United States alleged to fall within its provisions; and whereas that Article manifestly does not constitute a basis of jurisdiction in the present case, even *prima facie*;

"5. When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case";

27. Whereas the United States observes that it "has not consented to jurisdiction under Article 38, paragraph 5, [of the Rules of Court] and will not do so".

28. Whereas it is quite clear that, in the absence of consent by the United States, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise jurisdiction in the present case, even *prima facie*:

* * *

29. Whereas it follows from what has been said above that the Court manifestly lacks jurisdiction to entertain Yugoslavia's Application; whereas it cannot therefore indicate any provisional measure whatsoever in order to protect the rights invoked therein; and whereas, within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice;

* * *

30. Whereas there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law; the former requires consent; the latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties;

31. Whereas, whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law; whereas any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties;

32. Whereas in this context the parties should take care not to aggravate or extend the dispute;

33. Whereas, when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter;

* * *

34. For these reasons,

THE COURT,

(1) By twelve votes to three,

Rejects the request for the indication of provisional measures submitted by the Federal Republic of Yugoslavia on 29 April 1999;

IN FAVOUR: *Vice-President* Weeramantry, *Acting President*; *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Fleischhauer, Koroma, Higgins, Parra-Aranguren, Kooijmans;

AGAINST: *Judges* Shi, Vereshchetin; *Judge ad hoc* Krčea;

(2) By twelve votes to three.

Orders that the case be removed from the List.

IN FAVOUR: *Vice-President* Weeramantry, *Acting President*; *President* Schwebel; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Higgins, Kooijmans;

AGAINST: *Judges* Vereshchetin, Parra-Aranguren; *Judge ad hoc* Krčea.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this second day of June, one thousand nine hundred and ninety-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Yugoslavia and the Government of the United States of America, respectively.

(Signed) Christopher G. WEERAMANTRY,

Vice-President.

(Signed) Eduardo VALENCIA-OSPINÀ,

Registrar.

Judges SHI, KOROMA and VERESHCHETIN append declarations to the Order of the Court.

Judges ODA and PARRA-ARANGUREN append separate opinions to the Order of the Court.

Judge *ad hoc* KRČEA appends a dissenting opinion to the Order of the Court.

(Initialled) C.G.W.

(Initialled) E.V.O.

International Court of Justice

**Legal Consequences of the Construction of a Wall in
the Occupied Palestinian Territory**

Advisory Opinion

I.C.J. Reports 2004

of opinion — Nullus commodum capere potest de sua iniuria propria — Opinion to be given to the General Assembly, not to a specific State or entity.

INTERNATIONAL COURT OF JUSTICE

YEAR 2004

9 July
General List
No. 131

LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

“Legal consequences” of the construction of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem — Scope of question posed — Request for opinion limited to the legal consequences of the construction of those parts of the wall situated in Occupied Palestinian Territory — Use of the term “wall”.

*Historical background.
Description of the wall.*

* *

*Applicable law.
United Nations Charter — General Assembly resolution 2625 (XXV) — Illegality of any territorial acquisition resulting from the threat or use of force — Right of peoples to self-determination.*

International humanitarian law — Regulations annexed to the Fourth Hague Convention of 1907 — Fourth Geneva Convention of 1949 — Applicability of Fourth Geneva Convention in the Occupied Palestinian Territory — Human rights law — International Covenant on Civil and Political Rights — International Covenant on Economic, Social and Cultural Rights — Convention on the Rights of the Child — Relationship between international humanitarian law and human rights law — Applicability of human rights instruments outside national territory — Applicability of those instruments in the Occupied Palestinian Territory.

* *

Settlements established by Israel in breach of international law in the Occupied Palestinian Territory — Construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent — Risk of situation tantamount to de facto annexation — Construction of the wall severely impedes the exercise by the Palestinian people of its right to self-determination and is therefore a breach of Israel’s obligation to respect that right.

Applicable provisions of international humanitarian law and human rights instruments relevant to the present case — Destruction and requisition of properties — Restrictions on freedom of movement of inhabitants of the Occupied Palestinian Territory — Impediments to the exercise by those concerned of the right to work, to health, to education and to an adequate standard of living — Demographic changes in the Occupied Palestinian Territory — Provisions of international humanitarian law enabling account to be taken of military exigencies — Clauses in human rights instruments qualifying rights guaranteed or providing for derogation — Construction of the wall and its associated régime cannot be justified by military exigencies or by the requirements of national security or public order — Breach by Israel of various of its obligations under

Discretionary power of Court to decide whether it should give an opinion.

Article 65, paragraph 1, of Statute — Relevance of lack of consent of a State concerned — Question cannot be regarded only as a bilateral matter between Israel and Palestine but is directly of concern to the United Nations — Possible effects of opinion on a political solution to the Israeli-Palestinian conflict — Question representing only one aspect of Israeli-Palestinian conflict — Sufficiency of information and evidence available to Court — Useful purpose

the applicable provisions of international humanitarian law and human rights instruments.

Self-defence — Article 51 of the Charter — Attacks against Israel not inputable for a foreign State — Threat invoked to justify the construction of the wall originating within a territory over which Israel exercises control — Article 51 not relevant in the present case.

State of necessity — Customary international law — Conditions — Construction of the wall not the only means to safeguard Israel's interests against the peril invoked.

Construction of the wall and its associated régime are contrary to international law.

* *

Legal consequences of the violation by Israel of its obligations.

Israel's international responsibility — Israel obliged to comply with the international obligations it has breached by the construction of the wall — Israel obliged to put an end to the violation of its international obligations — Obligation to cease forthwith the works of construction of the wall, to dismantle it forthwith and to repeat or render ineffective forthwith the legislative and regulatory acts relating to its construction, save where relevant for compliance by Israel with its obligation to make reparation for the damage caused — Israel obliged to make reparation for the damage caused to all natural or legal persons affected by construction of the wall.

Legal consequences for States other than Israel — Obligation for all States not to recognize the illegal situation resulting from construction of the wall and not to render aid or assistance in maintaining the situation created by such construction — Obligation for all States, while respecting the Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end — Obligation for all States parties to the Fourth Geneva Convention, while respecting the Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention — Need for the United Nations, and especially the General Assembly and the Security Council, to consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and its associated régime, taking due account of the Advisory Opinion.

* *

Construction of the wall must be placed in a more general context — Obligation of Israel and Palestine scrupulously to observe international humanitarian law — Implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973) — "Roadmap" — Need for efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, with peace and security for all in the region.

ADVISORY OPINION

Present: President SHI; Vice-President RANJEEVA; Judges GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOUMANS, REZEK, AL-KHASAWNEH, ELARABY, OWADA, SIMMA, TOMKA; Registrar COURREUR.

On the legal consequences of the construction of a wall in the Occupied Palestinian Territory,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the "General Assembly") on 8 December 2003 at its Tenth Emergency Special Session. By a letter dated 8 December 2003 and received in the Registry by facsimile on 10 December 2003, the original of which reached the Registry subsequently, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of resolution ES-10/14 were enclosed with the letter. The resolution reads as follows:

"*The General Assembly,*

Reaffirming its resolution ES-10/13 of 21 October 2003,

Guided by the principles of the Charter of the United Nations,

Aware of the established principle of international law on the inadmissibility of the acquisition of territory by force,

Aware also that developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples is among the purposes and principles of the Charter of the United Nations,

Recalling relevant General Assembly resolutions, including resolution 181 (II) of 29 November 1947, which partitioned mandated Palestine into two States, one Arab and one Jewish,

Recalling also the resolutions of the tenth emergency special session of the General Assembly,

Recalling further relevant Security Council resolutions, including resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 267 (1969) of 3 July 1969, 298 (1971) of 25 September 1971, 446 (1979) of 22 March 1979, 452 (1979) of 20 July 1979, 465 (1980) of 1 March 1980, 476 (1980) of 30 June 1980, 478 (1980) of 20 August 1980, 904 (1994) of 18 March 1994, 1073 (1996) of 28 September 1996, 1397 (2002) of 12 March 2002 and 1515 (2003) of 19 November 2003,

Reaffirming the applicability of the Fourth Geneva Convention¹ as well as Additional Protocol I to the Geneva Conventions² to the Occupied Palestinian Territory, including East Jerusalem,

Recalling the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907³,

Welcomeing the convening of the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, at Geneva on 15 July 1999,

Expressing its support for the declaration adopted by the reconvened Conference of High Contracting Parties at Geneva on 5 December 2001,

Recalling in particular relevant United Nations resolutions affirming that Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, are illegal and an obstacle to peace and to economic and social development as well as those demanding the complete cessation of settlement activities,

Recalling relevant United Nations resolutions affirming that actions taken by Israel, the occupying Power, to change the status and demographic composition of Occupied East Jerusalem have no legal validity and are null and void,

Noting the agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process,

Gravely concerned at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the de facto annexation of large areas of territory, and underlining the unanimous opposition by the international community to the construction of that wall,

Gravely concerned also at the even more devastating impact of the projected parts of the wall on the Palestinian civilian population and on the prospects for solving the Palestinian-Israeli conflict and establishing peace in the region,

Welcomeing the report of 8 September 2003 of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967⁴, in particular the section regarding the wall,

¹ United Nations, *Treaty Series*, Vol. 75, No. 973.

² *Ibid.*, Vol. 1125, No. 17512.

³ See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

⁴ E/CN.4/2004/6.

Affirming the necessity of ending the conflict on the basis of the two-State solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949, in accordance with relevant Security Council and General Assembly resolutions,

Having received with appreciation the report of the Secretary-General, submitted in accordance with resolution ES-10/13⁵,

Bearing in mind that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences,

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

⁵ A/ES-10/248.

Also enclosed with the letter were the certified English and French texts of the report of the Secretary-General dated 24 November 2003, prepared pursuant to General Assembly resolution ES-10/13 (A/ES-10/248), to which resolution ES-10/14 makes reference.

2. By letters dated 10 December 2003, the Registrar notified the request for an advisory opinion to all States entitled to appear before the Court, in accordance with Article 66, paragraph 1, of the Statute.

3. By a letter dated 11 December 2003, the Government of Israel informed the Court of its position on the request for an advisory opinion and on the procedure to be followed.

4. By an Order of 19 December 2003, the Court decided that the United Nations and its Member States were likely, in accordance with Article 66, paragraph 2, of the Statute, to be able to furnish information on all aspects raised by the question submitted to the Court for an advisory opinion and fixed 30 January 2004 as the time-limit within which written statements might be submitted to it on the question in accordance with Article 66, paragraph 4, of the Statute. By the same Order, the Court further decided that, in the light of resolution ES-10/14 and the report of the Secretary-General transmitted with the request, and taking into account the fact that the General Assembly had granted Palestine a special status of observer and that the latter was co-sponsor of the draft resolution requesting the advisory opinion, Palestine might also submit a written statement on the question within the above time-limit.

5. By the aforesaid Order, the Court also decided, in accordance with

Article 105, paragraph 4, of the Rules of Court, to hold public hearings during which oral statements and comments might be presented to it by the United Nations and its Member States, regardless of whether or not they had submitted written statements, and fixed 23 February 2004 as the date for the opening of the said hearings. By the same Order, the Court decided that for the reasons set out above (see paragraph 4), Palestine might also take part in the hearings. Lastly, it invited the United Nations and its Member States, as well as Palestine, to inform the Registry, by 13 February 2004 at the latest, if they were intending to take part in the above-mentioned hearings. By letters of 19 December 2004, the Registrar informed them of the Court's decisions and transmitted to them a copy of the Order.

6. Ruling on requests submitted subsequently by the League of Arab States and the Organization of the Islamic Conference, the Court decided, in accordance with Article 66 of its Statute, that those two international organizations were likely to be able to furnish information on the question submitted to the Court, and that consequently they might for that purpose submit written statements within the time-limit fixed by the Court in its Order of 19 December 2003 and take part in the hearings.

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

8. By a reasoned Order of 30 January 2004 regarding its composition in the case, the Court decided that the matters brought to its attention by the Government of Israel in a letter of 31 December 2003, and in a confidential letter of 15 January 2004 addressed to the President pursuant to Article 34, paragraph 2, of the Rules of Court, were not such as to preclude Judge Elaraby from sitting in the case.

9. Within the time-limit fixed by the Court for that purpose, written statements were filed by, in order of their receipt: Guinea, Saudi Arabia, League of Arab States, Egypt, Cameroon, Russian Federation, Australia, Palestine, United Nations, Jordan, Kuwait, Lebanon, Canada, Syria, Switzerland, Israel, Yemen, United States of America, Morocco, Indonesia, Organization of the Islamic Conference, France, Italy, Sudan, South Africa, Germany, Japan, Norway, United Kingdom, Pakistan, Czech Republic, Greece, Ireland, on its own behalf, Ireland on behalf of the European Union, Cyprus, Brazil, Namibia, Malta, Malaysia, Netherlands, Cuba, Sweden, Spain, Belgium, Palau, Federated States of Micronesia, Marshall Islands, Senegal, Democratic People's Republic of Korea. Upon receipt of those statements, the Registrar transmitted copies thereof to the United Nations and its Member States, to Palestine, to the League of Arab States and to the Organization of the Islamic Conference.

10. Various communications were addressed to these latter by the Registry, concerning in particular the measures taken for the organization of the oral proceedings. By communications of 20 February 2004, the Registry transmitted a detailed timetable of the hearings to those of the latter who, within the time-limit fixed for that purpose by the Court, had expressed their intention of taking part in the aforementioned proceedings.

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

12. In the course of hearings held from 23 to 25 February 2004, the Court heard oral statements, in the following order, by:

<i>for Palestine:</i>	H.E. Mr. Nasser Al-Kidwa, Ambassador, Permanent Observer of Palestine to the United Nations,
Ms. Stephanie Koury, Member, Negotiations Support Unit, Counsel,	Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institute of International Law, Counsel and Advocate,
Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law, Counsel and Advocate,	Mr. Vaughan Lowe, Chichele Professor of International Law, University of Oxford, Counsel and Advocate,
Mr. Jean Salmon, Professor Emeritus of International Law, Université libre de Bruxelles, Member of the Institute of International Law, Counsel and Advocate;	Mr. Aziz Pahad, Deputy Minister for Foreign Affairs, Head of Delegation,
<i>for the Republic of South Africa:</i>	Judge M. R. W. Madlanga, S.C.;
<i>for the People's Democratic Republic of Algeria:</i>	Mr. Ahmed Laraba, Professor of International Law;
<i>for the Kingdom of Saudi Arabia:</i>	H.E. Mr. Fawzi A. Shobokshi, Ambassador and Permanent Representative of the Kingdom of Saudi Arabia to the United Nations in New York, Head of Delegation;
<i>for the People's Republic of Bangladesh:</i>	H.E. Mr. Liaquat Ali Choudhury, Ambassador of the People's Republic of Bangladesh to the Kingdom of the Netherlands;
<i>for Belize:</i>	Mr. Jean-Marc Sorel, Professor at the University of Paris I (Panthéon-Sorbonne);
<i>for the Republic of Cuba:</i>	H.E. Mr. Abelardo Moreno Fernández, Deputy Minister for Foreign Affairs;
<i>for the Republic of Indonesia:</i>	H.E. Mr. Mohammad Jusuf, Ambassador of the Republic of Indonesia to the Kingdom of the Netherlands, Head of Delegation;
<i>for the Hashemite Kingdom of Jordan:</i>	H.R.H. Ambassador Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, New York, Head of Delegation,
	Sir Arthur Watts, K.C.M.G., Q.C., Senior Legal

Adviser to the Government of the Hashemite Kingdom of Jordan;

for the Republic of Madagascar: H.E. Mr. Alfred Rambeloson, Permanent Representative of Madagascar to the Office of the United Nations at Geneva and to the Specialized Agencies, Head of Delegation;

for Malaysia: H.E. Datuk Seri Syed Hamid Albar, Foreign Minister of Malaysia, Head of Delegation;

for the Republic of Senegal: H.E. Mr. Saliou Cissé, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands, Head of Delegation;

for the Republic of the Sudan: H.E. Mr. Abuelgasim A. Idris, Ambassador of the Republic of the Sudan to the Kingdom of the Netherlands;

for the League of Arab States: Mr. Michael Bothe, Professor of Law, Head of the Legal Team;

for the Organization of the Islamic Conference: H.E. Mr. Abdellouah Belkeziz, Secretary General of the Organization of the Islamic Conference, Ms Monique Chemillier-Gendreau, Professor of Public Law, University of Paris VII-Denis Diderot, as Counsel.

* * *

13. When seized of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10).

* * *

14. The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 December 2003. The competence of the Court in this regard is based on Article 65, paragraph 1, of its Statute, according to which the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". The Court has already had occasion to indicate that:

"It is . . . a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ." (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21.)

15. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it. In the present instance, the Court notes that the General Assembly, which seeks the advisory opinion, is authorized to do so by Article 96, paragraph 1, of the Charter, which provides: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

16. Although the above-mentioned provision states that the General Assembly may seek an advisory opinion "on any legal question", the Court has sometimes in the past given certain indications as to the relationship between the question the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 70; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 232 and 233, paras. 11 and 12).

17. The Court will so proceed in the present case. The Court would observe that Article 10 of the Charter has conferred upon the General Assembly a competence relating to "any questions or any matters" within the scope of the Charter, and that Article 11, paragraph 2, has specifically provided it with competence on "questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . . and to make recommendations under certain conditions fixed by those Articles As will be explained below, the question of the construction of the wall in the Occupied Palestinian Territory was brought before the General Assembly by a number of Member States in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what the Assembly, in its resolution ES-10/2 of 25 April 1997, considered to constitute a threat to international peace and security.

* *

18. Before further examining the problems of jurisdiction that have been raised in the present proceedings, the Court considers it necessary to describe the events that led to the adoption of resolution ES-10/14, by which the General Assembly requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

19. The Tenth Emergency Special Session of the General Assembly, at which that resolution was adopted, was first convened following the rejection by the Security Council, on 7 March and 21 March 1997, as a result of negative votes by a permanent member, of two draft resolutions concerning certain Israeli settlements in the Occupied Palestinian Territory (see, respectively, S/1997/199 and S/PV.3747, and S/1997/241 and S/PV.3756). By a letter of 31 March 1997, the Chairman of the Arab Group then requested "that an emergency special session of the General Assembly be convened pursuant to resolution 377 A (V) entitled 'Uniting

for Peace' " with a view to discussing "Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory" (letter dated 31 March 1997 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General, A/ES-10/1, 22 April 1997, Annex). The majority of Members of the United Nations having concurred in this request, the first meeting of the Tenth Emergency Special Session of the General Assembly took place on 24 April 1997 (see A/ES-10/1, 22 April 1997). Resolution ES-10/2 was adopted the following day; the General Assembly thereby expressed its conviction that:

"the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security",

and condemned the "illegal Israeli actions" in occupied East Jerusalem and the rest of the Occupied Palestinian Territory, in particular the construction of settlements in that territory. The Tenth Emergency Special Session was then adjourned temporarily and has since been reconvened 11 times (on 15 July 1997, 13 November 1997, 17 March 1998, 5 February 1999, 18 October 2000, 20 December 2001, 7 May 2002, 5 August 2002, 19 September 2003, 20 October 2003 and 8 December 2003).

20. By a letter dated 9 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested an immediate meeting of the Security Council to consider the "grave and ongoing Israeli violations of international law, including international humanitarian law, and to take the necessary measures in this regard" (letter of 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations to the President of the Security Council, S/2003/973, 9 October 2003). This letter was accompanied by a draft resolution for consideration by the Council, which condemned as illegal the construction by Israel of a wall in the Occupied Palestinian Territory departing from the Armistice Line of 1949. The Security Council held its 4841st and 4842nd meetings on 14 October 2003 to consider the item entitled "The situation in the Middle East, including the Palestine question". It then had before it another draft resolution proposed on the same day by Guinea, Malaysia, Pakistan and the Syrian Arab Republic, which also condemned the construction of the wall. This latter draft resolution was put to a vote after an open debate and was not adopted owing to the negative vote of a permanent member of the Council (S/PV.484) and S/PV.4842).

On 15 October 2003, the Chairman of the Arab Group, on behalf of

the States Members of the League of Arab States, requested the resumption of the Tenth Emergency Special Session of the General Assembly to consider the item of "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory" (A/ES-10/242); this request was supported by the Non-Aligned Movement (A/ES-10/243) and the Organization of the Islamic Conference Group at the United Nations (A/ES-10/244). The Tenth Emergency Special Session resumed its work on 20 October 2003.

21. On 27 October 2003, the General Assembly adopted resolution ES-10/13, by which it demanded that

"Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law" (para. 1).

In paragraph 3, the Assembly requested the Secretary-General

"to report on compliance with the . . . resolution periodically, with the first report on compliance with paragraph 1 [of that resolution] to be submitted within one month . . .".

The Tenth Emergency Special Session was temporarily adjourned and, on 24 November 2003, the report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (hereinafter the "report of the Secretary-General") was issued (A/ES-10/248).

22. Meanwhile, on 19 November 2003, the Security Council adopted resolution 1515 (2003), by which it "Endorse[d] the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict". The Quartet consists of representatives of the United States of America, the European Union, the Russian Federation and the United Nations. That resolution

"Call[ed] on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security."

Neither the "Roadmap" nor resolution 1515 (2003) contained any specific provision concerning the construction of the wall, which was not discussed by the Security Council in this context.

23. Nineteen days later, on 8 December 2003, the Tenth Emergency Special Session of the General Assembly again resumed its work, following a new request by the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, and pursuant to resolution ES-10/13 (letter dated 1 December 2003 to the President of the General Assembly from the Chargé d'affaires a.i. of the Permanent Mission

of Kuwait to the United Nations, A/ES-10/249, 2 December 2003). It was during the meeting convened on that day that resolution ES-10/14 requesting the present advisory opinion was adopted.

*

24. Having thus recalled the sequence of events that led to the adoption of resolution ES-10/14, the Court will now turn to the questions of jurisdiction that have been raised in the present proceedings. First, Israel has alleged that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the Charter when it requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

25. The Court has already indicated that the subject of the present request for an advisory opinion falls within the competence of the General Assembly under the Charter (see paragraphs 15-17 above). However, Article 12, paragraph 1, of the Charter provides that:

“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

A request for an advisory opinion is not in itself a “recommendation” by the General Assembly “with regard to [a] dispute or situation”. It has however been argued in this case that the adoption by the General Assembly of resolution ES-10/14 was *ultra vires* as not in accordance with Article 12. The Court thus considers that it is appropriate for it to examine the significance of that Article, having regard to the relevant texts and the practice of the United Nations.

26. Under Article 24 of the Charter the Security Council has “primary responsibility for the maintenance of international peace and security”. In that regard it can impose on States “an explicit obligation of compliance if for example it issues an order or command . . . under Chapter VII” and can, to that end, “require enforcement by coercive action” (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 163*). However, the Court would emphasize that Article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, *inter alia*, under Article 14 of the Charter, to “recommend measures for the peaceful adjustment” of various situations (*ibid.*).

“[T]he only limitation which Article 14 imposes on the General

Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.” (*I.C.J. Reports 1962, p. 163*.)

27. As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council’s agenda. Thus the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, *inter alia*, that the Council remained seized of the matter (*Official Records of the General Assembly, Fourth Session, Ad Hoc Political Committee, Summary Records of Meetings, 27 September-7 December 1949, 56th Meeting, 3 December 1949, p. 339*, para. 118). As for the Council, on a number of occasions it deleted items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question (*Official Records of the Security Council, First Year: Second Series, No. 21, 79th Meeting, 4 November 1946, p. 498*), in connection with incidents on the Greek border (*Official Records of the Security Council, Second Year, No. 89, 202nd Meeting, 15 September 1947, pp. 2404-2405*) and in regard to the Island of Taiwan (Formosa) (*Official Records of the Security Council, Fifth Year, No. 48, 506th Meeting, 29 September 1950, p. 5*)). In the case of the Republic of Korea, the Council decided on 31 January 1951 to remove the relevant item from the list of matters of which it was seized in order to enable the Assembly to deliberate on the matter (*Official Records of the Security Council, Sixth Year, SPV.531, 531st Meeting, 31 January 1951, pp. 11-12*, para. 57).

However, this interpretation of Article 12 has evolved subsequently. Thus the General Assembly deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo (resolutions 1955 (XV) and 1600 (XVI)) and in 1963 in respect of the Portuguese colonies (resolution 1913 (XVIII)) while those cases still appeared on the Council’s agenda, without the Council having adopted any recent resolution concerning them. In response to a question posed by Peru during the twenty-third session of the General Assembly, the Legal Counsel of the United Nations confirmed that the Assembly interpreted the words “is exercising the functions” in Article 12 of the Charter as meaning “is exercising the functions at this moment” (General Assembly, Twenty-third Session, Third Committee, 1637th meeting, A/C.3/SR.1637, para. 9). Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and

Somalia). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

28. The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.

The Court is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

29. It has however been contended before the Court that the present request for an advisory opinion did not fulfil the essential conditions set by resolution 377 A (V), under which the Tenth Emergency Special Session was convened and has continued to act. In this regard, it has been said, first, that “The Security Council was never seized of a draft resolution proposing that the Council itself should request an advisory opinion from the Court on the matters now in contention”, and, that specific issue having thus never been brought before the Council, the General Assembly could not rely on any inaction by the Council to make such a request. Secondly, it has been claimed that, in adopting resolution 1515 (2003), which endorsed the “Roadmap”, before the adoption by the General Assembly of resolution ES-10/14, the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. The validity of the procedure followed by the Tenth Emergency Special Session, especially the Session’s “rolling character” and the fact that its meeting was convened to deliberate on the request for the advisory opinion at the same time as the General Assembly was meeting in regular session, has also been questioned.

30. The Court would recall that resolution 377 A (V) states that: “if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures . . .”

The procedure provided for by that resolution is premised on two conditions, namely that the Council has failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members, and that the situa-

tion is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression. The Court must accordingly ascertain whether these conditions were fulfilled as regards the convening of the Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.

31. In the light of the sequence of events described in paragraphs 18 to 23 above, the Court observes that, at the time when the Tenth Emergency Special Session was convened in 1997, the Council had been unable to take a decision on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to negative votes of a permanent member; and that, as indicated in resolution ES-10/2 (see paragraph 19 above), there existed a threat to international peace and security.

The Court further notes that, on 20 October 2003, the Tenth Emergency Special Session of the General Assembly was reconvened on the same basis as in 1997 (see the statements by the representatives of Palestine and Israel, A/ES-10/PV.21, pp. 2 and 5), after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377 A (V). It does not appear to the Court that the situation in this regard changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the construction of the wall nor adopted any resolution in that connection. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. It follows that, during that period, the Tenth Emergency Special Session was duly reconvened and could properly be seized, under resolution 377 A (V), of the matter now before the Court.

32. The Court would also emphasize that, in the course of this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject-matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court’s opinion. It is irrelevant in that regard that no proposal had been made to the Security Council to request such an opinion.

33. Turning now to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the “rolling” character of that Session, namely the fact of its having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. The Court observes in that regard that the Seventh Emergency Special Session of the General Assembly, having been convened on 22 July 1980, was subsequently reconvened four times (on 20 April 1982, 25 June 1982, 16 August 1982 and 24 September 1982), and that the validity of

resolutions or decisions of the Assembly adopted under such circumstances was never disputed. Nor has the validity of any previous resolutions adopted during the Tenth Emergency Special Session been challenged.

34. The Court also notes the contention by Israel that it was improper to reconvene the Tenth Emergency Special Session at a time when the regular session of the General Assembly was in progress. The Court considers that, while it may not have been originally contemplated that it would be appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule of the Organization has been identified which would be thereby violated, so as to render invalid the resolution adopting the present request for an advisory opinion.

35. Finally, the Tenth Emergency Special Session appears to have been convened in accordance with Rule 9 (b) of the Rules of Procedure of the General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules. As the Court stated in its Advisory Opinion of 21 June 1971 concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, a

"resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted" (*I.C.J. Reports 1971*, p. 22, para. 20).

In view of the foregoing, the Court cannot see any reason why that presumption is to be rebutted in the present case.

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36. The Court now turns to a further issue related to jurisdiction in the present proceedings, namely the contention that the request for an advisory opinion by the General Assembly is not on a "legal question" within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has been contended in this regard that, for a question to constitute a "legal question" for the purposes of these two provisions, it must be reasonably specific, since otherwise it would not be amenable to a response by the Court. With regard to the request made in the present advisory proceedings, it has been argued that it is not possible to determine with reasonable certainty the legal meaning of the question asked of the Court for two reasons.

First, it has been argued that the question regarding the "legal consequences" of the construction of the wall only allows for two possible interpretations, each of which would lead to a course of action that is

precluded for the Court. The question asked could first be interpreted as a request for the Court to find that the construction of the wall is illegal, and then to give its opinion on the legal consequences of that illegality. In this case, it has been contended, the Court should decline to respond to the question asked for a variety of reasons, some of which pertain to jurisdiction and others rather to the issue of propriety. As regards jurisdiction, it is said that, if the General Assembly had wished to obtain the view of the Court on the highly complex and sensitive question of the legality of the construction of the wall, it should have expressly sought an opinion to that effect (cf. *Exchange of Greek and Turkish Populations*. *Advisory Opinion*, 1925, *P.C.I.J., Series B*, No. 10, p. 17). A second possible interpretation of the request, it is said, is that the Court should assume that the construction of the wall is illegal, and then give its opinion on the legal consequences of that assumed illegality. It has been contended that the Court should also decline to respond to the question on this hypothesis, since the request would then be based on a questionable assumption and since, in any event, it would be impossible to rule on the legal consequences of illegality without specifying the nature of that illegality.

Secondly, it has been contended that the question asked of the Court is not of a "legal" character because of its imprecision and abstract nature. In particular, it has been argued in this regard that the question fails to specify whether the Court is being asked to address legal consequences for "the General Assembly or some other organ of the United Nations", "Member States of the United Nations", "Israel", "Palestine" or "some combination of the above, or some different entity".

37. As regards the alleged lack of clarity of the terms of the General Assembly's request and its effect on the "legal nature" of the question referred to the Court, the Court observes that this question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the "Fourth Geneva Convention") and relevant Security Council and General Assembly resolutions. The question submitted by the General Assembly has thus, to use the Court's phrase in its *Advisory Opinion on Western Sahara*, "been framed in terms of law and raise[s] problems of international law"; it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character (see *Western Sahara, Advisory Opinion*, *I.C.J. Reports 1975*, p. 18, para. 15).

38. The Court would point out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncer-

tainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.

In the past, both the Permanent Court and the present Court have observed in some cases that the wording of a request for an advisory opinion did not accurately state the question on which the Court's opinion was being sought (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.J., Series B, No. 16 (I)*, pp. 14-16), or did not correspond to the "true legal question" under consideration (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 87-89, paras. 34-36). The Court noted in one case that "the question put to the Court is, on the face of it, at once infelicitously expressed and vague" (*Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46).

Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put (see the three Opinions cited above; see also *Jaworznia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8; Admissibility of Hearings of Petitions by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157-162).

In the present instance, the Court will only have to do what it has often done in the past, namely "identify the existing principles and rules, interpret them and apply them . . . thus offering a reply to the question posed based on law" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13).

39. In the present instance, if the General Assembly requests the Court to state the "legal consequences" arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law. Thus, the Court is first called upon to determine whether such rules and principles have been and are still being breached by the construction of the wall along the planned route.

40. The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, the Court took the position that to contend that it should not deal with a question couched in abstract terms is "a mere affirmation devoid of any justification" and that "the Court may give an advisory opinion on any legal question, abstract or otherwise" (*I.C.J. Reports 1996 (I)*, p. 236, para. 15, referring to *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion 1948, I.C.J. Reports 1947-1948*, p. 61; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 51; and *Legal Con-*

sequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 27, para. 40). In any event, the Court considers that the question posed to it in relation to the legal consequences of the construction of the wall is not an abstract one, and moreover that it would be for the Court to determine for whom any such consequences arise.

41. Furthermore, the Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the "political" character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects, "as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute' (*Application for Review of 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 the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155); (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 13).

In its Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court indeed emphasized that, "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate . . ." (*I.C.J. Reports 1980*, p. 87, para. 33).

Moreover, the Court has affirmed in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that "the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion" (*I.C.J. Reports 1996 (I)*, p. 234, para. 13).

The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.

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42. The Court accordingly has jurisdiction to give the advisory opinion requested by resolution ES-10/14 of the General Assembly.

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43. It has been contended in the present proceedings, however, that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly's request that would render the exercise of the Court's jurisdiction improper and inconsistent with the Court's judicial function.

44. The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that "The Court *may* give an advisory opinion . . ." (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 234-235, para. 14). The Court however is mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.) Given its responsibilities as the "principal judicial organ of the United Nations" (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only "compelling reasons" should lead the Court to refuse its opinion (*Certain Expenses of the United Nations (Article I/7, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.)

The present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion. Its decision not to give the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* requested by the World Health Organization was based on the Court's lack of jurisdiction, and not on considerations of judicial propriety (see *I.C.J. Reports 1996 (I)*, p. 235, para. 14). Only on one occasion did the Court's predecessor, the Permanent Court of International Justice, take the view that it should

not reply to a question put to it (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*), but this was due to

"the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 235-236, para. 14).

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45. These considerations do not release the Court from the duty to satisfy itself, each time it is seized of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of "compelling reasons" as cited above. The Court will accordingly examine in detail and in the light of its jurisprudence each of the arguments presented to it in this regard.

46. The first such argument is to the effect that the Court should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction. According to this view, the subject-matter of the question posed by the General Assembly "is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters". Israel has emphasized that it has never consented to the settlement of this wider dispute by the Court or by any other means of compulsory adjudication; on the contrary, it contends that the parties repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that recourse could be had to arbitration. It is accordingly contended that the Court should decline to give the present Opinion, on the basis *inter alia* of the precedent of the decision of the Permanent Court of International Justice on the *Status of Eastern Carelia*.

47. The Court observes that the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion. In an Advisory Opinion of 1950, the Court explained that:

"The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the

United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organization, and, in principle, should not be refused." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also *Western Sahara, I.C.J. Reports 1975*, p. 24, para. 31.)

It followed from this that, in those proceedings, the Court did not refuse to respond to the request for an advisory opinion on the ground that, in the particular circumstances, it lacked jurisdiction. The Court did however examine the opposition of certain interested States to the request by the General Assembly in the context of issues of judicial propriety. Commenting on its 1950 decision, the Court explained in its Advisory Opinion on *Western Sahara* that it had "Thus . . . recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion." The Court continued:

"In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent." (*Western Sahara, I.C.J. Reports 1975*, p. 25, paras. 32-33.)

In applying that principle to the request concerning *Western Sahara*, the Court found that a legal controversy did indeed exist, but one which had arisen during the proceedings of the General Assembly and in relation to matters with which the Assembly was dealing. It had not arisen independently in bilateral relations (*ibid.*, p. 25, para. 34).

48. As regards the request for an advisory opinion now before it, the Court acknowledges that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel's construction of the wall, on which the Court has been asked to pronounce. However, as the Court has itself noted, "Differences of views . . . on legal issues have existed in practically every advisory proceeding" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 34).

49. Furthermore, the Court does not consider that the subject-matter

of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (see paragraphs 70 and 71 below). This responsibility has been described by the General Assembly as "a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.

50. The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

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51. The Court now turns to another argument raised in the present proceedings in support of the view that it should decline to exercise its jurisdiction. Some participants have argued that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it has been contended that such an opinion could undermine the scheme of the "Roadmap" (see paragraph 22 above), which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The requested opinion, it has been alleged, could complicate the negotiations envisaged in the "Roadmap", and the Court should therefore exercise its discretion and decline to reply to the question put.

This is a submission of a kind which the Court has already had to consider several times in the past. For instance, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated:

"It has . . . been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another." (*I.C.J. Reports 1996 (I)*, p. 237, para. 17; see also *Western Sahara, I.C.J. Reports 1975*, p. 37, para. 73.)

52. One participant in the present proceedings has indicated that the Court, if it were to give a response to the request, should in any event do so keeping in mind

"two key aspects of the peace process: the fundamental principle that permanent status issues must be resolved through negotiations; and the need during the interim period for the parties to fulfil their security responsibilities so that the peace process can succeed".

53. The Court is conscious that the "Roadmap", which was endorsed by the Security Council in resolution 1515 (2003) (see paragraph 22 above), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court's opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

54. It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict, which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked. The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

55. Several participants in the proceedings have raised the further

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the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of

argument that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. In particular, Israel has contended, referring to the Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, that the Court could not give an opinion on issues which raise questions of fact that cannot be elucidated without hearing all parties to the conflict. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians. This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits. Israel has concluded that the Court, confronted with factual issues impossible to clarify in the present proceedings, should use its discretion and decline to comply with the request for an advisory opinion.

56. The Court observes that the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance. In its Opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (I.C.J. Reports 1950, p. 72)* and again in its Opinion on the *Western Sahara*, the Court made it clear that what is decisive in these circumstances is

"whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character" (*Western Sahara, I.C.J. Reports 1975*, pp. 28-29, para. 46).

Thus, for instance, in the proceedings concerning the *Status of Eastern Carelia*, the Permanent Court of International Justice decided to decline to give an Opinion *inter alia* because the question put "raised a question of fact which could not be elucidated without hearing both parties" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 72; see *Status of Eastern Carelia, P.C.I.J., Series B, No. 5*, p. 28). On the other hand, in the *Western Sahara* Opinion, the Court observed that it had been provided with very extensive documentary evidence of the relevant facts (*I.C.J. Reports 1975*, p. 29, para. 47).

57. In the present instance, the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of

the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. The Secretary-General has further submitted to the Court a written statement updating his report, which supplemented the information contained therein. Moreover, numerous other participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel's Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes; many other documents issued by the Israeli Government on those matters are in the public domain.

58. The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.

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59. In their written statements, some participants have also put forward the argument that the Court should decline to give the requested opinion on the legal consequences of the construction of the wall because such opinion would lack any useful purpose. They have argued that the advisory opinions of the Court are to be seen as a means to enable an organ or agency in need of legal clarification for its future action to obtain that clarification. In the present instance, the argument continues, the General Assembly would not need an opinion of the Court because it has already declared the construction of the wall to be illegal and has already determined the legal consequences by demanding that Israel stop and reverse its construction, and further, because the General Assembly has never made it clear how it intended to use the opinion.

60. As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. In its Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court observed: "The object of this request for an Opinion is to guide the United Nations in respect of its own action." (*I.C.J. Reports 1951*, p. 19.) Likewise, in its Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South*

West Africa) notwithstanding Security Council Resolution 276 (1970), the Court noted: "The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions." (*I.C.J. Reports 1971*, p. 24, para. 32.) The Court found on another occasion that the advisory opinion it was to give would "furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara" (*Western Sahara, I.C.J. Reports 1975*, p. 37, para. 72).

61. With regard to the argument that the General Assembly has not made it clear what use it would make of an advisory opinion on the wall, the Court would recall, as equally relevant in the present proceedings, what it stated in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

"Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

62. It follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly — and the Security Council — may then draw conclusions from the Court's findings.

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63. Lastly, the Court will turn to another argument advanced with regard to the propriety of its giving an advisory opinion in the present proceedings. Israel has contended that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim *nullius commodum capere potest de sua injuria propria*, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of "clean hands" provide a compelling reason that should lead the Court to refuse the General Assembly's request.

64. The Court does not consider this argument to be pertinent. As was emphasized earlier, it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity.

* * *

65. In the light of the foregoing, the Court concludes not only that it has jurisdiction to give an opinion on the question put to it by the General Assembly (see paragraph 42 above), but also that there is no compelling reason for it to use its discretionary power not to give that opinion.

* * *

66. The Court will now address the question put to it by the General Assembly in resolution ES-10/14. The Court recalls that the question is as follows:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

67. As explained in paragraph 82 below, the “wall” in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel (“fence”) or by the Secretary-General (“barrier”), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built “in the Occupied Palestinian Territory, including in and around East Jerusalem”. As also explained below (see paragraphs 79-84 below), some parts of the complex are being built, or are planned to be built, on the territory of Israel itself; the Court does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall.

68. The question put by the General Assembly concerns the legal consequences of the construction of the wall in the Occupied Palestinian Territory. However, in order to indicate those consequences to the General Assembly the Court must first determine whether or not the construction of that wall breaches international law (see paragraph 39 above). It will

therefore make this determination before dealing with the consequences of the construction.

69. To do so, the Court will first make a brief analysis of the status of the territory concerned, and will then describe the works already constructed or in course of construction in that territory. It will then indicate the applicable law before seeking to establish whether that law has been breached.

* * *

70. Palestine was part of the Ottoman Empire. At the end of the First World War, a class “A” Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of Article 22 of the Covenant, which provided that:

“Certain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”

The Court recalls that in its Advisory Opinion on the *International Status of South West Africa*, speaking of mandates in general, it observed that “The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilization.” (*I.C.J. Reports 1950*, p. 132.) The Court also held in this regard that “two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] ‘a sacred trust of civilization’” (*ibid.*, p. 131).

The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928.

71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which “Recommends to the United Kingdom . . . and to all other Members of the United Nations the adoption and implementation . . . of the Plan of Partition” of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May

1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.

72. By resolution 62 (1948) of 16 November 1948, the Security Council decided that “an armistice shall be established in all sectors of Palestine” and called upon the parties directly involved in the conflict to seek agreement to this end. In conformity with this decision, general armistice agreements were concluded in 1949 between Israel and the neighbouring States through mediation by the United Nations. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the “Green Line”) owing to the colour used for it on maps; hereinafter the “Green Line”). Article III, paragraph 2, provided that “No element of the . . . military or para-military forces of either Party . . . shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines . . .” It was agreed in Article VI, paragraph 8, that these provisions would not be “interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties”. It was also stated that “the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto”. The Demarcation Line was subject to such rectification as might be agreed upon by the parties.

73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).

74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war and called for the “Withdrawal of Israel armed forces from territories occupied in the recent conflict”, and “Termination of all claims or states of belligerency”.

75. From 1967 onwards, Israel took a number of measures in these territories aimed at changing the status of the City of Jerusalem. The Security Council, after recalling on a number of occasions “the principle that acquisition of territory by military conquest is inadmissible”, condemned those measures and, by resolution 298 (1971) of 25 September 1971, confirmed in the clearest possible terms that:

“all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status”.

Later, following the adoption by Israel on 30 July 1980 of the Basic Law making Jerusalem the “complete and united” capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, stated that the enactment of that Law constituted a violation of international law and that “all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . are null and void”. It further decided “not to recognize the ‘basic law’ and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem”.

76. Subsequently, a peace treaty was signed on 26 October 1994 between Israel and Jordan. That treaty fixed the boundary between the two States “with reference to the boundary definition under the Mandate as is shown in Annex I (a) . . . without prejudice to the status of any territories that came under Israeli military government control in 1967” (Article 3, paragraphs 1 and 2). Annex I provided the corresponding maps and added that, with regard to the “territory that came under Israeli military government control in 1967”, the line indicated “is the administrative boundary” with Jordan.

77. Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.

78. The Court would observe that, under customary international law as reflected (see paragraph 89 below) in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter “the Hague Regulations of 1907”), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.

79. It is essentially in these territories that Israel has constructed or plans to construct the works described in the report of the Secretary-General. The Court will now describe those works, basing itself on that report. For developments subsequent to the publication of that report, the Court will refer to complementary information contained in the Written Statement of the United Nations, which was intended by the Secretary-General to supplement his report (hereinafter "Written Statement of the Secretary-General").

80. The report of the Secretary-General states that "The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank . . ." (para. 4). According to that report, a plan of this type was approved for the first time by the Israeli Cabinet in July 2001. Then, on 14 April 2002, the Cabinet adopted a decision for the construction of works, forming what Israel describes as a "security fence", 80 kilometres in length, in three areas of the West Bank.

The project was taken a stage further when, on 23 June 2002, the Israeli Cabinet approved the first phase of the construction of a "continuous fence" in the West Bank (including East Jerusalem). On 14 August 2002, it adopted the line of that "fence" for the work in Phase A, with a view to the construction of a complex 123 kilometres long in the northern West Bank, running from the Salem checkpoint (north of Jenin) to the settlement at Elkana. Phase B of the work was approved in December 2002. It entailed a stretch of some 40 kilometres running east from the Salem checkpoint towards Beth Shean along the northern part of the Green Line as far as the Jordan Valley. Furthermore, on 1 October 2003, the Israeli Cabinet approved a full route, which, according to the report of the Secretary-General, "will form one continuous line stretching 720 kilometres along the West Bank". A map showing completed and planned sections was posted on the Israeli Ministry of Defence website on 23 October 2003. According to the particulars provided on that map, a continuous section (Phase C) encompassing a number of large settlements will link the north-western end of the "security fence" built around Jerusalem with the southern point of Phase A construction at Elkana. According to the same map, the "security fence" will run for 115 kilometres from the Har Gilo settlement near Jerusalem to the Carmel settlement south-east of Hebron (Phase D). According to Ministry of Defence documents, work in this sector is due for completion in 2005. Lastly, there are references in the case file to Israel's planned construction of a "security fence" following the Jordan Valley along the mountain range to the west.

81. According to the Written Statement of the Secretary-General, the first part of these works (Phase A), which ultimately extends for a distance of 150 kilometres, was declared completed on 31 July 2003. It is reported that approximately 56,000 Palestinians would be encompassed in enclaves. During this phase, two sections totalling 19.5 kilometres

were built around Jerusalem. In November 2003 construction of a new section was begun along the Green Line to the west of the Nazlat Issa-Baq'a al-Sharqiya enclave, which in January 2004 was close to completion at the time when the Secretary-General submitted his Written Statement.

According to the Written Statement of the Secretary-General, the works carried out under Phase B were still in progress in January 2004. Thus an initial section of this stretch, which runs near or on the Green Line to the village of al-Mutilla, was almost complete in January 2004. Two additional sections diverge at this point. Construction started in early January 2004 on one section that runs due east as far as the Jordanian border. Construction of the second section, which is planned to run from the Green Line to the village of Taysir, has barely begun. The United Nations has, however, been informed that this second section might not be built.

The Written Statement of the Secretary-General further states that Phase C of the work, which runs from the terminus of Phase A, near the Elkana settlement, to the village of Nu'man, south-east of Jerusalem, began in December 2003. This section is divided into three stages. In Stage C1, between *inter alia* the villages of Rantis and Budrus, approximately 4 kilometres out of a planned total of 40 kilometres have been constructed. Stage C2, which will surround the so-called "Ariel Salient" by cutting 22 kilometres into the West Bank, will incorporate 52,000 Israeli settlers. Stage C3 is to involve the construction of two "depth barriers"; one of these is to run north-south, roughly parallel with the section of Stage C1 currently under construction between Rantis and Budrus, whilst the other runs east-west along a ridge said to be part of the route of Highway 45, a motorway under construction. If construction of the two barriers were completed, two enclaves would be formed, encompassing 72,000 Palestinians in 24 communities.

Further construction also started in late November 2003 along the south-eastern part of the municipal boundary of Jerusalem, following a route that, according to the Written Statement of the Secretary-General, cuts off the suburban village of El-Ezariya from Jerusalem and splits the neighbouring Abu Dis in two.

As at 25 January 2004, according to the Written Statement of the Secretary-General, some 190 kilometres of construction had been completed, covering Phase A and the greater part of Phase B. Further construction in Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun.

The Israeli Government has explained that the routes and timetable as described above are subject to modification. In February 2004, for example, an 8-kilometre section near the town of Baqa al-Sharqiya was

demolished, and the planned length of the wall appears to have been slightly reduced.

82. According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:

- (1) a fence with electronic sensors;
- (2) a ditch (up to 4 metres deep);
- (3) a two-lane asphalt patrol road;
- (4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;
- (5) a stack of six coils of barbed wire marking the perimeter of the complex.

The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. “Depth barriers” may be added to these works.

The approximately 180 kilometres of the complex completed or under construction as of the time when the Secretary-General submitted his report included some 8.5 kilometres of concrete wall. These are generally found where Palestinian population centres are close to or about Israel (such as near Qalqilya and Tulkarm or in parts of Jerusalem).

83. According to the report of the Secretary-General, in its northernmost part, the wall as completed or under construction barely deviates from the Green Line. It nevertheless lies within occupied territories for most of its course. The works deviate more than 7.5 kilometres from the Green Line in certain places to encompass settlements, while encircling Palestinian population areas. A stretch of 1 to 2 kilometres west of Tulkarm appears to run on the Israeli side of the Green Line. Elsewhere, on the other hand, the planned route would deviate eastward by up to 22 kilometres. In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.

84. On the basis of that route, approximately 975 square kilometres (or 16.6 per cent of the West Bank) would, according to the report of the Secretary-General, lie between the Green Line and the wall. This area is stated to be home to 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities, described as enclaves in the report. As a result of the planned route, nearly 320,000 Israeli settlers (of whom 178,000 in East Jerusalem) would be living in the area between the Green Line and the wall.

85. Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative régime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the

part of the West Bank lying between the Green Line and the wall as a “Closed Area”. Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

* *

86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

87. The Court first recalls that, pursuant to Article 2, paragraph 4, of the United Nations Charter:

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

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States” (hereinafter “resolution 2625 (XXV)”), in which it emphasized that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.” As the Court stated in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law (see *I.C.J. Reports 1986*, pp. 98–101, paras. 187–190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

88. The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant

to which “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination.” Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

The Court would recall that in 1971 it emphasized that current developments in “international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]”. The Court went on to state that “[T]hese developments leave little doubt that the ultimate objective of the sacred trust” referred to in Article 22, paragraph 1, of the Covenant of the League of Nations “was the self-determination . . . of the peoples concerned” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 31, paras. 52–53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid.*; see also *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29).

89. As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the International Military Tribunal of Nuremberg has found that the “rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war” (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 (I), p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.

The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns “Military authority over the territory of the hostile State”, is particularly pertinent in the present case.

90. Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the other participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory. In particular, in paragraph 3 of Annex I to the report of the Secretary-General, entitled “Summary Legal Position of the Government of Israel”, it is stated that Israel does not agree that the Fourth Geneva Convention “is applicable to the occupied Palestinian Territory”, citing “the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt” and inferring that it is “not a territory of a High Contracting Party as required by the Convention”.

91. The Court would recall that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention. Jordan has also been a party thereto since 29 May 1951. Neither of the two States has made any reservation that would be pertinent to the present proceedings.

Furthermore, Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention, Switzerland, as depository State, considered that unilateral undertaking valid. It concluded, however, that it “[was] not — as a depository — in a position to decide whether” “the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the ‘State of Palestine’ to accede” *inter alia* to the Fourth Geneva Convention “can be considered as an instrument of accession”.

92. Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common Article 2 of the four Conventions of 12 August 1949:

“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the

present Convention, the Powers who are parties thereto shall remain

bound by it in their mutual relations.

They shall furthermore be bound by the Convention in relation to the said Power, if the latter

accepts and applies the provisions thereof.”

93. After the occupation of the West Bank in 1967, the Israeli authori-

ties issued an order No. 3 stating in its Article 35 that:

“the Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of

Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail.”

Subsequently, the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel’s position as briefly recalled in paragraph 90 above, that Convention is not applicable *de jure* within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that Jordan was admittedly a party to the Fourth Geneva Convention in 1967, and that an armed conflict broke out at that time between Israel and Jordan, but it goes on to observe that the territories occupied by Israel subsequent to that conflict had not previously fallen under Jordanian sovereignty. It infers from this that that Convention is not applicable *de jure* in those territories. According however to the great majority of other participants in the proceedings, the Fourth Geneva Convention is applicable to those territories pursuant to Article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967.

94. The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 32 provides that:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly obscure or unreasonable” (See *Oil Platforms (Islamic Republic of Iran v. United States of America). Preliminary Objection. Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23; see, similarly, *Kasikili/Sedudu Island (Botswana/Namibia). Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia). Judgment, I.C.J. Reports 2002*, p. 645, para. 37.)

95. The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized), and that the conflict has arisen between two contracting parties. If those two conditions are satis-

fied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.

That interpretation is confirmed by the Convention’s *travaux préparatoires*. The Conference of Government Experts convened by the International Committee of the Red Cross (hereinafter, “ICRC”) in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict “whether [it] is or is not recognized as a state of war by the parties” and “in cases of occupation of territories in the absence of any state of war” (*Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 14-26 April 1947*, p. 8). The drafters of the second paragraph of Article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter’s scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.

96. The Court would moreover note that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1999. They issued a statement in which they “reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem”. Subsequently, on 5 December 2001, the High Contracting Parties, referring in particular to Article 1 of the Fourth Geneva Convention of 1949, once again reaffirmed the “applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem”. They further reminded the Contracting Parties participating in the Conference, the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations.

97. Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be “recognized and respected at all times” by the parties pursuant

to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that “the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem”.

98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. Thus on 10 December 2001 and 9 December 2003, in resolutions 56/60 and 58/97, it reaffirmed “that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967”.

99. The Security Council, for its part, had already on 14 June 1967 taken the view in resolution 237 (1967) that “all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War . . . should be complied with by the parties involved in the conflict”. Subsequently, on 15 September 1969, the Security Council, in resolution 271 (1969), called upon “Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation”.

Ten years later, the Security Council examined “the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967”. In resolution 446 (1979) of 22 March 1979, the Security Council considered that those settlements had “no legal validity” and affirmed “once more that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem”. It called “once more upon Israel, as the occupying Power, to abide scrupulously” by that Convention.

On 20 December 1990, the Security Council, in resolution 681 (1990), urged “the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention . . . to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention”. It further called upon “the high contracting parties to the said Fourth Geneva Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article I thereof”.

Lastly, in resolutions 799 (1992) of 18 December 1992 and 904 (1994) of 18 March 1994, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories.

100. The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

“The military operations of the [Israeli Defence Forces] in Rafah,

to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 . . . and the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949.”

101. In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

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102. The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

“4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.”

Of the other participants in the proceedings, those who addressed this issue contend that, on the contrary, both Covenants are applicable within the Occupied Palestinian Territory.

103. On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.

104. In order to determine whether these texts are applicable in the Occupied Palestinian Territory, the Court will first address the issue of the relationship between international humanitarian law and human rights law and then that of the applicability of human rights instruments outside national territory.

105. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil

and Political Rights. In those proceedings certain States had argued that “the Covenant was directed to the protection of human rights in peace-time, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict” (*I.C.J. Reports 1996 (I)*, p. 239, para. 24).

The Court rejected this argument, stating that:

“the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then fails to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” (*Ibid.*, p. 240, para. 25.)

106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances. 108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This provision can be interpreted as covering only individuals who are both present within a State’s territory and subject to that State’s jurisdiction. It can also be construed as covering both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Monteiro v. Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee’s interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V*, para. 4 (1955)).

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question “whether individuals resident in the occupied territories were indeed subject to Israel’s jurisdiction” for purposes of the application of the Covenant (CCPR/C/ISR.1675, para. 21). Israel took the position that “the Covenant and similar instruments did not apply directly to the current situation in the occupied territories” (*ibid.*, para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel’s attitude and pointed “to the long-standing presence of Israel in [the occupied] territories, Israel’s

ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein" (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel's consistent position, to the effect that "the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza . . .", the Committee reached the following conclusion:

"in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law" (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which "at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge".

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1998, Israel provided "statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories". The Committee noted that, according to Israel, "the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant" (E/C.12/1/Add.27, para. 8). The Committee expressed its concern in this regard, to which Israel replied in a further report of 19 October 2001 that it has "consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction" (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is "based on the well-established distinction between human rights and humanitarian law under international law". It added: "the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights" (E/1990/6/Add.32, para. 5). In view of these observations, the Committee reiterated

its concern about Israel's position and reaffirmed "its view that the State party's obligations under the Covenant apply to all territories and populations under its effective control" (E/C.12/1/Add.90, paras. 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel's view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .". That Convention is therefore applicable within the Occupied Palestinian Territory.

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114. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.

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115. In this regard, Annex II to the report of the Secretary-General, entitled "Summary Legal Position of the Palestine Liberation Organization", states that "The construction of the Barrier is an attempt to annex the territory contrary to international law" and that "The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination." This view was echoed in certain of the written statements submitted to the Court and in the views expressed at the hearings. *Inter alia*, it was contended that:

"The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force."

In this connection, it was in particular emphasized that "[t]he route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli

settlements" illegally established on the Occupied Palestinian Territory. It was further contended that the wall aimed at "reducing and parcelling out the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination".

116. For its part, Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure (see report of the Secretary-General, para. 29). It did so *inter alia* through its Permanent Representative to the United Nations at the Security Council meeting of 14 October 2003, emphasizing that "[the fence] does not annex territories to the State of Israel", and that Israel is "ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement" (S/PV.4841, p. 10). Israel's Permanent Representative restated this view before the General Assembly on 20 October and 8 December 2003. On this latter occasion, he added:

"As soon as the terror ends, the fence will no longer be necessary. The fence is not a border and has no political significance. It does not change the legal status of the territory in any way." (A/ES-10/PV.23, p. 6.)

117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of "the inadmissibility of the acquisition of territory by war" (see paragraphs 74 and 87 above). Thus in resolution 242 (1967) of 22 November 1967, the Security Council, after recalling this rule, affirmed that:

"the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force".

It is on this same basis that the Council has several times condemned the measures taken by Israel to change the status of Jerusalem (see paragraph 75 above).

118. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a "Palestinian people" is no

longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized "the right of the State of Israel to exist in peace and security" and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, "the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people". The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its "legitimate rights" (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003).

119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the "Closed Area" (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.

The Security Council has thus taken the view that such policy and practices "have no legal validity". It has also called upon "Israel, as the occupying Power, to abide scrupulously" by the Fourth Geneva Convention and:

"to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem

and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories" (resolution 446 (1979) of 22 March 1979).

The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980. Indeed, in the latter case it described "Israel's policy and practices of settling parts of its population and new immigrants in [the occupied] territories" as a "flagrant violation" of the Fourth Geneva Convention.

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

121. Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

122. The Court recalls moreover that, according to the report of the Secretary-General, the planned route would incorporate in the area between the Green Line and the wall more than 16 per cent of the territory of the West Bank. Around 80 per cent of the settlers living in the Occupied Palestinian Territory, that is 320,000 individuals, would reside in that area, as well as 237,000 Palestinians. Moreover, as a result of the construction of the wall, around 160,000 other Palestinians would reside in almost completely encircled communities (see paragraphs 84, 85 and 119 above).

In other terms, the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deployed by the Security Council (see paragraphs 75 and 120 above). There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, as will be further explained in paragraph 133 below, to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.

123. The construction of the wall also raises a number of issues in relation to the relevant provisions of international humanitarian law and of human rights instruments.

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124. According to Article 47:

"Protected persons who are in occupied territory shall not be

tion to the relevant provisions of international humanitarian law and of human rights instruments.

124. With regard to the Hague Regulations of 1907, the Court would recall that these deal, in Section II, with hostilities and in particular with "means of injuring the enemy, sieges, and bombardments". Section III deals with military authority in occupied territories. Only Section III is currently applicable in the West Bank and Article 23 (g) of the Regulations, in Section II, is thus not pertinent.

Section III of the Hague Regulations includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to "take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country". Article 46 adds that private property must be "respected" and that it cannot "be confiscated". Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.

125. A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. It thus states in Article 6:

"The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention."

Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.

126. These provisions include Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention.

According to Article 47:

"Protected persons who are in occupied territory shall not be

deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

Article 49 reads as follows:

"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place. The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

According to Article 52:

"No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited."

Article 53 provides that:

"Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

Lastly, according to Article 59:

"If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing. All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power."

127. The International Covenant on Civil and Political Rights also contains several relevant provisions. Before further examining these, the Court will observe that Article 4 of the Covenant allows for derogation to be made, under various conditions, to certain provisions of that instrument. Israel made use of its right of derogation under this Article by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991 :

"Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant.

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of

the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."

The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

128. Among these mention must be made of Article 17, paragraph 1 of which reads as follows: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

Mention must also be made of Article 12, paragraph 1, which provides: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

129. In addition to the general guarantees of freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. The status of the Christian Holy Places in the Ottoman Empire dates far back in time, the latest provisions relating thereto having been incorporated into Article 62 of the Treaty of Berlin of 13 July 1878. The Mandate for Palestine given to the British Government on 24 July 1922 included an Article 13, under which:

"All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory . . ."

Article 13 further stated: "nothing in this mandate shall be construed as conferring . . . authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed".

In the aftermath of the Second World War, the General Assembly, in adopting resolution 181 (II) on the future government of Palestine, devoted an entire chapter of the Plan of Partition to the Holy Places, religious buildings and sites. Article 2 of this Chapter provided, in so far as the Holy Places were concerned:

"the liberty of access, visit and transit shall be guaranteed, in conformity with existing rights, to all residents and citizens [of the Arab

State, of the Jewish State] and of the City of Jerusalem, as well as to aliens, without distinction as to nationality, subject to requirements of national security, public order and decorum".

Subsequently, in the aftermath of the armed conflict of 1948, the 1949 General Armistice Agreement between Jordan and Israel provided in Article VIII for the establishment of a special committee for "the formulation of agreed plans and arrangements for such matters as either Party may submit to it" for the purpose of enlarging the scope of the Agreement and of effecting improvement in its application. Such matters, on which an agreement of principle had already been concluded, included "free access to the Holy Places".

This commitment concerned mainly the Holy Places located to the east of the Green Line. However, some Holy Places were located west of that Line. This was the case of the Room of the Last Supper and the Tomb of David, on Mount Zion. In signing the General Armistice Agreement, Israel thus undertook, as did Jordan, to guarantee freedom of access to the Holy Places. The Court considers that this undertaking by Israel has remained valid for the Holy Places which came under its control in 1967. This undertaking has further been confirmed by Article 9, paragraph 1, of the 1994 Peace Treaty between Israel and Jordan, by virtue of which, in more general terms, "Each party will provide freedom of access to places of religious and historical significance."

130. As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (Arts. 6 and 7); protection and assistance accorded to the family and to children and young persons (Art. 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right "to be free from hunger" (Art. 11); the right to health (Art. 12); the right to education (Arts. 13 and 14).
131. Lastly, the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in Articles 16, 24, 27 and 28.

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132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of

Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqilya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. For example, according to the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, "Qalqilya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m." (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A and entitled "Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine", E/CN.4/2004/6, 8 September 2003, para. 9.)

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories

"an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank's most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus groves and hothouses upon which tens of thousands of Palestinians rely for their survival" (Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/58/311, 22 August 2003, para. 26).

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region" and adds that "Many fruit and olive trees had been destroyed in the course of building the barrier" (E/CN.4/2004/6, 8 September 2003, para. 9). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall "cuts off Palestinians from their agricultural lands, wells and means of subsistence" (Report by the Special Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, "The Right to Food", Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31 October 2003, para. 49). In a recent survey conducted by the World Food Programme, it is stated that the situation has aggra-

vated food insecurity in the region, which reportedly numbers 25,000 new beneficiaries of food aid (report of the Secretary-General, para. 25).

It has further led to increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water. This is also attested by a number of different information sources. Thus the report of the Secretary-General states generally that "According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks." (Report of the Secretary-General, para. 23.) The Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Palestinians between the Wall and Green Line will effectively be cut off from their land and workplaces, schools, health clinics and other social services." (E/CN.4/2004/6, 8 September 2003, para. 9.) In relation specifically to water resources, the Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights observes that "By constructing the fence Israel will also effectively annex most of the western aquifer system (which provides 51 per cent of the West Bank's water resources)." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) Similarly, in regard to access to health services, it has been stated that, as a result of the enclosure of Qalqilya, a United Nations hospital in that town has recorded a 40 per cent decrease in its caseload (report of the Secretary-General, para. 24).

At Qalqilya, according to reports furnished to the United Nations, some 600 shops or businesses have shut down, and 6,000 to 8,000 people have already left the region (E/CN.4/2004/6, 8 September 2003, para. 10; E/CN.4/2004/10/Add.2, 31 October 2003, para. 51). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights has also observed that "With the fence/wall cutting communities off from their land and water without other means of subsistence, many of the Palestinians living in these areas will be forced to leave." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) In this respect also the construction of the wall would effectively deprive a significant number of Palestinians of the "freedom to choose [their] residence". In addition, however, in the view of the Court, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned in paragraph 120 above, is tending to alter the demographic composition of the Occupied Palestinian Territory.

134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception

of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated regime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.

135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances.

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2, of that Article provides for an exception in those cases in which "the security of the population or imperative military reasons so demand". This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception "where such destruction is rendered absolutely necessary by military operations".

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument.

The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in Article 17 of the Interna-

tional Covenant on Civil and Political Rights. On the other hand, Article 12, paragraph 3, of that instrument provides that restrictions on liberty of movement as guaranteed under that Article "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".

As for the International Covenant on Economic, Social and Cultural Rights, Article 4 thereof contains a general provision as follows:

"The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they "must conform to the principle of proportionality" and "must be the least intrusive instrument amongst those which might achieve the desired result" (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14). On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel's construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be "solely for the purpose of promoting the general welfare in a democratic society".

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various

of its obligations under the applicable international humanitarian law and human rights instruments.

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138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)”. More specifically, Israel’s Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that “the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter”; the Security Council resolutions referred to, he continued, “have clearly recognized the right of States to use force in self-defence against terrorist attacks”, and therefore surely recognize the right to use non-forcible measures to that end (A/ES-10/PV.21, p. 6).

139. Under the terms of Article 51 of the Charter of the United Nations:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

140. The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see para-

graphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabikovo-Nagymaros Project (Hungary/Slovakia)*, “the state of necessity is a ground recognized by customary international law” that “can only be accepted on an exceptional basis”; it “can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met” (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be “the only way for the State to safeguard an essential interest against a grave and imminent peril” (Article 25 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts; see also former Article 33 of the Draft Articles on the International Responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

* * *

143. The Court having concluded that by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it (see paragraphs 114-137 above), it must now, in order to reply to the question posed by the General Assembly, examine the consequences of those violations.

144. In their written and oral observations, many participants in the proceedings before the Court contended that Israel's action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations; in its Written Statement, Israel, for its part, presented no arguments regarding the possible legal consequences of the construction of the wall.

145. As regards the legal consequences for Israel, it was contended that Israel has, first, a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory, and to give appropriate assurances and guarantees of non-repetition.

It was argued that, secondly, Israel is under a legal obligation to make reparation for the damage arising from its unlawful conduct. It was submitted that such reparation should first of all take the form of restitution, namely demolition of those portions of the wall constructed in the Occupied Palestinian Territory and annulment of the legal acts associated with its construction and the restoration of property requisitioned or expropriated for that purpose; reparation should also include appropriate compensation for individuals whose homes or agricultural holdings have been destroyed.

It was further contended that Israel is under a continuing duty to comply with all of the international obligations violated by it as a result of the construction of the wall in the Occupied Palestinian Territory and of the associated régime. It was also argued that, under the terms of the Fourth Geneva Convention, Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall.

146. As regards the legal consequences for States other than Israel, it was contended before the Court that all States are under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to co-operate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefor.

Certain participants in the proceedings further contended that the States parties to the Fourth Geneva Convention are obliged to take measures to ensure compliance with the Convention and that, inasmuch as the construction and maintenance of the wall in the Occupied Palestinian Territory constitutes grave breaches of that Convention, the States parties to that Convention are under an obligation to prosecute or extradite the authors of such breaches. It was further observed that

Israel, particularly . . . international humanitarian law, and take all necessary measures to put an end [to] these violations", and that the Security Council and the General Assembly must take due account of the advisory opinion to be given by the Court.

* *

147. Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel's international obligations, it follows that the responsibility of that State is engaged under international law.

148. The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.

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149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above).

150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 149; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 44, para. 95; *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82).

151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court's finding (see paragraph 143 above) that Israel's violations of

its international obligations stem from the construction of the wall and from its associated regime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.

152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:

“The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.” (*Fractur at Chorzon; Merits, Judgment No. I3, 1928, P.C.I.J., Series A, No. I7*, p. 47.)

153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall’s construction.

*

154. The Court will now consider the legal consequences of the internationally wrongful acts flowing from Israel’s construction of the wall as regards other States.

155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature “the concern of all States” and, “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection” (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed (paragraph 88 above) that in the *East Timor* case, it described as “irreproachable” the assertion that “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character” (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

“Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . .”

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* it stated that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ . . . , that they are ‘to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law’” (*I.C.J. Reports 1996* (I), p. 257, para. 79). In the Court’s view, these rules incorporate obligations which are essentially of an *erga omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” It follows from that provision that every State party to that Convention, whether or

not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion.

* * *

161. The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.

162. The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic

situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The "Roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving, as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

* * *

163. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By fourteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchtein, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;
AGAINST: Judge Buergenthal;

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

A. By fourteen votes to one,

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchtein, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;
AGAINST: Judge Buergenthal;

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith

all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchtein, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*
 AGAINST: *Judge Buergenthal;*

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchtein, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*
 AGAINST: *Judge Buergenthal;*

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchtein, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*
 AGAINST: *Judges Kooijmans, Buergenthal;*

E. By fourteen votes to one,

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchtein, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;*
 AGAINST: *Judge Buergenthal.*

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this ninth day of July, two thousand and

(Signed) SHI JIUYONG,
 President.
 (Signed) PHILIPPE COUVREUR,
 Registrar.

IN FAVOUR: *Judge Guillaume, Kooijmans and AL-KHASAWNEH append separate opinions to the Advisory Opinion of the Court; Judge BUERGENTHAL appends a declaration to the Advisory Opinion of the Court; Judges ELARABY and OWADA append separate opinions to the Advisory Opinion of the Court.*

(Initialled) J.Y.S.
 (Initialled) Ph.C.

International Court of Justice

**Armed Activities on the Territory of the Congo
(Democratic Republic of the Congo *v.* Uganda)
Judgment**

I.C.J. Reports 2005, paras. 26-180

Counter-Memorial, and reaffirmed in Chapter VI of the Rejoinder as well as the oral pleadings be upheld.

(2) To reserve the issue of reparation in relation to Uganda's counter-claims for a subsequent stage of the proceedings."

* * *

26. The Court is aware of the complex and tragic situation which has long prevailed in the Great Lakes region. There has been much suffering by the local population and destabilization of much of the region. In particular, the instability in the DRC has had negative security implications for Uganda and some other neighbouring States. Indeed, the Summit meeting of the Heads of State in Victoria Falls (held on 7 and 8 August 1998) and the Agreement for a Ceasefire in the Democratic Republic of the Congo signed in Lusaka on 10 July 1999 (hereinafter "the Lusaka Agreement") acknowledged as legitimate the security needs of the DRC's neighbours. The Court is aware, too, that the factional conflicts within the DRC require a comprehensive settlement to the problems of the region.

However, the task of the Court must be to respond, on the basis of international law, to the particular legal dispute brought before it. As it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that.

* * *

27. The Court finds it convenient, in view of the many actors referred to by the Parties in their written pleadings and at the hearing, to indicate the abbreviations which it will use for those actors in its judgment. Thus the Allied Democratic Forces will hereinafter be referred to as the ADF, the Alliance of Democratic Forces for the Liberation of the Congo (Alliance des forces démocratiques pour la libération du Congo) as the AFDL, the Congo Liberation Army (Armée de libération du Congo) as the ALC, the Congolese Armed Forces (Forces armées congolaises) as the FAR, the Rwandan Armed Forces (Forces armées rwandaises) as the FAR, the Former Uganda National Army as the FUNA, the Lord's Resistance Army as the LRA, the Congo Liberation Movement (Mouvement de libération du Congo) as the MLC, the National Army for the Liberation of Uganda as the NALU, the Congolese Rally for Democracy (Rassemblement congolais pour la démocratie) as the RCD, the Congolese Rally for Democracy-Kisangani (Rassemblement congolais pour la démocratie-Kisangani) as the RCD-Kisangani (also known as RCD-Wamba), the Congolese Rally for Democracy-Liberation Movement (Rassemblement congolais pour la démocratie-Mouvement de libération) as the RCD-ML, the Rwandan Patriotic Army as the RPA, the Sudan People's Liberation Movement/Army as the SPLM/A, the Uganda

28. In its first submission the DRC requests the Court to adjudge and declare:

- "1. That the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces having operated there, has violated the following principles of conventional and customary law:
 - the principle of non-use of force in international relations;
 - including the prohibition of aggression;
 - the obligation to settle international disputes exclusively by peaceful means so as to ensure that international peace and security, as well as justice, are not placed in jeopardy;
 - respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;
 - the principle of non-intervention in matters within the domestic jurisdiction of States, including refraining from extending any assistance to the parties to a civil war operating on the territory of another State."
- 29. The DRC explains that in 1997 Laurent-Désiré Kabila, who was at the time a Congolese rebel leader at the head of the AFDL (which was supported by Uganda and Rwanda), succeeded in overthrowing the then President of Zaire, Marshal Mobutu Sese Seko, and on 29 May 1997 was formally sworn in as President of the renamed Democratic Republic of the Congo. The DRC asserts that, following President Kabila's accession to power, Uganda and Rwanda were granted substantial benefits in the DRC in the military and economic fields. The DRC claims, however, that President Kabila subsequently sought a gradual reduction in the influence of these two States over the DRC's political, military and economic spheres. It was, according to the DRC, this "new policy of independence and emancipation" from the two States that constituted the real reason for the invasion of Congolese territory by Ugandan armed forces in August 1998.
- 30. The DRC maintains that at the end of July 1998 President Kabila learned of a planned coup d'état organized by the Chief of Staff of the FAC, Colonel Kabarebe (a Rwandan national), and that, in an official statement published on 28 July 1998 (see paragraph 49 below), President

Kabila called for the withdrawal of foreign troops from Congolese territory. Although his address referred mainly to Rwandan troops, the DRC argues that there can be no doubt that President Kabila intended to address his message to "all foreign forces". The DRC states that on 2 August 1998 the 10th Brigade assigned to the province of North Kivu rebelled against the central Government of the DRC, and that during the night of 2 to 3 August 1998 Congolese Tutsi soldiers and a few Rwandan soldiers not yet repatriated attempted to overthrow President Kabila. According to the DRC, Uganda began its military intervention in the DRC immediately after the failure of the coup attempt.

31. The DRC argues that on 4 August 1998 Uganda and Rwanda organized an airborne operation, flying their troops from Goma on the eastern frontier of the DRC to Kitona, some 1,800 km away on the other side of the DRC, on the Atlantic coast. The DRC alleges that the aim was to overthrow President Kabila within ten days. According to the DRC, in the advance towards Kinshasa, Ugandan and Rwandan troops captured certain towns and occupied the Inga Dam, which supplies electricity to Kinshasa. The DRC explains that Angola and Zimbabwe came to the assistance of the Congolese Government to help prevent the capture of Kinshasa. The DRC also states that in the north-eastern part of the country, within a matter of months, UPDF troops had advanced and had progressively occupied a substantial part of Congolese territory in several provinces.

32. The DRC submits that Uganda's military operation against the DRC also consisted in the provision of support to Congolese armed groups opposed to President Kabila's Government. The DRC thus maintains that the RCD was created by Uganda and Rwanda on 12 August 1998, and that at the end of September 1998 Uganda supported the creation of the new MLC rebel group, which was not linked to the Rwandan military. According to the DRC, Uganda was closely involved in the recruitment, education, training, equipment and supplying of the MLC and its military wing, the ALC. The DRC alleges that the close links between Uganda and the MLC were reflected in the formation of a united military front in combat operations against the FAC. The DRC maintains that in a number of cases the UPDF provided tactical support, including artillery cover, for ALC troops. Thus, the DRC contends that the UPDF and the ALC constantly acted in close co-operation during many battles against the Congolese regular army. The DRC concludes that Uganda, "in addition to providing decisive military support for several Congolese rebel movements, has been extremely active in supplying these movements with a political and diplomatic framework".

was attended by representatives of the DRC, Uganda, Namibia, Rwanda, Tanzania, Zambia and Zimbabwe,

"member countries of the SADC [Southern African Development Community], following the submission of an application by the Democratic Republic of the Congo, unequivocally condemned the aggression suffered by the Congo and the occupation of certain parts of its national territory".

The DRC further points out that, in an attempt to help resolve the conflict, the SADC, the States of East Africa and the Organization of African Unity (OAU) initiated various diplomatic efforts, which included a series of meetings between the belligerents and the representatives of various African States, also known as the "Lusaka Process". On 18 April 1999 the Sirte Peace Agreement was concluded, in the framework of the Lusaka peace process, between President Kabila of the DRC and President Museveni of Uganda. The DRC explains that, under this Agreement, Uganda undertook to "cease hostilities immediately" and to withdraw its troops from the territory of the DRC. The Lusaka Agreement was signed by the Heads of State of the DRC, Uganda and other African States (namely, Angola, Namibia, Rwanda and Zimbabwe) on 10 July 1999 and by the MLC and RCD (rebel groups) on 1 August 1999 and 31 August 1999, respectively. The DRC explains that this Agreement provided for the cessation of hostilities between the parties' forces, the disengagement of these forces, the deployment of OAU verifiers and of the United Nations Mission in the Democratic Republic of the Congo (hereinafter "MONUC"), to be followed by the withdrawal of foreign forces. On 8 April 2000 and 6 December 2000 Uganda signed troop disengagement agreements known as the Kampala plan and the Harare plan.

34. According to the DRC, following the withdrawal of Ugandan troops from its territory in June 2003, Uganda has continued to provide arms to ethnic groups confronting one another in the Ituri region, on the boundary with Uganda. The DRC further argues that Uganda "has left behind it a fine network of warlords, whom it is still supplying with arms and who themselves continue to plunder the wealth of the DRC on behalf of Ugandan and foreign businessmen".

*

35. Uganda, for its part, claims that from early 1994 through to approximately May 1997 the Congolese authorities provided military and logistical support to anti-Ugandan insurgents. Uganda asserts that from the beginning of this period it was the victim of cross-border attacks from these armed rebels in eastern Congo. It claims that, in response to these attacks, until late 1997 it confined its actions to its own side of the

33. The DRC notes that the events in its territory were viewed with grave concern by the international community. The DRC claims that at the Victoria Falls Summit, which took place on 7 and 8 August 1998, and

Congo-Uganda border, by reinforcing its military positions along the frontier.

36. According to Uganda, in 1997 the AFDL, made up of a loose alliance of the combined forces of the various Congolese rebel groups, together with the Rwandan army, overthrew President Mobutu's régime in Zaire. Uganda asserts that upon assuming power on 29 May 1997, President Kabila invited Uganda to deploy its own troops in eastern Congo in view of the fact that the Congolese army did not have the resources to control the remote eastern provinces, and in order to "eliminate" the anti-Ugandan insurgents operating in that zone and to secure the border region. According to Uganda, it was on this understanding that Ugandan troops crossed into eastern Congo and established bases on Congolese territory. Uganda further alleges that in December 1997, at the invitation of President Kabila's further invitation, Uganda sent two UPDF battalions into eastern Congo, followed by a third one in April 1998, also at the invitation of the Congolese President. Uganda states that on 27 April 1998 the Protocol on Security along the Common Border was signed by the two Governments in order to reaffirm the invitation of the DRC to Uganda to deploy its troops in eastern Congo as well as to commit the armed forces of both countries to jointly combat the anti-Ugandan insurgents in Congolese territory and secure the border region. Uganda maintains that three Ugandan battalions were accordingly stationed in the border region of the Ruwenzori Mountains within the DRC.

37. However, Uganda claims that between May and July 1998 President Kabila broke off his alliances with Rwanda and Uganda and established new alliances with Chad, the Sudan and various anti-Ugandan insurgent groups.

With regard to the official statement by President Kabila published on 28 July 1998 calling for the withdrawal of Rwandan troops from Congolese territory, Uganda interprets this statement as not affecting Uganda, arguing that it made no mention of the Ugandan armed forces that were then in the DRC pursuant to President Kabila's earlier invitation and to the Protocol of 27 April 1998.

38. Uganda affirms that it had no involvement in or foreknowledge of the FAR rebellion that occurred in eastern Congo on 2 August 1998 nor of the attempted coup d'état against President Kabila on the night of 2-3 August 1998. Uganda likewise denies that it participated in the attack on the Kitona military base. According to Uganda, on 4 August 1998 there were no Ugandan troops present in either Goma or Kitona, or on board the planes referred to by the DRC.

39. Uganda further claims that it did not send additional troops into the DRC during August 1998. Uganda states, however, that by August-September 1998, as the DRC and the Sudan prepared to attack Ugandan forces in eastern Congo, its security situation had become untenable. Uganda submits that "[i]n response to this grave threat, and in the lawful exercise of its sovereign right of self-defence", it made a decision on

11 September 1998 to augment its forces in eastern Congo and to gain control of the strategic airfields and river ports in northern and eastern Congo in order to stop the combined forces of the Congolese and Sudanese armies as well as the anti-Ugandan insurgent groups from reaching Uganda's borders. According to Uganda, the military operations to take control of these key positions began on 20 September 1998. Uganda states that by February 1999 Ugandan forces succeeded in occupying all the key airfields and river ports that served as gateways to eastern Congo and the Ugandan border. Uganda maintains that on 3 July 1999 its forces gained control of the airport at Gbadolite and drove all Sudanese forces out of the DRC.

40. Uganda notes that on 10 July 1999 the on-going regional peace process led to the signing of a peace agreement in Lusaka by the Heads of State of Uganda, the DRC, Rwanda, Zimbabwe, Angola and Namibia, followed by the Kampala (8 April 2000) and Harare (6 December 2000) Disengagement Plans. Uganda points out that, although no immediate or unilateral withdrawal was called for, it began withdrawing five battalions from the DRC on 22 June 2000. On 20 February 2001 Uganda announced that it would withdraw two more battalions from the DRC. On 6 September 2002 Uganda and the DRC concluded a peace agreement in Luanda (Agreement between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on Withdrawal of Ugandan Troops from the Democratic Republic of the Congo, Co-operation and Normalisation of Relations between the two Countries, hereinafter "the Luanda Agreement"). Under its terms Uganda agreed to withdraw from the DRC all Ugandan troops, except for those expressly authorized by the DRC to remain on the slopes of Mt. Ruwenzori. Uganda claims that, in fulfilment of its obligations under the Luanda Agreement, it completed the withdrawal of all of its troops from the DRC in June 2003. Uganda asserts that "[s]ince that time, not a single Ugandan soldier has been deployed inside the Congo".

41. As for the support for irregular forces operating in the DRC, Uganda states that it has never denied providing political and military assistance to the MLC and the RCD. However, Uganda asserts that it did not participate in the formation of the MLC and the RCD.

"[I]t was only *after* the rebellion had broken out and *after* the RCD had been created that Uganda began to interact with the RCD, and, even then, Uganda's relationship with the RCD was strictly political until after the middle of September 1998." (Emphasis in the original.)

According to Uganda, its military support for the MLC and for the RCD began in January 1999 and March 1999 respectively. Moreover, Uganda argues that the nature and extent of its military support for the Congolese rebels was consistent with and limited to the requirements of self-defence. Uganda further states that it refrained from providing the rebels

with the kind or amount of support they would have required to achieve such far-reaching purposes as the conquest of territory or the overthrow of the Congolese Government.

* * *

ISSUE OF CONSENT

42. The Court now turns to the various issues connected with the first submission of the DRC.

43. In response to the DRC's allegations of military and paramilitary activities amounting to aggression, Uganda states that from May 1997 (when President Laurent-Désiré Kabila assumed power in Kinshasa) until 11 September 1998 (the date on which Uganda states that it decided to respond on the basis of self-defence) it was present in the DRC "with the latter's consent. It asserts that the DRC's consent to the presence of Ugandan forces was renewed in July 1999 by virtue of the terms of the Lusaka Agreement and extended thereafter. Uganda defends its military actions in the intervening period of 11 September 1998 to 10 July 1999 as lawful self-defence. The Court will examine each of Uganda's arguments in turn.

44. In a written answer to the question put to it by Judge Vereshchetin (see paragraph 22 above), the DRC clarified that its claims relate to actions by Uganda beginning in August 1998. However, as the Parties do not agree on the characterization of events in that month, the Court deems it appropriate first to analyse events which occurred a few months earlier, and the rules of international law applicable to them.

45. Relations between Laurent-Désiré Kabila and the Ugandan Government had been close, and with the coming to power of the former there was a common interest in controlling anti-government rebels who were active along the Congo-Uganda border, carrying out in particular cross-border attacks against Uganda. It seems certain that from mid-1997 and during the first part of 1998 Uganda was being allowed to engage in military action against anti-Ugandan rebels in the eastern part of Congolese territory. Uganda claims that its troops had been invited into eastern Congo by President Kabila when he came to power in May 1997. The DRC has acknowledged that "Ugandan troops were present on the territory of the Democratic Republic of the Congo with the consent of the country's lawful government". It is clear from the materials put before the Court that in the period preceding August 1998 the DRC did not object to Uganda's military presence and activities in its eastern border area. The written pleadings of the DRC make reference to authorized Ugandan operations from September 1997 onwards. There is reference to such authorized action by Uganda on 19 December 1997, in early February 1998 and again in early July 1998, when the DRC author-

ized the transfer of Ugandan units to Ntabi, in Congolese territory, in order to fight more effectively against the ADF.

46. A series of bilateral meetings between the two Governments took place in Kinshasa from 11 to 13 August 1997, in Kampala from 6 to 7 April 1998 and again in Kinshasa from 24 to 27 April 1998. This last meeting culminated in a Protocol on Security along the Common Border being signed on 27 April 1998 between the two countries, making reference, *inter alia*, to the desire "to put an end to the existence of the rebel groups operating on either side of the common border, namely in the Ruwenzori". The two parties agreed that their respective armies would "co-operate in order to insure security and peace along the common border". The DRC contends that these words do not constitute an "invitation or acceptance by either of the contracting parties to send its army into the other's territory". The Court believes that both the absence of any objection to the presence of Ugandan troops in the DRC in the preceding months, and the practice subsequent to the signing of the Protocol, support the view that the continued presence as before of Ugandan troops would be permitted by the DRC by virtue of the Protocol. Uganda told the Court that

"[p]ursuant to the Protocol, Uganda sent a third battalion into eastern Congo, which brought her troop level up to approximately 2,000, and she continued military operations against the armed groups in the region both unilaterally and jointly with Congolese Government forces".

The DRC has not denied this fact nor that its authorities accepted this situation.

47. While the co-operation envisaged in the Protocol may be reasonably understood as having its effect in a continued authorization of Ugandan troops in the border area, it was not the legal basis for such authorization or consent. The source of an authorization or consent to the crossing of the border by these troops antedated the Protocol and this prior authorization or consent could thus be withdrawn at any time by the Government of the DRC, without further formalities being necessary.

48. The Court observes that when President Kabila came to power, the influence of Uganda and in particular Rwanda in the DRC became substantial. In this context it is worthy of note that many Rwandan officers held positions of high rank in the Congolese army and that Colonel James Kabarebe, of Rwandan nationality, was the Chief of Staff of the FAR (the armed forces of the DRC). From late spring 1998, President Kabila sought, for various reasons, to reduce this foreign influence; by mid-1998, relations between President Kabila and his former allies had

deteriorated. In light of these circumstances the presence of Rwandan troops on Congolese territory had in particular become a major concern for the Government of the DRC.

49. On 28 July 1998, an official statement by President Kabila was published, which read as follows:

“The Supreme Commander of the Congolese National Armed Forces, the Head of State of the Republic of the Congo and the Minister of National Defence, advises the Congolese people that he has just terminated, with effect from this Monday 27 July 1998, the Rwandan military presence which has assisted us during the period of the country’s liberation. Through these military forces, he would like to thank all of the Rwandan people for the solidarity they have demonstrated to date. He would also like to congratulate the democratic Congolese people on their generosity of spirit for having tolerated, provided shelter for and trained these friendly forces during their stay in our country. This marks the end of the presence of all foreign military forces in the Congo.” (*Translation by the Registr./J*

50. The DRC has contended that, although there was no specific reference to Ugandan troops in the statement, the final phrase indicated that consent was withdrawn for Uganda as well as Rwandan troops. It states that, having learned of a plotted coup, President Kabila “officially announced . . . the end of military co-operation with Rwanda and asked the Rwandan military to return to their own country, adding that this marked the end of the presence of foreign troops in the Congo”. The DRC further explains that Ugandan forces were not mentioned because they were “very few in number in the Congo” and were not to be treated in the same way as the Rwandan forces, “who in the prevailing circumstances, were perceived as enemies suspected of seeking to overthrow the régime”. Uganda, for its part, maintains that the President’s statement was directed at Rwandan forces alone; that the final phrase of the statement was not tantamount to the inclusion of a reference to Ugandan troops; and that any withdrawal of consent for the presence of Ugandan troops would have required a formal denunciation, by the DRC, of the April 1998 Protocol.

51. The Court notes, first, that for reasons given above, no particular formalities would have been required for the DRC to withdraw its consent to the presence of Ugandan troops on its soil. As to the content of President Kabila’s statement, the Court observes that, as a purely textual matter, the statement was ambiguous.

52. More pertinently, the Court draws attention to the fact that the consent that had been given to Uganda to place its forces in the DRC, and to engage in military operations, was not an open-ended consent. The DRC accepted that Uganda could act, or assist in acting, against rebels on the eastern border and in particular to stop them operating across the common border. Even had consent to the Ugandan military

presence extended much beyond the end of July 1998, the parameters of that consent, in terms of geographic location and objectives, would have remained thus restricted.

53. In the event, the issue of withdrawal of consent by the DRC and that of expansion by Uganda of the scope and nature of its activities went hand in hand. The Court observes that at the Victoria Falls Summit (see paragraph 33 above) the DRC accused Rwanda and Uganda of invading its territory. Thus, it appears evident to the Court that, whatever interpretation may be given to President Kabila’s statement of 28 July 1998, any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998, i.e. the closing date of the Victoria Falls Summit.

54. The Court recalls that, independent of the conflicting views as to when Congolese consent to the presence of Ugandan troops might have been withdrawn, the DRC has informed the Court that its claims against Uganda begin with what it terms an aggression commencing on 2 August 1998.

* * *

FINDINGS OF FACT CONCERNING UGANDA’S USE OF FORCE IN RESPECT OF KITONA

55. The Court observes that the dispute about the commencement date of the military action by Uganda that was not covered by consent is, in the most part, directed at the legal characterization of events rather than at whether these events occurred. In some instances, however, Uganda denies that its troops were ever present at particular locations, the military action at Kitona being an important example. The DRC has informed the Court that from 2 August 1998 Uganda was involved in military activities in the DRC that violated international law, and that these were directed at the overthrow of President Kabila. According to the DRC, Ugandan forces (together with those of Rwanda) were involved on 4 August in heavy military action at Kitona, which lies in the west of the DRC some 1,800 km from the Ugandan frontier. Virtually simultaneously Uganda engaged in military action in the east, first in Kivu and then in Orientale province. The DRC contends that this was followed by an invasion of Equateur province in north-west Congo. The DRC maintains that “[a]fter a few months of advances, the Ugandan army had thus conquered several hundred thousand square kilometres of territory”. The DRC provided a sketch-map to illustrate the alleged scope and reach of Ugandan military activity.

56. Uganda characterizes the situation at the beginning of August

1998 as that of a state of civil war in the DRC — a situation in which President Kabila had turned to neighbouring Powers for assistance, including, notably, the Sudan (see paragraphs 120-129 below). These events caused great security concerns to Uganda. Uganda regarded the Sudan as a long-time enemy, which now, as a result of the invitation from President Kabila, had a free rein to act against Uganda and was better placed strategically to do so. Uganda strongly denies that it engaged in military activity beyond the eastern border area until 11 September. That military activity by its troops occurred in the east during August is not denied by Uganda. But it insists that it was not part of a plan agreed with Rwanda to overthrow President Kabila; it was rather actions taken by virtue of the consent given by the DRC to the operations by Uganda in the east, along their common border.

57. In accordance with its practice, the Court will first make its own determination of the facts and then apply the relevant rules of international law to the facts which it has found to have existed. The Court will not attempt a determination of the overall factual situation as it applied to the vast territory of the DRC from August 1998 till July 2003. It will make such findings of fact as are necessary for it to be able to respond to the first submission of the DRC, the defences offered by Uganda, and the first submissions of Uganda as regards its counter-claims. It is not the task of the Court to make findings of fact (even if it were in a position to do so) beyond these parameters.

58. These findings of fact necessarily entail an assessment of the evidence. The Court has in this case been presented with a vast amount of materials proffered by the Parties in support of their versions of the facts. The Court has not only the task of deciding which of those materials must be considered relevant, but also the duty to determine which of them have probative value with regard to the alleged facts. The greater part of these evidentiary materials appear in the annexes of the Parties to their written pleadings. The Parties were also authorized by the Court to produce new documents at a later stage. In the event, these contained important items. There has also been reference, in both the written and the oral pleadings, to material not annexed to the written pleadings but which the Court has treated as “part of a publication readily available” under Article 56, paragraph 4, of its Rules of Court. Those, too, have been examined by the Court for purposes of its determination of the relevant facts.

59. As it has done in the past, the Court will examine the facts relevant to each of the component elements of the claims advanced by the Parties. In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value. In accordance with

its prior practice, the Court will explain what items it should eliminate from further consideration (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 50, para. 85; see equally the practice followed in the case concerning *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3).

60. Both Parties have presented the Court with a vast amount of documentation. The documents advanced in supporting findings of fact in the present case include, *inter alia*, resolutions of the United Nations Security Council, reports of the Special Rapporteur of the Commission on Human Rights, reports and briefings of the OAU, communiques by Heads of State, letters of the Parties to the Security Council, reports of the Secretary-General on MONUC, reports of the United Nations Panels of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (hereinafter “United Nations Panel reports”), the White Paper prepared by the Congolese Ministry of Human Rights, the Porter Commission Report, the Ugandan White Paper on the Porter Commission Report, books, reports by non-governmental organizations and press reports.

61. The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties.

62. The Court will embark upon its task by determining whether it has indeed been proved to its satisfaction that Uganda invaded the DRC in early August 1998 and took part in the Kitona airborne operation on 4 August 1998. In the Memorial the DRC claimed that on 4 August 1998 three Boeing aircraft from Congo Airlines and Blue Airlines, and a Con-

golese plane from Lignes Aériennes Congolaises (LAC), were boarded by armed forces from “aggressor countries”, including Uganda, as they were about to leave Goma Airport. It was claimed that, after refuelling and taking on board ammunition in Kigali, they flew to the airbase in Kitona, some 1,800 km from Uganda’s border, where several contingents of foreign soldiers, including Ugandans, landed. It was claimed by the DRC that these forces, among which were Ugandan troops, took Kitona, Boma, Matadi and Inga, which they looted, as well as the Inga Dam. The DRC claimed that the aim of Uganda and Rwanda was to march to Kinshasa and rapidly overthrow President Kabila.

63. Uganda for its part has denied that its forces participated in the airborne assault launched at Kitona, insisting that at the beginning of August the only UPDF troops in the DRC were the three battalions in Beni and Butembo, present with the consent of the Congolese authorities. In the oral pleadings Uganda stated that it had been invited by Rwanda to join forces with it in displacing President Kabila, but had declined to do so. No evidence was advanced by either Party in relation to this contention. The Court accordingly does not need to address the question of “intention” and will concentrate on the factual evidence, as such.

64. In its Memorial the DRC relied on “testimonies of Ugandan and other soldiers, who were captured and taken prisoners in their abortive attempt to seize Kinshasa”. No further details were provided, however. No such testimonies were ever produced to the Court, either in the later written pleadings or in the oral pleadings. Certain testimonies by persons of Congolese nationality were produced, however. These include an interview with the Congo airline pilot, in which he refers — in connection with the Kitona airborne operation — to the presence of both Rwandans and Ugandans at Hotel Nyira. The Court notes that this statement was prepared more than three years after the alleged events and some 20 months after the DRC lodged with the Court its Application commencing proceedings. It contains no signature as such, though the pilot says he “signed on the manuscript”. The interview was conducted by the Assistant Legal Adviser at the Service for the Military Detection of Unpatriotic Activities in the DRC. Notwithstanding the DRC’s position that there is nothing in this or other such witness statements to suggest that they were obtained under duress, the setting and context cannot therefore be regarded as conducive to impartiality. The same conclusion has to be reached as regards the interview with Issa Kisaka Kakule, a former rebel. Even in the absence of these deficiencies, the statement of the airline pilot cannot prove the arrival of Ugandan forces and their participation in the military operation in Kitona. The statement of Lieutenant Colonel Viala Mbeang Ilwa was more contemporaneous (15 October 1998) and is of some particular interest, as he was the pilot of the plane said to have been hijacked. In it he asserts that Ugandan officers at the hotel informed him

of their plan to topple President Kabila within ten days. There is, however, no indication of how this statement was provided, or in what circumstances. The same is true of the statement of Commander Mpelle-Mpelle regarding air traffic allegedly indicating Ugandan participation in the Kitona operation.

65. The Court has been presented with some evidence concerning a Ugandan national referred to by the DRC as Salim Byaruhanga, said to be a prisoner of war. The record of an interview following the visit of Ugandan Senator Aggrey Awori consists of a translation, unsigned by the translator. Later, the DRC produced for the Court a video, said to verify the meeting between Mr. Awori and Ugandan prisoners. The video shows four men being asked questions by another addressing them in a language of the region. One of these says his name is “Salim Byaruhanga”. There is, however, no translation provided, nor any information as to the source of this tape. There do exist letters of August 2001 passing between the International Committee of the Red Cross (ICRC) and the Congolese Government on the exchange of Ugandan prisoners, one of whom is named as Salim Byaruhanga. However, the ICRC never refers to this person as a member of the UPDF. Uganda has also furnished the Court with a notarized affidavit of the Chief of Staff of the UPDF saying that there were no Ugandan prisoners of war in the DRC, nor any officer by the name of Salim Byaruhanga. This affidavit is stated to have been prepared in November 2002, in view of the forthcoming case before the International Court of Justice. The Court recalls that it has elsewhere observed that a member of the government of a State engaged in litigation before this Court — and especially litigation relating to armed conflict — “will probably tend to identify himself with the interests of his country” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 43, para. 70). The same may be said of a senior military officer of such a State, and “while in no way impugning the honour or veracity” of such a person, the Court should “treat such evidence with great reserve” (*ibid.*).

66. The Court observes that, even if such a person existed and even if he was a prisoner of war, there is nothing in the ICRC letters that refers to his participation (or to the participation of other Ugandan nationals) at Kitona. Equally, the PANA Agency press communiqué of 17 September 2001 mentions Salim Byaruhanga when referring to the release of four Ugandan soldiers taken prisoner in 1998 and 1999 — but there is no reference to participation in action in Kitona.

67. The press statements issued by the Democratic Party of Uganda on 14 and 18 September 1998, which refer to Ugandan troops being

flew to western Congo from Gala Airport, make no reference to the location of Kitona or to events there on 4 August.

68. Nor can the truth about the Kitona airborne operation be established by extracts from a few newspapers, or magazine articles, which rely on a single source (Agence France Presse, 2 September 1998); on an interested source (Integrated Regional Information Networks (hereinafter IRIN)), or give no sources at all (Pierre Barbancey, *Regards 41*). The Court has explained in an earlier case that press information may be useful as evidence when it is “wholly consistent and concordant as to the main facts and circumstances of the case” (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 10, para. 13), but that particular caution should be shown in this area. The Court observes that this requirement of consistency and concordance is not present in the journalistic accounts. For example, while Professor Weiss referred to 150 Ugandan troops under the command of the Rwandan Colonel Kaberebe at Kitona in an article relating to the events in the DRC, the Belgian journalist Mrs. Brackman wrote about rebels fleeing a Ugandan battalion of several hundred men.

69. The Court cannot give weight to claims made by the DRC that a Ugandan tank was used in the Kitona operation. It would seem that a tank of the type claimed to be “Ugandan” was captured at Kasangulu. This type of tank a — T-55 — was in fact one used also by the DRC itself and by Rwanda. The DRC does not clarify in its argument whether a single tank was transported from Uganda, nor does it specify, with supporting evidence, on which of the planes mentioned (a Boeing 727, Ilyushin 76, Boeing 707 or Antonov 32) it was transported from Uganda. The reference by the DRC to the picture of Mr. Bemba, the leader of the MLC, on a tank of this type in his book *Le choix de la liberté*, published in 2001, cannot prove its use by Ugandan forces in Kitona. Indeed, the Court finds it more pertinent that in his book Mr. Bemba makes no mention of the involvement of Ugandan troops at Kitona, but rather confirms that Rwanda took control of the military base in Kitona.

70. The Court has also noted that contemporaneous documentation clearly indicated that at the time the DRC regarded the Kitona operation as having been carried out by Rwanda. Thus the White Paper annexed to the Application of the DRC states that between 600 and 800 Rwandan soldiers were involved in the Kitona operation on 4 August. The letter sent by the Permanent Representative of the DRC on 2 September 1998 to the President of the Security Council referred to 800 soldiers from Rwanda being involved in the Kitona operation on 4 August 1998. This perception seems to be confirmed by the report of the Special Rapporteur

of the Commission on Human Rights in February 1999, where reference is made to Rwandan troops arriving in Kitona on 4 August in order to attack Kinshasa. The press conference given at United Nations Headquarters in New York by the Permanent Representative of the DRC to the United Nations on 13 August 1998 only referred to Rwandan soldiers conducting the Kitona airborne operation on 4 August, and to Ugandan troops advancing upon Bunia on 9 August.

71. The Court thus concludes that, on the basis of the evidence before it, it has not been established to its satisfaction that Uganda participated in the attack on Kitona on 4 August 1998.

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FINDINGS OF FACT: MILITARY ACTION IN THE EAST OF THE DRC AND IN OTHER AREAS OF THAT COUNTRY

72. The Court will next analyse the claim made by the DRC of military action by Uganda in the east of the DRC during August 1998. The facts regarding this action are relatively little contested between the Parties. Their dispute is as to how these facts should be characterized. The Court must first establish which relevant facts it regards as having been convincingly established by the evidence, and which thus fall for scrutiny by reference to the applicable rules of international law.

73. The Court finds it convenient at this juncture to explain that its determination of the facts as to the Ugandan presence at, and taking of, certain locations is independent of the sketch-map evidence offered by the Parties in support of their claims in this regard. In the response given by the DRC to the question of Judge Kooijmans, reference was made to the sketch-map provided by the DRC (see paragraph 55 above) to confirm the scope of the Ugandan “invasion and occupation”. This sketch-map is based on a map of approximate deployment of forces in the DRC contained in a Report (Africa Report No. 26) prepared by International Crisis Group (hereinafter ICG), an independent, non-governmental body, whose reports are based on information and assessment from the field. On the ICG map, forces of the MLC and Uganda are shown to be “deployed” in certain positions to the north-west (Gbadolite, Zongo, Gomena, Bondo, Buta, Bumba, Lisala, Bonmongo, Basankusu, and Mbandaka); and Uganda and “RCD-Wamba” (officially known as RCD-Kisangani) forces are shown as “deployed” on the eastern frontier at Bunia, Beni and Isiro. The presence of Uganda and RCD-Wamba forces is shown at two further unspecified locations.

74. As to the sketch-maps which Uganda provided at the request of Judge Kooijmans, the DRC argues that they are too late to be relied on and were unilaterally prepared without any reference to independent source materials.

75. In the view of the Court, these maps lack the authority and credibility, tested against other evidence, that is required for the Court to place reliance on them. They are at best an aid to the understanding of what is contended by the Parties. These sketch-maps necessarily lack precision. With reference to the ICG map (see paragraph 73 above), there is also the issue of whether MLC forces deployed in the north-west may, without yet further findings of fact and law, be treated as “Ugandan” forces for purposes of the DRC’s claim of invasion and occupation. The same is true for the RCD-Wamba forces deployed in the north-east.

76. Uganda has stated, in its response to the question put to it during the oral proceedings by Judge Kooijmans (see paragraph 22 above), that as of 1 August 1998
 “there were three battalions of UPDF troops — not exceeding 2,000 soldiers — in the eastern border areas of the DRC, particularly in the northern part of North Kivu Province (around Beni and Butembo) and the southern part of Orientale Province (around Bunia)”.

Uganda states that it “modestly augmented the UPDF presence in the Eastern border” in response to various events. It has informed the Court that a UPDF battalion went into Bunia on 13 August, and that a single battalion had been sent to Watsa “to maintain the situation between Bunia and the DRC’s border with Sudan”. Uganda further states in its response to Judge Kooijmans’ question that by the end of August 1998 there were no Ugandan forces present in South Kivu, Maniema or Kasai Oriental province; “nor were Ugandan forces present in North Kivu Province south of the vicinity of Butembo”.

77. The DRC has indicated that Beni and Butembo were taken by Ugandan troops on 6 August 1998, Bunia on 13 August and Watsa on 25 August.

78. The Court finds that most evidence of events in this period is indirect and less reliable than that which emerges from statements made under oath before the Porter Commission. The Court has already noted that statements “emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them” (*Military and Paramilitary Activities in and against Nicaragua v. United States of America*, Merits, Judgment, I.C.J. Reports 1986, p. 41, para. 64). The Court believes the same to be the case when such statements against interest are made by senior military officers given the objective circumstances in which those statements were taken. Accordingly, the Court finds it relevant that before the Porter Commission, Brigadier General Kazini, who was commander of the Ugandan forces in the DRC, referred

to “the capture of Beni, that was on 7 August 1998”.

79. He also referred to 8 August 1998 as the date of capture of Beni, 7 August being the date “that was the fighting (when it took place) and our troops occupied Beni”. The Court is satisfied that Beni was taken on 7 August, and Bunia on 13 August. There is some small uncertainty about the precise date of the taking of Watsa, though none as to the fact of its being taken in this period. A report by Lieutenant Colonel Waswa (Annexure G, Porter Commission Report) asserts that the “7th infantry Battalion, operational force” entered the DRC at Aru on 10 August, leaving there on 14 August, and “went to Watsa via Duruba 250 km away from the Uganda-Congo border. The force spent one day at Duruba, i.e., 23 August 1998 and proceeded to Watsa which is 40 km where we arrived on 24 August 1998.” Twenty days were said by him to have been spent at Watsa, where the airport was secured. Notwithstanding that this report was dated 18 May 2001, the Court notes that it is detailed, specific and falls within the rubric of admission against interest to which the Court will give weight. However, Justice Porter refers to 29 August as the relevant date for Watsa; whereas, in its response to the question of Judge Kooijmans, the DRC gives the date of 25 August for the “prise de Watsa” (taking of Watsa).

80. The Court will now consider the events of September 1998 on the basis of the evidence before it. Uganda acknowledges that it sent part of a battalion to Kisangani Airport, to guard that facility, on 1 September 1998. It has been amply demonstrated that on several later occasions, notably in August 1999 and in May and June 2000, Uganda engaged in large-scale fighting in Kisangani against Rwandan forces, which were also present there.

81. The Court notes that a schedule was given by the Ugandan military to the Porter Commission containing a composite listing of locations and corresponding “dates of capture”. The Court observes that the period it covers stops short of the period covered by the DRC’s claims. This evidence was put before the Court by Uganda. It includes references to locations not mentioned by the DRC, whose list, contained in the response to Judge Kooijmans’s question, is limited to places said to have been “taken”. The Court simply observes that Ugandan evidence before the Porter Commission in relation to the month of September 1998 refers to Kisangani (1 September); Munubele (17 September); Bengamisa (18 September); Banallia (19 September); Isiro (20 September); Faladje (23 September); and Tele Bridge (29 September). Kisangani (1 September) and Isiro (20 September) are acknowledged by Uganda as having been “taken” by its forces (and not just as locations passed through).

82. As for the events of October 1998, Uganda has confirmed that it was at Buta on 3 October and Aketi on 6 October. The DRC lists the taking of Aketi as 8 November (response to the question put by Judge Kooijmans), but the Court sees no reason for this date to be preferred.

Both Parties agree that Buta was taken on 3 October and Dulia on 27 October. The Porter Commission was informed that Ugandan troops were present at Bafwasende on 12 October.

83. The DRC has alleged that Kindu was taken by Ugandan troops on 20 October 1998; this was denied in some detail by Uganda in its Rejoinder. No response was made in the oral pleadings by the DRC to the reasons given by Uganda for denying it had taken Kindu. Nor is Kindu in the listing given by the Ugandan military authorities to the Porter Commission. The Court does not feel it has convincing evidence as to Kindu having been taken by Ugandan forces in October 1998.

84. There is agreement between the Parties that Bumba was taken on 17 November 1998.

85. Uganda claims that Lisala was taken on 12 December 1998. The list contained in the Porter Commission exhibits makes reference to the location of Benda, with the date of 13 December. Also listed are Titure (20 December) and Poko (22 December). Uganda insists it “came to” Businga on 28 December 1998 and not in early February 1999 as claimed by the DRC; and to Gomena on 25 December 1998, and not on 10 July 1999 as also claimed by the DRC.

These discrepancies do not favour the case of Uganda and the Court accepts the earlier dates claimed by Uganda.

86. The DRC claims that Ango was taken on 5 January 1999, and this is agreed by Uganda. There also appears in the Ugandan “location/dates of capture” list, Lino-Mbambi (2 January 1999) and Lino (same date), Akula Port (4 February); Kuna (1 March); Ngai (4 March); Bonzanga (19 March); Pumusi (31 March); Bondo (28 April); Katete (28 April); Baso Adia (17 May); Ndanga (17 May); Bongandanga (22 May); Wapinda (23 May); Kalawa Junchai (28 May); Bosobata (30 May); Bosobolo (9 June); Abuzi (17 June); Nduu (22 June); Pimu Bridge (27 June); Busingaloko Bridge (28 June); Yakoma (30 June); and Bogbonga (30 June). All of these appear to be locations which Ugandan forces were rapidly traversing. The sole place claimed by the DRC to have been “taken” in this period was Mobeika — a precise date for which is given by Uganda (30 June 1999).

87. The DRC claims Gbadolite to have been taken on 3 July 1999 and that fact is agreed by Uganda. The Ugandan list refers also to Mowaka (1 July); Ebonga (2 July); Pambwa Junction (2 July); Bosomera (3 July); Djombo (4 July); Bokota (4 July); Bolomudanda Junction (4 July); the crossing of Yakoma Bridge (4 July); Mabaye (4 July); Businga (7 July); Katakoli (8 July); Libenge (29 July); Zongo (30 July); and Makanza (31 July).

88. The DRC also claims Bongandanga and Basankusu (two locations in the extreme south of Equateur province) to have been taken on 30 November 1999; Bomorge, Moboza and Dongo at unspecified dates

in February 2000; Inese and Bururu in April 2000; and Moberenze in June 2000.

89. There is considerable controversy between the Parties over the DRC’s claim regarding towns taken after 10 July 1999. The Court recalls that on this date the Parties had agreed to a ceasefire and to all the further provisions of the Lusaka Agreement. Uganda has insisted that Gomena was taken in December 1998 and the Court finds this date more plausible. Uganda further states in its observations on the DRC’s response to the question of Judge Kooijmans that “there is no evidence that Ugandan forces were ever in Moberenze, Bururu, Bomongo, and Moboza at any time”. The Court observes that Uganda’s list before the Porter Commission also makes no reference to Dongo at all during this period.

90. Uganda limits itself to stating that equally no military offensives were initiated by Uganda at Zongo, Basankusu and Dongo during the post-Lusaka periods; rather, “the MLC, with some limited Ugandan assistance, repulsed [attacks by the FAC in violation of the Lusaka Agreement].”

91. The Court makes no findings as to the responsibility of each of the Parties for any violations of the Lusaka Agreement. It confines itself to stating that it has not received convincing evidence that Ugandan forces were present at Moberenze, Bururu, Bomongo and Moboza in the period under consideration by the Court for purposes of responding to the final submissions of the DRC.

* * *

DID THE LUSAKA, KAMPALA AND HARARE AGREEMENTS CONSTITUTE ANY CONSENT OF THE DRC TO THE PRESENCE OF UGANDAN TROOPS?

92. It is the position of Uganda that its military actions until 11 September 1998 were carried out with the consent of the DRC, that from 11 September 1998 until 10 July 1999 it was acting in self-defence, and that thereafter the presence of its soldiers was again consented to under the Lusaka Agreement.

The Court will first consider whether the Lusaka Agreement, the Kampala and Harare Disengagement Plans and the Luanda Agreement constituted consent to the presence of Ugandan troops on the territory of the DRC.

93. The Court issued on 29 November 2001 an Order regarding counter-claims contained in the Counter-Memorial of Uganda. The Court found certain of Uganda’s counter-claims to be admissible as such. However, it found Uganda’s third counter-claim, alleging violations by the DRC of the Lusaka Agreement, to be “not directly connected with the subject-matter of the Congo’s claims”. Accordingly, the Court found this counter-claim not admissible under Article 80, paragraph 1, of the Rules of Court.

94. It does not follow, however, that the Lusaka Agreement is thereby excluded from all consideration by the Court. Its terms may certainly be examined in the context of responding to Uganda's contention that, according to its provisions, consent was given by the DRC to the presence of Ugandan troops from the date of its conclusion (10 July 1999) until all the requirements contained therein should have been fulfilled.

95. The Lusaka Agreement does not refer to "consent". It confines itself to providing that "[t]he final withdrawal of all foreign forces from the national territory of the DRC shall be carried out in accordance with the Calendar in Annex 'B' of this Agreement and a withdrawal schedule to be prepared by the UN, the OAU and the JMC [Joint Military Commission]" (Art. III, para. 12). Under the terms of Annex "B", the Calendar for the Implementation of the Ceasefire Agreement was dependent upon a series of designated "Major Events" which were to follow upon the official signature of the Agreement ("D-Day"). This "Orderly Withdrawal of all Foreign Forces" was to occur on "D-Day plus 180 days". It was provided that, pending that withdrawal, "[a]ll forces shall remain in the declared and recorded locations" in which they were present at the date of signature of the Agreement (Ann. A, Art. 11.4).

96. The Court first observes that nothing in the provisions of the Lusaka Agreement can be interpreted as an affirmation that the security interests of Uganda had already required the presence of Ugandan forces on the territory of the DRC as from September 1998, as claimed by Uganda in the oral proceedings.

97. The Lusaka Agreement is, as Uganda argues, more than a mere ceasefire agreement, in that it lays down various "principles" (Art. III) which cover both the internal situation within the DRC and its relations with its neighbours. The three annexes appended to the Agreement deal with these matters in some considerable detail. The Agreement goes beyond the mere ordering of the parties to cease hostilities; it provides a framework to facilitate the orderly withdrawal of all foreign forces to a stable and secure environment. The Court observes that the letter from the Secretary-General of the United Nations to the President of Uganda of 4 May 2001, calling for Uganda to adhere to the agreed timetable for orderly withdrawal, is to be read in that light. It carries no implication as to the Ugandan military presence having been accepted as lawful. The overall provisions of the Lusaka Agreement acknowledge the importance of internal stability in the DRC for all of its neighbours. However, the Court cannot accept the argument made by Uganda in the oral proceedings that the Lusaka Agreement constituted "an acceptance by all parties of Uganda's justification for sending additional troops into the DRC between mid-September 1998 and mid-July 1999".

94. It does not follow, however, that the Lusaka Agreement is thereby excluded from all consideration by the Court. Its terms may certainly be examined in the context of responding to Uganda's contention that, according to its provisions, consent was given by the DRC to the presence of Ugandan forces for at least 180 days from 10 July 1999 — and indeed beyond that time if the envisaged necessary "Major Events" did not occur.

95. The Court is of the view that, notwithstanding the special features of the Lusaka Agreement just described, this conclusion cannot be drawn. The Agreement took as its starting point the realities on the ground. Among those realities were the major Ugandan military deployment across vast areas of the DRC and the massive loss of life over the preceding months. The arrangements made at Lusaka, to progress towards withdrawal of foreign forces and an eventual peace, with security for all concerned, were directed at these factors on the ground and at the realities of the unstable political and security situation. The provisions of the Lusaka Agreement thus represented an agreed *modus operandi* for the parties. They stipulated how the parties should move forward. They did not purport to qualify the Ugandan military presence in legal terms. In accepting this *modus operandi* the DRC did not "consent" to the presence of Ugandan troops. It simply concurred that there should be a process to end that reality in an orderly fashion. The DRC was willing to proceed from the situation on the ground as it existed and in the manner agreed as most likely to secure the result of a withdrawal of foreign troops in a stable environment. But it did not thereby recognize the situation on the ground as legal, either before the Lusaka Agreement or in the period that would pass until the fulfilment of its terms.

100. In resolution 1234 of 9 April 1999 the Security Council had called for the "immediate signing of a ceasefire agreement" allowing for, *inter alia*, "the orderly withdrawal of all foreign forces". The Security Council fully appreciated that this withdrawal would entail political and security elements, as shown in paragraphs 4 and 5 of resolution 1234 (1999). This call was reflected three months later in the Lusaka Agreement. But these arrangements did not preclude the Security Council from continuing to identify Uganda and Rwanda as having violated the sovereignty and territorial integrity of the DRC and as being under an obligation to withdraw their forces "without further delay, in conformity with the timetable of the Ceasefire Agreement" (Security Council resolution 1304, 16 June 2000), i.e., without any delay to the *modus operandi* provisions agreed upon by the parties.

101. This conclusion as to the effect of the Lusaka Agreement upon the legality of the presence of Ugandan troops on Congolese territory did not change with the revisions to the timetable that became necessary. The

Kampala Disengagement Plan of 8 April 2000 and the Harare Disengagement Plan of 6 December 2000 provided for new schedules for withdrawal, it having become apparent that the original schedule in the Annex to the Lusaka Agreement was unrealistic. While the status of Ugandan troops remained unchanged, the delay in relation to the D-Day plus 180 days envisaged in the Lusaka Agreement likewise did not change the legal status of the presence of Uganda, all parties having agreed to these delays to the withdrawal calendar.

102. The Luanda Agreement, a bilateral agreement between the DRC and Uganda on “withdrawal of Ugandan troops from the Democratic Republic of the Congo, co-operation and normalisation of relations between the two countries”, alters the terms of the multilateral Lusaka Agreement. The other parties offered no objection.

103. The withdrawal of Ugandan forces was now to be carried out “in accordance with the Implementation Plan marked Annex “A” and attached thereto” (Art. 1, para. 1). This envisaged the completion of withdrawal within 100 days after signature, save for the areas of Gbadolite, Beni and their vicinities, where there was to be an immediate withdrawal of troops (Art. 1, para. 2). The Parties also agreed that “the Ugandan troops shall remain on the slopes of Mt. Ruwenzori until the Parties put in place security mechanisms guaranteeing Uganda’s security, including training and co-ordinated patrol of the common border”.

104. The Court observes that, as with the Lusaka Agreement, none of these elements purport generally to determine that Ugandan forces had been legally present on the territory of the DRC. The Luanda Agreement revised the *modus operandi* for achieving the withdrawal of Ugandan forces in a stable security situation. It was now agreed — without reference to whether or not Ugandan forces had been present in the area when the agreement was signed, and to whether any such presence was lawful — that their presence on Mount Ruwenzori should be authorized, if need be, after the withdrawal elsewhere had been completed until appropriate security mechanisms had been put in place. The Court observes that this reflects the acknowledgment by both Parties of Uganda’s security needs in the area, without pronouncing upon the legality of prior Ugandan military actions there or elsewhere.

105. The Court thus concludes that the various treaties directed to achieving and maintaining a ceasefire, the withdrawal of foreign forces and the stabilization of relations between the DRC and Uganda did not (save for the limited exception regarding the border region of the Ruwenzori Mountains contained in the Luanda Agreement) constitute consent by the DRC to the presence of Ugandan troops on its territory for the period after July 1999, in the sense of validating that presence in law.

* *

SELF-DEFENCE IN THE LIGHT OF PROVEN FACTS

106. The Court has already said that, on the basis of the evidence before it, it has not been established to its satisfaction that Uganda participated in the attack on Kitona on 4 August 1998 (see paragraph 71 above). The Court has also indicated that with regard to the presence of Ugandan troops on Congolese territory near to the common border after the end of July 1998, President Kabila’s statement on 28 July 1998 was ambiguous (see paragraph 51 above). The Court has further found that any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998 (see paragraph 53 above). The Court now turns to examine whether Uganda’s military activities starting from this date could be justified as actions in self-defence.

107. The DRC has contended that Uganda invaded on 2 August 1998, beginning with a major airborne operation at Kitona in the west of the DRC, then rapidly capturing or taking towns in the east, and then, continuing to the north-west of the country. According to the DRC, some of this military action was taken by the UPDF alone or was taken in conjunction with anti-government rebels and/or with Rwanda. It submits that Uganda was soon in occupation of a third of the DRC and that its forces only left in April 2003.

108. Uganda insists that 2 August 1998 marked the date only of the beginning of civil war in the DRC and that, although Rwanda had invited it to join in an effort to overthrow President Kabila, it had declined. Uganda contends that it did not act jointly with Rwanda in Kitona and that it had the consent of the DRC for its military operations in the east until the date of 11 September 1998. 11 September was the date of issue of the “Position of the High Command on the Presence of the UPDF in the DRC” (hereinafter “the Ugandan High Command document”) (see paragraph 109 below). Uganda now greatly increased the number of its troops from that date on. Uganda acknowledges that its military operations thereafter can only be justified by reference to an entitlement to act in self-defence.

109. The Court finds it useful at this point to reproduce in its entirety the Ugandan High Command document. This document has been relied on by both Parties in this case. The High Command document, although mentioning the date of 11 September 1998, in the Court’s view, provides the basis for the operation known as operation “Safe Haven”. The document reads as follows:

“WHEREAS for a long time the DRC has been used by the enemies of Uganda as a base and launching pad for attacks against Uganda;

AND
WHEREAS the successive governments of the DRC have not been in effective control of all the territory of the Congo;

AND

WHEREAS in May 1997, on the basis of a mutual understanding the Government of Uganda deployed UPDF to jointly operate with the Congolese Army against Uganda enemy forces in the DRC;
AND
WHEREAS when an anti-Kabila rebellion erupted in the DRC the forces of the UPDF were still operating along side the Congolese Army in the DRC, against Uganda enemy forces who had fled back to the DRC;

NOW THEREFORE the High Command sitting in Kampala this 11th day of September, 1998, resolves to maintain forces of the UPDF in order to secure Uganda's legitimate security interests which are the following:

1. To deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda.
2. To enable UPDF neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.
3. To ensure that the political and administrative vacuum, and instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda.
4. To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR, which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.
5. To be in position to safeguard the territory integrity of Uganda against irresponsible threats of invasion from certain forces."
110. In turning to its assessment of the legal character of Uganda's activities at Aru, Beni, Bunia and Watsa in August 1998, the Court begins by observing that, while it is true that those localities are all in close proximity to the border, "as per the consent that had been given previously by President Kabila", the nature of Ugandan action at these locations was of a different nature from previous operations along the common border. Uganda was not in August 1998 engaging in military operations against rebels who carried out cross-border raids. Rather, it was engaged in military assaults that resulted in the taking of the town of Beni and its airfield between 7 and 8 August, followed by the taking of the town of Bunia and its airport on 13 August, and the town of Watsa and its airport at a date between 24 and 29 August.

111. The Court finds these actions to be quite outside any mutual understanding between the Parties as to Uganda's presence on Congolese territory near to the border. The issue of when any consent may have terminated is irrelevant when the actions concerned are so clearly beyond co-operation "in order to ensure peace and security along the common border", as had been confirmed in the Protocol of 27 April 1998.

112. The Court observes that the Ugandan operations against these eastern border towns could therefore only be justified, if at all, as actions in self-defence. However, at no time has Uganda sought to justify them on this basis before the Court.

113. Operation "Safe Haven", by contrast, was firmly rooted in a claimed entitlement "to secure Uganda's legitimate security interests" rather than in any claim of consent on the part of the DRC. The Court notes, however, that those most intimately involved in its execution regarded the military actions throughout August 1998 as already part and parcel of operation "Safe Haven".

114. Thus Mr. Kavuma, the Minister of State for Defence, informed the Porter Commission that the UPDF troops first crossed the border at the beginning of August 1998, at the time of the rebellion against President Kabila, "when there was confusion inside the DRC" (Porter Commission document CW/01/02 23/07/01, p. 23). He confirmed that this "entry" was "to defend our security interests". The commander of the Ugandan forces in the DRC, General Kazini, who had immediate control in the field, informing Kampala and receiving thereafter any further orders, was asked "[w]hen was 'Operation Safe Haven'? When did it commence?" He replied "[i]t was in the month of August. That very month of August 1998, 'Safe Haven' started after the capture of Beni, that was on 7 August 1998." (CW/01/03 24/07/01, p. 774.) General Kazini emphasized that the Beni operation was the watershed: "So before that... 'Operation Safe Haven' had not started. It was the normal UPDF operations — counter-insurgency operations in the Rwenzoris before that date of 7 August, 1998." (CW/01/03 24/07/01, p. 129.) He spoke of "the earlier plan" being that both Governments, in the form of the UPDF and the FAC, would jointly deal with the rebels along the border. "But now this new phenomenon had developed: there was a mutiny, the rebels were taking control of those areas. So we decided to launch an offensive together with the rebels, a special operation we code-named 'Safe Haven'." General Kazini was asked by Justice Porter what was the objective of this joint offensive with the rebels. General Kazini replied "[t]o crush the bandits together with their FAC allies" and confirmed that by "FAC" he meant the "Congolese Government Army" (CW/01/03 24/07/01, p. 129).

115. It is thus clear to the Court that Uganda itself actually regarded the military events of August 1998 as part and parcel of operation “Safe Haven”, and not as falling within whatever “mutual understandings” there had previously been.

116. The Court has noted that within a very short space of time Ugandan forces had moved rapidly beyond these border towns. It is agreed by all that by 1 September 1998 the UPDF was at Kisangani, very far from the border. Furthermore, Lieutenant Colonel Magenji informed the Porter Commission, under examination, that he had entered the DRC on 13 August and stayed there till mid-February 1999. He was based at Isiro, some 580 km from the border. His brigade had fought its way there: “we were fighting the ADFs who were supported by the FAC”.

117. Accordingly, the Court will make no distinction between the events of August 1998 and those in the ensuing months. 118. Before this Court Uganda has qualified its action starting from mid-September 1998 as action in self-defence. The Court will thus examine whether, throughout the period when its forces were rapidly advancing across the DRC, Uganda was entitled to engage in military action in self-defence against the DRC. For these purposes, the Court will not examine whether each individual military action by the UPDF could have been characterized as action in self-defence, unless it can be shown, as a general proposition, that Uganda was entitled to act in self-defence in the DRC in the period from August 1998 till June 2003.

119. The Court first observes that the objectives of operation “Safe Haven”, as stated in the Ugandan High Command document (see paragraph 109 above), were not consonant with the concept of self-defence as understood in international law.

120. Uganda in its response to the question put to it by Judge Kooijmans (see paragraph 22 above) confirms that the changed policies of President Kabila had meant that co-operation in controlling insurgency in the border areas had been replaced by “stepped-up cross-border attacks against Uganda by the ADF, which was being re-supplied and re-equipped by the Sudan and the DRC Government”. The Court considers that, in order to ascertain whether Uganda was entitled to engage in military action on Congolese territory in self-defence, it is first necessary to examine the reliability of these claims. It will thus begin by an examination of the evidence concerning the role that the Sudan was playing in the DRC at the relevant time.

121. Uganda claimed that there was a tripartite conspiracy in 1998 between the DRC, the ADF and the Sudan; that the Sudan provided military assistance to the DRC’s army and to anti-Ugandan rebel groups; that the Sudan used Congo airfields to deliver materiel; that the Sudan airlifted rebels and its own army units around the country; that Sudanese aircraft bombed the UPDF positions at Bunia on 26 August 1998; that a

Sudanese brigade of 2,500 troops was in Gbadolite and was preparing to engage the UPDF forces in eastern Congo; and that the DRC encouraged and facilitated stepped-up cross border attacks from May 1998 onwards.

122. The Court observes, more specifically, that in its Counter-Memorial Uganda claimed that from 1994 to 1997 anti-Ugandan insurgents “received direct support from the Government of Sudan” and that the latter trained and armed insurgent groups, in part to destabilize Uganda’s status as a “good example” in Africa. For this, Uganda relied on a Human Rights Watch (hereinafter HRW) report. The Court notes that this report is on the subject of slavery in the Sudan and does not assist with the issue before the Court. It also relied on a Ugandan political report which simply claimed, without offering supporting evidence, that the Sudan was backing groups launching attacks from the DRC. It further relies on an HRW report of 2000 stating that the Sudan was providing military and logistical assistance to the LRA, in the north of Uganda, and to the SPLM/A (by which Uganda does not claim to have been attacked). The claims relating to the LRA, which are also contained in the Counter-Memorial of Uganda, have no relevance to the present case. No more relevant is the HRW report of 1998 criticizing the use of child soldiers in northern Uganda.

123. The Court has next examined the evidence advanced to support the assertion that the Sudan was supporting anti-Ugandan groups which were based in the DRC, namely FUNA, UNRFL II and NALU. This consists of a Ugandan political report of 1998 which itself offers no evidence, and an address by President Museveni of 2000. These documents do not constitute probative evidence of the points claimed.

124. Uganda states that President Kabila entered into an alliance with the Sudan, “which he invited to occupy and utilise airfields in north-eastern Congo for two purposes: delivering arms and other supplies to the insurgents; and conducting aerial bombardment of Uganda towns and villages”. Only President Museveni’s address to Parliament is relied on. Certain assertions relating to the son of Idi Amin, and the role he was being given in the Congolese military, even were they true, prove nothing as regards the specific allegations concerning the Sudan.

125. Uganda has informed the Court that a visit was made by President Kabila in May 1998 to the Sudan, in order to put at the Sudan’s disposal all the airfields in northern and eastern Congo, and to deliver arms and troops to anti-Ugandan insurgents along Uganda’s border. Uganda offered as evidence President Museveni’s address to Parliament, together with an undated, unsigned internal Ugandan military intelligence document. Claims as to what was agreed as a result of any such meeting that might have taken place remain unproven.

126. Uganda informed the Court that Uganda military intelligence reported that in August 1998 the Sudan airlifted insurgents from the WNBFF and LRA to fight alongside Congolese forces against RPA and RCD rebels. The Court observes that, even were that proven (which in the Court's view is not the case), the DRC was entitled so to have acted. This invitation could not of itself have entitled Uganda to use force in self-defence. The Court has not been able to verify from concordant evidence the claim that the Sudan transported an entire Chadian brigade to Gbadolite (whether to join in attacks on Uganda or otherwise).

127. The Court further observes that claims that the Sudan was training and transporting FAC troops at the request of the Congolese Government, cannot entitle Uganda to use force in self-defence, even were the alleged facts proven. In the event, such proof is not provided by the unsigned Ugandan military intelligence document, nor by a political report that Uganda relies on.

128. Article 51 of the Charter refers to the right of “individual or collective” self-defence. The Court notes that a State may invite another State to assist it in using force in self-defence. On 2 August 1998 civil war had broken out in the DRC and General Kazini later testified to the Porter Commission that operation “Safe Haven” began on 7-8 August 1998. The Ugandan written pleadings state that on 14 August 1998 Brigadier Khalil of the Sudan delivered three planeloads of weapons to the FAC in Kinshasa, and that the Sudan stepped up its training of FAC troops and airlifted them to different locations in the DRC. Once again, the evidence offered to the Court as to the delivery of the weapons is the undated, unsigned, internal Ugandan military intelligence report. This was accompanied by a mere political assertion of Sudanese backing for troops launching attacks on Uganda from the DRC. The evidentiary situation is exactly the same as regards the alleged agreement by President Kabila with the Sudanese Vice-President for joint military measures against Uganda. The same intelligence report, defective as evidence that the Court can rely on, is the sole source for the claims regarding the Sudanese bombing with an Antonov aircraft of UPDF positions in Bunia on 26 August 1998; the arrival of the Sudanese brigade in Gbadolite shortly thereafter; the deployment of Sudanese troops, along with those of the DRC, on Uganda's border on 14 September; and the pledges made on 18 September for the deployment of more Sudanese troops.

129. It was said by Uganda that the DRC had effectively admitted the threat to Uganda's security posed by the Sudan, following the claimed series of meetings between President Kabila and Sudanese officials

in May, August and September 1998. In support of these claims Uganda referred the Court to a 1999 ICG report, “How Kabila Lost His Way”; although not provided in the annexes, this report was in the public domain and the Court has ascertained its terms. Reliance is also placed on a political statement by the Ugandan High Command. The Court observes that this does not constitute reliable evidence and in any event it speaks only of the reason for the mid-September deployment of troops. The Court has also found that it cannot rely as persuasive evidence on a further series of documents said to support these various claims relating to the Sudan, all being internal political documents. The Court has examined the notarized affidavit of 2002 of the Ugandan Ambassador to the DRC, which refers to documents that allegedly were at the Ugandan Embassy in Kinshasa, showing that “the Sudanese government was supplying ADF rebels”. While a notarized affidavit is entitled to a certain respect, the Court must observe that it is provided by a party in the case and provides at best indirect “information” that is unverified.

130. The Court observes that it has not been presented with evidence that can safely be relied on in a court of law to prove that there was an agreement between the DRC and the Sudan to participate in or support military action against Uganda; or that any action by the Sudan (of itself factually uncertain) was of such a character as to justify Uganda's claim that it was acting in self-defence.

131. The Court has also examined, in the context of ascertaining whether Uganda could have been said to have acted in self-defence, the evidence for Uganda's claims that from May 1998 onwards the frequency, intensity and destructiveness of cross-border attacks by the ADF “increased significantly”, and that this was due to support from the DRC and from the Sudan.

132. The Court is convinced that the evidence does show a series of attacks occurring within the relevant time-frame, namely: an attack on Kichwamba Technical School of 8 June 1998, in which 33 students were killed and 106 abducted; an attack near Kichwamba, in which five were killed; an attack on Benyangule village on 26 June, in which 11 persons were killed or wounded; the abduction of 19 seminarians at Kiburara on 5 July; an attack on Kasese town on 1 August, in which three persons were killed. A sixth attack was claimed at the oral hearings to have occurred at Kijarumba, with 33 fatalities. The Court has not been able to ascertain the facts as to this latter incident.

133. The DRC does not deny that a number of attacks took place, but its position is that the ADF alone was responsible for them. The documents relied on by Uganda for its entitlement to use force in self-defence against the DRC include a report of the interrogation of a captured ADF rebel, who admits participating in the Kichwamba attack and refers to an “intention” to obtain logistical support and sanctuary from the Congolese Government; this report is not signed by the person making the statement, nor does it implicate the DRC. Uganda also relies on a document entitled “Chronological Illustration of Acts of Destabilisation by Sudan and Congo Based Dissidents”, which is a Ugandan military document. Further, some articles in newspapers relied on by Uganda in fact blame only the ADF for the attacks. A very few do mention the Sudan. Only some internal documents, namely unsigned witness statements, make any reference to Congolese involvement in these acts.

134. The Court observes that this is also the case as regards the documents said to show that President Kabila provided covert support to the ADF. These may all be described as internal documents, often with no authenticating features, and containing unsigned, unauthenticated and sometimes illegible witness statements. These do not have the quality or character to satisfy the Court as to the matters claimed.

135. In oral pleadings Uganda again referred to these “stepped up attacks”. Reference was made to an ICG report of August 1998, “North Kivu, into the Quagmire”. Although not provided in the annexes, this report was in the public domain and the Court has ascertained its terms. It speaks of the ADF as being financed by Iran and the Sudan. It further states that the ADF is “[e]xploring the incapacity of the Congolese Armed Forces” in controlling areas of North Kivu with neighbour Uganda. This independent report does seem to suggest some Sudanese support for the ADF’s activities. It also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border.

136. Uganda relies on certain documents annexed by the DRC to its Reply. However, the Court does not find this evidence weighty and convincing. It consists of a bundle of news reports of varying reliability, which go no further than to say that unconfirmed reports had been received that the Sudan was flying military supplies to Juba and Dungu. The Court has therefore not found probative such media reports as the IRIN update for 12 to 14 September 1998, stating that Hutu rebels were being trained in southern Sudan, and the IRIN update for 16 September 1998, stating that “rebels claim Sudan is supporting Kabila at Kindu”.

Neither has the Court relied on the (unreferenced and unsourced) claim that President Kabila made a secret visit to Khartoum on 25 August 1998 nor on the extract from Mr. Bemba’s book *Le choix de la liberté* stating that 108 Sudanese soldiers were in the DRC, under the command of the Congolese army, to defend the area around Gbadolite.

137. Nor has the Court been able to satisfy itself as to certain internal military intelligence documents, belatedly offered, which lack explanations as to how the information was obtained (e.g. Revelations of Commander Junju Juma (former commanding officer in the ADF) of 17 May 2000, undated Revelations by Issa Twatera (former commanding officer in the ADF)).

138. A further “fact” relied on by Uganda in this case as entitling it to act in self-defence is that the DRC incorporated anti-Ugandan rebel groups and Interahamwe militia into the FAC. The Court will examine the evidence and apply the law to its findings.

139. In its Counter-Memorial, Uganda claimed that President Kabila had incorporated into his army thousands of ex-FAR and Interahamwe génocidaires in May 1998. A United States State Department statement in October 1998 condemned the DRC’s recruitment and training of former perpetrators of the Rwandan genocide, thus giving some credence to the reports internal to Uganda that were put before the Court, even though these lacked signatures or particulars of sources relied on. But this claim, even if true, seems to have relevance for Rwanda rather than Uganda.

140. Uganda in its oral pleadings repeated the claims of incorporation of former Rwandan soldiers and Interahamwe into special units of the Congolese army. No sources were cited, nor was it explained to the Court how this might give rise to a right of self-defence on the part of Uganda.

141. In the light of this assessment of all the relevant evidence, the Court is now in a position to determine whether the use of force by Uganda within the territory of the DRC could be characterized as self-defence.

142. Article 51 of the United Nations Charter provides:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and

shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

143. The Court recalls that Uganda has insisted in this case that operation “Safe Haven” was not a use of force against an anticipated attack. As was the case also in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case, “reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised” (*I.C.J. Reports 1986*, p. 103, para. 194). The Court there found that “[a]ccordingly [it] expresses no view on that issue”. So it is in the present case. The Court feels constrained, however, to observe that the wording of the Ugandan High Command document on the position regarding the presence of the UPDF in the DRC makes no reference whatsoever to armed attacks that have already occurred against Uganda at the hands of the DRC (or indeed by persons for whose action the DRC is claimed to be responsible). Rather, the position of the High Command is that it is necessary “to secure Uganda’s legitimate security interests”. The specified security needs are essentially preventative – to ensure that the political vacuum does not adversely affect Uganda, to prevent attacks from “genocidal elements”, to be in a position to safeguard Uganda from irresponsible threats of invasion, to “deny the Sudan the opportunity to use the territory of the DRC to destabilize Uganda”. Only one of the five listed objectives refers to a response to acts that had already taken place — the neutralization of “Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan”.

144. While relying heavily on this document, Uganda nonetheless insisted to the Court that after 11 September 1998 the UPDF was acting in self-defence in response to attacks that had occurred. The Court has already found that the military operations of August in Beni, Bunia and Watsa, and of 1 September at Kisangani, cannot be classified as coming within the consent of the DRC, and their legality, too, must stand or fall by reference to self-defence as stated in Article 51 of the Charter.

145. The Court would first observe that in August and early September 1998 Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence.

146. It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The “armed attacks” to

which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 33/4 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.

147. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.

* * *

FINDINGS OF LAW ON THE PROHIBITION AGAINST THE USE OF FORCE

148. The prohibition against the use of force is a cornerstone of the United Nations Charter. Article 2, paragraph 4, of the Charter requires that:

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

Article 51 of the Charter may justify a use of force in self-defence only within the strict confines thereof. It does not allow the use of force by a State to protect perceived security interests beyond these

parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.

149. The Court has found that, from 7 August 1998 onwards, Uganda engaged in the use of force for purposes and in locations for which it had no consent whatever. The Court has also found that the events attested to by Uganda did not justify recourse to the use of force in self-defence.

150. The long series of resolutions passed by the Security Council (1234 (1999), 1258 (1999), 1273 (1999), 1279 (1999), 1291 (2000), 1304 (2000), 1316 (2000), 1323 (2000), 1332 (2000), 1341 (2001), 1355 (2001), 1376 (2001), 1399 (2002), 1417 (2002), 1445 (2002), 1457 (2003), 1468 (2003), 1484 (2003), 1489 (2003), 1493 (2003), 1499 (2003), 1501 (2003), 1522 (2004), 1533 (2004), 1552 (2004), 1555 (2004), 1565 (2004), 1592 (2005), 1596 (2005), 1616 (2005) and 1621 (2005)) and the need for the United Nations to deploy MONUC, as well as the prolonged efforts by the United Nations to restore peace in the region and full sovereignty to the DRC over its territory, testify to the magnitude of the military events and the attendant suffering. The same may be said of the need to appoint a Special Rapporteur on the situation of human rights, a Special Envoy of the Secretary-General for that region, and the establishment of a panel (later reconstituted) to report on certain of the categories of facts relating to natural resources.

151. The Court recalls that on 9 April 1999 the Security Council determined the conflict to constitute a threat to peace, security and stability in the region. In demanding an end to hostilities and a political solution to the conflict (which call was to lead to the Lusaka Agreement of 10 July 1999), the Security Council deplored the continued fighting and presence of foreign forces in the DRC and called for the States concerned “to bring to an end the presence of these uninvited forces” (United Nations doc. S/RES/1234, 9 April 1999).

152. The United Nations has throughout this long series of carefully balanced resolutions and detailed reports recognized that all States in the region must bear their responsibility for finding a solution that would bring peace and stability. The Court notes, however, that this widespread responsibility of the States of the region cannot excuse the unlawful military action of Uganda.

153. The evidence has shown that the UPDF traversed vast areas of the DRC, violating the sovereignty of that country. It engaged in military operations in a multitude of locations, including Bunia, Kisangani, Gbadolite and Iuri, and many others. These were grave violations of Article 2, paragraph 4, of the Charter.

154. The Court notes that the Security Council, on 16 June 2000, expressed “outrage at renewed fighting between Ugandan and Rwandan

forces in Kisangani”, and condemned it as a “violation of the sovereignty and territorial integrity of the Democratic Republic of the Congo” (United Nations doc. S/RES/1304 (2000)).

155. The Court further observes that Uganda — as is clear from the evidence given by General Kazini and General Kavuma to the Porter Commission (see above, paragraph 114) — decided in early August 1998 to launch an offensive together with various factions which sought to overthrow the Government of the DRC. The DRC has in particular claimed that, from September 1998 onwards, Uganda both created and controlled the MLC rebel group led by Mr. Bemba.

156. The DRC also points to the book written by Mr. Bemba (see paragraph 69 above) to support this contention, as well as to the fact that in the Harare Disengagement Plan the MLC and UPDF are treated as a single unit.

157. For its part, Uganda acknowledges that it assisted the MLC during fighting between late September 1998 and July 1999, while insisting that its assistance to Mr. Bemba “was always limited and heavily conditioned”. Uganda has explained that it gave “just enough” military support to the MLC to help Uganda achieve its objectives of driving out the Sudanese and Chadian troops from the DRC, and of taking over the air-fields between Gbadolite and the Ugandan border; Uganda asserts that it did not go beyond this.

158. The Court observes that the pages cited by the DRC in Mr. Bemba’s book do not in fact support the claim of “the creation” of the MLC by Uganda, and cover the later period of March-July 1999. The Court has noted the description in Mr. Bemba’s book of the training of his men by Ugandan military instructors and finds that this accords with statements he made at that time, as recorded in the ICG report of 20 August 1999. The Court has equally noted Mr. Bemba’s insistence, in November 1999, that, while he was receiving support, it was he who was in control of the military venture and not Uganda. The Court is equally of the view that the Harare Disengagement Plan merely sought to identify locations of the various parties, without passing on their relationships to each other.

159. The Court has not relied on various other items offered as evidence on this point by the DRC, finding them, uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say by the DRC, or even in some cases partisan. The Court has for such reasons set aside the ICG report of 17 November, the HRW Report of March 2001, passages from the Secretary-General’s report on MONUC of 4 September 2000 (where reliance on second-hand reports is acknowledged); articles in the IRIN bulletin and *Jeune Afrique*; and the statement of a

deserter who was co-operating with the Congolese military commission in preparing a statement for purposes of the present proceedings.

160. The Court concludes that there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use. In the view of the Court, the conduct of the MLC was not that of “an organ” of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Art. 5). The Court has considered whether the MLC’s conduct was “on the instructions of, or under the direction or control of” Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (see *Military and Paramilitary Activities in and against Nicaragua v. United States of America*, *Merits, Judgment, I.C.J. Reports 1986*, pp. 62-65, paras. 109-115).

161. The Court would comment, however, that, even if the evidence does not suggest that the MLC’s conduct is attributable to Uganda, the training and military support given by Uganda to the ALC, the military wing of the MLC, violates certain obligations of international law.

162. Thus the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter “the Declaration on Friendly Relations”) provides that:

“Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.” (General Assembly resolution 2625 (XXXV), 24 October 1970.)

The Declaration further provides that

“no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State” (*ibid.*).

These provisions are declaratory of customary international law.

163. The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war.

164. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court made it clear that the principle of non-intervention prohibits a State “to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State” (*I.C.J. Reports 1986*, p. 108, para. 206). The Court notes that in the present case it has been presented with probative evidence as to military intervention. The Court further affirms that acts which breach the principle of non-intervention “will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations” (*ibid.*, pp. 109-110, para. 209).

165. In relation to the first of the DRC’s final submissions, the Court accordingly concludes that Uganda has violated the sovereignty and also the territorial integrity of the DRC. Uganda’s actions equally constituted an interference in the internal affairs of the DRC and in the civil war there raging. The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.

* * *

166. Before turning to the second and third submissions of the DRC, dealing with alleged violations by Uganda of its obligations under international human rights law and international humanitarian law and the illegal exploitation of the natural resources of the DRC, it is essential for the Court to consider the question as to whether or not Uganda was an occupying Power in the parts of Congolese territory where its troops were present at the relevant time.

* * *

THE ISSUE OF BELLIGERENT OCCUPATION

167. The DRC asserts that the border regions of eastern Congo were attacked by Ugandan forces between 7 and 8 August 1998, and that more areas fell under the control of Ugandan troops over the following months with the advance of the UPDF into Congolese territory. It further points

out that “the territories occupied by Uganda have varied in size as the conflict has developed”: the area of occupation initially covered Orientale province and part of North Kivu province; in the course of 1999 it increased to cover a major part of Equateur province. The DRC specifies that the territories occupied extended from Bunia and Beni, close to the eastern border, to Burunu and Molbenzene, in the far north-western part of the DRC; and that “the southern boundary of the occupied area [ran] north of the towns of Mbandaka westwards, then [extended] east to Kisangani, rejoining the Ugandan border between Goma and Butembo”. According to the DRC, the occupation of its territory ended with the withdrawal of the Ugandan army on 2 June 2003.

168. The DRC contends that “the UPDF set up an occupation zone, which it administered both directly and indirectly”, in the latter case by way of the creation of and active support for various Congolese rebel factions. As an example of such administration, the DRC refers to the creation of a new province within its territory. In June 1999, the Ugandan authorities, in addition to the existing ten provinces, created an 11th province in the north-east of the DRC, in the vicinity of the Ugandan frontier. The “Kibali-Ituri” province thus created was the result of merging the districts of Ituri and Haut-Uélé, detached from Orientale province. On 18 June 1999 General Kazini, commander of the Ugandan forces in the DRC, “appointed Ms Adèle Lotsove, previously Deputy Governor of Orientale Province, to govern this new province”. The DRC further asserts that acts of administration by Uganda of this province continued until the withdrawal of Ugandan troops. In support of this contention, the DRC states that Colonel Muzaora, of the UPDF, exercised *de facto* the duties of governor of the province between January and May 2001, and that “at least two of the five governors who succeeded Ms Lotsove up until 2003 were relieved of their duties by the Ugandan military authorities, sometimes under threat of force”. The DRC claims that the Ugandan authorities were directly involved “in the political life of the occupied regions” and, citing the Ugandan daily newspaper *New Vision*, that “Uganda has even gone so far as to supervise local elections”. The DRC also refers to the Sixth report of the Secretary-General on MONUC, which describes the situation in Bunia (capital of Ituri district) in the following terms: “[s]ince 22 January, MONUC military observers in Bunia have reported the situation in the town to be tense but with UPDF in effective control”.

national law, as reflected in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter “the Hague Regulations of 1907”), is closely tied to the control exercised by the troops of the State operating on parts, extensive or not, of the territory of the occupied State. Thus, “rather than the omnipresence of the occupying State’s armed forces, it is that State’s ability to assert its authority which the Hague Regulations look to as the criterion for defining the notion of occupying State”.

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170. For its part, Uganda denies that it was an occupying Power in the areas where UPDF troops were present. It argues that, in view of the small number of its troops in the territory of the DRC, i.e. fewer than 10,000 soldiers “at the height of the deployment” they could not have occupied vast territories as claimed by the DRC. In particular, Uganda maintains that its troops “were confined to the regions of eastern Congo adjacent to the Uganda border and to designated strategic locations, especially airfields, from which Uganda was vulnerable to attack by the DRC and her allies”. Thus, there was “no zone of Ugandan military occupation and there [was] no Ugandan military administration in place”. Uganda points out, moreover, that it “ensured that its troops refrained from all interferences in the local administration, which was run by the Congolese themselves”. Uganda further notes that “it was the rebels of the Congo Liberation Movement (MLC) and of the Congolese Rally for Democracy (RDC) which controlled and administered these territories, exercising *de facto* authority”.

171. As for the appointment of a governor of Ituri district, which Uganda characterizes as “the only attempt at interference in this local administration by a Ugandan officer”, Uganda states that this action was “motivated by the desire to restore order in the region of Ituri in the interests of the population”. Furthermore, Uganda emphasizes that this step was “immediately opposed and disavowed by the Ugandan authorities” and that the officer in question, General Kazini, was firmly reprimanded by his superiors, who instituted disciplinary measures against him.

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172. The Court observes that, under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised (see *Legal Con-*

169. Finally, according to the DRC, the fact that Ugandan troops were not present in every location in the vast territory of the north and east of the DRC “in no way prevents Uganda from being considered an occupying power in the localities or areas which were controlled by its armed forces”. The DRC claims that the notion of occupation in inter-

sequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 167, para. 78, and p. 172, para. 89).

173. In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an “occupying Power” in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied.

174. The Court will now ascertain whether parts of the territory of the DRC were placed under the authority of the Ugandan army in the sense of Article 42 of the Hague Regulations of 1907. In this regard, the Court first observes that the territorial limits of any zone of occupation by Uganda in the DRC cannot be determined by simply drawing a line connecting the geographical locations where Ugandan troops were present, as has been done on the sketch-map presented by the DRC (see paragraphs 55 and 73 above).

175. It is not disputed between the Parties that General Kazini, commander of the Ugandan forces in the DRC, created the new “province of Kibali-Ituri” in June 1999 and appointed Ms Adèle Lotsove as its Governor. Various sources of evidence attest to this fact, in particular a letter from General Kazini dated 18 June 1999, in which he appoints Ms Adèle Lotsove as “provisional Governor” and gives suggestions with regard to questions of administration of the new province. This is also supported by material from the Porter Commission. The Court further notes that the Sixth report of the Secretary-General on MONUC (S/2001/128 of 12 February 2001) states that, according to MONUC military observers, the UPDF was in effective control in Bunia (capital of Ituri district).

176. The Court considers that regardless of whether or not General Kazini, commander of the Ugandan forces in the DRC, acted in violation of orders and was punished as a result, his conduct is clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power.

177. The Court observes that the DRC makes reference to “indirect administration” through various Congolese rebel factions and to the supervision by Ugandan officers over local elections in the territories under UPDF control. However, the DRC does not provide any specific evidence to show that authority was exercised by Ugandan armed forces

in any areas other than in Ituri district. The Court further notes that, although Uganda recognized that as of 1 September 1998 it exercised “administrative control” at Kisangani Airport, there is no evidence in the case file which could allow the Court to characterize the presence of Ugandan troops stationed at Kisangani Airport as occupation in the sense of Article 42 of the Hague Regulations of 1907. Neither can the Court uphold the DRC’s contention that Uganda was an occupying Power in areas outside Ituri controlled and administered by Congolese rebel movements. As the Court has already indicated, the evidence does not support the view that these groups were “under the control” of Uganda (see paragraph 160 above).

178. The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.

180. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation.

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VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW: CONTENTIONS OF THE PARTIES

181. It is recalled (see paragraph 25 above) that in its second submission the DRC requests the Court to adjudge and declare: